Legislative Summary **LS-475E**

BILL C-23: FIRST NATIONS FISCAL AND STATISTICAL MANAGEMENT ACT

Tonina Simeone
Political and Social Affairs Division

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LEGISLATIVE HISTORY OF BILL C-23

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	10 March 2004	First Reading:	
Second Reading:	10 March 2004	Second Reading:	
Committee Report:	10 March 2004	Committee Report:	
Report Stage:	4 May 2004	Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BILL C-23: FIRST NATIONS FISCAL AND STATISTICAL MANAGEMENT ACT*

Bill C-23, the proposed First Nations Fiscal and Statistical Management Act, was introduced in the House of Commons and given first reading on 10 March 2004. It was deemed to have been read a second time, referred to a committee and reported back to the House of Commons also on 10 March 2004.(1)

The bill proposes the establishment of an institutional framework to provide First Nations with the tools to address economic development and fiscal issues on-reserve. Among other things, it would enable First Nations governments to establish their own financing through property tax and borrowing regimes.

The legislation proposes the establishment of four financial institutions.(2)

- The First Nations Finance Authority (FNFA): The FNFA would allow First Nations to collectively issue bonds and raise long-term private capital at preferred rates for roads, water, sewer and other infrastructure projects.

- The First Nations Tax Commission (FNTC): The FNTC would replace the Indian Taxation Advisory Board. It will assume and streamline the real property tax by-law approval process and help reconcile community and ratepayer interests.

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

This paper has benefited greatly from the input and suggestions of Carol Hilling, Law and Government Division, Parliamentary Research Branch.

(1) By a motion adopted on 10 February 2004, the House of Commons provided for the reintroduction in the 3rd session of government bills that had not received royal assent during the previous session and that died on the *Order Paper* when Parliament was prorogued on 12 November 2003. The bills could be reinstated at the same legislative stage that they had reached when the 2nd session was prorogued. Bill C-23 is the reinstated version of Bill C-19, which died on the *Order Paper*.

(2) Within this suite, the First Nations Tax Commission would have the greatest authority. Its mandate would be to "harmonize the tax system for First Nations in Canada; encourage and support First Nations in generating revenue through the exercise of tax powers; establish legislated and enforceable standards which provide for transparency and surety amongst taxpayers; provide timely approval of First Nation tax bylaw; and provide representation of taxpayers' interest in the commission and to ensure the decisions are fair." INAC Briefing Note, 23 November 2002.

- The First Nations Financial Management Board (FMB): The FMB would establish financial standards and provide the independent and professional assessment services required for entry into the FNFA borrowing pool.

- The First Nations Statistical Institute (FNSI): The FNSI will assist all First Nations in meeting their local data needs while encouraging participation in, and use of, the integrated national systems of Statistics Canada.

The initiative would target mechanisms aimed at enhancing First Nations' fund-raising capacity through taxation of leasehold interests on reserve lands and access to more affordable, long-term loans for community development. Unlike the federal government's proposed First Nations Governance Act (Bill C-7), which would have applied to all First Nations in Canada (but which died on the *Order Paper* in November 2003), the proposed fiscal institutions legislation is intended to be opt-in.

BACKGROUND

A. Context

The development of a new fiscal relationship between First Nations and Canada has been an ongoing subject of discussion. In 1983, the Report of the House of Commons Special Committee on Indian Self-Government (the Penner report) recommended the restructuring of fiscal relationships between Canada and First Nations, as did the final report of the 1996 Royal Commission on Aboriginal Peoples (RCAP). Generally, the move to restructure fiscal relationships between First Nations and the federal government has remained part of a broader movement toward Aboriginal self-government.(3) The federal government, as well as a number of First Nations, view Bill C-23 as part of that evolution toward greater economic self-sufficiency and political autonomy.(4)

B. Legislative Approach

Bill C-23, the First Nations Fiscal and Statistical Management Act, is an extension of a series of legislative and consultative measures initiated 15 years ago. From a legislative standpoint, Bill C-23 follows Bill C-115 (commonly referred to as the Kamloops

(3) See, for example, Robert Bish, *Financing Indian Self-Government: Practice and Principles*, School of Public Administration, University of Victoria, Victoria, 1987.

(4) Several First Nations, however, see Bill C-23 as a departure from the principles articulated in the Penner report and the RCAP. They argue that, rather than promoting greater fiscal autonomy, the legislation merely delegates taxation authority to First Nations and is therefore an attempt to "municipalize" Aboriginal governments.

Amendments), which was passed in 1988.(5) Bill C-115 broadened the taxation authority of First Nations under the *Indian Act* to include conditionally surrendered or "designated" lands. It clarified that leased lands remained a part of reserve lands, thereby enabling First Nations to enact property tax by-laws in respect of those lands.(6) As a result of Bill C-115, the conditional land surrender process was abandoned and replaced by a land use "designation" process to accommodate leasing arrangements. The former "surrendered" lands which, by definition, were excluded from reserve status become "designated" lands.(7) Consequently, when lands are conditionally surrendered or "designated" (e.g., leased), no band interest is ceded and the land, therefore, retains reserve status.

Arguably, the result of these legislative amendments is twofold. First, they allow First Nations governments to clarify their tax authority over reserve land. Second, they have expanded the tax authority granted to First Nations and thereby created greater opportunities for economic development.(8)

C. Establishment of a New Institutional Framework

In order to establish an administrative structure for the management of the new legislation, Indian and Northern Affairs Canada (INAC) created the Indian Taxation Advisory Board (ITAB) in early 1989. "The Board's primary purpose is to provide recommendations to the Minister on the approval of taxation by-laws, and to promote the exercise of these new Indian taxation powers."(9) As of September 2003, 107 First Nations had entered into the field of real property taxation.(10)

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(5) Bill C-115, An Act to Amend the Indian Act (Designated Lands), S.C. 1988, amending the Indian Act, R.S., c. I-6, as amended.

