

**2006-2007**

**ANNUAL REPORT**

**OF THE**

**INDIAN TAXATION ADVISORY BOARD**

**INDIAN  
TAXATION  
ADVISORY  
BOARD**



**COMMISSION  
CONSULTATIVE  
DE LA FISCALITÉ  
INDIENNE**





The Honourable Jim Prentice, P.C., Q.C., M.P.  
Minister of Indian Affairs and Northern Development and  
Federal Interlocutor for Métis and Non-status Indians  
Les Terrasses de la Chaudière  
Room 2100, 10 Wellington Street  
GATINEAU PQ K1A 0H4

Dear Minister Prentice:

It is my pleasure to submit the 2006-2007 Annual Report for the Indian Taxation Advisory Board (ITAB). This is the sixteenth annual report for ITAB and the final full year for ITAB. On July 1, 2007 the First Nations Tax Commission (FNTC) became operational and, accordingly, ITAB ceased operation. At that moment, one of the key goals of the *First Nations Fiscal and Statistical Management Act (FSMA)*, the creation of the new First Nation fiscal institutions, was finally realized.

For the past fiscal year, our primary focus has been the preparation for transition from ITAB to the FNTC. Key activities include: an exhaustive review of all ITAB policies (to ensure compliance with the FSMA) and the drafting of new policies, standards and procedures where gaps may exist; the passage of 11 supporting regulations; and the development of a new corporate accountability regime.

In closing, I would like to thank you for both your long-standing and continued support of the FSMA and the creation of the First Nation fiscal institutions. We are now set to begin our work of building the economic infrastructure necessary to create private sector investment, jobs and development opportunities for First Nations across Canada.

Sincerely,

C.T. (Manny) Jules  
Chairman



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**2006-2007  
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INDIAN TAXATION ADVISORY BOARD**

## **EXECUTIVE SUMMARY**

Created in 1989, the Indian Taxation Advisory Board (ITAB) is the only independent and Aboriginal controlled body involved in the exercise of the Minister of Indian Affairs and Northern Development's (Minister) approval authority under the *Indian Act*. ITAB has exercised its mandate to ensure the smooth and credible introduction of First Nation property taxation jurisdiction on reserve.

First Nation property taxation plays a fundamental role in improving First Nation economies. It allows First Nations to provide their taxpayers with quality local services at a fair price. This certainty helps to attract investment. ITAB research has identified that high costs of doing business is the root cause of market failure on First Nation lands. This research concludes that it is ten times harder to attract private investment to First Nations than in other Canadian jurisdictions. Many of the socio-economic disparities facing First Nations are directly linked to a lack of private investment on First Nation lands. Investment is impeded because the legal and institutional foundations necessary to support a market economy are largely missing. ITAB has been working with other First Nations to develop research, best practices and most recently the creation of four institutions through the *First Nations Fiscal and Statistical Management Act* to build the legal and institutional framework necessary to support effective markets.

Today, as a result, 114 First Nations across Canada are collecting property tax, generating more than \$49 million in tax revenues. In 2006-2007, ITAB reviewed and recommended 111 by-laws for approval by the Minister, enacted by First Nations under section 83 of the *Indian Act*. ITAB has recommended a total of 1327 by-laws, since 1989, covering areas such as property taxation, assessment, tax rates, expenditure, business licensing, financial administration, telephone companies and other related amendments.

The past year was one of change and transition for our organization as we worked toward the July 1, 2007 date in which the First Nations Tax Commission would become operational. The *First Nations Fiscal and Statistical Management Act* (FSMA), which came into force on April 1, 2006, changes ITAB from an advisory body reporting to the Minister to the First Nations Tax Commission (FNTC) - a statute-based service agency. The FNTC is one of four First Nation fiscal institutions created by the FSMA, including

the First Nations Financial Management Board (FMB), First Nations Finance Authority (FNFA) and First Nations Statistical Institute (FNSI).

The FNTC will be directly accountable to the federal government through Parliament and to First Nation tax 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. The FNTC will be responsible for maintaining two parallel and national on-reserve property tax systems, as the FSMA permits First Nations to choose between exercising property taxation jurisdiction under section 83 of the *Indian Act* or under the FSMA.

To ensure organizational readiness, the main priority for ITAB in 2006-2007 was the extensive work related to the transition from ITAB to the FNTC. The Board worked with First Nation tax authorities, taxpayers, and other stakeholders to draft sample laws, policies, standards, procedures, and consult on 10 supporting federal regulations required for the FSMA to fully come into force.

To meet the more stringent accountability provisions of the FSMA, ITAB revised its operational policies and developed an entirely new accountability framework. This included draft rules and procedures and standards, a new management policy to provide the administrative back bone for the FNTC, and the drafting of the FNTC's corporate plan. All three are to be approved at the first meeting of the FNTC.

The publication of the *First Nations Gazette*, which marks its tenth year of operation in June 2007, continued to provide for the proper promulgation of First Nation legislation. The Board has also formulated a business plan to expand the role of the *First Nations Gazette* to meet the FSMA requirements.

To build the capacity of First Nation property tax administrations, ITAB offers support by way of training and mediation services. The Board focussed most of its capacity-building time on developing the TULO School of Economics and Public Finance and a relationship with Thompson Rivers University.

The Board also provided facilitation services to various First Nations, resulting in an historic service agreement between First Nations in the Sto:Lo Nation and the City of Chilliwack in British Columbia. Community support services were also provided to the Sumas and Fort Williams First Nations, as well as some First Nations in British Columbia working towards service agreements.



## 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 by-laws. 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 by-laws 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 by-laws.
- 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 by-laws 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 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:

- Clarence T. (Manny) Jules, (Chairman and CEO), Kamloops Indian Band, BC.
- David Paul, Tobique First Nation, NB.
- William (Bill) McCue, Chippewas of Georgina Island, ON.

Strater Crowfoot of the Siksika Nation in Alberta was also a member and Deputy Chairman until late in 2006. With the Minister's agreement, the existing Board decided to address the vacancy by expanding their workload to ensure service levels to the First Nations tax system were maintained.

### 4. Process

The Board has established policies, precedents and procedures regarding by-law development, enactment, approval and implementation, as well as by-law enforcement and assessment appeal procedures. All by-laws 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 by-law 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.

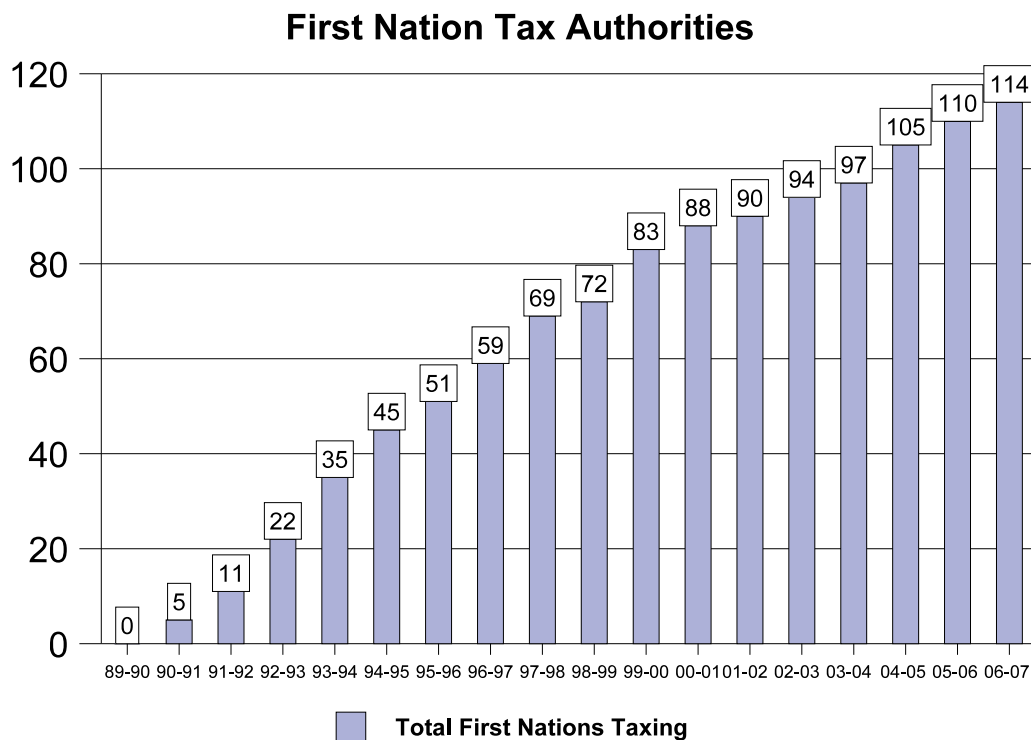
ITAB is also supported by five operational working groups to bring focus to the many corporate, policy, law, and communications issues associated with the transfer of the roles and responsibilities from ITAB to the FNTC.

