

**2003-2004**

**ANNUAL REPORT**

**OF THE**

**INDIAN TAXATION ADVISORY BOARD**

**INDIAN  
TAXATION  
ADVISORY  
BOARD**



**COMMISSION  
CONSULTATIVE  
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 present to you our 2003-2004 Annual Report. The report highlights just some of our more notable achievements for the year and outlines the challenges that lie ahead.

The First Nation property taxation system remains strong, credible, and vital to First Nation economies. As one of the original Board members of ITAB, it gives me great pride to see the growth of interest in First Nation property taxation. Increasingly, First Nations are recognizing the integral role of property tax in community planning, infrastructure, and economic growth, and the importance of having an open and continuing dialogue with ratepayers.

As 2004-2005 unfolds, ITAB will be looking forward to its evolution from a ministerial advisory body to a statutorily based service agency. The First Nations Tax Commission will improve certainty, consistency, and confidence in the tax system. In addition, the Tax Commission and the other First Nation institutions under the proposed *First Nations Fiscal and Statistical Management Act*, will allow First Nations to fully maximize the economic benefits of their revenues.

In closing and on behalf of the Board, I trust you will find this report satisfactory.

Regards,

Chief Strater Crowfoot  
Chairman



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**2003-2004**  
**ANNUAL REPORT**  
**OF THE**  
**INDIAN TAXATION ADVISORY BOARD**

**EXECUTIVE SUMMARY**

The Indian Taxation Advisory Board (ITAB) represents a unique institutional relationship between the Minister of Indian Affairs (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, approximately 100 First Nations across Canada are collecting property tax, generating over \$44 million dollars in tax revenues.

Increased revenues through First Nation taxation continues to play a fundamental role in improving First Nation economies insofar as tax revenues afford First Nations the opportunity to finance infrastructure improvements in order to attract private investment. However, in comparison to other jurisdictions, First Nations still spend ten times more to attract private investment.

ITAB has spent ten years working with First Nations on ways to improve this arithmetic. It has proposed the development of four institutions that will together help First Nations turn our infrastructure into wealth.

In accordance with the Memorandum of Understanding between ITAB and the Minister of Indian Affairs, work continued on the creation of the First Nations Tax Commission (FNTC) through the *First Nations Fiscal and Statistical Management Act*. This will change the organization from an advisory body reporting to the Minister to a statutory, legislated service agency. It 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 is one of the four proposed First Nation fiscal institutions, along with the First Nations Financial Management Board, First Nations Finance Authority and First Nations

Statistical Institute, in the *First Nations Fiscal and Statistical Management Act* (formerly Bill C-23). The development of these institutions through legislation 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 has been able to create a bridge between First Nation bylaws and federal legislation. ITAB has streamlined the process and made it easier for First Nations to establish their own taxation regimes by developing sample legislation, specialized software, educational workshops and publications, and through ITAB's own body of policies, procedures and regulations. It is widely recognized that all governments have gained valuable expertise in the intricacies of developing taxation legislation for First Nations.

As the leading authority on First Nation property taxation in Canada, ITAB is committed to developing strong First Nation tax administrations. The number of First Nations with real property tax regimes continues to increase, as does the requirement for strong tax administrations to manage them. ITAB's 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, to facilitate their mobility between First Nations and serve as a model for future capacity development initiatives.

ITAB 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 repeatedly and 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 new tool for communicating and enforcing First Nation laws.



## Highlights of 2003-2004

**New Chairman Appointed:** The Chairmanship of the Indian Taxation Advisory Board changed on December 1, 2003. Mr. C.T. (Manny) Jules, ITAB's first Chairman, stepped down and Chief Strater Crowfoot was appointed to the position of Chairman. As an original ITAB Board member, appointed in 1989, Chief Crowfoot brings a wealth of experience and core ITAB values to the Chairmanship. He has previously served as both Deputy Chairman of the Board and Chair of the Rates Committee. He also served as Chief of the Siksika Nation, a First Nation exercising its property tax jurisdiction, from 1988 to 1995. Chief Crowfoot was elected again in November 2003. Mr. David Paul, also an original Board Member, succeeds Chief Crowfoot as Deputy Chair.

**First Nations Tax Commission:** ITAB continued to conduct research and define and refine a policy framework that will best serve its transition from an advisory body to the First Nations Tax Commission (FNTC) – a statutory, legislated 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. In anticipation of the proposed *First Nations Fiscal and Statistical Management Act* coming into force, ITAB has discussed the development of a regulatory framework that would be required to complete the FNTC's legislated capacity.

**Bylaws:** 82 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 recommended a total of 1009 bylaws covering areas such as property taxation, assessment, tax rates, expenditure, business licensing, financial administration, telephone companies and other related amendments.

**Accountability:** ITAB is a leading advocate for First Nation government accountability through the development and delivery of the Financial Management Bylaw Certificate Program and the publication of the *First Nations Gazette*.

**Building Capacity:** To build the capacity of First Nation tax administration, a total of 102 certificates were awarded to candidates in the last fiscal year after they completed ITAB courses in the Financial Management Bylaw Certificate Program, Client Lands Assessment Services System, Budget-Based Tax Rate Setting, and the mediation training workshop.

**First Nations Fiscal and Statistical Management Act:** In 2003-2004 fiscal year, ITAB played a key leadership role as the proposed *First Nations Fiscal and Statistical Management Act* successfully moved through the Parliamentary process, including the House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, and debate in the House of Commons. The legislation continued

through the Parliamentary process despite prorogation and a change in Prime Minister.

**Canadian Pacific Railway Right-of-Way Regulation Amendment:** ITAB's mutual gains approach -negotiate rather than litigate- has proven successful once again. In 2003, ITAB reprised its role as facilitator and partner with nine First Nations in British Columbia, DIAND, DOJ, and the Canadian Pacific Railway (CPR) in negotiating a settlement over tax jurisdiction of the main CPR rail line in that province. The First Nations involved were Adams Lake, Chawathil, Kanaka Bar, Leq'á:mel, Little Shuswap, Neskonlith, Nicomen, Shuswap, and Siska. The discussions resulted in an agreement between the parties, and the *Property Assessment and Taxation (Railway Right-of-Way) Regulations* were amended in support of the negotiated settlements.

**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. Throughout the year, the Board carried out these activities using established mediation procedures and standards that have proven highly effective over time. With ITAB facilitation, the Adams Lake and Campbell River First Nations were able to conclude service agreements with their respective neighbouring municipality. In addition, ITAB has partnered with the Consensus Building Institute of Harvard University to create a mediation program that will provide the foundation for all future tax disputes, further strengthening this much-needed service. This four-part series was completed in the past fiscal year.

## I. OPERATIONS

### 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 (ITAB) 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*.

### Mandate

- 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.

## Membership

The five-member Board is composed of respected members of First Nations who are knowledgeable and experienced in First Nation government, intergovernmental relations, property taxation, reserve land development, economic development and the provision of government services. They have been given a mandate by their respective regional/provincial political organizations to serve on the Board and reflect the various perspectives of First Nations across the country.

The members are:

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

## 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 the Department of Indian Affairs and Northern Development (DIAND) in order to assure the Minister that all interests and perspectives have been considered.