(6) Generally, First Nations use money derived from taxing leasehold interests on reserve lands to finance programs and services that are not provided for by Canada. As a matter of policy, where there are non-native leaseholders on reserve, the government does not pay for infrastructure development.

(7) Fiscal Realities, "First Nation Taxation and New Fiscal Relationships," Kamloops, B.C., 1997, available on-line at: http://www.ainc-inac.gc.ca/pr/ra/fnt_nfr/ntltax_e.pdf.

(8) For a more detailed examination of property taxation on reserve leasehold lands and responsibility for services, see Robert Bish, *Aboriginal Government Taxation and Service Responsibility: Implementing Self-Government in a Federal System*, School of Public Administration, University of Victoria, Victoria, 1993.

(9) Jonathan R. Kesselman, "Aboriginal Taxation of Non-Aboriginal Residents: Representation, Discrimination and Accountability in the Context of First Nations Autonomy," *Canadian Tax Journal*, Vol. 48, No. 5, 2000, p. 1537.

(10) *First Nations Fiscal Institutions Initiative – Information Package*, Spring/Summer 2002, p. 28.

In the years that followed the 1988 Kamloops Amendments, a number of events increased the existing support for the restructuring of fiscal relationships between First Nations and the federal government. These included the Department of Finance conference on Indian government taxation (1991), the Charlottetown Accord (1992), and the final report of the RCAP (1996).

Beginning in 1991, the Department of Finance undertook to revise its policy on Indian taxation. The Department published its *Working Paper on Indian Government Taxation* in 1993. In 1995, the First Nations Financial Institute (FNFI) was created through an initiative of the Westbank First Nation. It was subsequently incorporated under a federal act. The primary objective of the FNFI was to provide investment opportunities for First Nations, with a view to providing long-term financing for their public debt. Bill C-23 would transform the FNFI into the First Nations Finance Authority (FNFA).

A round table meeting organized in 1995 between representatives of the Department of Finance and the AFN led in 1996 to the AFN's Annual General Assembly adopting Resolution 5/96 on taxation. This resolution supported the development of new fiscal relationships between First Nations governments and the Government of Canada, based on the principles of flexibility, fairness, choice, the certainty of government service delivery comparable to other jurisdictions, economic incentives and efficiency.

The Chiefs Committee on Fiscal Relations was established two years later to review the financial relationship between First Nations governments and the federal government (General Assembly Resolution 49/98). The Chiefs Committee recommended the creation of First Nations fiscal institutions. In 1999, the AFN expressed its support for this initiative when participants at the Annual General Assembly of the AFN supported the creation of the First Nations Finance Authority (General Assembly Resolution 6/99) and supported the ITAB in its efforts to establish a First Nations Tax Commission (General Assembly Resolution 7/99).

In December 1999, in conjunction with these developments, the federal government and the AFN signed a memorandum of understanding to implement a national round table meeting on fiscal relationships. The meeting was designed to establish concrete foundations for the fiscal relationship through the exchange of information, capacity building and standards development.

In 2000, the AFN confirmed its support for the establishment of the First Nations Statistical Institute and the First Nations Financial Management Board (Confederacy of Nations Resolutions 5/2000 and 6/2000). In Resolution 24/2001, the General Assembly endorsed the recommendation of the Chiefs Committee that four new national First Nations fiscal institutions be established through federal legislation. There was some controversy surrounding the legal validity of this resolution, however, as some felt it did not receive the 60% support required by the AFN charter.

On 15 August 2002, the Minister of Indian Affairs released the proposed legislation with the stated purpose of commencing public consultations on the bill prior to its tabling in the House.(11) Following the release, several First Nations expressed deep concerns over the bill as drafted. As a result, the AFN convened a Special Chiefs Assembly in November 2002 and passed a resolution rejecting the proposed First Nations Fiscal and Statistical Management Act (AFN Resolution 30/2002). According to the AFN resolution, the proposed legislation violates the historic nation-to-nation relationship, infringes upon Aboriginal and treaty rights, and is otherwise so flawed that it cannot be corrected by mere amendments. An additional "accommodation" resolution was also passed (AFN Resolution 31/2002) respecting the right of those First Nations to enter into local and regional agreements, but not, however, in the context of national legislation.

On 2 December 2002, the Minister of Indian Affairs tabled Bill C-19, the proposed First Nations Fiscal and Statistical Management Act, in the House of Commons. That bill, which died on the *Order Paper* in November 2003, was reinstated as Bill C-23 on 10 March 2004.

DESCRIPTION AND ANALYSIS

Bill C-23 contains a brief preamble and 155 clauses divided into eight Parts: First Nations Fiscal Powers; First Nations Tax Commission; First Nations Financial Management Board; First Nations Finance Authority; First Nations Statistical Institute; Financial Management and Control; Provisions of General Application; Transitional Provisions, Consequential Amendments, Coordinating Amendments and Coming into Force.

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(11) INAC, "Notes for Remarks by the Honourable Robert D. Nault, P.C., M.P. Minister of Indian Affairs and Northern Development At a News Conference to Announce Public Consultations on the First Nations Fiscal and Statistical Management Consultation Bill, August 15, 2002, Ottawa, Ontario," available on-line at: http://www.ainc-inac.gc.ca/nr/spch/2002/fnf_e.html.