**5. Support**

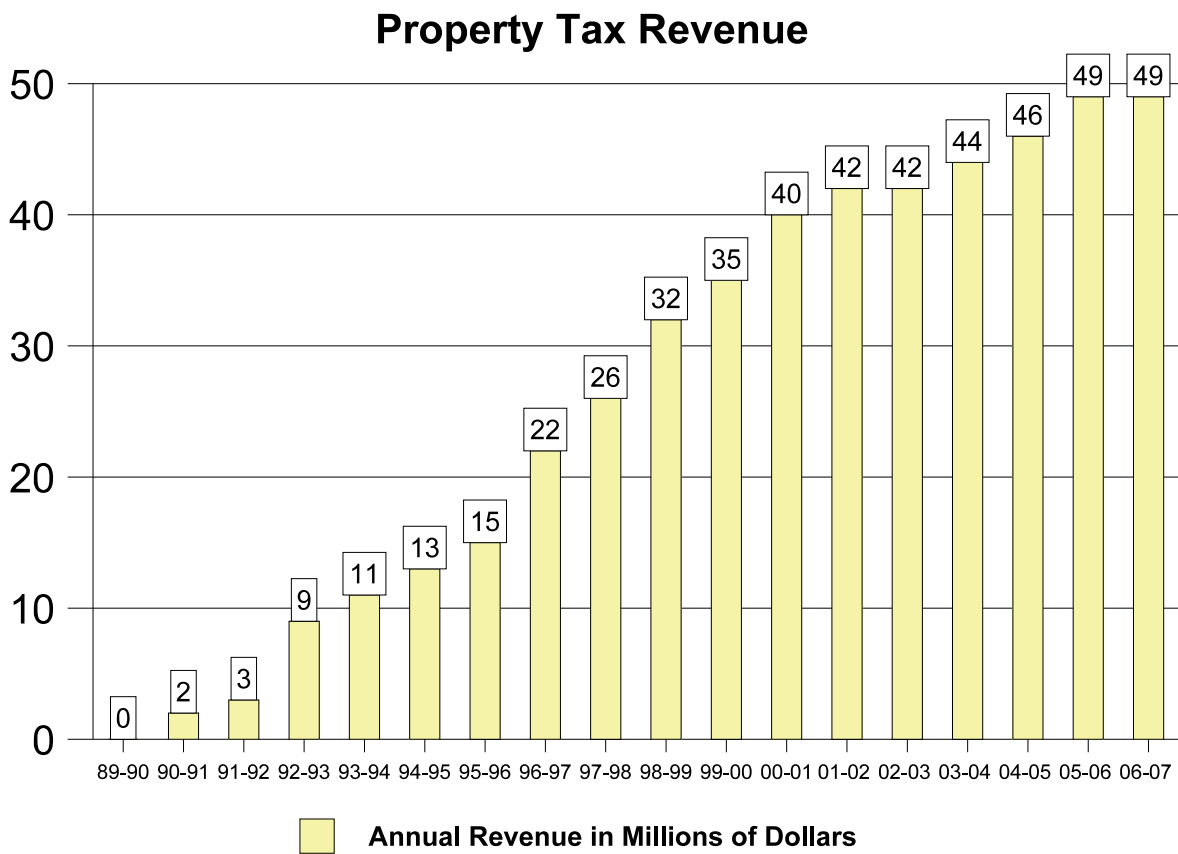
The Board is supported by a staff of 12 employees located in the Head Office in Kamloops, British Columbia, and the Eastern Office, in Ottawa. The staff provides professional and logistical support and assist the Board by reviewing proposed taxation by-laws and developing, communicating, and implementing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

**6. Results**

One hundred and fourteen First Nations were exercising taxation jurisdiction as of March 31, 2007. More than 15 percent of First Nations in Canada are now levying property taxes on reserve.

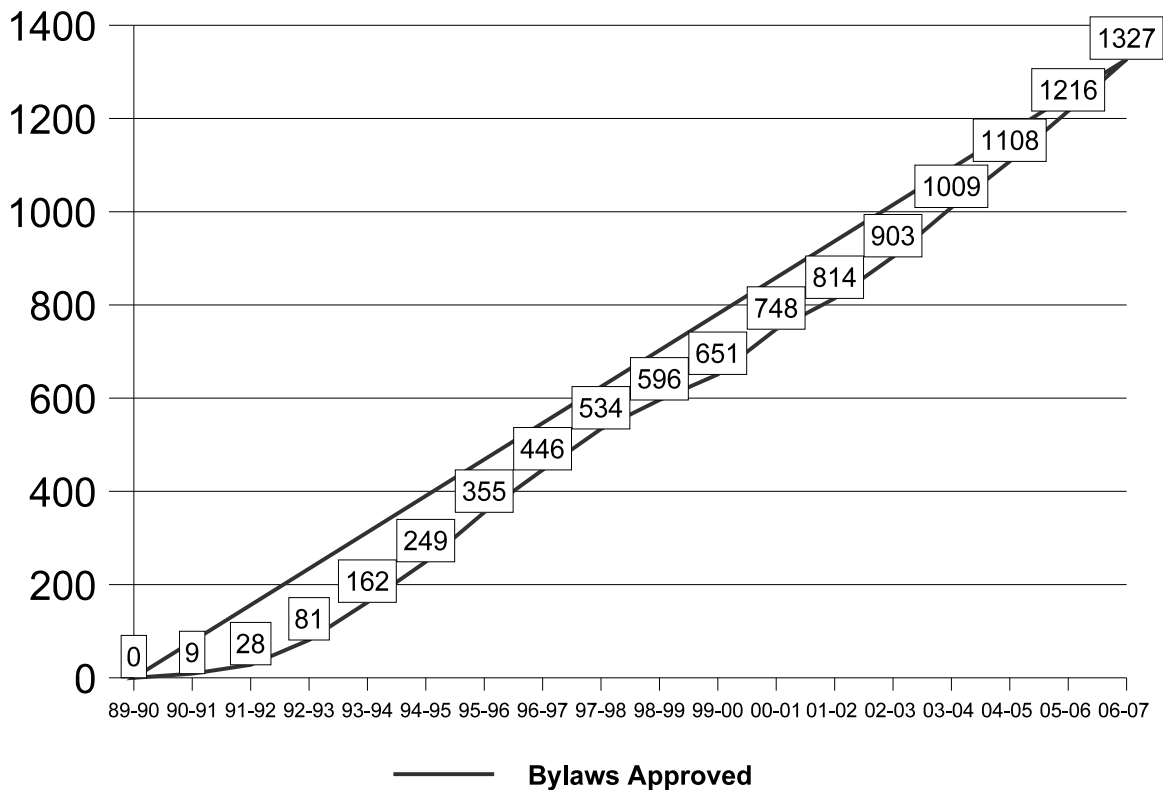


Annual revenues to First Nations from taxation exceeded \$49 million in 2006-2007. Since 1989, more than \$294 million has been generated through property taxation on reserve.



