

# AN OVERVIEW OF THE FIRST NATIONS FISCAL AND STATISTICAL MANAGEMENT ACT

By Christopher Devlin\*

On March 23, 2005, the *First Nations Fiscal and Statistical Management Act*, S.C. 2005, c. 9 (“FNFSMA” or the “Act”) became law. This legislation represents a significant tool for First Nations to access capital markets for infrastructure improvements. It marks a radical departure from the historic restrictions under the *Indian Act*, R.S.C. 1985, c. I-5. First Nations now have the means, for those who choose them, to use the equity in their reserves to finance their goals of self-government.

## POWER OF TAXATION AND DEBT-FINANCING CRUCIAL TO SELF-DETERMINATION

The FNFSMA provides a codified framework by which First Nations can use their right to levy property taxes on their reserves to access capital markets for equity to make infrastructure improvements. It is a powerful model for local self-government, closely designed to replicate for Aboriginal communities what the B.C. Municipal Finance Authority achieves for the provincial municipalities—the raising of large sums of money for infrastructure development. The FNFSMA integrates property taxation, fiscal management, borrowing power, the ability to obtain equity financing and statistical information management into a complete code.

Access to capital is the path to economic independence—the foundation of true self-determination. The colonial model of financing First Nations under the *Indian Act* does not facilitate self-determination. The model presented under the FNFSMA, while still a form of delegated federal authority, is nonetheless an enormous step towards enabling self-determination. By creating the mechanism for First Nations to access capital markets for the first time, the FNFSMA enables First Nations to build their own destinies on their reserves without the heavy and restrictive hand of the minister on their shoulders.

The FNFSMA also provides another opportunity for a First Nation to qualify as a “municipal authority” under s. 149(1) of the *Income Tax Act*. As a First Nation’s business and economic development interests move off-reserve, there will be increased income tax consequences. One way to mitigate those tax consequences is to rely on s. 149(1), which exempts from taxation “municipal authorities” and wholly owned corporations of municipal authorities. In order to qualify as a “municipal authority”, a First Nation must show that it talks and

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walks like a provincial municipality, in terms of the laws it makes and the services it provides. By pledging property tax revenues as security for long-term debt in order to fund major infrastructure projects, First Nations under the FNFSMA will look very much their provincial municipal counterparts. That, in turn, will help protect off-reserve income from income taxation. Even more money should stay in First Nation communities.

### HIGHLIGHTS AND STRUCTURE OF THE ACT

The FNFSMA received royal assent on March 23, 2005, but has not yet been proclaimed into law. The government expects to do so sometime around April, 2006, in order to give time for the regulations to be developed and for individual First Nations to be added to the schedule of the Act.<sup>1</sup>

The Act contains a non-derogation clause<sup>2</sup> that expressly prevents it from being construed by a court as derogating from any existing Aboriginal or treaty rights guaranteed under s. 35(1) of the *Constitution Act*, 1982. This means that the Act will not affect treaty negotiations, except perhaps to serve as a possible model for real property taxation power and borrowing powers for treaty discussion.

The Act is voluntary. This means that it does not apply to a First Nation unless that First Nation requests, by way of a band council resolution, that the minister add the First Nation to the schedule of the Act.<sup>3</sup> In this sense, it functions very much like the First Nations GST legislation—it is enabling, rather than compulsory like the *Indian Act*. If a First Nation wishes to take advantage of the property tax and borrowing powers of the FNFSMA, it can ask to be added to the schedule;<sup>4</sup> if it does not, then the *Indian Act*, including the property taxation power under s. 83, still applies to the First Nation.

First Nations who take advantage of borrowing powers under the FNFSMA are deemed to have legal capacity to contract, to sue and to be sued.<sup>5</sup> This clarifies a long-standing ambiguous point of law which the *Indian Act* has never addressed: that is, whether Indian bands are legal persons in their own right, like corporations.

The Act creates four new independent bodies to oversee and administer the powers conferred by the Act on participating First Nations: the First Nations Tax Commission,<sup>6</sup> the First Nations Financial Management Board,<sup>7</sup> the First Nations Finance Authority<sup>8</sup> and the First Nations Statistical Institute.<sup>9</sup> These bodies will be staffed by federal appointees and elected directors.<sup>10</sup> They will operate independently from government as stand-alone entities, outside the purview of the Department of Indian Affairs.<sup>11</sup>

#### **First Nations Fiscal Management Board<sup>12</sup>**

In order to access the borrowing powers of the Act, a First Nation must first pass a financial administration law which is approved by the First Nations Financial Management Board (the "Board").<sup>13</sup> The Board has the power to establish standards for financial management of First Nations.<sup>14</sup> Financial administration laws will have to conform to those standards.<sup>15</sup>

The Board may also review a First Nation's financial management system to ensure compliance with the laws and the standards.<sup>16</sup> If a First Nation is not in

compliance, the Board has the power to place the First Nation's taxation revenue account under co-management or even third-party management.<sup>17</sup> This may seem to be a considerable change from the taxation scheme of the *Indian Act*, in terms of requiring a First Nation to pass financial administration laws prior to implementing a taxation bylaw and then to be subject to ongoing review respecting its financial administration. These provisions are reminiscent of the proposed *First Nation Self-Governance Act* that never passed through Parliament two years ago.

#### **First Nations Tax Commission<sup>18</sup>**

Once a First Nation passes a financial administration law which the Board approves, the First Nation can then make laws respecting "taxation for local purposes of reserve lands", including property taxes, business taxes, development cost charges, borrowing laws and so on.<sup>19</sup> This power appears to be greater than that conferred by ss. 81 and 83 of the *Indian Act*, although it has been argued before that some of these powers are implied in those sections. Local revenue laws must be approved by the First Nations Tax Commission (the "Tax Commission"), which is the successor to the Indian Tax Advisory Board ("ITAB").<sup>20</sup> Essentially, ITAB is being rolled over into the Tax Commission, and gains the final approval authority that currently resides with the minister.