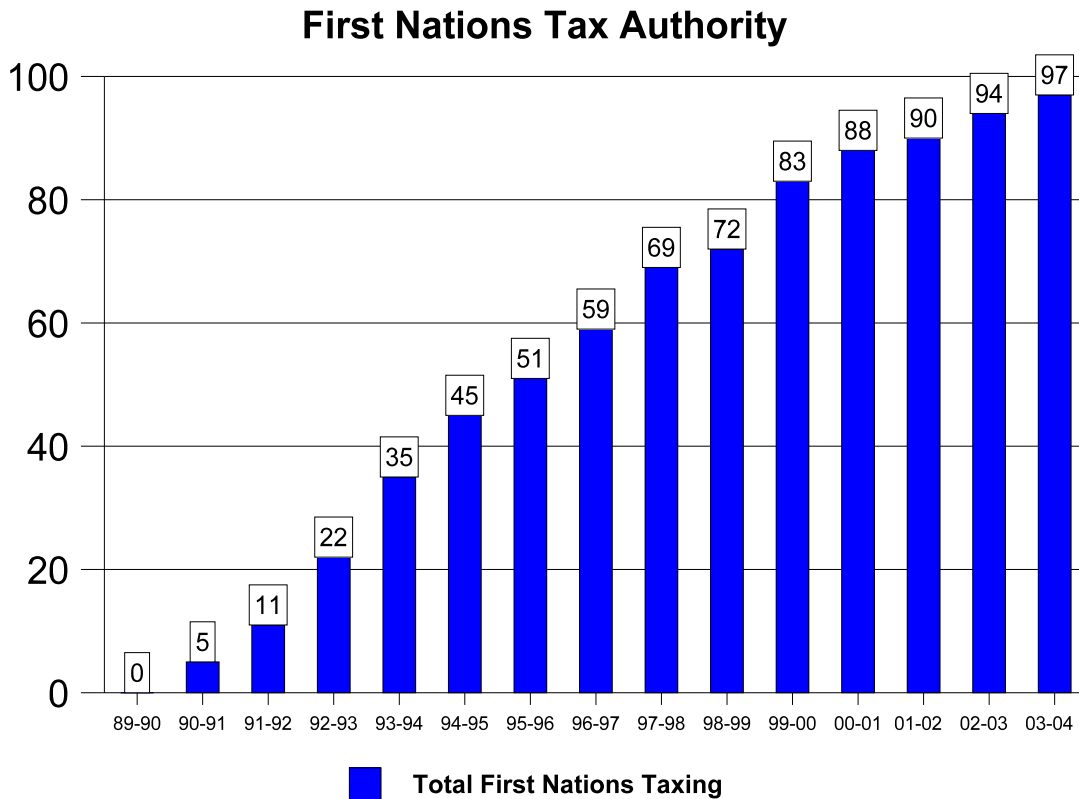
Furthermore, the ITAB Rates Committee develops policy and reviews each First Nation's proposed annual rates bylaw in order to balance the need to respect on-reserve taxpayers' rights to fairness and equity with the need to respect the accountability of First Nation governments to their citizens.

**Support**

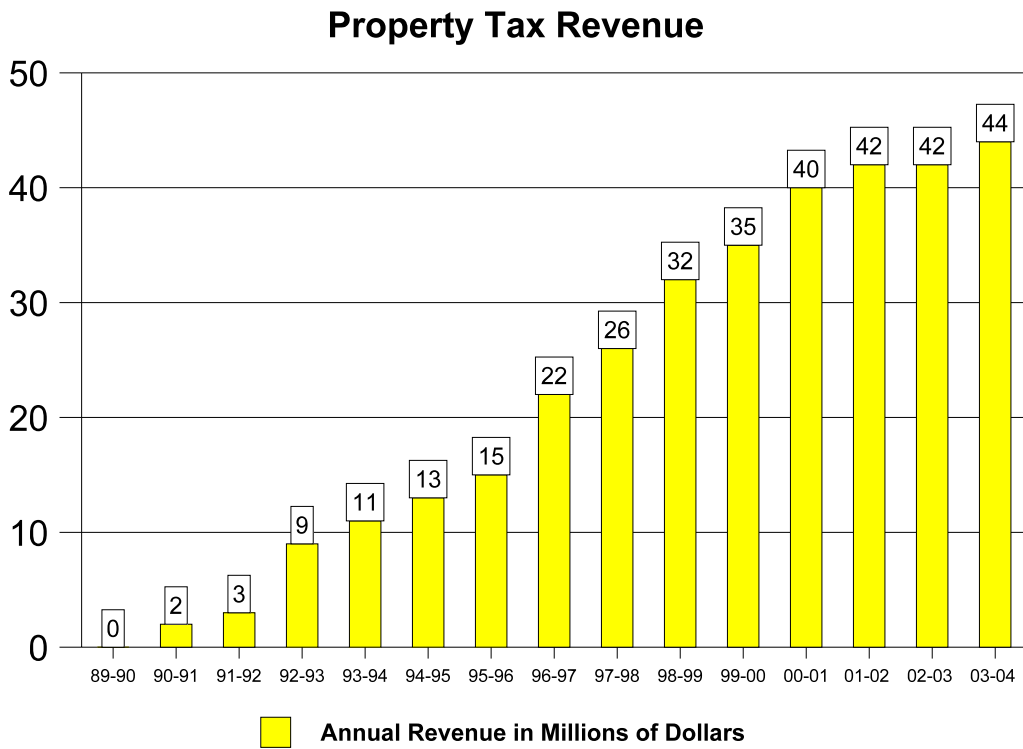
The Board is supported by a staff of 12 employees located in the Eastern Office in Ottawa and the Head Office in Kamloops, British Columbia. The staff provide professional and logistical support and assist the Board by reviewing proposed taxation bylaws and developing related policy. The Board is also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

**Results**

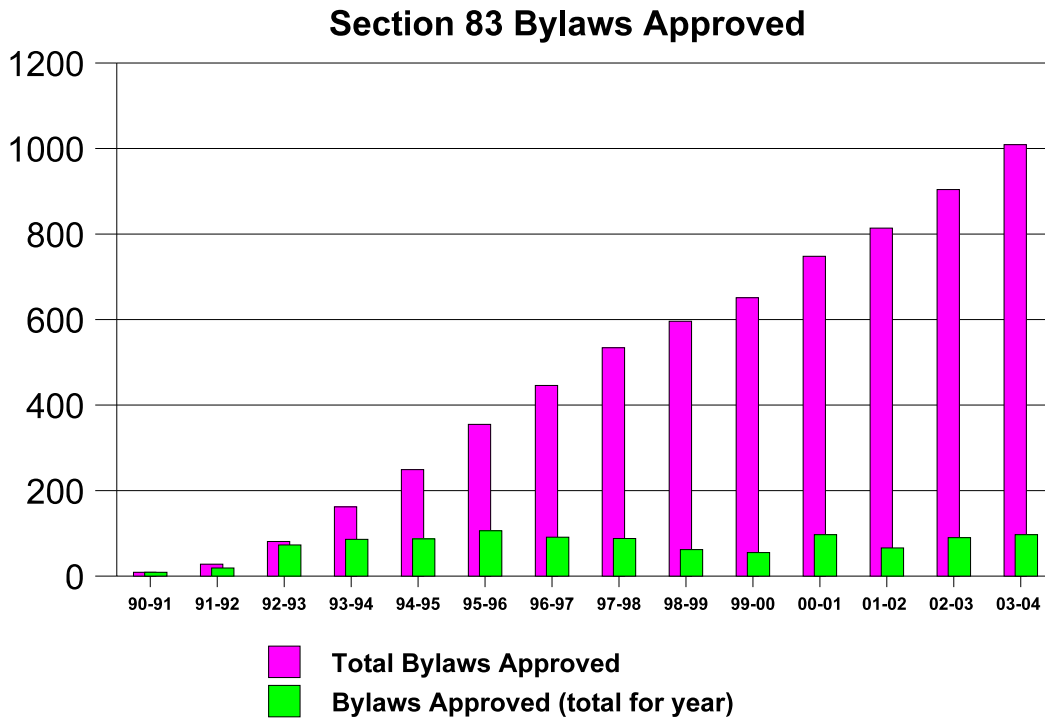
Ninety-seven First Nations were exercising taxation jurisdiction as of March 31, 2004. Over 15 percent of First Nations in Canada are now levying property taxes on reserve.



Annual revenues to First Nations from taxation exceeded \$44 million in 2003-2004. Since 1989, more than \$292 million has been generated through property taxation on reserve.