The variety, complexity and volume of by-laws processed by the Board each year and approved by the Minister has increased steadily. By the end of fiscal year 2006-2007, ITAB had reviewed 1327 by-laws 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 by-law under section 83 of the *Indian Act*, signalling a continued strong interest in exercising this jurisdiction.

### Section 83 Bylaws Approved



## II. PROGRAMS AND POLICIES

### 1. By-law Services

The following by-laws were reviewed, recommended and received ministerial approval in 2006-2007:

#### **Property Assessment and Taxation**

Haisla Nation  
Union Bar First Nation

#### **Property Assessment and Taxation Amendments**

Scowlitz First Nation  
Shxwhá:y Village  
Musqueam Indian Band

#### **Property Tax Rates**

Adams Lake Indian Band  
Akisqnuq First Nation  
Alexander First Nation  
Alexis First Nation  
Ashcroft Indian Band  
Bigstone Cree First Nation  
Campbell River First Nation  
Carry The Kettle First Nation  
Chawathil First Nation  
Cheam Indian Band  
Chemainus First Nation  
Coldwater Indian Band  
Cook's Ferry Indian Band  
Cowichan Indian Band  
Dene Tha' First Nation  
Innu Takuaihan Uashat mak Mani-  
Utenam First Nation  
Kamloops Indian Band  
Kanaka Bar Indian Band  
Kwantlen First Nation  
Kwaw Kwaw Apilt First Nation  
Leq'a:mel First Nation  
Little Shuswap Indian Band  
Lower Kootenay Indian Band

Lower Nicola Indian Band  
Matsqui First Nation  
Metlakatla First Nation  
Millbrook Band of Indians  
Moricietown First Nation  
Musqueam Indian Band  
Nadleh Whut'en Indian Band  
Neskonlith Indian Band  
Nicomen Indian Band  
O'Chiese First Nation  
Ocean Man First Nation  
Opaskwayak Cree Nation  
Osoyoos Indian Band  
Popkum First Nation  
Seabird Island Indian Band  
Scowlitz First Nation  
Shuswap Indian Band  
Shxwhá:y Village  
Shxw'owhamel First Nation  
Siksika Nation  
Siska Indian Band  
Skawahlook First Nation  
Skeetchestn Indian Band  
Skowkale First Nation  
Skuppah Indian Band  
Sliammon First Nation  
Snuneymuxw First Nation  
Soda Creek Indian Band  
Songhees First Nation  
Squamish Nation  
Squaila First Nation  
St. Mary's Indian Band  
Stoney First Nation  
Sumas First Nation  
T'it'q'et First Nation

Tl'azt'en Nation  
 Tobacco Plains Indian Band  
 Ts'Kw'aylaxw Nation  
 Tsawout Indian Band  
 Tsawwassen First Nation  
 Tsleil-Waututh Nation  
 Tzeachten First Nation  
 Upper Similkameen Indian Band  
 Westbank First Nation  
 Whispering Pines/Clinton Indian Band  
 Whitebear First Nations  
 Whitecap Dakota First Nation  
 Williams Lake Indian Band

**Property Tax Expenditure/Budget**

Cheam Indian Band  
 Chemainus First Nation  
 Kamloops Indian Band  
 Matsqui First Nation  
 Mushuau Innu First Nation

Musqueam Indian Band  
 Sheshatshiu Innu First Nation  
 Shuswap Indian Band  
 Skeetchestn Indian Band  
 Sliammon First Nation  
 Songhees First Nation  
 Tl'azt'en Nation  
 Tsleil-Waututh Nation  
 Westbank First Nation  
 Williams Lake Indian Band

**Financial Management**

Old Massett Village Council

**Trust Account**

Alexis First Nation

**Telephone Companies Taxation**

Mushuau Innu First Nation  
 Sheshatshiu Innu First Nation

At the end of the 2006-2007 fiscal year, the following by-laws were still under review:

Athabasca Chipewyan First Nation - Settlement Revenue Account  
 Douglas First Nation - Property Assessment and Taxation  
 Driftpile First Nation - Property Assessment and Taxation  
 Fort McMurray First Nation - Financial Administration  
 Gitanmaax First Nation - Property Assessment and Taxation  
 Haisla Nation - Financial Administration  
 Kahkewistahaw First Nation - Property Assessment and Taxation  
 Muskowekwan First Nation - Property Assessment and Taxation  
 Samahquam First Nation - Property Assessment and Taxation  
 Shuswap First Nation - Financial Management  
 Simpcw First Nation - Property Assessment and Taxation  
 Skatin First Nation - Property Assessment and Taxation  
 Snaw Naw As First Nation - Property Assessment and Taxation

In 2006-2007, ITAB reviewed more than 120 by-laws dealing with assessment, taxation, rates, expenditure, financial management, trust revenue and telephone companies. Of this total, two new First Nations have entered into real property taxation. All by-laws that were recommended received approval by the Minister. A list of First Nations with section 83 by-laws is attached as Annex A.

## 2. Strengthening First Nation Tax Administration

### *Education and Training*

The management of a real property taxation system is an emerging specialty within self-government. A broad set of skills is required to undertake by-law management and maintenance of various pieces of legislation covering such things as rate setting, assessment, appeals, financial management and effective ongoing communications with community members and on-reserve taxpayers. However, institutional training in these unique areas, specific to the First Nation setting, has not been available and ITAB has acted to fill this void since 1989.

Consistent with the mandate of the Board and the capacity building objectives of *Gathering Strength*, the Board has focused considerable attention on the training of tax administrators. Working with the University of Victoria, the Consensus Building Institute of Harvard University and others, ITAB has successfully developed a number of certificate courses in tax administration and mediation. ITAB's courses have proven successful in improving the overall accountability to on-reserve taxpayers and First Nation members, implementing labour-saving technology, reducing disputes, improving administrative efficiency and facilitating First Nation tax administrator labour mobility.

Over the last eighteen years, ITAB has offered courses in Budget-Based Real Property Tax Rate training (BBTR), Client Lands Assessment Services System (CLASS), communications course, Financial Administration and Management By-law Certificate program (on-premises and on-line), and mediation courses on building relationships within community and the public sector. In 18 years, 906 participants have taken one or more of the courses offered by the ITAB resulting in issuance of 753 Certificates of Completion.

Course	# of Participants	Certificates of Completion Issued	Representing # of First Nations
Mediation	525	443	
Budget-Based Tax Rate Setting	130	94	68
Alberta BBTR/CLASS	13	0	10
Client Lands Assessment Services System	100	98	45
Financial Administration and Management By-law Certificate Program	119	103	23
Financial Administration and Management By-law Certificate Program – Distant Learning	4	0	3
Communications	15	15	10
	<b>906</b>	<b>753</b>	<b>159</b>



***Education Report for 2006-2007***

In 2006-2007, ITAB completed the following education related projects:

Alberta CLASS – ITAB’s Client Lands Assessment Services Software (CLASS) was modified to work more effectively with Alberta First Nation tax systems. After several tests and revisions, an expert group of users approved the Alberta CLASS version. ITAB is proud that this version of CLASS is now being used by most of the First Nations collecting property tax in Alberta to administer their tax systems.

CLASS Survey – ITAB conducted an extensive survey of CLASS during the last year to ensure it remained effective and efficient for users. A group of expert CLASS users was created to help ITAB review CLASS. The CLASS expert user group identified a number of modifications to improve the software. These suggested changes are currently in the testing phase with the CLASS expert user group. It was also suggested that a support and service group be established by ITAB to help property tax First Nations using CLASS. This recommendation will be reviewed by the FNTC.

