



CLEARING THE PATH

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A First Nations Tax Commission Quarterly Publication

Advancing First Nation FMA Cannabis Fiscal and Regulatory Proposal



First Nation governments were left out of the federal-provincial cannabis tax and regulatory framework, which was concluded in December 2017. First Nations were also left out of the public distribution system that is being used to support online sales and, eventually, a broader market for edible, concentrate and other cannabis derived product sales. This was done despite federal commitments to First Nations for reconciliation, a new fiscal relationship, nation-to-nation frameworks and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

Since March 2017, the First Nations Tax Commission (FNTC) has been working with proponent First Nations to advance a First Nation led cannabis jurisdiction option using the *First Nations Fiscal Management Act* (FMA).

A presentation about this FMA cannabis option was made to the Standing Senate Committee on Aboriginal Peoples in February 2018 by the FNTC Chief Commissioner, with a series of specific amendments provided to the Senate Committee in March 2018. The proposal was also presented at the “First Nations Leading the Way” National Meeting in May 2018. In each case, the proposal for First Nations cannabis fiscal and regulatory jurisdiction received strong support.

In June 2018, in a letter to the Senate Committee on Aboriginal Peoples, the Ministers of Indigenous Services and Health Canada committed to work with interested First Nations and the FNTC to develop a First Nation cannabis excise tax sharing, tax and regulatory option within one year. Proponent First Nations and the FNTC are advancing a comprehensive First Nation cannabis jurisdiction proposal. *Cont. on pg 5*



IN THIS ISSUE

- A First Nation FMA Cannabis Fiscal and Regulatory Proposal
- Understanding Assessment on First Nation Lands
- Welcome New Chief Operating Officer
- FMA Amendments
- Update from BC Assessment: Two Important changes to Vancouver Island First Nations Assessment for 2019
- Best Wishes to Ken Scopick on His Retirement

Chief Commissioner's Message



2019 marks the 30th anniversary of the Indian Taxation Advisory Board, the predecessor to the First Nations Tax Commission. The Board was created following the passage of Bill C-115, the First Nations-led 'Kamloops Amendment' to the *Indian Act*. Expectations for growth were very modest back then; projecting that 20 First Nations in the first five years would enact property tax by-laws pursuant to section 83 of the *Indian Act*. Today, almost 300 First Nations are exercising their jurisdiction and making use of the fiscal tools available in another First Nations-led piece of legislation – the *First Nations Fiscal Management Act*, and the First Nation fiscal institutions: the Tax Commission, the First Nations Finance Authority (FNFA), and the First Nations Financial Management Board (FMB).

As we begin 2019, nearly 200 First Nations - from every region in Canada - have or are developing property tax laws/by-laws. Over 1000 First Nation laws/by-laws have been passed. Over 30 tax-based service agreements with local governments have been negotiated. Investment in our communities has risen significantly. Our communities have over \$4 billion in assessed value. Over \$500 million in FNFA debentures have been issued. The FMB has certified over 100 First Nations and is now providing the financial certification for 10-year grants for eligible First Nations. Many of our communities now have better services and infrastructure.

Along the way, we also created the *First Nations Gazette* and the Tulo Centre of Indigenous Economics. With support of First Nations across Canada, we have advanced concepts such as the First Nations Goods and Services Tax, a First Nation jurisdiction-based fiscal relationship, an aboriginal resource charge, cannabis and tobacco tax jurisdiction, a First Nation land title registry and the creation of the First Nation Infrastructure Institute – which would be the fourth FMA institution. While some independent assessments have called the FMA institutions the most successful First Nation-led policy innovation in Canadian history, the FMA remains the most successful First Nation-led legislation in Canadian history.

In May of this year, the fiscal Institutions and the Lands Advisory Board will host the second national meeting of all FMA, *First Nations Lands Management Act* (FNLMA) and other interested communities. "First Nations Innovation and Success: First Nations Leading the Way II" will celebrate our successes, discuss our challenges and make proposals to expand and improve the FMA and FNLMA for interested First Nations. I hope you will join us. More information will be made available as the date for the meeting nears.

In our first issue of *Clearing the Path* for 2019, I would like to focus on what I believe are the two main reasons for our success.

First, we focus on better economic outcomes for First Nation communities, members, investors and lenders. We want our communities, members and investors to increase their wealth, revenues, incomes and property values. We want better services and infrastructure for all First Nation residents. These better outcomes are the focus of our legislative, institutional, policy and standard making proposals that guide the processes we use to deliver services.