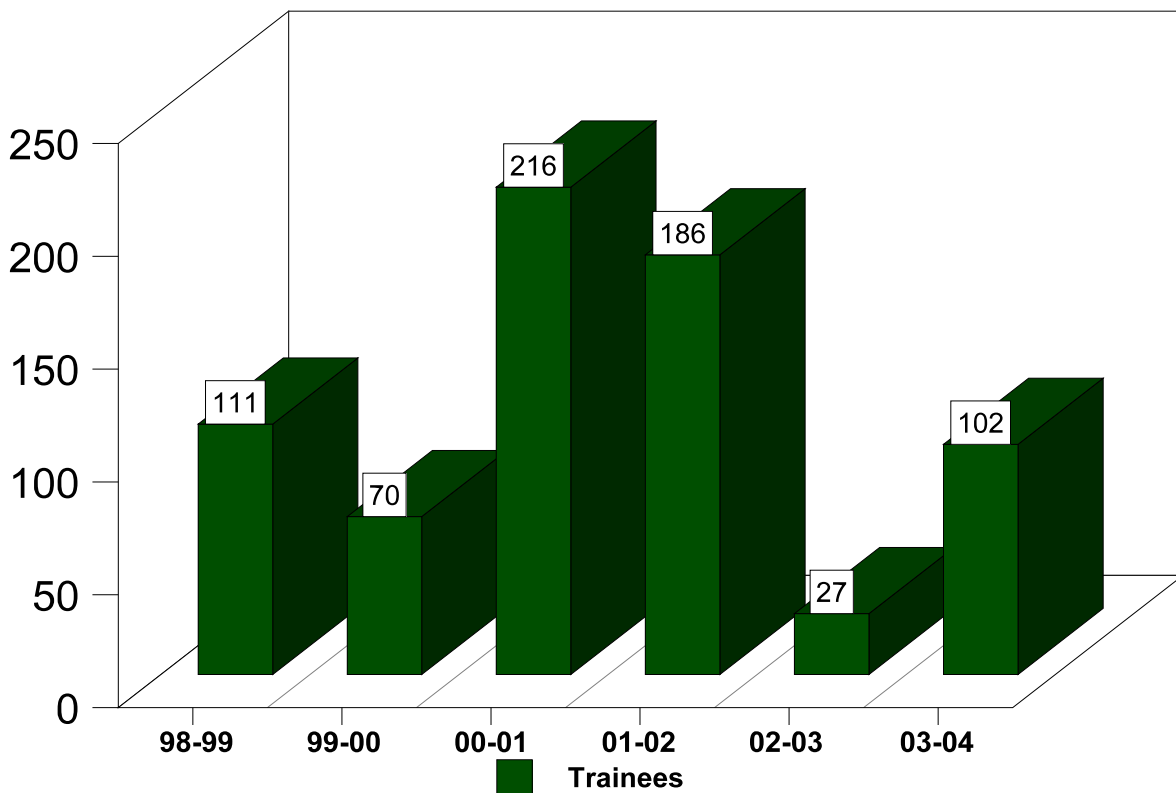


The variety, complexity and volume of bylaws processed by the Board each year and approved by the Minister has increased steadily. By the end of fiscal year 2003-2004, ITAB had reviewed 1009 bylaws concerning property taxation, assessment, rates, expenditure, business licensing, financial administration, telephone companies 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.



To build the capacity of First Nation tax administration, 102 candidates received certification in the 2003-2004 fiscal year after completing ITAB courses in the Client Lands Assessment Services System, Financial Management Bylaw Certificate Training, Budget-based Tax Rate Setting, and Mediation 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 resources.

### Building Capacity





## II. PROGRAMS AND POLICIES

### 1. Bylaw Services

#### *First Nation Bylaw Development*

In 2003 -2004, the following First Nation communities submitted bylaws for review under section 83 of the *Indian Act*:

- a) Property Taxation
  - Bigstone Cree First Nation, AB
  - Chemainus First Nation, BC
  - Eel River Bar First Nation, NB
  - Nanoose First Nation, BC
  - North Thompson Indian Band, BC
  - Williams Lake First Nation, BC
- b) Expenditure Bylaws
  - Westbank First Nation, BC
- c) Business Licensing
  - Chippewas of Mnjikaning First Nation, ON
  - Flying Dust First Nation, SK
  - Opaskwayak Cree Nation, MB
- d) Financial Administration
  - Dokis, ON

ITAB also reviewed 77 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, has not been available. ITAB has acted to fill this void.

Consistent with the Board's mandate and the capacity building objectives of *Gathering Strength*, the Board has focussed considerable attention on training tax administrators. Working with the University of Victoria, the Consensus Building Institute (CBI) of Harvard University and others, ITAB has successfully developed a number of certificate courses in tax administration and mediation.

Today ITAB offers 5 courses: each is designed to improve the overall accountability to on-reserve taxpayers and First Nation members and helped implement labour-saving technology, reduce disputes, improve administrative efficiency and facilitate First Nation tax administrator labour mobility.

### ***Budget-Based Real Property Tax Rates Training***

In accordance with statutory requirements for the setting of annual property tax rates, the Board has 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. During the 2003-04 fiscal year, ITAB provided training to 40 individuals representing 30 First Nations. It is estimated that a potential of 37 First Nations will be requiring training in 2005. Although more tax administrators have been trained, training is an on-going requirement to service the expanding tax system, communicate policy changes, and to address the high turnover rate of tax administrators.

### ***Client Lands Assessment Services System (CLASS)***

The Client Lands Assessment Services System (CLASS) is a database management system for the total 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. In 2003-2004, 14 CLASS trainees were certified. To date, 89 individuals have been certified to operate CLASS software.

### ***Financial Management Bylaw Certificate Program***

The Financial Management Bylaw Certificate Program is a course presented to members of council and senior administration who work on the development of a draft financial 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 management bylaws and supporting First Nations interested in developing their own accountability regimes. Training and on-going development in the last fiscal year was provided to the following First Nations: North Thompson, Temagami, Tsawwassen, Pheasant Rump Nakota, Lower Kootenay, Shuswap, Campbell River, Old Masset Village Council, White Bear, and Penticton.

In 2003-2004, 20 certificates were awarded to candidates representing 3 First Nations for completing the Financial Management Bylaw Certificate Program.

### ***Distance Learning***

As of March 31, 2004, 107 First Nations were generating revenue under section 83 of the Indian Act. These communities are located across Canada, in nearly every provincial jurisdiction. It is imperative on-going training be provided to these communities in respect of the evolving policy, legal and political environment. Accordingly, in 2001, ITAB undertook a study on the use of "distance learning", which considered the approach to on-line resources and course delivery that ITAB could use to reach every taxing First Nation. Based on the findings of the study, it was possible for ITAB to meet these training demands. ITAB has undertaken the development of a program and infrastructure to support "distance learning" study. Curriculum, course materials and a resource management web-site will also be developed. Work on this project will continue in the next fiscal year.

### 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 link to ITAB's mandate, programs and services, list of First Nations with s.83 bylaws, the *First Nations Gazette*, the ITAB-DIAND Memorandum of Understanding, previous annual reports and other publications, sample bylaws, research and policies, and the FNTC web site. It is also kept current with recent news items related to First Nation property taxation.

***www.fntc.ca***

The First Nations Tax Commission (FNTC) web site was launched in August 2002. It provides information on current issues and includes a media room to keep audiences up to date on events relating to the FNTC. The site is also linked to the First Nations Fiscal Institutions Initiative web site ([www.fnfi.ca](http://www.fnfi.ca)), which offers access to the web sites of the other proposed organizations under the First Nations fiscal institutions initiative: the First Nations Finance Authority ([www.fnfa.ca](http://www.fnfa.ca)), the First Nations Financial Management Board ([www.fnfmb.com](http://www.fnfmb.com)), and the First Nations Statistical Institute ([www.firststats.ca](http://www.firststats.ca)). The FNFI web site received 2,781 visits and 103,797 hits in the 2003-2004 fiscal year. The FNTC web site received 1,649 visits and 37,003 hits in 2003-2004.

#### ***First Nations Gazette***

The *First Nations Gazette*, launched on Aboriginal Day, June 21, 1997, 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 Indian 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 audience 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-nine bylaws were gazetted in 2003-2004.

### ***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](http://www.itab.ca).

## **4. Mediation**

### ***Community Support***

The smooth transition and transfer of real property 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 fee 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 lessees 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 following are some areas where ITAB has provided these services:

#### **(a) Campbell River Indian Band (BC)**

The Campbell River Indian Band enacted real property taxation in November 2002 and, in support, ITAB facilitated several meetings between the First Nation and the District of Campbell River in their efforts to establish a service agreement. The parties reached an interim agreement for the provision of services for 2003 and continue to work on a comprehensive long-term arrangement. The parties utilized the ITAB Service Agreement Software to calculate service agreement costs and provide options for consideration. The negotiations are proceeding positively. On September 2, 2003, ITAB attended a joint meeting between the Campbell River Indian Band and the District of Campbell River to finalize a service agreement between them.

#### **(b) Opaskwayak Cree Nation (MB)**

The Opaskwayak Cree Nation has requested ITAB's assistance in their initiative towards a grant-in-lieu of taxes from Manitoba Hydro, Manitoba Telephone Systems and Videon Cable. Manitoba Hydro is a Crown Corporation and are exempt from tax and/or grants-in-lieu of taxes on real property used in the generation, transmission and distribution of

electrical power. Manitoba Telephone Systems and Videon Cable, however, are private corporations and may not have the same protection from taxation on reserve lands.