Tax Administration Certificate Program – ITAB developed course outlines for a complete certificate in tax administration. Course materials have been developed for five (marked with an \*) of the courses listed below. In 2006-2007 all of the materials were revised to reflect the FSMA and new materials for the service agreement course and joint contracts were developed. These course outlines and course materials have been preliminarily reviewed by Thompson Rivers University and they have agreed to work to accredit these courses and establish a certificate program in First Nation tax administration.

- An Introduction to First Nation Taxation
- Assessments and Assessment Appeals\*
- Budgeting and Tax Rate Setting\*
- Administration - Tax Notices, Collecting and Enforcement\*
- Communications and Taxpayer Relations\*
- Service Agreements and Joint Contracts\*
- Development Cost Charges

First Nation Economics and Public Finance Certificates and Courses – ITAB also completed course outlines for three courses that would be part of a certificate in First Nation economics and three course outlines that would be part of a certificate in First Nation public finance. These courses are listed below. Much of the materials for these courses will be drawn from ITAB's ten year research project on facilitating investment on First Nation lands.

- An Introduction to First Nation Economics
- Investment Facilitation and the FSMA
- Commercial and Residential Development on First Nation Lands
- First Nation infrastructure, capital planning and debentures
- First Nation Tax and Public Policy Development
- First Nation Fiscal Relationships

Education Advisory Board Meetings – Two meetings of the education advisory committee were held this year to review plans to develop accredited and transferable tax administrator training courses. The education advisory committee (which includes members from the FNTAA) has recommended that the tax administrator training be accredited and transferable. The education advisory committee reviewed the plans and course outlines for a certificate program in tax administration, First Nation economics and First Nation public finance during its first meeting. In the second meeting, the education advisory committee recommended that an appropriate mechanism be developed for delivering these certificate programs once the FNTC is established.

### ***The Tulo Centre of Indigenous Economics – A Legacy for ITAB***

ITAB has always promoted investment facilitation and open markets as a means for property tax collecting First Nations to improve the revenue potential of their tax bases. To this end, ITAB has completed a ten year research agenda about allowing markets to work more efficiently on First Nation lands. Moreover, ITAB has also developed and delivered specialized education and training programs in the areas of property taxation, assessment, communication and dispute resolution to First Nation tax administrators and other interested students. This ongoing training has always supported the goal of creating investor confidence in First Nation administrations.

As part of its legacy, ITAB has created the Tulo Centre of Indigenous Economics – a not for profit institution dedicated to delivering education and training certificates and diplomas in First Nation administration; and, conducting research in the areas of First Nation taxation, public finance and economics. The not for profit arms length approach is appropriate because it will be more efficient (use less resources), effective (ensure objectives are met) and less financially dependent (other sources of revenue are available) than having the education program managed by the First Nations Tax Commission.

The Tulo Centre will provide the following services and functions:

1. Develop curriculum for accredited and transferable courses relating to certificate programs in First Nation tax administration, economics and public finance and deliver this curriculum to tax administrators, students and potential investors;
2. Deliver seminars or workshops in areas of general interest relating to First Nation taxation, investment facilitation and public finance; and,
3. Establish partnerships and working relationships with the FNTC and other institutions (private and public) to deliver courses, seminars or workshops relating to First Nation taxation, economics and public administration and/or complete research relating to indigenous economics or public administration.

### ***First Nation Tax Administrators Association - Thirteenth Annual Forum***

ITAB helped to sponsor the Thirteenth Annual Forum of the First Nation Tax Administrators Association (FNTAA) on September 27, 2006. ITAB Chairman delivered the keynote address entitled “Creating Certainty in a First Nation Market Economy”.

Attending tax administrators were provided with an overview of the First Nation Tax System for 2006 including priorities for section 83 and FSMA taxation. ITAB delivered presentations regarding policy development, the transition to the FSMA and new law making powers under the FSMA. A discussion paper on the implementation policy covering local improvement taxes was also presented. Further, ITAB products specifically prepared for the FNTAA were delivered: the FNTAA Policy and Procedures Manual (3<sup>rd</sup> Edition) and the Guide to First Nation Property Taxation. Finally, ITAB presented the CLASS software enhancements and released a preliminary description of the eleven courses identified for the First Nation School of Economics and Public Finance. The session provided tax administrators with a valuable opportunity for input into the policy development process.

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

The ITAB web site provides the general public with user-friendly, easy-to-access information about ITAB. The site will cease to exist once the FNTC becomes operational. However, various documents (annual reports, research, and newsletters) will be archived on the new [www.fntc.ca](http://www.fntc.ca).

***[www.fntc.ca](http://www.fntc.ca)***

The original FNTC web site was launched in August 2002 as an education tool about the future First Nations Tax Commission. A new site will replace this one, once the FNTC becomes operational. It will allow visitors to access the FNTC mandate, programs and services, a list of taxing First Nations, and information on the two different possibilities for First Nations to exercise their property tax jurisdiction. It will also include information on the *First Nations Gazette*, various archived ITAB documents and other publications and tools.

#### ***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 by-laws 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. One hundred and three by-laws were published in the *Gazette* in 2006-2007.

#### ***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). The newsletter will be archived on the new FNTC site.

#### 4. Dispute Resolution and Negotiations

##### *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 also continued to provide support to service agreement negotiations. This support program includes a facilitation process and technical support for calculation of costs associated with the delivery of local services. The approach is to work toward building a structure for discussions with specific protocols and ground rules for negotiations and then move on with cost calculations.

The following are some other areas where ITAB has provided community support:

##### **(a) Sumas First Nation**

The dispute at Sumas First Nation centres on issues raised by a Sumas certificate of possession holder with respect to the implementation of First Nations tax jurisdiction. ITAB attended two community meetings to address the concerns raised, as well as answer any questions posed by the membership. As a result, it appears that the issues raised were addressed and the community is considering its next steps with respect to the implementation of property taxation.

##### **(b) Fort William First Nation**

ITAB engaged negotiations between the Fort William First Nation and the City of Thunder Bay regarding the implementation of the First Nation's property tax jurisdiction.

The highly complex matter includes issues surrounding the First Nation's acquisition of lands and the ATR process. Discussions are on-going.

**(c) Sto:Lo Nation and the City of Chilliwack Celebrate Historic Service Agreement**

ITAB supported First Nations in the Sto:Lo Nation and the City of Chilliwack in reaching an historic service agreement in 2006. The agreement is a template for future service and development cost charge agreements and provides a comprehensive process for joint land use planning.

Regional economic growth benefits both the Sto:Lo communities and the City of Chilliwack. By focussing on their mutual interests, Chilliwack and the Sto:Lo created one of the best investment climates in British Columbia.

**(d) Other Service Agreements**

On-going discussions, with varying levels of ITAB support, took place at Kwantlen, Squamish, Westbank, Tsawwassen, and Sliammon First Nations, all of which are located in British Columbia.

The work at Kwantlen commenced with an initial meeting between the First Nation and the Municipality of Maple Ridge taking place in June 2006. The first stage of this work will see the development of a protocol of relationship between the First Nation and the municipality. A draft of the document is being prepared. ITAB reviewed the basis for its role as a facilitator and ground rules for the negotiation process and is developing a workplan to support the process and continue negotiations.

## **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.

*\*\*Note - Draft policy objectives for the FNTC were developed in 2006-2007 for FNTC approval in 2007-2008. They were formulated from the FSMA, particularly the Act's preamble and section 20 which lists the Commission's purposes. The policy objectives are presented below.*

**Support First Nation Jurisdiction** - The Commission will protect and support First Nation tax jurisdiction by providing certainty and preserving the integrity of the First Nation local revenue system.