In order to maintain coherence with the bill, this legislative summary follows the format of the legislation and the major provisions are discussed under the principal headings found in the bill. Where applicable, an analysis of those provisions is provided immediately following the clause description. Much of the analysis draws on the following sources:

- Chiefs of Ontario, "Briefing Note: Institutional Fiscal Relations Package" (prepared by Michael Sherry), 21 April 2002.
- Mandell Pinder, "First Nations' Fiscal and Statistical Management Act Aboriginal Rights Issues," 31 October 2002.
- Dr. Fred Lazar, "Comments Regarding the First Nations Fiscal and Statistical Institutions Initiative," Schulich School of Business, York University, Toronto, 25 September 2002.
- Dr. Robert Bish, "Comments Regarding the First Nations Fiscal and Statistical Institutions Initiative," School of Public Administration, University of Victoria.
- Ardith Walkem Law Corporation, "Summary and Analysis: First Nations Fiscal and Statistical Management Act," 25 September 2002.(12)

A. Preamble

An eleven-paragraph preamble to Bill C-23 sets out the context and parliamentary intent of the proposed legislation. (Preambles by nature are interpretive rather than substantive and may be used by the courts in resolving any ambiguity in the legislation.) Noteworthy aspects of the preamble include statements indicating that:

- the proposed legislation is opt-in and will apply only to those First Nations who choose to exercise real property taxation jurisdiction on reserve lands;(13)
- First Nations real property tax revenues are to be used for the development of public infrastructure on reserve lands;

(12) Copies of these articles can be obtained from the author.

(13) First Nations participation in this initiative will be optional. However, those First Nations that already have by-laws enacted under section 83 of the *Indian Act* automatically fall under the proposed legislation once it comes into effect. Section 141(1) of the proposed First Nations Fiscal and Statistical Management Act states that "By-laws made under section 83 of the *Indian Act* that are in force on the day on which section 150 [repealing the current sections 83 and 84 of the *Indian Act*] comes into force are deemed to be laws made under section 4 or 8, as the case may be, to the extent that they are not inconsistent with section 4 or 8 [description of possible local revenue laws and financial administration laws], and remain in force until they are repealed or replaced."

- an objective of the legislation is to establish a balance between the interests of First Nations members and (non-native) on-reserve taxpayers;[14]

- the proposed legislative initiative has been driven largely by First Nations in Canada and reflects their aspirations to establish statutory institutions.[15]

Although the preamble states that the legislation is not intended to define the nature and scope of self-government, some commentators have criticized it for reflecting a conservative bias. In particular, the language is said to reflect a strong municipal approach to First Nations governments.[16]

B. Interpretation and Title (Clauses 1 and 2)[17]

Clause 1 gives the short title of the bill, the First Nations Fiscal and Statistical Management Act.

Clause 2 provides a series of general definitions of the terms used in the bill.

The definition of "first nation" contains the standard reference to bands under subsection 2(1) of the *Indian Act*.[18]

"Borrowing member" is defined as a First Nation that has been accepted as a borrowing member by the First Nations Finance Authority on the basis that it has been certified by the First Nations Financial Management Board.

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(14) It should be remembered that First Nations governments levy property taxes only on lessees who are not band members, i.e., non-native leaseholds on reserve lands. This article attempts to address the issue of non-First Nations taxation of leaseholds on reserves without the accompanying provision of services by the taxing government to taxpayers. The principle being put forward is that of fiscal equivalence: that is to say, a group of people who pay tax should receive benefits and have a voice in the decisions concerning taxes and services.

(15) Although the proposed legislation has been sponsored by a group of First Nations, it should be borne in mind that support for the legislation among First Nations is uneven across the country.

(16) On this issue, see Lazar (2002), "Comments Regarding the First Nations Fiscal and Statistical Institutions Initiative," and Chiefs of Ontario, "Legal Analysis on Re: First Nations Fiscal and Statistical Management Act" (prepared by Michael Sherry), 21 September 2002, available on-line at: http://www.chiefs-of-ontario.org/governance/gov13.html.

(17) Not all definitions are contained in this section of the bill. Relevant definitions will be dealt with as they appear throughout the bill.

(18) This definition of First Nation is not used in Part 5 of the bill as it relates to the First Nations Statistical Institute. See, in particular, the discussion of clause 88.

The definition of "local revenue law" refers to property taxation laws passed by a First Nation under subsection 4(1) of the proposed Act as well as laws dealing with expenditure of local revenues, licensing, fees for service, and borrowing. This definition is interesting because of its use of the term "law" as opposed to "by-law" (the term currently used under section 83 of the *Indian Act*). This modification in language is intended to reflect the enhanced fiscal autonomy of First Nations under the proposed legislation. Ministerial approval is no longer required when a First Nation wishes to enact property taxation laws. Approval would fall under the authority of the First Nations Tax Commission.(19)

Importantly, Bill C-23 includes a non-derogation clause (clause 2.1).

C. Part 1: First Nations Fiscal Powers (Clauses 3 to 13)

This section of the bill generally sets out the administrative procedures and requirements by which a First Nation can enact property taxation laws. The proposed legislation requires that any First Nation wishing to enact property tax laws must obtain the prior approval of the First Nations Financial Management Board. Clause 3 sets out the general principle that any First Nation wishing to enact property taxation laws must first adopt legislation governing its financial administration.