In the new fiscal year, ITAB may be requested to facilitate talks between the First Nation and the utilities companies.

(c) CN Railway Taxation

First Nations in British Columbia with real property taxation jurisdiction continue to press for tax revenue from CN Railway interests passing through their respective reserves. ITAB has been asked to facilitate discussions between the First Nations, the Province of BC and CN Railway in an effort to find resolution to this longstanding issue. Initial contacts have been made with the parties and discussions are underway. Talks will continue in 2004-2005.

(d) Sto:Lo Nation Joint Reserve (BC)

The management of real property taxation on reserves that are jointly owned by a number of First Nations is an emerging challenge for the on-reserve tax system. ITAB has been asked to consider how twenty-two First Nations within the Sto:Lo Nation could apply property tax jurisdiction to a jointly-held reserve. ITAB has convened a number of meetings with Sto:Lo representatives to consider options. An initial legal review indicates that it may be necessary to develop regulations to support the management system. Work on this initiative will continue in 2004-2005.

(e) Adams Lake Indian Band

In 1998, the District of Salmon Arm Council signed a Servicing Agreement with the Adams Lake Band which gave the certainty of service delivery to Reserve Lands within the boundaries of Salmon Arm. The District Council recognized that the Servicing Agreement worked well for the first five years but, today, in light of the proposed Wal-Mart development on-reserve, the Servicing Agreement needed to be expanded. In a spirit of co-operation, and largely through ITAB facilitation, the Adams Lake Band and the District Council have expanded the Servicing Agreement that will see a portion of taxes collected by the Band paid toward the global road infrastructure of Salmon Arm.

Focussing on sustainability over the long term, the parties have committed to work together under the principles of mutual gain, fairness, cooperation and respect for differences in governmental jurisdiction and priorities. The agreement was announced on February 16, 2004.

***Mediation Program Development***

In 1998-1999, the Board established mediation procedures and standards to guide Board members and staff in dispute resolution. They have proven effective in resolving disputes

between First Nations, municipal governments, provincial governments and taxpayers on reserve. With approximately 15 percent of First Nations collecting property taxes across Canada, there is greater pressure on this dispute resolution service.

With the assistance of the Consensus Building Institute (CBI), ITAB established a mediation program that will provide the basis for third-party intervention to resolve tax-related disputes.

The Harvard University Native American Program, the CBI, the M.I.T-Harvard Public Disputes Program and ITAB signed a Memorandum of Understanding in October 1999 to form a partnership on dispute prevention and resolution. The primary purpose of the partnership is to focus on this area as it relates to taxation issues resulting from the establishment of First Nation jurisdiction. Training materials and tools to support these activities have also been developed. Ultimately, the goal of this partnership is to ensure that sound agreements are reached by promoting the fair and efficient resolution of disputes at the lowest possible level when conflict does arise.

### ***Mediation Training***

ITAB and the Canadian Energy Pipeline Association (CEPA) agreed to provide a program of four courses for First Nations and energy pipeline taxpayers on the mutual gains process. The first three courses, held prior to last year, were attended by 370 participants.

On December 3 to 5, 2003, ITAB and the Canadian Energy Pipeline Association sponsored the last of the four workshops. The workshop, entitled "Building Partnerships-Building Mutual Gains" was held in Calgary, Alberta, and was facilitated by the Consensus Building Institute of the MIT-Harvard Public Disputes Program. Forty-one participants attended the workshop, representing 11 First Nations, the pipeline industry and government.

Previous workshops, held between 1998 and 2001, included: a mutual gains approach to negotiation; building agreements with a component on working with difficult people; and, consensus building. The program has been credited with changing the culture of negotiations and has created new options for negotiators leading to successful agreements.

## **5. ITAB Policy Objectives**

- **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.

- **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.
- **Expand Revenue Jurisdiction.** ITAB policies create trust and capacity in First Nation property tax systems to facilitate future expansion into other revenue-raising jurisdictions.
- **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.
- **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.
- **Promote Efficiencies.** Property tax policies seek to achieve economic, technical and administrative efficiency throughout the First Nation property tax system.

#### **(a) Policy Development**

##### ***Budget-Based Property Taxation Rates/Policy Development***

The implementation of the budget-based method for the setting of property taxation rates remains a policy development priority. This method bases property tax rates on planned expenditures for local services. Rather than restrict First Nation property taxation authorities to simply mirror tax rates set by neighbouring jurisdictions, budget-based tax rates (BBTR) increase First Nation autonomy. The direct relationship between tax rates and expenditures better reflects the local conditions driving tax revenue requirements thereby producing a more responsive and responsible property tax system. Further, the BBTR method enhances the transparency and accountability of Band Council expenditures to First Nation community members and provides the non-voting taxpayer with an accounting of, and rationale for, the expenditure of their real property tax monies.

The implementation of BBTR across the country will require enabling amendments to First Nation taxation bylaws in order to better reflect provincial practices. This process has begun in Alberta. Modifications to the ITAB Mill Rate Wizard and CLASS software are being made. Changes to the ITAB BBTR training courses will also be made to facilitate implementation. A pilot project to facilitate and gain support for BBTR implementation across First Nation property taxing jurisdictions will also be developed.

In recognition of the benefits of BBTR and the importance of their effective implementation through adequate training and preparation, ITAB has provided a two year grace period to



taxing First Nations for the adoption of the budget-based tax rate setting method. The time frame for BBTR implementation by all taxing First Nations has thereby been extended to the 2006 taxation year.

### ***Tax Revenue and Expenditure Policy Development***

The preliminary research and development work for the ITAB Tax Revenue and Expenditure Policy has been completed. The emerging policy will feature five broad elements:

- a definition of broad expenditure categories similar to those of other local governments in Canada and a detailed list of acceptable local purposes expenditures within each category;
- a mechanism for updating the listing of acceptable local purposes expenditures;
- specific requirements for levels of expenditure for certain expenditure categories such as debenture debt;
- a property tax financial firewall segregating property tax revenue from revenue from other sources to effectively implement the expenditure policy; and
- an expenditure policy implementation plan to include a training and education component.

For specific expenditure requirements, ITAB is currently developing a capital project financial fiscal feasibility definition which will be a component of the ITAB rates policy and the proposed *First Nation Fiscal and Statistical Management Act*. The property tax financial firewall will also be an important feature of the proposed Act.

The broad features of the ITAB Tax Revenue and Expenditure Policy have been integrated into the curriculum for the Budget-Based Tax Rates course and in the accompanying Mill Rate Wizard Software. And, in accordance with the ITAB policy development process, consultation with stakeholder groups, including representatives of First Nations levying property taxes and their tax payers, will be carried out in 2004-2005 to finalize the policy, develop an implementation plan, and integrated into the new tax revenue and expenditure policy requirements into the First Nation property taxation system.

### III. SPECIAL INITIATIVES

#### 1. First Nations Fiscal Institutions Initiative (FNFI)

##### (a) Introduction

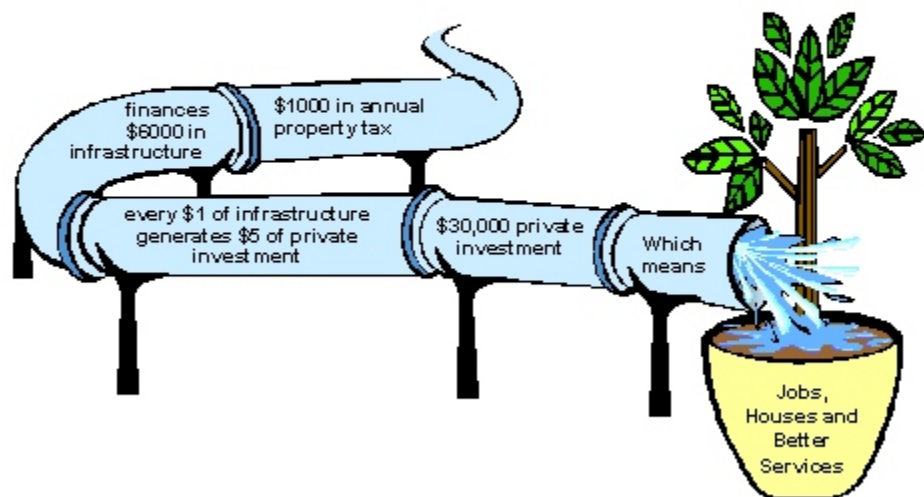
Increased revenues through First Nation taxation continues to play a fundamental role in improving First Nation economies insofar as tax revenues afford First Nations the opportunity to finance infrastructure improvements in order to attract private investment. However, in comparison to other jurisdictions, First Nations still spend ten times more to attract private investment.