**Reconcile Interests** - The Commission seeks to reconcile interests and create mutual benefits for the First Nations governments and stakeholders in the First Nation tax system. To this end, the Commission seeks to achieve a First Nation tax system that prevents disputes before they arise, and effectively resolves them once they occur. The Commission advocates the use of strategies to improve taxpayer relations, and appropriate dispute resolution as an alternative to formal complaints or litigation.

**Promote Transparency** - The Commission promotes transparency and clarity in the First Nation tax system. Transparency is a cornerstone in building a First Nation tax system that is credible, sustainable, and supported by taxpayers.

**Support First Nations in Achieving Sustainable Economic Development** - Stable local revenue, the infrastructure it affords, and a competitive investment climate are prerequisites for sustainable economic development. The Commission is committed to helping First Nations facilitate investments on their lands.

**Educate and Promote Understanding** - Education and promoting understanding are key ingredients in securing a healthy and sustainable First Nation property tax system. The Commission is committed to building capacity amongst First Nations to enable them to better administer their property tax administrations.

**Promote Harmonization** - The First Nation property tax system should be harmonized with its relevant provincial property tax system where possible. This creates certainty and transparency, and promotes sustainable economic development.

**Foster Administrative Efficiencies** - The Commission will work to achieve an efficient and a practicable First Nations property tax system.

### ***Policy Development***

In 2006-2007, ITAB policy development was divided into two broad areas: policy governing section 83 taxation, and policy concerning options for FSMA taxation. Since the fall of 2005, this work has been guided by the Policy Working Group under a Board approved workplan.

### **Policy Governing Section 83 Taxation**

With the transition of ITAB to the FNTC, all governing policies for section 83 taxation needed to be reviewed and revised. In some instances, revisions entailed updating information and in others it meant expanding on policy statements or achieving greater efficiencies. For example, all policies had to be revised to reflect the change from ITAB to FNTC. More complicated revisions included developing new policy statements on assessments (e.g., requirements for qualified assessors, rules governing assessment review boards) and on the complaints process. The revisions are intended to mirror the FSMA policy approach to these issues.

ITAB will forward this policy work to the FNTC in the next fiscal year. Once adopted by the FNTC, these policy revisions will be the FNTC framework for section 83 review.



### **Policy Options for FSMA Taxation**

In preparation of the establishment of the FNTC and to ensure that the FNTC is operational as soon as possible, ITAB continued work on developing policy options for the law review standards, procedures, and operational policies governing the FNTC. The aim is to develop these options based on an assessment of best practices, and then present them to the FNTC for final approval. Thereafter these documents would undergo a consultation process to obtain First Nation and taxpayer input. The Policy Working Group established a workplan and carry out the research. Among the policy options developed are:

- Law review standards for all local revenue laws that are reviewed by the FNTC which includes: Property Tax and Assessment, Rates, Expenditures, Taxpayer Representations to Council, Development Cost Charges, Taxation for the Provision of Services, Business Activity Tax, Delegation to a Common Body, and Borrowing Laws;
- FNTC procedures; and
- Policy regarding FNTC initiated reviews, FNTC Review of Complaints, education, borrowing room, project eligibility, and non-Indian Band participation.

In 2006-2007, ITAB concluded work on draft law review standards for taxation laws, assessment laws, rates laws, and expenditure laws. These standards were developed using a drafting principles document that the Board approved in December of 2006. Further work continued on the taxation for the provision of services law review standards, the development cost charges law review standards, borrowing law review standards, and the delegation to a common body law review standards. These standards are expected to be adopted by the FNTC in 2007-2008.

### III. SPECIAL INITIATIVES

#### 1. FSMA Regulatory Development

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.

A first package of FSMA regulations went through the entire process of consultations, with comments being considered in the final regulations. The regulations received final approval and were passed by the Governor-in-Council on October 5, 2006. They were published in Part II of the *Canada Gazette* (Vol.140, No. 21) on October 18, 2006.

The regulations in the first package were:

1. First Nations Tax Commissioner Appointment Regulations;
2. Debt Reserve Fund Replenishment Regulations;
3. Short-term Pooled Investment Fund Regulations; and
4. Statistical Data Disclosure Regulations.

The second package includes seven regulations affecting the operations of FNTC and the Financial Management Board, and the property tax regimes established by the Act. These regulations were blue-stamped and working their way through approvals to be pre-published in Part I of the *Canada Gazette*. After the 30-day consultation period, the regulations will be amended, as necessary, to accommodate as many comments received as possible. The regulations will then move through approvals to be passed by the Governor-in-Council.

These regulations are:

1. First Nations Tax Commission Review Procedures Regulations;
2. First Nations Local Revenue Law Review Procedures Regulations;
3. First Nations Assessment Appeal Regulations;
4. First Nations Assessment Inspection Regulations;
5. First Nations Enforcement Regulations;
6. First Nations Rates and Expenditure Laws Timing Regulations; and
7. Local Revenue Management Implementation Regulations.

A final package will include two additional regulations: the first will add the names of First Nations opting to operate property tax systems under the FSMA to its Schedule, while the second will make certain amendments to the *Property Assessment and Taxation (Railway Right-of-Way) Regulations*.

## 2. First Nations Tax Commission

### A. Transition

The past fiscal year saw ITAB continue to undertake the many activities associated with the transition from ITAB to the FNTC. This transition work included:

**Policy and Law Development** – ITAB committed to developing policies, procedures and standards in twenty-two separate areas. Most of these relate to procedures and standards required to review s. 83 (*Indian Act*) by-laws and *First Nations Fiscal and Statistical Management Act* (FSMA) laws.

The FNTC will also have to review First Nation local revenue laws enacted pursuant to s.5 and s.10 of the FSMA. The sample laws currently in development include:

- a. Property Tax Laws;
- b. Property Tax Expenditures Laws;
- c. Property Tax Rates Laws;
- d. Taxpayer Relations Laws; and
- e. Borrowing Laws.

In February 2007, the ITAB by-law, law and policy working groups held joint working sessions to further the development of the sample C-20 taxation law, as well as section 83 (*Indian Act*) taxation and assessment and related by-laws. The working groups also progressed in the development of FNTC standards for the passage of taxation and assessment laws, pursuant to section 35 of the FSMA.

**Education and Training** – ITAB continued with the development of an educational program to certify First Nation tax administrators through a university. In this regard, Thompson River University (TRU), located in Kamloops, was identified as a suitable location. In a presentation to the TRU Board of Governors, ITAB set out the case for the development of a program in applied First Nation economics and public finance and the training and education requirements associated with the FSMA and the FNTC. The TRU Board of Governors enthusiastically accepted the proposal and agreed to establish a working committee to advance the project.

The working committee conducted a preliminary assessment of the curriculum course outline. Early indications suggest that this material represents between 24 to 30 credit hours and could be further developed to produce a diploma (one year) or certificate (two year) program. The working committee also carried out work regarding the accreditation process, course delivery models (ranging from traditional classroom course at TRU, to courses on site at First Nations, and the on-line delivery of multi-media courses), and resources requirements associated with curriculum development, review and accreditation, as well as course delivery and project management.

ITAB anticipates the accreditation of initial course modules in order for the courses to be offered in September 2007.

**Communications** – Work was completed this past year to support the transition to the FNTC for July 1, 2007. Communications materials to support this included press releases, a new [www.fntc.ca](http://www.fntc.ca) web site, public information materials, as well as information documents to support the new Commissioners upon their appointment.

**Property Tax and Assessment Guide** – This publication provides an overview of property taxation for a wide range of audiences. The “*FNTC Guide to First Nations Property Assessment and Taxation*” was completed in both official languages. A plan for the distribution of the document will be developed once it is finalized by August 2007.

**FNTC Planning and Management** – ITAB management policies have been updated and new policies required by the FNTC were created in preparation for the operation of the Commission. These policies reflect the more stringent accountability framework provided by the FSMA.