1. Local Revenue Laws (Clause 4)

Clause 4(1) enumerates the categories for which a First Nation council may enact local revenue laws. These include, for example, laws respecting property taxation, expenditure of local revenues, borrowing money and tax rates.

Clause 4(1)(a) is arguably the most important category of "local revenue laws." It provides for laws "respecting taxation for local purposes of reserve lands." According to available commentary, several First Nations consider this clause to be overly prescriptive in that it dictates that local taxation revenue must be specifically directed to local purposes, such as public infrastructure projects. Some have argued that, by restricting First Nations' ability to decide for themselves the purposes for which their tax monies can be spent, the provision

(19) This linguistic change, however, has been criticized as merely superficial. According to clause 16 of the bill, the Tax Commission is an agent of the Crown and, as such, exercises only delegated authority. A brief prepared by the Chiefs of Ontario states that this delegated authority is "inconsistent with the inherent right to self-government, as recognized and affirmed by s. 35 of the *Constitution Act, 1982*" (Chiefs of Ontario (2002), "Legal Analysis," p. 6).

violates the principle of the inherent right to self-government. According to the Chiefs of Ontario, the assumption underlying this clause is that:

> … all significant matters dealing with taxation and taxation revenue expenditure, particularly as they affect non-Indians, are beyond the independent capacity of individual First Nations. … Passage of the *FNFSMA* means that the inherent right does not include local revenue collection for local purposes. That is a remarkably restrictive interpretation of the inherent right, and one that is prejudicial to all First Nations, whether or not they later participate actively in the *FNFSMA* mechanisms.(20)

While not all First Nations share this view, the provision is fairly controversial.

2. Procedure for Enacting Local Revenue Laws (Clauses 6 to 8)

Under clause 4(2), the First Nations Tax Commission must approve all local revenue laws passed by a First Nation council. Clauses 6 and 7 set out the information that must accompany the proposed law when it is submitted to the Commission. Before the First Nations Tax Commission can approve the law, however, the submitting First Nation must have enacted financial administration laws (see the discussion of clause 3, above). Clause 8(2) requires that laws respecting the financial administration of a First Nation be approved by the First Nations Financial Management Board. Accordingly, any First Nation wishing to enact property taxation laws will trigger the involvement of the FMB as well as requiring the approval of the First Nations Tax Commission.

The legislation does not specify how extensive the financial administration laws of a First Nation are required to be in order to obtain FMB approval. No explicit criteria or requirements are set out in the proposed legislation. This measure is seen by some as a mechanism to ensure that a First Nation's financial management system complies with the financial management systems of other governments, in particular those of surrounding municipalities. Accordingly, some First Nations argue that the applied criteria may not fully take into consideration the priorities of individual First Nation governments.

(20) *Ibid.*, p. 8.

3. Publication of Proposed Laws (Clauses 5 and 9)

Clause 5(1) requires First Nations to give a 60-day notice of any law (a) respecting taxation for local purposes of reserve lands or rights and interests in reserve lands, (b) authorizing the expenditure of local revenues and (c) respecting procedures by which the interests of tax payers may be represented to the council.

Two exceptions are provided in clause 9 (a) and (b): a law setting the rate of tax to be applied, and a law establishing a budget for the expenditure of revenues raised under the property taxation law.

The proposed legislation sets out how the required notice will be given as well as its exact content. In addition to publishing it in a local newspaper, posting it in a public place on the reserve, and sending it by regular or electronic mail to individual members of the First Nation as well as to others who may have rights or interests in the land, the council must send the notice to the First Nations Tax Commission and to every government, organization and individual who, in the opinion of the council, may be affected by the proposed law.

Under Clause 5(2), a First Nation may be exempted from the 60-day notice requirement if the First Nations Tax Commission considers that the amendment is not significant.

4. Protection of Taxpayer Interests (Clauses 4 and 5)

Importantly, the proposed legislation provides that before a First Nation can make any property taxation laws, it must consider any representations made by interested parties, including non-native taxpayers (clause 5(4)). This provision appears to reflect a level of concern and protection in the bill for non-native taxpayers' interests. There is no explicit protection in this respect in s. 83 of the *Indian Act*. This provision and other related provisions in the bill have been criticized as a further limitation on the authority of First Nations to enact local property tax laws based on their priorities.

Clause 4(4) provides that all laws made pursuant to clause 4(1)(a) – property taxation laws – must include an appeal mechanism to be valid. Clause 4(4)(a) provides that procedures for appeal mechanisms will be fixed by regulation.

5. Requirements of Local Revenue Laws (Clauses 9 to 13)

Clause 9 requires First Nations that enact property taxation laws to pass, on an annual basis, (i) taxation rates legislation and (ii) a budget authorizing the expenditure of local revenues raised under the property taxation law. The First Nations Tax Commission has authority to approve these laws as well, to ensure that First Nations tax rates are harmonized with the municipal tax system and that annual budgets for the expenditure of local revenues are directed toward local services and infrastructure. In the case of a "borrowing member," the annual budget must give priority to the requirements of the First Nations Finance Authority (i.e., payments on financing obtained from the FNFA).

Clause 10(1) provides that a "borrowing member" cannot repeal a property taxation law.

Under clause 10(2), in the case of a "borrowing member," the annual budget must give priority to the requirements of the First Nations Finance Authority (i.e., payments on financing obtained from the FNFA).

In addition, clause 10(3) further provides that in order to meet its financial commitments, a borrowing member must set aside, in every given year, the necessary local revenues to meet its financial obligations to the FNFA.