Our second key to success is consistency. We have been consistent in our philosophy and strategy. We use federal and, as necessary, provincial legislation and establish supportive First Nation institutions to provide an orderly process to further First Nation jurisdiction in a manner that leads to better economic outcomes. This is the strategy and philosophy that established the Indian Taxation Advisory Board 30 years ago and it is the approach we use today to advance and expand the FMA.

Since 1989, First Nation acceptance and commitment to this consistent, outcome-focussed philosophy has grown considerably. First Nations working with the innovative legislation have become a model for Indigenous peoples in the United States, New Zealand and Australia. I am confident that this growth will continue for two reasons. First, we have learned that our collective jurisdiction, institutional framework, and credit worthiness is stronger than that of any one First Nation. Second, we have learned that by working together we can renew or establish our jurisdictions and claim our rightful place as full participants and partners in the Canadian economy and federation.

While I will resist making any predictions for 2019, I hope it will be a good year for us all.

A handwritten signature in black ink that reads "Manny".

C.T. (Manny) Jules
Chief Commissioner



Understanding Assessment on First Nation Lands

First Nations contract with qualified, independent assessors to assess the leases, licenses and other occupations of their lands (generally referred to as “interests in land”). Over the past 30 years, a national approach to assessment of these interests in land has developed. To understand the approach and the reasons for the approach, it is important to understand the key elements of First Nation taxation systems.

HOW ARE FIRST NATIONS LANDS DIFFERENT FROM OTHER LAND IN CANADA?

First Nation lands are “reserve” lands, the title to which is held by the Government of Canada for the use and benefit of the First Nation. This means that reserve lands do not have titles that are registered in the provincial land title office, and that no one can own a fee simple interest in the reserve lands. Even the First Nation itself does not have a fee simple interest in the land.

WHAT TYPES OF INTERESTS IN LAND EXIST ON RESERVE LANDS?

There are different ways that non-members of the First Nation may occupy reserve lands. The most common way is through a lease either with a member of the First Nation or with the First Nation itself. Leases can range from short term, such as 10 years, to long term, usually up to 99 years. Leases can be pre-paid for the term or have annual payments with periodic rent reviews. It is common for different types of leases with varying terms to exist on a single reserve at any given time.

There may also be short or long-term licenses of occupation, permits to occupy, or rental agreements, and there may also be simple occupations of reserve lands without any legal documentation.

WHAT INTERESTS IN LAND ARE TAXABLE ON RESERVE LANDS?

Provincial property tax systems generally levy taxes on the fee simple interest of a property, and it is the owner of the fee simple interest who is liable for the taxes. Because there are no fee simple interests in reserve lands, a different approach is necessary.

First Nation property tax systems levy taxes on occupiers of reserve lands, regardless of the nature of the occupation. This means that occupiers of reserve lands, whether they hold a lease, license, permit or simply occupy the land,

can be liable for taxes. In this sense, the taxation is on the occupation of the land, and not related to the specific way that the person occupies the reserve lands.

Occupations can be for a range of uses, including residential, commercial, industrial, agricultural or utility. The full range of occupations can be taxable, just as they are off reserve.

HOW ARE OCCUPATIONS OF RESERVE LANDS ASSESSED?

Where provincial property tax is levied on the fee simple interest, the province assesses the value of the fee simple interest. Although the specific rules and approach vary among the provinces, generally the objective is to determine the market value of the property.

A common approach to determine market value is the sale price of the property on the open market. Some provincial systems also have rules for assessing non-fee simple interests that are taxable, including leases, licenses and other occupations. Where a person is occupying Crown land (whether by lease, license or otherwise), that person’s occupation is taxable, and the provincial assessment legislation directs the assessor to assess the occupation based on the full market value of the property as though it were held in fee simple by the occupier.

First Nations across Canada have adopted this approach to assessment of occupational interests in their reserve lands. On reserve lands, it is the First Nation’s property assessment law which governs how the assessor must assess each interest in land, as provincial assessment legislation does not apply. The approach is reflected in each First Nation’s property assessment law, which generally direct the assessor to assess each interest in land as though it is held in fee simple off reserve. It is “off reserve” because there is no fee simple interest in reserve land, there tends to be a lack of comparable data on reserve lands, it avoids issues of reserve land valuation, and it provides for a similar tax burden to off reserve properties.

WHY IS THIS APPROACH THE BEST ASSESSMENT APPROACH FOR FIRST NATION PROPERTY TAX SYSTEMS?

There are several reasons why this approach is used and why it makes sense for First Nation property taxation systems.