ITAB also developed an FNTC corporate plan, capital plan and information management and technology plan to support the transition and prepare for operations. Training materials for the new commissioners were also developed.

The corporate plan, rules of governance and procedure and management policy will be approved by the FNTC at its first meeting.

**Section 83 Responsibilities** – The mandate of the FNTC also includes the continuation of ITAB responsibilities related to the exercise of First Nation property taxation jurisdiction under section 83 of the *Indian Act*.

This continuing function will give the FNTC the role of supporting the Minister in his responsibilities regarding the approval of First Nation by-laws enacted pursuant to section 83. The FNTC will act as an advisor and agent with regard to the review and recommendation for approval of section 83 by-laws and related activities which include providing authoritative policy advice to the Minister and facilitation, advocacy and dispute resolution services to First Nation property tax authorities and their taxpayers.

A Memorandum of Understanding was drafted to govern this relationship and it is expected to be signed by both the Minister and Chief Commissioner early in the new fiscal year.

**Appointment of Commissioners** – On November 24, 2006, the ITAB Chairman was appointed Chief Commissioner of the FNTC. The advertising of positions for the rest of the Commissioners was also posted and selection process completed. However, no appointments were announced before the end of the fiscal year.

## IV. SUPPORTING PROGRAMS

### 1. Research and Policy Development

In this fiscal year, ITAB has completed a major research compendium into improving First Nation land title certainty. The research includes four papers.

1. Cragg, Diane – Best Practices in First Nations Land Title Systems
2. Lang Michener– Best Practices in First Nations Land Administration Systems
3. Fiscal Realities Economists – The Role of Land Title in Developing First Nation Economies and Government
4. Fiscal Realities Economists – The Economic and Fiscal Impacts of Market Reforms and Land Titling for First Nations

There are two types of registry systems in Canada – deeds systems that list documents that have been registered and Torrens systems that create title and have an assurance fund.

Taken together, the first two research papers yielded an important conclusion. The Torrens system is superior to the deeds registry system because it generates secure title, establishes an assurance fund and achieves cost efficiencies. The Indian land registry does not create sufficient certainty nor does it establish a comprehensive priority scheme for interests in lands. Lacking significant attributes of a Torrens-based land title registry system, it is a limited deeds system with a limited legislative framework.

The Best Practices in Land Title Systems paper also shows how to develop a good First Nation land title system based on experience with land title systems and the land title system operated by the Nisga'a Nation. These best practices and comparisons to the other types of systems are contained in the table below.

Land Title Registry	Deeds Registry	Indian Land Registry
<p>Accuracy &amp; Reliability Best Practice</p> <ul style="list-style-type: none"> <li>Standards of document registration established by statute</li> <li>Guarantee and Assurance Fund</li> </ul>	<ul style="list-style-type: none"> <li>Standards of document registration established by statute</li> <li>No guarantee</li> </ul>	<ul style="list-style-type: none"> <li>Standards of document registration established by policy rather than statute</li> <li>No guarantee</li> </ul>
<p>Document and Data Security Best Practice</p> <ul style="list-style-type: none"> <li>Responsibility for documents security set out in legislation</li> <li>All relevant records are in one place</li> </ul>	<ul style="list-style-type: none"> <li>Responsibility for document security may be set out in legislation</li> <li>May be multiple registries</li> </ul>	<ul style="list-style-type: none"> <li>Responsibility for documents security established by policy</li> <li>Multiple registries</li> </ul>
<p>Protection Against Fraud Best Practice</p> <ul style="list-style-type: none"> <li>Participants in fraud do not acquire interest in land</li> <li>Mechanisms to protect against registration of fraudulent interests</li> <li>Fraud Victims are compensated by Assurance Fund</li> </ul>	<ul style="list-style-type: none"> <li>Registry has no role in establishing the verity of a transaction</li> <li>Fraudulent transactions may be determined by law to have no effect</li> <li>Not all documents are registered</li> </ul>	<ul style="list-style-type: none"> <li>Fraudulent transactions are determined by policy to have no effect</li> <li>Eligibility requirements may reduce opportunities for fraud</li> </ul>
<p>Guarantee and Assurance Funds Best Practice</p> <ul style="list-style-type: none"> <li>Guarantee of title and assurance fund established by statute</li> </ul>	<ul style="list-style-type: none"> <li>No guarantee of title</li> <li>assurance fund (title insurance) may not be provided</li> </ul>	<ul style="list-style-type: none"> <li>No guarantee of title</li> <li>No assurance fund</li> </ul>
<p>Priority Registration Best Practice</p> <ul style="list-style-type: none"> <li>priority of registration establishes priority of interests</li> </ul>	<ul style="list-style-type: none"> <li>priority of registration may establish priority of interests</li> <li>Unregistered documents may affect priority</li> </ul>	<ul style="list-style-type: none"> <li>Registration in priority sequence based on policy, rather than legislation</li> <li>Unregistered documents affect priority in some cases</li> </ul>
<p>Resolution of Competing Interests Best Practice</p> <ul style="list-style-type: none"> <li>Has no role in resolving competing interests when initial title determined</li> <li>Does not allow the establishment of competing interests</li> </ul>	<ul style="list-style-type: none"> <li>Has no role in resolving competing interest when initial title determined</li> <li>Registered documents may create competing interests</li> </ul>	<ul style="list-style-type: none"> <li>Has a role in granting interests (via Ministerial Approval)</li> </ul>
<p>Matrimonial Property Best Practice</p> <ul style="list-style-type: none"> <li>Clear and consistent practice regulated by statute</li> </ul>	<ul style="list-style-type: none"> <li>Clear and consistent practice regulated by statute</li> <li>Matrimonial real property may not be registered</li> </ul>	<ul style="list-style-type: none"> <li>Court orders with respect to matrimonial real property have no effect</li> </ul>
<p>Estates Best Practice</p> <ul style="list-style-type: none"> <li>Clear and consistent practice regulated by statute</li> </ul>	<ul style="list-style-type: none"> <li>Clear and consistent practice regulated by statute</li> <li>property may not be registered</li> </ul>	<ul style="list-style-type: none"> <li>Complex process using both federal and provincial legislation</li> <li>Property may not be registered</li> </ul>
<p>Legal Surveys Best Practice</p> <ul style="list-style-type: none"> <li>Standards for surveys set out in legislation</li> <li>All parcels surveyed and allocated a unique legal description</li> </ul>	<ul style="list-style-type: none"> <li>Standards for surveys set out in legislation</li> <li>Multiple surveys may exist</li> </ul>	<ul style="list-style-type: none"> <li>Standards for surveys set out by policy</li> <li>Multiple surveys may exist</li> </ul>

The third paper assessed how a Torrens style system would affect the investment climate of First Nations. The paper found that the existing systems of land title do not provide property rights with the characteristics that support an efficient land market. The consequence of this is that investors and First Nations must go to substantial lengths to devise contractual arrangements to do what the system of property rights provides in other contexts. As a consequence, investors shy away from First Nation projects and First Nation persons are less able to earn equity from their land or use it as collateral for business start up loans.

The paper also found that the existing systems have prevented the development of First Nation economies in other ways.

First, it has prevented the development of proper investment facilitation policies and skills within First Nation land administrations. These cannot be easily imported from other jurisdictions. It has also made it difficult to deliver training in a cost effective manner.

Second, it has prevented the development of land transaction and investment professionals to support investors seeking First Nation opportunities. The existing systems are unfamiliar and have developed in diverse ways. Investors face a steeper learning curve and a lower payoff from learning these systems as a result.

Third, it has prevented the development of a host of policies related to the proper use and disposition of the land. This would include land use policies but also policies that are normally enforced by recording interests in the land, such as the system of liens and collateral that supports normal business practices.