Clause 12 provides that revenues raised from property taxes shall be kept in a separate "local revenue account." In other words, local revenue collected by a First Nation under clause 4(1) cannot be co-mingled with other First Nation funds (i.e., government transfers). Clause 13 requires a separate annual audit of the local revenue account, and states that the results must be made available to a large number of parties (clause 13(2)), including the Minister, the First Nations Financial Management Board, the First Nations Tax Commission and the First Nations Finance Authority. The reason for the requirement to submit an audit report to the FNFA, even if a First Nation is not a "borrowing member," is unclear.

Clause 12(3) requires that an annual expenditure budget based on the separate local revenue account, and required under clause 9, must be balanced: planned expenditures cannot exceed estimated local revenues in any given year. Accordingly, a First Nation is statutorily forbidden to run an operating deficit.

D. Part 2: First Nations Tax Commission (Clauses 14 to 34)

1. Establishment and Organization of Commission (Clauses 15 to 26)

This section of the bill deals mainly with administrative matters for the establishment of the Commission, such as the appointment of commissioners, terms of office, reimbursement of expenses, and location of the head office.

2. Delegated Authority (Clauses 15 and 16)

Clause 15 provides that the Commission has the rights, privileges and capacity of a natural person, including the right to enter into contracts, hold real property, raise, invest or borrow money, and sue and be sued.

However, clause 16(1) provides that the Commission is an agent of the Crown with regard to the approval of local revenue laws. Currently, real property taxation by-laws enacted under section 83 of the *Indian Act* require ministerial approval. This clause suggests that the Commission is exercising delegated authority and may ensure that laws approved by the Commission have the status of federal regulations – and therefore have priority over other federal regulations of a more limited nature. According to a legal opinion prepared by Mandell Pinder, this clause also helps to ensure that First Nations' laws are not subject to a challenge on the grounds of taxation without representation.(21)

3. Appointment of Commissioners (Clauses 15 and 18)

According to clause 15(1), the Commission will be made up of 10 commissioners, including a Chief Commissioner and Deputy Chief Commissioner. Clause 17 provides that the Chief and Deputy Chief Commissioner shall be appointed by the Governor in Council on the recommendation of the Minister of Indian Affairs, to serve a term not exceeding five years, and subject to removal for cause. Clause 18 provides that the Governor in Council, on the Minister's recommendation, shall appoint another seven commissioners (not including the Chief and Deputy Chief Commissioners), to serve terms not exceeding five years. Clause 18(2) further provides that three of the commissioners shall be taxpayers, separately representing residential, commercial and utility groups.

(21) Mandell Pinder (2002), p. 14.

An additional commissioner (clause 18(3)) is to be appointed by "[a] body prescribed by regulation," although the legislation does not specify what that body might be. This provision reflects an important theme in the proposed legislation: namely, to balance and protect the interests of non-native taxpayers.

Clause 18(5) stipulates that commissioners should include First Nations members "who are committed to the development of a system of first nations real property taxation." The proposed legislation, however, is silent on regional representation, does not specify the number of commissioners who are to be members of First Nations communities, and does not specify whether the Minister must consult, and to what extent, with First Nations when selecting commissioners.

4. Location (Clause 24)

Clause 24 provides that, unless otherwise determined by the Governor in Council, the head office of the First Nations Tax Commission is to be located on the Kamloops reserve. This unusual provision reflects the fact that the existing Indian Taxation Advisory Board will become the First Nations Tax Commission. The Board is currently chaired by Manny Jules, who is also the former Chief of the Kamloops First Nation in British Columbia.

5. Purpose (Clause 27)

Clause 27 sets out nine paragraphs that outline the basic purposes of the Commission. According to this clause, a key purpose of the Commission is to harmonize the tax system for First Nations in Canada by promoting a common approach. This seems to suggest two levels of tax harmonization: First Nations' local taxation laws should generally be the same; and those taxation laws should be integrated into the broader municipal and provincial tax framework.

Clause 27(b) requires that real property taxation regimes of First Nations be reconciled with the interests of taxpayers. This provision reflects an emphasis in the proposed legislation on ensuring that taxpayers' interests are balanced with the interests of First Nations members.[22]

(22) See also the discussion of clause 29. In addition, under clause 5, a First Nation enacting or amending local revenue laws must post notices and hold public meetings for all ratepayers, and consider any representations made by them to the council. The legislation also guarantees taxpayers seats on the Tax Commission, which has the power to approve all taxation laws (see clause 18(2)).

6. Functions and Powers (Clauses 28 to 32)

The First Nations Tax Commission is to be active in the regulation of First Nations property tax regimes, including regulation of how property tax monies are spent. Clause 30(1)(c) provides that the Commission will approve property taxation laws only if the tax dollars will be used by First Nations to finance capital infrastructure for the provision of local services on reserve lands.(23)

Clause 29 provides that the Commission has the authority to review and approve all First Nations' property taxation laws. Before giving approval, the Commission will consider representations made by members of the First Nation or other parties having an interest in the reserve lands of the First Nation. Presumably, this could include input concerning how taxation revenues are spent. This level of consultation provides for a significant role for ratepayers in the operation of a First Nations taxation regime.

Clause 30(3) provides that the Commission shall inform the First Nations Finance Authority of any judicial proceedings that have been initiated in respect of laws made by a First Nation concerning the borrowing of money (clause 4(1)(d)).

Clause 30(1)(a) stipulates that before the Commission can consider and approve any property taxation law, it must first ensure that the First Nation has obtained certification from the First Nations Financial Management Board (see clause 48(3)).