1. The approach is used provincially for occupational interests and is familiar to taxpayers.



Welcome New Chief Operating Officer

The Chief Commissioner is pleased to announce that Marlene Gaudry has been appointed Chief Operating Officer of the FNTC. She has been a key advisor to the ITAB and FNTC for over 12 years. She has extensive experience working with First Nations as an advisor in policy development, financial management and capacity development.

You can reach Marlene by email at mgaudry@fntc.ca or by telephone (250) 828-9857.



2. The approach enables assessors to use the same rules for assessment that are used provincially, which are based on fee simple assessments. This means the assessment process does not require new and different rules, has comparable properties, and is cost effective to implement.
3. The approach ensures that tax revenues do not depend on whether the occupation is under a lease, license or other arrangement or on the time remaining on the occupation. The assessed value and proportional share of taxes for a class of property will be the same as off reserve lands, whether a property is held under a lease or a license or whether that tenure is short or long term. This ensures a similar distribution of tax liability as is achieved on non-reserve lands.
4. Using an approach that is similar to the system used off reserve enables First Nations and their taxpayers to compare their annual tax rates to adjacent non-reserve jurisdictions.

HOW ARE TAXES DETERMINED ON RESERVE LANDS?

The method for determining taxes on reserve lands is the same as for properties on non-reserve lands. The First Nation sets annual tax rates for each property class (e.g. residential, commercial etc.). The applicable tax rate is multiplied by the assessed value of the property to create a tax bill. First Nation tax rates are similar, and in many cases identical, to those of adjacent governments. Using a similar assessment method means that taxpayers pay similar amounts to amounts paid off reserve.



FIRST NATIONS INNOVATION AND SUCCESS: FIRST NATIONS LEADING THE WAY II

May 29 & 30, 2019 – Calgary, Alberta



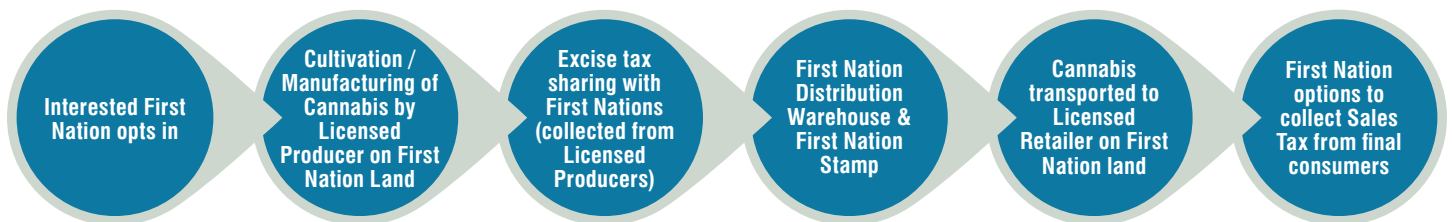
The First Nations Finance Authority, First Nations Financial Management Board, First Nations Tax Commission and the First Nations Lands Advisory Board will be inviting representatives from First Nations to attend the national meeting of First Nations participating in the *First Nations Fiscal Management Act*, the *Framework Agreement on First Nation Land Management (FA)* and First Nations who are entering 10-Year Grants with the federal government. Invitations will be sent soon, stay tuned for more details!

Proposal Overview

In September 2018, the FNTC and some proponent First Nations developed a comprehensive proposal to establish an FMA cannabis fiscal and regulatory framework option for interested First Nations. There are six distinct elements to the proposed FMA First Nation cannabis fiscal and regulatory option:

- Voluntary Participation by Interested First Nations
- First Nation Jurisdiction Framework for Cannabis Regulation and Licensing
- FMA Cannabis Fiscal Jurisdiction Framework (excise and other tax options)
- First Nations Cannabis Distribution Warehouses
- First Nations Stamp on First Nation Cannabis
- First Nation Institutional Support to Implement System

A SIMPLIFIED VERSION OF THE FIRST NATION CANNABIS SUPPLY CHAIN UNDER THIS PROPOSAL



The Benefits of a FMA Cannabis Tax and Regulatory Option

The application of the FMA framework to First Nations cannabis tax and regulation is an efficient, effective option to achieve health, economic and fiscal interests for interested First Nations for the following reasons:

- 1. Respects First Nations Right of Self Determination (UNDRIP):** Participation in this option is voluntary for interested First Nations.
- 2. FMA Precedent of Success (almost 300 First Nations):** This option would utilize the successful FMA precedent.
- 3. First Nation jurisdiction implemented efficiently and legislatively protected:** The FMA option is the quickest way to implement comprehensive cannabis jurisdiction for interested First Nations.
- 4. Reduced Implementation Time and Cost:** This option will be supported by First Nation led institutions with sample laws, implementation support and training for participating First Nations.
- 5. Many First Nations Could Benefit regardless of location:** All First Nations participating in this option could share in cannabis revenues.
- 6. Opens First Nation entrepreneurs' access to expanded and future cannabis markets:** This option means First Nation entrepreneurs won't lose future cannabis market share. Without it, First Nation entrepreneurs could have limited access to the online direct-to-consumer market and future edible, concentrate and other cannabis-derived product markets.
- 7. Improves First Nation Fiscal Relationship:** This option will increase First Nation revenues to support improvements to community services and infrastructure.
- 8. Supports First Nation Health Objectives:** This option should help reduce youth consumption and the potential for unsafe production activities. It should also help improve product handling and product quality.

Learn More

If you would like more information about this initiative, please contact the First Nations Tax Commission.

FMA Amendments

On December 13, 2018, a number of amendments to the FMA came into force. These amendments include proposals advanced by the Commission, the First Nations Financial Management Board and the First Nations Finance Authority over the last 3 years, as well as “bijural” amendments to ensure that the FMA is fully operational in Canada’s common law and civil law jurisdictions.

The amendments are aimed at clarifying certain aspects of the legislation, addressing gaps in the legislation, increasing the flexibility of the legislation and expanding access to the legislation.


Amendments that will be of particular interest to taxing First Nations include the deletion of subsection 5(6) of the FMA; correcting a drafting inconsistency in section 7 by including reference to fee laws made under paragraph 5(1)(a.1); correcting a drafting inconsistency between section 6 and subsection 31(2) in respect of written representations made to the Commission; and new standard-making powers for the approval of delegation laws and taxation laws related to joint reserves.

Taxing First Nations will also be impacted by certain “bijural” amendments, in particular the new definitions that are now included in the FMA for “interest” and “right”. The Commission will be updating all of its standards and sample laws to incorporate the new definitions, and First Nations are encouraged to consider making corresponding updates to their taxation laws.

Key amendments that were advanced by the First Nations Financial Management Board include amendments to section 53 to clarify the Board’s role in third party management; and a new section 50.1 to enable the Board to provide law review services, and financial performance and management review services, to First Nations that are not scheduled to the FMA and other entities.

Key amendments that were advanced by the First Nations Finance Authority include an amendment to section 61 to limit its board to borrowing member representatives; an amendment to section 74(d) to enable the Authority to provide investment services to a broad range of entities; amendments to section 84 for internal consistency and to enable First Nations to recover amounts owing to the Authority under a property taxation law or using other revenue sources; and a number of amendments to clarify that the Authority can finance capital assets, which includes capital infrastructure.

The amendments also include two new regulatory powers. A new section 141.1 to enable the Governor in Council to make regulations to expand access to financing from the Authority to specified non-First Nation entities, and to enable the Board to provide services to those entities; and a new section 141.2 to enable regulations in respect of joint reserve taxation.



“First Nations should be proud because by doing this they are taking control of their own jurisdiction, they’re creating their own revenues and they’re exercising their rights as a government.”

— Commissioner McCue on the success of First Nations implementing property tax

In addition to amendments advanced by the fiscal Institutions, the FMA now includes a new Part V that enables FMA First Nations to request that Canada pay to the First Nation all moneys held for the use and benefit of the First Nation, including moneys to be collected or received by Her Majesty in the future. Part V sets out a process for a First Nation to make this request, and includes a requirement for an approved financial administration law and approval of members through a community vote.

FMA Amendments advanced by the First Nations Tax Commission

AMENDMENT	FMA SECTION
Section 5(6) deleted. Borrowing member First Nations no longer required to include a “special levy” provision in their property taxation laws.	5(6)
Section 7 amended to include a reference to fee laws, which are made under section 5(1)(a.1). Corrects a drafting oversight from the 2016 FMA amendments that did not include these laws in the section 7 process.	7
The phrase “members and others who have interests in the reserve land” deleted from section 31(2). Creates internal consistency with the notice requirements in section 6 of the FMA.	31(2)
New standard-making power to set criteria for the approval of taxation laws for joint reserves. Gives the FNTC the ability to make standards for the approval of local revenue laws that will apply to joint reserves.	35(1)(c.01)
New standard-making power to set criteria for the approval of delegation laws. Gives the FNTC the ability to make standards for the approval of delegation laws.	35(1)(c)
New regulation-making power for the taxation of joint reserves. Enables regulations to be developed that create a framework specifically for joint reserve taxation.	141.2

Update from BC Assessment: Two Important changes to Vancouver Island First Nations Assessments for 2019

Mobile Home Assessments

Leading up to the preparation of the 2019 First Nation assessment rolls, BC Assessment conducted a review of all Mobile Home assessments on Vancouver Island. This review included verification of all existing mobile home improvements using both aerial imagery and on-site inspections, and a review of the land assessments for those homes, including research of comparable fee simple sales of mobile homes off reserve. The result was significant increases for mobile home assessments.