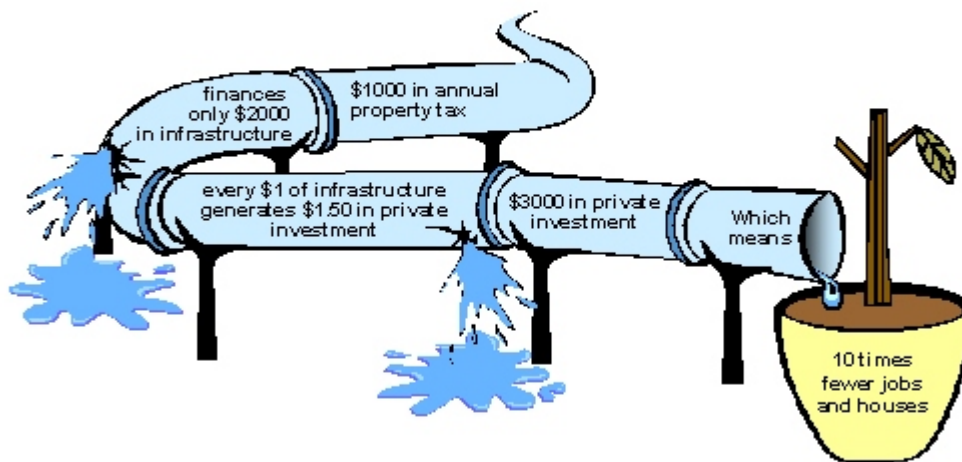
This “arithmetic” lies at the heart of the problems besetting First Nation communities – less wealth means poverty, joblessness, poor quality infrastructure and a shortage of housing. Any “solution” to First Nation poverty that does not change this arithmetic is ultimately not a solution.

ITAB has spent ten years working with First Nations on ways to improve this arithmetic. It has proposed the development of four institutions that will together help First Nations turn our infrastructure into wealth.

**FIGURE 1:  
W E A L T H  
C R E A T I O N  
I N  
A  
T Y P I C A L  
C A N A D I A N  
C O M M U N I T Y**

Figure 1 shows a typical Canadian community where \$1000 in annual property tax revenues bring \$30,000 into the local economy.





**FIGURE 2:  
WEALTH  
CREATION IN A  
FIRST NATION  
COMMUNITY**

Figure 2 shows the same situation in a First Nation context. That same \$1000 generates only \$3000. This means fewer jobs, fewer houses, and poorer services.

The institutions proposed in the *First Nations Fiscal and Statistical Management Act* will start plugging the leaks described in the figures above. First Nations must be able to finance infrastructure on the same advantageous terms as prevail in the rest of the country. They must be able to attract as much new development from an infrastructure improvement as any other government.

Below are the details of the progress of the First Nations fiscal institutions initiative to March 31, 2004.

### **(b) Parliamentary Process**

#### ***House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources***

On June 9<sup>th</sup>, 2003, the House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources (the Committee) began hearings on the proposed *First Nations Fiscal and Statistical Management Act* (then Bill C-19). Over the next four days, 26 witnesses testified before the Committee.

The Assembly of First Nations (AFN) were the first witnesses to be called. The AFN was represented by Quebec Vice-Chief Ghislain Picard (on behalf of the National Chief) and BC

Vice-Chief Satsan (Herb George). Vice-Chief Picard stated that the AFN has been instructed by certain Chiefs in a Special Assembly to not officially support Bill C-19 as drafted. Specifically, the AFN said that Bill C-19 must be optional and the proposed institutions must be independent. Vice-Chief George strongly endorsed the bill, and pointed to the fact that the AFN is unable to articulate a single opinion on the legislation. He suggested that the instruction of the 39 Chiefs and proxies in a recent Special Assembly could not be taken as the AFN national opinion since the AFN represents 633 First Nations. He emphasized that the First Nations Summit alone, representing some 140 BC First Nations, expressed its full support of Bill C-19 by unanimous resolution. Both Vice-Chiefs encouraged the committee to consider amendments with respect to ensuring the optional nature of the bill and the independence of the institutions is made clear.

Some First Nations expressed concern that C-19 was not entirely First Nation-led and was related to the DIAND's "suite" of legislation. They also expressed the view that the legislation could use a non-derogation clause and stronger language on the optional nature of the legislation. Many of these First Nations stated they could live with C-19, as long as it did not apply to them. They also recognized and applauded the hard work done by the First Nation proponents; but maintained that their communities are unprepared to use the services afforded by the bill.

First Nation supporters of C-19 underscored the unique history behind Bill C-19, its First Nation-led development, and how it is separate and distinct from the other First Nation legislation that was currently before Parliament. They also clearly demonstrated the optional nature of the bill and strongly supported the inclusion of a non-derogation clause. Several business and financial industry experts testified to the sound mechanics of the bill and felt it is a sensible and practical step in providing economic opportunities for those First Nations that wish to use the services offered by the proposed institutions.

The Committee, following four days of testimony, was set to move forward with a clause-by-clause review of Bill C-19. However, the House of Commons abruptly adjourned for the summer on June 13<sup>th</sup>, thereby postponing clause-by-clause consideration until Parliament's return in September.

### ***Clause-by-Clause Review***

Following the summer recess, the Committee began its clause-by-clause review of Bill C-19 on September 16, 2003, and concluded its work on September 23, 2003. First Nation proponents of the bill were very pleased to note that the amendment to include a non-derogation clause was carried unanimously by all members of the Standing Committee. The following day, Mr. Ray Bonin, Chairperson, tabled the Committee's report in the House of Commons.

### **Report Stage**

Bill C-19 was allotted time to be debated at the Report Stage in the House of Commons on November 6, 2003. The Speaker of the House of Commons ruled 54 of the 56 motions to amend the bill - proposed by the New Democratic Party - out of order. However, as the Speaker accepted two NDP motions as one debatable motion, every member of the House of Commons had five minutes to speak to that motion, and many chose to do so. When the time allotted that day for debate on C-19 had expired, the debate had not concluded and, therefore, no vote for Third Reading took place.

### **Prorogation and Reinstatement**

On November 12, 2003, Prime Minister Jean Chretien, prorogued Parliament (an end to the current parliamentary session) and announced that Parliament would be recalled on January 12, 2004.

Parliament resumed on February 2, 2004 and a motion was passed by the government shortly thereafter allowing Ministers to reinstate bills from the previous Parliamentary session at the beginning of the same stage at which they were left. The *First Nations Fiscal and Statistical Management Act* was named as one of the bills slated to be reinstated.

Accordingly, the Minister reinstated the legislation on March 10, 2004. The *First Nations Fiscal and Statistical Management Act* was now known as Bill C-23. At the end of March 2004, the legislation was awaiting House time to be debated at Third Reading, after which it would be referred to the Senate.

### **(c) FNFI Communication Activities**

As a First Nation-led initiative, communications representatives of each of the proposed fiscal institutions met regularly to coordinate information and develop 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*.

Throughout the Committee hearings, and in the months leading up to them, ITAB worked closely with representatives of the proposed institutions, First Nation leadership, taxpayer representatives and DIAND/ministerial officials to ensure timely follow-up with Members of Parliament to make certain their questions or concerns were satisfactorily addressed. During the summer Parliamentary recess, communications activities focussed on updating and disseminating FNFI information, with a view to maintaining a strong public education campaign.

The following is a list of key activities completed in 2003-2004:

**Newsletter (FNFI Update)** – The FNFI Update is directed to First Nations, Parliament, and the general public. Two newsletters were distributed to all First Nations, Members of Parliament and Senators in March and May 2003. A third newsletter was made available at the Assembly of First Nations Annual General Assembly in July 2003 and was also mailed out the following week to all Members of Parliament and Senators. A fourth edition was prepared and similarly distributed in October 2003. All newsletters are posted to the FNFI web site.