Clause 31 provides for the Commission to intervene in the event that a local revenue law is challenged by a member of a First Nation or by the holder of a right or interest in reserve lands. If the Commission determines that a First Nation law has been "unfairly or improperly applied" and the situation is not remedied within the time specified by the Commission, then it can ask that the Financial Management Board impose a co-management arrangement or assume third-party management of the First Nation's property tax revenues to remedy the situation. This means that, where the FMB assumes third-party management, it can amend or make taxation laws and "assume control of service delivery of programs and services that are paid for out of local revenues."(24) This aspect of the proposed legislation has been heavily criticized. Many First Nations consider that it is unduly harsh and leaves little procedural opportunity available to them to appeal the intervention.(25)

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(23) This aspect of the legislation has received a fair amount of criticism from some First Nations, who argue that it is unduly restrictive.

(24) Ardith Walkem (2002), p. 8. The provision has been characterized by Ardith Walkem as a "draconian measure which allows the Management Board to pass bylaws, purporting to [a]ct on behalf of the Band, and to assume complete control over the taxation revenues account" (*Ibid.*).

(25) Chiefs of Ontario (2002), "Legal Analysis," p. 27.

Clause 32 requires that all First Nations property taxation laws be published annually in the *First Nations Gazette*. The publication of the Gazette shall occur under the auspices of the Tax Commission.

Clause 33 gives the Commission broad authority to pass "standards and procedures" that will apply to the enactment of local revenue laws, including their form and content. This provision could limit First Nations' discretion in developing their local taxation laws. Also, clause 33(2) gives the Commission authority to establish procedures to include taxpayers' interests in decisions of the Commission.

Clause 34 provides that, on the recommendation of the Minister, the Governor in Council may make regulations with respect to the enforcement of laws and the assignment of rights and interests in the case of outstanding taxes and charges, as well as the appeal of assessment procedures. In the event of an inconsistency between these regulations and First Nations property taxation laws, the regulations prevail to the extent of the inconsistency.

E. Part 3: First Nations Financial Management Board (Clauses 35 to 54)

The First Nations Financial Management Board will be responsible for assessing, monitoring and accrediting the financial management and administration of First Nations. Under the proposed legislation, the jurisdiction of the Board will be voluntary, except for First Nations with property tax regimes and those wishing to participate in the First Nations Finance Authority.

1. Establishment and Organization of Board (Clauses 36 to 46)

Unlike the First Nations Tax Commission, the First Nations Financial Management Board is not an agent of the Crown (clause 37). Clause 36(2) provides that the Board has the rights, privileges and capacity of a natural person, including the right to enter into contracts, hold real property, raise, invest or borrow money, and sue and be sued.

A board of directors comprising a minimum of 9 and a maximum of 15 directors, including a Chairperson and Vice-Chairperson, will manage the First Nations Financial Management Board (clause 36).

The Chairperson and a minimum of 5 and a maximum of 11 directors shall be appointed by the Governor in Council on the recommendation of the Minister, and hold office for a term not exceeding five years (clauses 38 and 39(1)). The Aboriginal Financial Officers

Association (AFOA)[26] shall appoint up to three additional directors (clause 39(2)). Unlike the directors appointed by the Governor in Council, these directors will hold office during pleasure. In other words, they can be removed without cause. The proposed legislation does not specify the nature and extent to which the Minister must consult with First Nations representatives when making appointments to the Board. In addition, the legislation does not make it clear how many commissioners shall be representatives of First Nations.

2. Mandate (Clause 47)

A key mandatory purpose of the First Nations Financial Management Board is to assess the financial management and performance of First Nations seeking entry into the First Nations Finance Authority borrowing pool (clause 47(e) (f) and (g)). Only First Nations that are certified by the Board can proceed with bond issues.[27] The Board will also have enforcement powers (clause 47(h)) with the authority to impose co-management or third-party management arrangements.

The First Nations Financial Management Board's broader role is to assist First Nations in developing their financial management capacity (clause 47(a)) and strengthen their fiscal relationships with other governments and institutions to build shared accountability frameworks (clause 47(b)).

Clause 47(d) provides the Board with the authority to develop and apply "general credit rating criteria to first nations." It is unclear whether this provision would affect all First Nations, notwithstanding their participation in any of the financial institutions created by the bill.

3. Functions and Powers (Clause 48 to 52)

A key function of the First Nations Financial Management Board is to review a First Nation's financial management system and performance. If the Board determines that a First Nation meets the standards set out in the proposed legislation under clause 53(1), a certificate is issued to that effect.

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(26) Formed in July 1999, the AFOA is intended to help improve the professional skills of First Nations members as well as the professional support available to First Nations leaders. For more information on the Association, consult its Web site at: http://www.afoa.ca/.

(27) It is unclear to what extent, if at all, approval of a First Nation's financial administration laws by the FMB under Bill C-23 will conflict with the ability of First Nations to develop financial administration codes under the proposed First Nations Governance Act.

A First Nation's property taxation laws under the Commission, as well as bonds issued under the First Nations Finance Authority, will not be authorized without a certification of sound management from the Board. Under clause 48(7), once the Board makes a decision in this respect it is final and no appeal mechanism is available to individual First Nations.