The Tax Commission also serves as a review body to hear requests for reviews by members of First Nations or people with interests on reserve who complain that a First Nation is not complying with its local revenue laws.<sup>21</sup> If the Tax Commission finds a First Nation not in compliance and the First Nation refuses to remedy its conduct, the Board may place the revenue accounts of the First Nation in co-management or third-party management.<sup>22</sup>

#### **First Nations Finance Authority<sup>23</sup>**

Under its local revenue laws, a First Nation can pledge its local tax revenue to the First Nations Finance Authority (the "Finance Authority").<sup>24</sup> Through the use of pooled property tax revenues, the Finance Authority will secure long-term financing of capital infrastructure and lease financing of capital assets for provision of local services on reserve.<sup>25</sup> Through the pooling of borrowing capacity of participating First Nations, the Finance Authority will be able to reduce the cost of borrowing and enable smaller First Nations to access capital markets that they could not access before. The Finance Authority existed as an incorporated federal society prior to the Act and is being rolled over into a non-profit corporation under the Act.

Participating First Nations with financial administration compliance certificates from the Board may apply to become borrowing members.<sup>26</sup> The property tax revenues secure any long-term loans made from the Finance Authority to the borrowing members.<sup>27</sup> Borrowing members may also be liable to contribute to any sinking funds and debt reserve funds created by the Finance Authority.<sup>28</sup>

#### **First Nations Statistical Institute<sup>29</sup>**

Finally, the Act creates the First Nations Statistical Institute (the "Statistical Institute"), to collect information from participating First Nations which is currently

not collected in Canada.<sup>30</sup> In some respects, these provisions of the Act create a “StatsCan” for First Nations—a body that collects and analyzes the fiscal, economic and social conditions of First Nations. The Statistical Institute is to enable First Nations (and government) to have the necessary information to plan for their communities and attract investment and economic development. Again, this appears to be the resurrection of a similar initiative, introduced two years ago by the federal government, which did not pass Parliament as stand-alone legislation.

#### **TRANSITION FROM CURRENT TFN BYLAW UNDER FNFSMA**

The FNFSMA provides for the transition of First Nations from a s. 83 *Indian Act* property tax regime to the FNFSMA regime. On the day a First Nation with an existing property tax bylaw is added to the schedule of the Act, its bylaw is deemed to be a bylaw under the relevant sections of the Act to the extent that the bylaw is not inconsistent with the Act and until the bylaw is replaced or repealed under the FNFSMA.<sup>31</sup>

There are many First Nations who already have property tax bylaws. Should a band council decide that its First Nation should be added to the schedule, its property tax bylaw would be rolled over under the new process. This means that there ought to be no disruption with respect to the conduct of property assessments, preparing the rolls and collecting the taxes. However, one would reasonably anticipate that the First Nation will be required to develop and pass a fiscal administration law and then a revised property tax law in order to comply with the requirements of the Act. One might also expect the Board and the Tax Commission to develop and produce templates for these types of laws.

#### **SUMMARY**

For those First Nations who choose to be added to the schedule of the FNFSMA, the Act represents an opportunity not previously available to First Nations to obtain long-term loans for debt financing major infrastructure projects on their reserves. Historically, First Nations were unable to raise debt financing effectively or cheaply, due to their inability to pledge property on reserve as security. As well, the FNFSMA provides for significantly enhanced transparency and accountability respecting taxation revenues used as security for those loans. Investors will have the confidence that the bonds issued by the Finance Authority to pay for the loans to the First Nations are legally secured by the taxation revenues. This mechanism simply did not exist before for First Nations.

First Nations who participate in the FNFSMA will be able to obtain significant loans to pay for housing needs, water and sewage systems, roads, power systems and other major infrastructure requirements that otherwise are paid (or not paid) by the Department of Indian Affairs through capital funding. The FNFSMA represents a practical, realistic mechanism for effective self-government, notwithstanding that it is federal legislation.

However, under this new regime First Nations must be willing to submit to a higher degree of scrutiny than before. There will be four new federal bodies with

power to review and censure the actions of band councils. One may take some consolation that those bodies will likely be staffed by First Nations people. It may be telling that two of the bodies are being created from the existing Indian Taxation Advisory Board and the First Nation Finance Authority, which are operated by First Nations people now.

## ENDNOTES

1. As of October 21, 2005, there were none.
2. Section 3.
3. Section 2(3).
4. *Ibid.*
5. Section 12.
6. Section 17(1).
7. Section 38(1).
8. Section 58.
9. Section 91.
10. Tax Commission: s. 20; Financial Management Board: ss. 40 and 41; Finance Authority: s. 61 and Statistical Institute: ss. 95 and 96.
11. Tax Commission: s. 18(1) states that "the Commission is an agent of Her Majesty only for the approval of local revenue laws"; the other three bodies are explicitly stated not to be agents of Her Majesty: Financial Management Board: s. 39; Finance Authority: s. 60(1); and Statistical Institute: s. 93.
12. Part 3.
13. Section 4.
14. Section 55.
15. Section 9(5)(b).
16. Section 50(1).
17. Sections 52(1) and 53(1).
18. Part 2.
19. Section 5(1).
20. Section 5(2).
21. Section 33(1).
22. Section 33(3).
23. Part 4.
24. Section 5(1)(b) and (d).
25. Section 74.
26. Section 76(1) and (2).
27. Section 74(a)(i).
28. Section 84(5).
29. Part 5.
30. Sections 104 and 105(2).
31. Section 145(1).