**FNFI Update Bulletin** – The bulletin is intended for internal use by the institutions to update the boards and advisory panel members. The bulletins are prepared and distributed as needed, often to complement the FNFI Update Newsletter.

**Web site** – The [www.fnfi.ca](http://www.fnfi.ca) web site is coordinated with the [www.fntc.ca](http://www.fntc.ca) site and the web sites of the other institutions ([www.fnfa.ca](http://www.fnfa.ca), [www.fnfmb.com](http://www.fnfmb.com), [www.firststats.ca](http://www.firststats.ca)) to incorporate updated information on the development and progress of the legislation. The transcripts of Committee hearings and other major speeches related to the legislation are posted there, as well as news releases, background information, and answers to frequently asked questions.

**Video/CD** – A twenty-five minute video was produced and distributed to all First Nations across Canada in September. The video, entitled “Bill C-19: Building a Better Future”, explained the benefits of the legislation and each institution, allowing the viewer to visualize change in progress. The CD format was distributed to all Members of Parliament and Senators. Both the CD and video were also made available for consultation purposes.

**Information Booklet** – An FNFI information booklet was updated and mass distributed twice this past fiscal year. The first update was to reflect Bill C-19’s development and change to Bill C-23. It was also made available at the AFN AGA in July 2003. The second update reflected further development in the legislation.

**Mailouts** – In addition to the above-mentioned mailouts, information packages (frequently asked questions, media clippings, and timely news releases) were regularly sent to all First Nations, Members of Parliament and Senators.

#### **(d) Meetings and Information Sessions**

ITAB, in partnership with the proponents of the First Nations Finance Authority (FNFA), and the proposed First Nations Financial Management Board (FMB) and First Nations Statistical Institute (FNSI), has held extensive information sessions, meetings, trade shows and presentations with various stakeholders to fully explain the requirements and objectives of

the proposed *First Nations Fiscal and Statistical Management Act*. Engagements following the December 2, 2002 introduction of the legislation included meetings with the Canadian Property Tax Association (CPTA), First Nations Tax Administrators Association (FNTAA), Canadian Energy Pipeline Association, and many more. A complete list of meetings and information sessions is attached as APPENDIX B.

### **(e) November 2003 Report of the Auditor General**

The Auditor General, Sheila Fraser, released her November 2003 report on February 10, 2004. Chapter 9 of the Auditor General's report was devoted to support for institutional arrangements on First Nation lands to support economic development.

Ms. Fraser reported that federal programs can create barriers that increase the cost of doing business with First Nations and impede their economic development. She noted that federal programs can be an administrative burden and said, "Institutional arrangements make a significant difference between remaining poor and achieving sustainable economic success." Ms. Fraser also noted that she was pleased by First Nation communities which recognize the major responsibility for economic development rests with them and stated the need for federal organizations to work together with First Nations to build appropriate institutional arrangements.

Citing an ITAB/DIAND study, the Auditor General also found that the costs of completing an investment on First Nation lands are too high and steps should be taken to reduce these costs. ITAB has long felt that the *First Nations Fiscal and Statistical Management Act* addresses this problem. The institutions will support national standards for information, First Nation property tax systems, financial reporting and debenture financing. The standards created through the legislation will provide potential investors with the certainty and confidence they require.

With the *First Nations Fiscal and Statistical Management Act* before the House of Commons, the Auditor General's report was timely and provided very strong validation for the fiscal institutions initiative.

## **2. First Nations Tax Commission**

### **(a) Transition Issues**

In preparation for the eventual creation of the FNTC, the ITAB Management Committee undertook an organizational review of current ITAB capacity and future FNTC requirements. The purpose of the review was to ensure a smooth transition from ITAB to the FNTC. The functional review included an assessment of the ITAB organizational

structure, projected FNTC human resource requirements, performance measures and recommendations for change.

Work to the end of March 2004 included:

1. completion of job descriptions;
2. the formulation of various organizational options to reflect the eventual FNTC structure under a finalized Bill C-23;
3. a revised organizational chart to effectively prepare and co-ordinate the transition from ITAB to the FNTC; and
4. creation of a wage classification system.

#### **(b) Drafting of Regulations**

There are a number of associated regulations with the proposed *First Nations Fiscal and Statistical Management Act* 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 with ITAB, the Department of Indian Affairs and Northern Development 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 under development for the FNTC:

1. FNTC Review and Procedures Regulations;
2. First Nation Taxation Assessment Appeal Regulations;
3. First Nation Tax Rate and Expenditure Law Timing Regulations;
4. First Nation Taxation Enforcement Regulations;
5. First Nation Assessment Inspection Regulations; and
6. First Nations Tax Commission Appointing Body Regulations.

ITAB has sought input from its stakeholders to assist in the development of the proposed regulations. The first stage was completed by reviewing the concepts and initial policy discussions. This was completed through various meetings and correspondence and included meetings with the Canadian Property Tax Association, First Nations Tax Administrators Association, First Nations with property tax authority, Canadian Energy Pipeline Association, British Columbia Assessment Authority, and the Saskatchewan



Assessment Management Agency. The next stage will involve sharing and discussing the draft regulations, to be completed following Third Reading in the House of Commons.

### 3. Canadian Pacific Railway Right-of-Way Regulation Amendment

In November 2001, ITAB helped facilitate the settlement reached between five First Nations and CPR. The litigation revolved around property taxation jurisdiction over CPR interests situated on First Nation reserves in BC. CPR believed that it held full ownership of the rights-of-way in fee simple and that, therefore, the rights-of-way were not within the First Nations' reserves and were not taxable by First Nation governments. The First Nations disagreed and claimed sole property tax jurisdiction over all real property interest situated on-reserve. In the settlement, the CPR main rail line through these communities was confirmed as reserve land and CPR granted back a right-of-way from Canada. The settlement led to the November 2002 passing of the *Property Assessment and Taxation (Railway Right-of-Way) Regulations*, the first-ever regulated tax regime under the *Indian Act*, and settled 6 court cases that were before the Federal Court of Canada.

On June 6, 2003, nine more First Nations, representing 21 reserves, signed an Agreement-in-Principle, along with CPR and DIAND. They were: Adams Lake, Chawathil, Leq'á:mel, Little Shuswap, Kanaka Bar, Nicomen, Neskonlith, Shuswap, and Siska. The land involved was again CPR's main rail line in BC through the Fraser and Thompson River valleys, from Abbotsford east of Vancouver and east as far as Shuswap reserve near the Alberta border.

Property tax jurisdiction over the line was the subject of 36 outstanding court cases between the First Nations and CPR before the Federal Court of Canada. Proceedings were in abeyance and the Court continued to extend the time for the parties proceeding with the action while negotiations progressed.

Since the signing of the AIP in June, all parties continued the arduous work of finalizing the details. A copy of the AIP and a supporting information package detailing its background, content and implications were posted in each First Nation on September 24, 2003. A series of information meetings with all First Nations were held between October 22 and November 3, 2003.

Each First Nation community held a vote on November 7, 2003 to ratify the settlement agreement and designate the land for a right-of-way for CPR. To ratify the vote, the First Nations required a majority plus one of all eligible electors. Chawathil, Little Shuswap, Kanaka Bar, and Nicomen were successful in ratifying the vote. On November 19, 2003, *The Regulations Amending the Property Assessment and Taxation (Railway Right-of-Way) Regulations* were passed by the Governor in Council to include these four First Nations.

Adams Lake, Leq'á:mel, Neskonlith, Shuswap, and Siska were not successful in that voting format. Although more than 80% of the electors that voted did so in favour, these First Nations did not have the majority voter turnout. On March 11, 2004, Adams Lake, Leq'á:mel, Neskonlith, Siska, and Shuswap First Nations held a second vote (where a simple majority was required) and overwhelmingly ratified their settlement agreements. Regulations to further amend the *Property Assessment and Taxation (Railway Right-of-Way) Regulations* were passed by Canada on March 30, 2004.

Apart from the new tax dollars flowing to the participating First Nations, and the business certainty gained by CPR, 39 court cases between the parties have been settled.

## IV. SUPPORTING PROGRAMS

### 1. Research and Policy Development

#### ***Public Private Partnerships - Innovative Methods for Financing First Nation Infrastructure (2003)***

This paper explored the use of Public Private Partnerships (PPPs) as a tool for financing First Nation infrastructure. PPPs are a tool that is generally available to other jurisdictions but seldom used by First Nations.