According to clause 49, the Board also has the power to require a First Nation to enter into a co-management arrangement or can impose third-party management of the First Nation's local revenues. The decision to assume third-party management of a First Nation's local revenues rather than entering into a co-management arrangement is entirely at the discretion of the First Nations Financial Management Board. Third-party management can be imposed under the following circumstances:

(i) the FMB receives notice from the First Nations Tax Commission (clause 31(3)(b)); or
(ii) the FMB receives notice from the First Nations Finance Authority (clause 84(4)); or
(iii) the FMB determines that there is a significant risk the First Nation will default on an obligation to the FNFA.[28]

The co-management powers of the Board are outlined in clause 50(2). Under a co-management arrangement, the Board has authority, among other things, to recommend changes to a First Nation's local revenue laws, expenditures, budgets, and delivery of programs and services. Under clause 50(3), the Board also retains the power to terminate such an arrangement should it no longer be required or should the Board come to the opinion that third-party management is no longer necessary. Under clause 50(4), the opinion of the Board in these instances is final and not subject to appeal. This inability of First Nations to appeal a decision reached by the Board has been described by the Chiefs of Ontario as alarming in view of the potentially disastrous consequences of third-party management of a First Nation, including the prospect of the unelected Board passing laws for the First Nation on an indefinite basis.

If a co-management arrangement has proven ineffective, the Board may assume control of a First Nation's local revenues. However, clause 51 also allows the Board to act as third-party manager if it believes that there is a risk that the First Nation will default on an obligation to the First Nations Finance Authority, or on request by the First Nations Tax Commission. In the context of third-party management, the Board acts in the place of the council of the First Nation. Clause 51(2) outlines the third-party management powers of the Financial Management Board. Under a third-party management arrangement, the FMB is vested with broad powers, including the exclusive right to: make laws on behalf of a First Nation with

(28) It would appear that an actual breach by the First Nation is not required to prompt intervention by the Board.

respect to property taxation, expenditure of local revenues, the borrowing of money and tax rates; establish procedures by which taxpayers may be represented on council; and delegate authority to make laws on behalf of a First Nation to any person or body. This authority is quite extensive and goes beyond current administrative remedies,[29] because the Board can make laws on behalf of a First Nation placed under third-party management.

Clause 51(2.1) provides that, unless expressly consented to by a First Nation, the Board shall not delegate any other power to a third-party manager that was not already delegated at the time the Board assumed third-party management of a First Nation's local revenues.

Clause 51(2.2) provides that a First Nation cannot repeal any laws made by a third-party manager.

Clause 52 requires a First Nation to provide the FMB with any information about its financial management system and financial performance necessary for a decision regarding co-management or third-party management. Presumably, this could include a broad range of sensitive financial information relating to the affairs of a First Nation.

Finally, clause 53 outlines the areas in which the Board can establish standards and procedures. Notably, these include, among others, the content of financial administration laws, financial reporting, and procedures for certification and third-party management.

F. Part 4: First Nations Finance Authority (Clauses 55 to 87)

Generally, First Nations governments face considerable restrictions on their ability to raise funds from their own sources in order to finance projects requiring large capital sums. Alone, many First Nations are unable to raise such funds and require a source of capital with debt secured by future property tax revenues. The First Nations Finance Authority would allow First Nations collectively to issue bonds and raise long-term capital at preferred rates for roads, water, sewer and other infrastructure projects. Like the Municipal Finance Authority of British Columbia, the First Nations Finance Authority will act as a collective financing body representing the pooled resources (from real property tax revenues) of several First Nations.[30]

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(29) Under current departmental policy or funding agreements, there are no provisions for third-party managers to make or amend taxation by-laws on behalf of a band under remedial management.

(30) Some commentators have suggested that the FNFA contributes to the federal government's overall objective of reducing its fiscal obligations by establishing a system whereby First Nations can borrow from future revenues in order to finance capital infrastructure, rather than relying on federal funds. Thus, as First Nations begin to "self-finance" programs and services, there could be, some suggest, not only a reduction in federal fiscal transfers, but a curtailment in the Crown's fiduciary obligations to First Nations.

1. Interpretation (Clause 55)

In this section of the bill, "investing member" means a First Nation that has an investment in a short-term investment pool managed by the Authority. This provision reflects the fact that one of the FNFA's functions is to provide investment services to participating First Nations as well as capital financing services.(31)

2. Establishment and Organization of Authority (Clauses 56 to 71, Clause 73)

According to clauses 56 and 57, the Authority is established as a non-share capital corporation made up of subscribing First Nations. Unlike the Tax Commission, the Authority is not an agent of the Crown. Deposits and borrowings are made through the corporation. There is some uncertainty surrounding the need for a statutory base for the Authority. Proponents of the legislation argue that such a base secures a higher credit rating for First Nations and may be required to allow the Authority to issue bonds. Critics of the proposed legislation have argued that a statutory base may be required to "link the Authority with the binding enforcement and other powers of the Commission and Board."(32)

A board of directors will manage the Authority. The board's powers are outlined in clause 73. Notably, these include the authority to borrow money, issue securities, determine the rates of interest, determine when and how the securities are redeemable, etc.

Clause 59 provides that the board will consist of anywhere between 5 and 11 directors, including a Chairperson and Deputy Chairperson, to be elected by representatives of borrowing members. Directors serve on a part-time basis for a term of one year (clause 61). The board appoints a president to act as chief executive officer of the Authority (clause 67). The corporate structure of the Authority makes it different from the other three institutions established under the Act. Although members of the Authority comprise borrowing and investing members, no investing members sit on the Authority's board of directors, and only representatives of borrowing members can elect directors (clause 59(3)).

(31) See the discussion of clause 72(d).

(32) Chiefs of Ontario (2002), "Legal Analysis," p. 35.

3. Mandate (Clause 72)

The key purpose of the FNFA is to pool the resources (through property tax revenues) of First Nations across Canada, issue bonds, raise capital at affordable rates for borrowing members and handle the repayment of loans by First Nations.