Fourth, it has prevented the development of investment facilitation skills in First Nation administrations. These skills are developed largely through exposure to actual investment proposals. The absence of a Torrens system has created a bottleneck to the development of these policies. The need to secure land title is generally the first step in investor's decision making and the process terminates when it is not available. Consequently, there has been little exposure to the requirements of investors at other stages of the investment decision.

Fifth, it has prevented the development of a cadre of investment professionals specializing in First Nation projects. Again, these skills are generally produced by exposure to actual projects. The bottleneck created by land title has prevented this exposure.



Sixth, it has prevented First Nation persons from taking advantage of investment opportunities. They have been less able to use home equity as start up capital. Home equity is a principal source of start up capital.

Finally, it has prevented the development of a political orientation towards creating a favourable investment climate on First Nation lands. A principal problem has been that First Nation persons with land holdings have been less able to earn equity. Consequently, they have not had an incentive to support policies that would enhance their property values.

The paper also found that the development of a Torrens style system on First Nation lands would contribute to a number of other federal goals. It would support the reduction of socio-economic disparities on First Nation lands. It would create a platform that could remove some of the issues raised by settling claims or expediting additions to reserve. It would provide the means to help resolve the issue of marital property and unsettled estates. It would support the general goal of improving First Nation governance and cooperation among governments. Finally, it would be a significant first in the development of the rights of indigenous peoples'. It would showcase the success of the Canadian federation in accommodating these rights without compromising the principles of the federation. This would enhance Canada's stature on the international stage.

The fourth paper provided a preliminary net benefit estimate from implementing market reforms and land titling. Cost estimates were based on creating a mechanism to transfer the legal and institutional framework for markets, supporting competitive infrastructure and transfer the legal and survey framework for a land title system. The cost estimate is based on a national program.

Benefits were based on increases in real estate values, employment, residential development, tax revenues and infrastructure. Benefit estimates are based on a sample of 68 First Nations in BC collecting property. The development potential estimates of four First Nations (Squamish, Musqueam, Campbell River and Westbank) were restricted for reasons related to developable lands and the significant upward bias on benefit estimates these First Nations represented.

The net benefits and costs are summarized in the table below.

	<b>Benefits (over 15 years)</b>	<b>Costs (over 15 years)</b>
Estimates	Increase in real estate value - \$3.8 billion New Employment – 62,700 FTEs, \$410 million in increased productivity Increase in Housing Stock – 2750 residential units Increase in property tax revenues - \$150 million Increase in infrastructure - \$156 million Increase in sales tax revenues - \$92 million Reduced cost of poverty - \$1.1 billion	Market Framework transfer – \$68 million Infrastructure Program – \$280 million Land Title System – \$320 million
<b>Total</b>	<b>\$5.7 billion in benefits over next 15 years</b>	<b>\$688 million over the next 15 years</b>

## 2. Legal Issues

### Section 83 of the *Indian Act*

*Derrickson v. Kennedy* 2006 BCCA 356

The Defendant, Kennedy, leased lands from the Plaintiff, Derrickson, on one of the Westbank First Nation reserves. The lands were subject to taxation pursuant to the Westbank First Nation Taxation By-law. The lessee, Kennedy, was liable for the payment of the property taxes. She did not pay them but apparently took no steps to appeal or dispute them either. The Band took steps to recover the taxes, and Derrickson sought to regain possession of the lands. The Defendant objected mainly on the basis that the taxes were unconstitutional as applied to her. The Court rejected all of these arguments. The Court found that taxes imposed under a section 83 by-law could apply to her occupation of the lands under a lease and further that any challenge should have been made through the process provided for in the taxation by-laws and not through a collateral attack in the proceedings to recover the lands.

**Section 87 of the *Indian Act***

*Tsuruda v. The Queen* (2006), 60 D.T.C. 3243

The issue in this case was whether certain income was exempt from taxation. The Appellant Tsuruda was a status Indian and a member of the Spuzzum Band. However, the evidence indicated that the Appellant had very minimal contact with her Band. She had never lived on reserve or participated in the life of the Spuzzum, or any other Band. The Appellant derived her income from several corporations owned and operated by herself and/or family members. These corporations had their offices located in the Park Royal complex on reserve. Meetings were held there, various administrative tasks were performed there, and the banking and other minimal business activities were carried out on the reserve at Park Royal. The substance of the underlying income generating activity, however, was not carried out on reserve. The Appellant candidly admitted that the business activities had been structured so as to take advantage of the tax exemption found in section 87 of the *Indian Act*. Nevertheless the Appellant argued that she was entitled to structure her affairs so as to minimize her tax liability, including taking advantage of the section 87 tax exemption. The Court accepted the proposition that individuals, including Indians are entitled to structure their affairs so as to minimize their tax liability. However, the Court noted that not all tax minimizing strategies are successful. In order to be successful in employing the section 87 tax exemption, an individual must meet the connecting factors test articulated by the Supreme Court of Canada in *Williams* and subsequent cases. The Court concluded that the Appellant had simply not met that test in this case. There were insufficient factors connecting her income to reserve. Accordingly her attempt to minimize her tax liability failed.

*Large v. The Queen* (2006), 60 D.T.C. 3558

This case involved the issue of the section 87 tax exemption as applied to investment income. The issue involved a married couple. The wife was Indian and the husband was not. The husband arranged the couple's financial matters. For some time the family operated a tobacco store on reserve under the wife's name. In accordance with section 87 of the *Indian Act* the income earned by the wife from that business was exempt from taxation. The wife then sold the business and with this money as well as other accumulated funds she purchased shares in a publicly traded company. Realizing that earnings from these investments would not be tax exempt, the parties engaged in tax planning strategies which involved selling the shares to a corporation which had its head office on reserve in return for a promissory note upon which she earned interest income which was the subject of the appeal.

The parties defended their right to engage in tax planning strategies and argued that their situation was distinguishable from that in *Recalma* because here, the interest

income being earned by the Appellant was paid by a corporation which was located on reserve. The Court rejected the distinction. It held that the Court of Appeal's concern in *Recalma* had been with ensuring a real connection between the income at issue and the reserve. Such a connection could not simply be manufactured by inserting a corporation on reserve between the investments producing the income stream and the income.

### **Sections 89 and 90 of the *Indian Act***

*R. v. Sewell*, 2006 ONCJ 202

The defendant in this case ran a gas station and store on an Indian reserve. He collected and remitted GST on sales to non-native customers. In accordance with the terms of the *Excise Tax Act* he was asked to provide the underlying documentation supporting the GST returns he had filed. He refused. When prosecuted for failure to provide the documents he argued that the attempt to obtain them was equivalent to a "seizure" from which he was exempt in accordance with section 89 of the *Indian Act*. This argument was rejected by the Court. The Court looked at the historic purpose of sections 89 and 90 and concluded that their purpose was to protect from erosion entitlements held *qua* Indian. Here the Crown did not seek to deprive the defendant of property of any value. Rather, the Court characterized the demand as compliance with an administrative scheme. The Court held that it was not the sort of matter that section 89 was directed towards.

*McDiarmid Lumber Ltd. v. God's Lake First Nation*, [2006] 2 S.C.R. 846, 2006 SCC 58

In this case the Supreme Court of Canada considered the nature and scope of section 90 (1)(b) of the *Indian Act*, and in particular the requirements in order for a funding agreement between the Crown and a First Nation to be deemed to be always on reserve for the purposes of exemption from seizure under section 89 of the *Act*.

The God's Lake First Nation (the "Band") is an adherent to Treaty 5. The Band is located on an isolated reserve in northern Manitoba. Virtually all of the funding necessary to the Band's operations comes from a Comprehensive Funding Agreement ("CFA") between the Band and Canada.

The Band owed money to McDiarmid Lumber. McDiarmid sued and obtained judgment on the debt. It sought to execute on its judgment by attaching funds in the Band's account which was at a bank located off reserve. The issue was whether the funds were exempt from seizure under either section 89 or 90 of the *Indian Act*.