The paper provided a brief history of the rationale that has supported the use of PPPs, and supplied an assessment of how that rationale might apply in a First Nation context. The paper found that First Nations have the same motivations for developing PPPs as other jurisdictions. Moreover, some of these motivations are likely stronger within the context of First Nation government. First Nation administrations have a greater need to access the expertise, proximity to the market, and advantages of scale that a PPP can provide.

The paper then reviewed business literature to provide an understanding of their theoretical underpinnings in public finance. The literature review was used to identify and assess barriers to the greater use of PPPs to assist property tax financed infrastructure projects.

The study found that greater reliance on PPPs is part of the same general phenomenon that has been changing the business landscape for the last 20 years. These motivations have transformed the business landscape from large bureaucratic structures into smaller firms and autonomous operating units bound together by networks. In the case of small governments, PPPs were also found to be the best means by which they could utilize some of the advantages of large organizations.

The next step was to assess the current environment in order to determine what risks are associated with the greater use of PPPs by First Nations and what is required to reduce these risks. The conclusions were that PPPs could accelerate the development of First Nation financed infrastructure and improve the performance of this infrastructure. However, ITAB would have to develop a policy framework and provide program support to help overcome the barriers to PPPs. A principal aim of an ITAB policy framework would be to ensure these arrangements do not endanger the public interest or the mission of ITAB.

The final part of the paper spelled out a plan for developing the necessary policy framework and providing the necessary institutional support. It outlined an approach to developing a PPP policy framework that would augment the ability of First Nations to finance infrastructure. It outlined a structure for support of PPP development by First Nations.

Finally, it outlined a plan for developing the policy under which PPPs employing property tax-backed debentures could be coordinated with other funding sources in support of PPP infrastructure projects.

### ***First Nation Organization for Economic Coordination and Partnership***

In 2003-2004, ITAB examined the creation of a First Nations “Organization for Economic Co-operation and Partnership” (OECP). This body would take a strategic, long-term view, in working with First Nations, First Nation institutions, the federal and other governments and the private sector, in addressing the issues and barriers to First Nation economic development. It would consider the needs of First Nations in a pre and post self-government environment, and their needs in making this transition.

**The Organization for Economic Cooperation and Partnerships (OECP) will be a not for profit organization dedicated to improving First Nation economies through business development. It will be comprised of First Nations which wish to attract investment, support entrepreneurship, develop businesses, create a housing market on their lands, invest off-reserve and share in wealth created by investments on their traditional territories.**

The OECP would benefit three types of First Nations:

1. First Nations which are not yet aware of their business opportunities. The OECP would work to raise awareness about economic development, just as ITAB has raised awareness with respect to property tax. The OECP would also help First Nations identify and capitalize on this potential.
2. First Nations which need assistance in order to take advantage of economic opportunities. The OECP would provide them with advice, access to expertise and a forum in which to market investment opportunities. (For example, it is beyond the means of most First Nations to identify and then acquire the expertise they require to establish a housing market on their lands. They would require the support of an OECP to do this.)
3. First Nations which need to advance issues in a coordinated and strategic fashion in order to improve their respective investment climates. First Nations with a successful track record of developing businesses still need to advance issues and improve cooperation with other First Nations. The OECP could assist them by providing a forum in which First Nations work out agreements amongst themselves, work towards developing model codes to support investment and work with First Nation institutions and other governments.

The OECP will work with:

1. Individual First Nations to assist them in identifying their investment potential and assessing their overall investment climates.
2. Groups of First Nations to assist them in ensuring business ventures and institutions that support economic development are properly coordinated.
3. All interested First Nations in developing a code of conduct for members, certifying members and providing services and promoting harmonization as necessary. It will also work to create a network of investment facilitation experts so that best practices are communicated more effectively.
4. First Nation Institutions to ensure their services and regulatory framework support the needs of the First Nation investment climate.
5. Other governments to advocate the interests of the First Nation investment climate. It will also assist them in identifying high quality investments, communicating their initiatives and vetting policies. Initiatives of other governments have been less effective than they could be because there is no organization advocating the interests of the First Nation investment climate.
6. The investment community in promoting opportunities, identifying issues and creating business connections.

An OECP concept paper has been developed for review.

## **2. Legal Issues**

### ***Benoit v. Canada***

On June 11, 2003, the Federal Court of Appeal released its decision in the *Benoit* case. In a unanimous decision, the Court overturned the decision of Mr. Justice Campbell of the Federal Court, Trial Division, finding instead that Treaty 8 did not confer upon the Aboriginal descendants the right to tax-exempt status.

At trial, Campbell, J. held that Treaty 8 included a promise that the Aboriginal signatories would not have any tax imposed upon them at any time for any reason. There is no mention in the Treaty of a promise exempting the Aboriginal signatories from taxation. While the text of Treaty 8 itself contains no reference to taxation and the Treaty Commissioners did not make any tax exemption promise, the trial judge came to the

conclusion based on the evidence that the Aboriginal people believed that the tax exemption assurance had been made. Thus, he found that the tax exemption was a treaty right, and nothing less would meet Canada's fiduciary obligation to the Aboriginal people of Treaty 8.

The Federal Court of Appeal allows the appeal solely on the basis that the trial judge made a "palpable and overriding error" in reaching his findings of fact. The Court of Appeal disagreed with and disapproved of the trial judge's consideration of the evidence of the Aboriginal peoples' understanding of the tax exemption under Treaty 8. The Court finds that, as with all evidence, oral history evidence cannot be accepted as factual *per se*, but must be carefully scrutinized. Depending on the nature of the oral history, it may be that corroboration will be necessary for the courts to rely on that evidence. In this regard, the Court notes that nothing in the historical paper record surrounding Treaty 8 supports the Aboriginal understanding of the tax exemption promise. The Court of Appeal found that the Treaty 8 claimants failed to establish that the Treaty Commissioners made a promise which would have exempted them from taxation. Leave to appeal to the Supreme Court of Canada has now been denied.

### ***Osland v. James Smith Cree Nation***

This is a decision of the Court of Queen's Bench in Saskatchewan, made March 11, 2003. It concerns the application of a law firm for an order to garnishee funds held by a third party, having first successfully won a default judgment against the Band for fees owing. The third party was a corporation (First Nations Management Services Inc.), operating under an "Arrangement" with the Minister of Indian Affairs to administer certain programme moneys appropriated by Parliament for the Band as "third party manager". On the basis of the provisions of the "Arrangement", the Court held that funds provided by Parliament through the Minister and the third-party manager for the benefit of Band members are:

. . . trust funds in the hands of the third-party manager. Neither the Band nor the members of the First Nation judgment debtor have a legal claim to the funds, even those that are "ear marked" for a specific program. As such, the funds are not a 'debt due or accruing due' within the meaning of the [*The Attachment of Debts Act*] and are not attachable by a garnishee summons. (para. 45)

While on the face of it, the decision concerns issues respecting the vulnerability of programme funds in the hands of a third-party manager to attachment, it brings into sharp relief the question: whether funds, other than such programme funds, may be subject to attachment by a judgment creditor, whether in the hands of the Band administration or a third-party manager?

**Musqueam Leaseholders Litigation: *Chapman v. Canada; Westwick v. Canada*, [2003] B.C.J. No. 2742; and *Chapman v. Canada*, [2003] B.C.J. No. 2741.**

As is well known, the issue of determining “current land value”, and thus the annual rentals that would apply to the various leases on the Musqueam Reserve, went through the Federal Courts to the Supreme Court of Canada: *Musqueam Indian Band v. Glass*, [2000] S.C.J. No. 54. Before the Supreme Court rendered its decision, other litigation was commenced in the B.C. Supreme Court. In the B.C.S.C. action, the leaseholders claim that Canada wrongfully empowered the Band to exercise the Crown’s powers and duties respecting the leases and leaseholders. They also claim that the Crown breached its duty of good faith to them and breached their *Charter* rights. In a counter-claim, the Band sought an order that the leases forfeit to the Crown.

In preliminary proceedings, the Chambers judge considered two broad issues:

- Does the Band have standing to apply for court declarations that the leaseholders’ leases are forfeit to the Crown?
- Should the leaseholders’ claims be struck out on the face of the Statement of Claim?