This assessment review was necessary because the 2018 Assessment Review Boards for both the Songhees Nation and the Tsawout First Nation indicated that BC Assessment should be using the same approach to valuation for mobile homes as it uses for other residential properties. While land assessments for single family dwellings located within these First Nation jurisdictions were similar to the assessments of comparable property assessments off reserve, the Board noted that land assessments of mobile home occupiers were lower and that this resulted in inequity in the assessments. In their decisions, the Assessment Review Boards

found that BC Assessment should be using a direct comparison approach when valuing mobile homes, and strongly urged the Assessor to correct the mobile home assessments for the 2019 Rolls.

The assessment increases were communicated to the mobile home occupiers through a Pre-Roll Letter delivered in early December 2018, followed by the formal Assessment Notice in early January 2019. BC Assessment recently held taxpayer information meetings at both the Songhees Nation and the Tsawout First Nation.

BC Assessment is currently responding to inquiries from individual mobile home occupiers on Vancouver Island. BC Assessment expects numerous reconsideration requests and also anticipates appeals resulting from the increase in assessments. BC Assessment will provide an appraisal report to the appropriate Assessment Review Boards in defence of each appeal.

New Assessments for Billboards

BC Assessment conducted a Billboard Assessment Review that included identifying all existing billboards and conducting the land and improvement assessments for these occupations. This project was contemplated for a number of years, during which time BC Assessment researched the best assessment methodology to use. BC Assessment has implemented both a direct comparison and an income approach to valuation in order to assess the land on which billboards are located. This required

extensive research into both off reserve comparable sales and lease documentation available on reserve. The billboard improvements have been assessed using a depreciated cost of replacement approach. It is important to note that BC Assessment is assessing the occupation of these lands and improvements and not the value associated with an advertising business.



Best Wishes to Ken Scopick on His Retirement

On December 15, 2018, Ken Scopick retired after over thirty years of service to First Nation governments and their institutions. The First Nations Tax Commission held a

special dinner for him a few days before, honouring his service, and achievements. Co-workers and friends shared stories about his early work in helping to establish the Indian Taxation Advisory Board (FNTC's predecessor organization), and his subsequent contributions as ITAB Director of Operations, and later as the FNTC's Chief Operating Officer.

For those of us who had the pleasure of working with Ken over the last few decades, we can all attest to the drive, commitment, and excellence he brought to his work. He devoted countless hours, and sacrificed many weekends to get the job done. This took shape in many forms: helping to develop legislative options for the FMA, leading technical work to establish First Nation institutions (like the First Nations Tax Commission, First Nations Tax Administrators Association, First Nations Gazette, Tulo Centre of Indigenous Economics, and First Nations Infrastructure Institution), negotiating funding arrangements, formulating policy, resolving disputes, renovating FNTC offices, and producing this newsletter. Ken was always about "getting the job done" and he instilled this in his staff. No doubt his builder/developer background characterized his approach and served him well in many of the initiatives ITAB and FNTC undertook. He exemplifies a true commitment to strengthening First Nation jurisdiction, and in building a legacy for future generations.

We wish Ken health, happiness and a long and fulfilling retirement. **Kukstsétemc, Ken.**

Leading up to the final delivery of the 2019 Assessment Notices, BC Assessment notified affected First Nations and the billboard operators. Considering the unique nature of these assessments, BC Assessment expects that there may be appeals.

Moving Forward

BC Assessment is hopeful that both these initiatives will be met with success when any appeals are heard by the appropriate Assessment Review Boards and their decisions are delivered. BC Assessment is currently considering expanding these changes to all other First Nation customers throughout the Province and will plan accordingly. An important part of that plan will include communication with property occupiers and each affected First Nation. Success will depend on open lines of communication between BC Assessment and the affected First Nations, including provision of the necessary information that assists BC Assessment in correctly creating the annual assessment rolls. For the Billboard Assessment Review, BC Assessment depends heavily on information provided by the First Nation, and asks that all of its FMA and *Indian Act* customers obtain lease documentation for billboard occupations and send that information to BC Assessment as soon as possible.

For more information on the assessment or mobile homes, or to provide billboard information, please contact BC Assessment at firstnations@bcassessment.ca.



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