With respect to the application of section 89 which provides that the personal property of an Indian or Band which is “situated on reserve” is exempt from seizure, the majority of the Supreme Court of Canada began their analysis by asking “...whether the expression situated on a reserve is to be given its plain meaning and subjected to the common law and statutory *situs* rules, or whether it has a more abstract meaning unique to the *Indian Act*.” (para. 11)

The majority then reiterated the distinction between intangible personal property such as the unemployment insurance benefits at stake in *Williams* and other forms of property. It held that the “connecting factors” test set out in *Williams* was only appropriate in cases where the *situs* of the property was difficult to locate such as were those benefits. The majority cited with approval the reasoning of the Manitoba Court of Appeal that “...[i]t makes sense to adopt a highly fact-specific form of analysis with respect to the location of a *transaction*, such as the provision of benefits, for taxation purposes.” (para. 17) The Court held, however, that this kind of contextual approach (ie. the connecting factors test) was not appropriate where the location of the property at issue, in this case a bank account, is objectively easy to determine. (para. 18)

Accordingly the majority concluded that the funds in issue were not “situated on reserve” within the meaning of section 89 of the *Indian Act*.

The next issue was whether the funds were nevertheless deemed to be situated on reserve pursuant to section 90(1)(b) because they were provided to the Band “...under a treaty or agreement between the band and Her Majesty.” The majority concluded that:

Precedent, principle and policy all suggest that Parliament’s intent was that the word agreement in s. 90(1)(b) should not be accorded a broad meaning, but should instead be confined to agreements ancillary to treaties. (para. 25)

The majority invoked a number of rules of statutory construction to conclude that the term “agreement” as used in section 90 (1)(b) should be given a limited scope. The majority further held that this narrow approach was consistent with ensuring First Nations access to credit, as well as the historical development of the *Indian Act* provisions by which they held that Parliament intentionally intended to strike a balance which provided only limited protection against seizure and in particular intended only to extend the benefit of section 90 to those Bands who had entered into treaties and only to those agreements ancillary to those treaties.

*Ramsay Painting v. St. Mary's Indian Band* 2006 BCSC 976

This case involved the application of sections 89 and 90 of the *Indian Act* in the context of funds held in a Band's bank account off reserve which were received primarily from a Comprehensive Funding Agreement ("CFA") from the federal Crown to fulfill various Band purposes. The issue was whether, notwithstanding that they were on deposit with a bank not located on reserve, these funds were deemed to always be on reserve pursuant to section 90 (1)(b) of the *Act* as given under a "treaty or agreement between a band and Her Majesty" and were therefore exempt from seizure in accordance with section 89 of the *Act*.

Adopting the reasoning of the Manitoba Court of Appeal in *God's Lake First Nation v. McDiarmid Lumber Ltd.* (2005), 251 D.L.R. (4th) 93, the Court held that the deeming provision of section 90(1)(b) only applied to agreements which were ancillary to a treaty. Since the St. Mary's Indian Band was not party to a treaty with the Crown, no part of the CFA could be said to be ancillary to a treaty. Accordingly the Court held that the funds were not exempt from seizure. This result is consistent with the Supreme Court of Canada's decision in *God's Lake* discussed above.

*Pavage Levesque Paving Ltd. v. Eel River Bar First Nation*, 2007 NBCA 31

This was another case involving the issue of whether funds received under a CFA and held in a bank off reserve were exempt from attachment. The original decision had been made before the release of the Supreme Court of Canada's decision in *God's Lake*. The motions judge had originally found that they were, concluding that the funds were provided to the Band as part of the compensation for the cession of their territories. This conclusion was overturned on appeal. The Court of Appeal held that there was no evidence linking the funds to any treaties or ancillary agreements. Therefore in accordance with the Supreme Court of Canada's decision in *God's Lake* (released in the interim) the Court of Appeal held that the funds were not exempt from attachment.

### Miscellaneous Taxation Issues

*Acadia First Nation v. Canada (National Revenue)*, 2007 FC 259

The Acadia First Nation appealed against notices of assessment issued to it under the *Excise Tax Act* for failure to collect GST/HST as required on sales to non-Indians. The uncollected taxes were attributable to retail sales at convenience stores located on reserve lands. Some years prior the First Nation had enacted its own goods and services tax which it applied to these sales. The funds derived from this tax were used for a variety of community purposes. The First Nation argued that this tax was the modern expression of their historic tradition of communal sharing and providing for the needs of the community and an exercise of their right to self-government. In light of this they argued that the GST/HST rules as applied to them in this context violated their aboriginal rights and that the Minister's decision to enforce the rules against the Band was taken without meaningful consultation with the Band, and accordingly could not stand. This argument was rejected by the Court. The Court held that the Band had failed to establish the potential existence of the asserted aboriginal right which would trigger a duty to consult and accommodate. While the Court accepted that there was evidence of a pre-contact tradition of communal sharing which constituted an integral part of the applicant's distinctive culture, it held that there was an insufficient link between this activity and the revenue generation through taxation currently being conducted by the Band.

**APPENDIX A:****FIRST NATIONS WITH SECTION 83 BY-LAWS****Newfoundland (3)**

Miawpukek First Nation  
 Mushuau Innu First Nation  
 Sheshatshiu Innu 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 Takuaiakan 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 (7)**

Carry The Kettle First Nation  
 Flying Dust First Nation  
 Keeseekoosewun 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 Nakota Sioux 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 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 (82)**

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	Skawahlook First Nation
Campbell River Indian Band	Skeetchestn Indian Band
Canoe Creek Indian Band	Skidegate Indian Band
Chawathil Indian Band	Skowkale First Nation
Cheam Indian Band	Skuppah Indian Band
Chemainus First Nation	Sliammon Indian Band
Coldwater Indian Band	Snuneymuxw First Nation
Cowichan Indian Band	Soda Creek Indian Band
Cook's Ferry Indian Band	Songhees Indian Band
Doig River Indian Band	Spuzzum Indian Band
Fort Nelson Indian Band	Squamish Nation
Haisla Nation	Squiala First Nation
Hupacasath First Nation	St. Mary's Indian Band
Kamloops Indian Band	Stellat'en First Nation
Kanaka Bar Indian Band	Sumas First Nation
Kitsumkalum First Nation	T'it'q'et First Nation
Kwantlen First Nation	Tla-o-qui-aht First Nations
Kwaw Kwaw Apilt First Nation	TI'azt'en Nation
Lake Babine First Nation	Tobacco Plain Indian Band
Leq'á:mel First Nation	Tsawout Indian Band
Lheidli-T'enneh Band	Tsawwassen First Nation
Little Shuswap Indian Band	Ts'kw'aylaxw First Nation
Lower Kootenay Indian Band	Tsleil-Waututh Nation
Lower Nicola Indian Band	Tzeachten First Nation
Lower Similkameen Indian Band	Union Bar First Nation
Matsqui First Nation	Upper Similkameen Band
McLeod Lake Indian Band	Westbank First Nation
Metlakatla First Nation	West Moberly First Nations
Moricietown First Nation	Whispering Pines/Clinton Indian Band
Musqueam Indian Band	Williams Lake Indian Band
Nadleh Whut'en Indian Band	Yale First Nation
Nak'azdli Indian Band	Yekooche First Nation
Neskonlith Indian Band	
Nicomien Indian Band	
Old Massett Village Council	
Osoyoos Indian Band	
Popkum First Nation	
Seabird Island Indian Band	
Scowlitz First Nation	
Shuswap Indian Band	
Shxw'owhamel First Nation	
Shxwhá:y Village	
Siska Indian Band	
	<b><u>Northwest Territories (1)</u></b>
	Hay River Dene Band

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