**1. Can the Band apply for forfeiture of the lease?**

Pursuant to section 53 of the *Indian Act*, the Minister appointed the Musqueam Chief and Council for the purposes of leasing and managing the leased lands. The Court noted that, while the Crown intended by the Minister’s appointment of Band Council under section 53 to have a broad power of management and authority, the appointment had its limits, and in particular, did not include the power to seek forfeiture of the leases - only the Crown could do this. In this case, it was the Crown that had issued notices of default to the leaseholders when they failed to pay their annual rents. It is the Crown, and not the Band Council, that can initiate forfeiture proceedings.

The Band appealed the issue of its standing to apply for declarations that the leases are forfeit to the Crown. The Court of Appeal agreed with the conclusion of the Chambers judge, which was based upon language in the leases, section 53 of the *Indian Act*, and the appointment granted by the Minister to the Chief and Council. The Court of Appeal agreed that the appointment did not include the power to maintain proceedings against defaulting leaseholders for declarations of forfeiture. The power to commence legal proceedings on behalf of the Crown is not mentioned in the appointment, nor can it be implied in the language. “Read as a whole, the [appointment] document authorizes the creation of instruments of title. This does not include, in my view, the right to litigate to bring them to an end.” (para. 13) In the end result, enforcement of rent becomes an issue between the Band and the Crown.

There is nothing in this case to say that the Minister could not make an appointment authorizing Chief and Council to assume the responsibility for issuing notices of default and taking other steps towards forfeiture. Nor is there anything to say that the Band could not assert this responsibility through itself issuing notices of default (unless of course the Minister's appointment prohibits this).

## 2. Striking the Statement of Claim

Under the *Rules of Court*, the court may strike a pleading, in whole or in part, based on certain criteria. The test is that it must be "plain and obvious" or "beyond reasonable doubt" that the claim cannot succeed. No evidence is admissible on an application to strike - the court assumes that the facts are as pleaded in the Statement of Claim. The threshold test for striking is high, because of the important principle that a litigant is entitled to his or her day in court.

The court applies this test and strikes all pleadings which challenge the validity of the leases and of the Band's actions in managing the leases. These are all issues which properly belong to the subject of the earlier rent review litigation.

As to pleading concerning property assessment and taxation over the leasehold interests, the leaseholders' argument is that the assessment and taxation powers derogate express or implied terms of the leases. In the view of the Chambers judge, this particular issue is not the kind of question that would normally be considered by the Band's Board of Review. Although the core of these claims is a fundamental attack on the authority of the Minister, the Court finds that it is not plain and obvious, without reference to any evidence, that the allegations disclose no reasonable cause of action. These claims are not struck.

The plaintiffs also claim that their *Charter* rights have been breached, because they are subject to a scheme of taxation without representation. The Chambers judge does not strike these claims, but does say this:

. . . I can only say that, on the arguments before me, the [leaseholders'] chance of success on these *Charter* arguments would appear tenuous to say the least but I would not be prepared to say that it is plain and obvious that they have no chance to succeed. (para. 90 of B.C. Supreme Court, [2001] B.C.J. No. 775)

On appeal to the B.C. Court of Appeal, the leaseholders challenged the decision to strike those claims which involve the validity of the leases. The Chambers judge decision was upheld, [2003] B.C.J. No. 2742.



**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 (2)**

Innu Takuaiakan Uashat mak Mani-  
Utenam  
Mashtiteuiatsh No. 5

**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  
Alexis 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  
O'Chiese First Nation  
Paul Band  
Piikani First Nation  
Siksika Nation  
Stoney Tribal Council  
Sturgeon Lake Band of Indians  
Tsuu T'ina Nation  
Whitefish Lake First Nation

**British Columbia (66)**

Adams Lake Indian Band  
Ashcroft Indian Band  
Blueberry River Indian Band

Bonaparte Indian Band  
 Boothroyd Indian Band  
 Burns Lake Indian Band  
 Campbell River Indian Band  
 Chawathil Indian Band  
 Cheam Indian Band  
 Chemainus First Nation  
 Coldwater Indian Band  
 Columbia Lake Indian Band  
 Cowichan Indian Band  
 Cook's Ferry Indian Band  
 Fort Nelson Indian Band  
 Kamloops Indian Band  
 Kanaka Bar Indian Band  
 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  
 Pavilion Indian Band  
 Seabird Island Indian Band  
 Shuswap Indian Band  
 Shxw'owhamel First Nation  
 Siska Indian Band  
 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  
 T'it'q'et First Nation  
 Tla-o-qui-aht First Nations  
 Tl'azt'en Nation Nation  
 Tobacco Plain Indian Band  
 Tsawout Indian Band  
 Tsawwassen 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:**

### **FIRST NATIONS FISCAL INSTITUTIONS INITIATIVE: Meetings and Information Sessions**

#### **April 2003**

April 8, 2003 - Presentation to Sto: Lo Nation, Chilliwack, BC.

April 29 to 30, 2003 - AFN Special Confederacy, Ottawa, ON.

#### **May 2003**

May 5, 2003 - FNFA presentation to Campbell River First Nation, BC.

May 6 to 8, 2003 - AFN Confederacy, Vancouver, BC.

May 30 to June 2, 2003 - Federation of Canadian Municipalities Tradeshow, Winnipeg, MB.

#### **June 2003**

June 2003 - All Members of Parliament and Senators mailed CD of "Bill C-19: Building a Better Future".

June 9 to 10, 2003 - Okanagan Nation Alliance Annual General Assembly, Penticton, BC.

June 11 to 18, 2003 - Bologna 2003 Leadership Tour - Cooperative Strategies for Economic Growth, Bologna, Italy.

June 12, 2003 - Presentation to Lands and Trust Services, DIAND, Ottawa, ON.

June 19, 2003 - Aboriginal Water Conference, Winnipeg, MB.

June 23, 2003 - INSIGHT Conference "Aboriginal Financial Management Strategies Forum", Ottawa, ON.

June 25, 2003 - Aboriginal Management Institute Conference "Effective Financial Management and Economic Development for Aboriginal Communities", Vancouver, BC.

June 26, 2003 - Presentation to Fort Francis Chiefs, Kelowna, BC.

## **July 2003**

July 15 to 17, 2003 - AFN Annual General Assembly, Edmonton, AB.

## **August 2003**

August 19, 2003 - International Property Tax Conference, Vancouver, BC.

August 27, 2003 - Bill C-19 Presentation to Kamloops Indian Band Membership, Kamloops, BC.

August 29, 2003 - Presentation to Fort Frances Chiefs, Winnipeg, MB.

## **September 2003**

September 2, 2003 - All First Nations mailed "Bill C-19: Building a Better Future" video.

September 11 to 13, 2003 - Conference: Centre International Pour le Credit Program - Introduction of FNFA to European Elite Banking Syndicate, Victoria, BC.

September 24 to 25, 2003 - Union of British Columbia Municipalities, Vancouver, BC.

September 29 to 30, 2003 - Canadian Property Tax Association, Vancouver, BC.

## **October 2003**

October 8 to 9, 2003 - AFN Confederacy, Squamish Nation, BC.

October 14, 2003 - FNFI Update newsletter mailed to all Members of Parliament, Senators, and First Nations.

October 16 to 17, 2003 - Indigenous Bar Association 15<sup>th</sup> Annual Conference.

October 21, 2003- Aboriginal Management Institute - "Aboriginal Water and Waste Water Conference", Vancouver, BC.

October 23, 2003 - First Nations Alliance for Land Management Conference, Chilliwack, BC.

## **November 2003**

November 26 to 28, 2003 - First Nations Tax Administrators Association Annual Meeting, Cranbrook, BC.

## **December 2003**

December 3, 2003 - Union of Ontario Indians Meeting, Sault Ste. Marie, ON.

December 3 to 4, 2003 - "Building Partnerships Building Mutual Gains" Mediation Training Workshop presented by ITAB with the Canadian Energy Pipeline Association, Calgary, BC.

December 9 to 11, 2003 - Assembly of First Nations Confederacy, Ottawa, ON.

## **February 2004**

February 26, 2004 - Aboriginal Financial Officers Association Conference, Calgary, AB.

February 27, 2004 - Indigenous Bar Association Symposium, Banff, AB.

## **March 2004**

March 10 to 12, 2004 - First Nations Summit Meeting, Vancouver, BC.

March 19, 2004 - Pacific Business Law Institute Conference, Calgary, AB.

\*\*Note: All updated information can also be found on the [www.fnfi.ca](http://www.fnfi.ca) website.