As part of its mandate, clause 72(d) states that the Authority will provide investment services to its members. However, while the Authority's mandate is to provide both capital financing and investment services to its members, the proposed legislation appears to be weighted in favour of the former.

As mentioned, the proposed FNFA would allow First Nations to secure long-term financing at preferred rates in order to develop capital infrastructure on reserve lands for the provision of local services (e.g., roads, sewers). Borrowing for other band-generated purposes is not contemplated in the proposed legislation.(33)

4. Functions and Powers (Clauses 73 to 85)

Under clause 74(1), a First Nation may apply to be a borrowing member of the Authority. The legislation does not outline any equivalent procedure for First Nations wishing to apply to be an investing member.

Clause 74(2) provides that the FNFA will accept a First Nation as a "borrowing member" only following certification by the First Nations Financial Management Board.(34) This provision suggests that the institutions are interconnected and that entry into one body may trigger the involvement of others.

Clause 75 is of notable importance. Any First Nation can cease to be a borrowing member only with the consent of all borrowing members. Some commentators have criticized this provision as unduly restrictive.

Approved requests for financing will be pooled by the FNFA and a sale of bonds will be issued in an amount sufficient to meet the requests.

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(33) Clause 72(a)(i) requires First Nations borrowing money from the Authority to use the money to finance capital infrastructure projects.

(34) See the discussion of clause 48(3).

5. Debt Repayment (Clauses 76 and 84)

The First Nations Finance Authority has priority over all other creditors of an insolvent First Nation (clause 76), with the exception of the Crown. In the event that a borrowing member fails to make a payment to the Authority or meet any of its obligations under a borrowing agreement, the FNFA is required under clause 84(1)(b) to notify the First Nations Financial Management Board and First Nations Tax Commission. If the First Nations Financial Management Board determines there is a "serious risk" that a First Nation will default on its obligations to the FNFA, it may recommend that the borrowing member enter into a co-management arrangement or impose third-party management (as provided for under clause 50 or 51). Equally, clause 84(4) provides that the First Nations Finance Authority could require such intervention of the Financial Management Board.

6. Infrastructure Loans (Clauses 77 and 78)

The proposed legislation restricts the use of band-generated tax revenue to the financing of local capital infrastructure projects. According to clause 77, the FNFA can make a long-term loan[35] to a First Nation for financing capital infrastructure only under certain conditions, including the approval of certain laws under clause 4(1)(d) by the First Nations Tax Commission.[36] In addition, loans payable to the First Nations Finance Authority from property tax revenues must ensure that the Authority has priority over all other creditors.

Clause 78 provides that a borrowing member may obtain long-term financing secured by property tax revenues only from the First Nations Finance Authority. The reason for this restriction on financing is unclear, but it could impede a First Nation from going to other lending institutions and possibly getting better terms for the loan.

7. Other Responsibilities (Clauses 80 to 83, Clause 86)

The First Nations Finance Authority will also establish a sinking fund (clause 80), a debt reserve fund (clause 82) and a credit enhancement fund (clause 83).

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(35) In the Act, a long-term loan means a loan that is for one year or longer (see clause 55).

(36) Clause 4(1)(d) provides for laws respecting the "borrowing of money from the First Nations Finance Authority, including any authorization to enter into a particular borrowing agreement with that Authority."

The sinking fund is to ensure the fulfilment of the Authority's repayment obligations to the holders of bonds/securities that it has issued (clause 80). The debt reserve fund is to make payments on loans when borrowing members have insufficient money.

Monies from these three funds can be invested only in government securities or guaranteed investments or deposits (clause 80(3)). Under clause 82(5), if the FNFA loses money (has a shortfall), it can require borrowing members to pay the amounts necessary to replenish the amounts lost.

Clause 86 requires the Authority to submit to the Minister and its members an audited annual report of its operations, including its financial statements.

G. Part 5: First Nations Statistical Institute (Clauses 88 to 111)

The 1996 Royal Commission on Aboriginal Peoples recommended a First Nations Fiscal Institute, and this proposal was supported by the Assembly of First Nations. The idea behind the establishment of a statistical institute is to provide First Nations with control over the data and information that generate statistics, and to improve the quality and accuracy of statistics so that they can be used to govern the fiscal relationship and ensure First Nations services are comparable to other governments.[37]

1. Definitions (Clause 88)

For the purposes of this section, "other aboriginal group" is defined as an aboriginal group that was formerly a band under the *Indian Act*[38] and that is party to a treaty, land claim agreement or self-government agreement with Canada. This definition excludes the Métis and Inuit, since neither of these was formerly ever a band under the *Indian Act* notwithstanding any treaties, land claim agreements or self-government agreements entered into with the Crown.

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(37) First Nations Statistics; document can be consulted at: www.firststats.ca.

(38) This refers to bands whose lands are no longer under the *Indian Act*, such as the Nisga'a Nation.

2. Establishment and Organization of Institute (Clauses 89 to 101)

The Institute will be a Crown corporation (clause 90) managed by a board of directors consisting of anywhere between 10 and 15 directors, including a Chairperson and Vice-Chairperson (clause 92). The directors, including the Chairperson, shall be Governor in Council appointments for terms not exceeding five years and shall hold office during pleasure. Canada's Chief Statistician will be a member of the board (clause 92(2)). Clause 100 provides that there will also be a First Nations Chief Statistician, appointed by the Governor in Council upon the recommendation of the Minister, who will also hold office during pleasure.

3. Mandate (Clause 102)

According to the proposed legislation, the key purposes of the First Nations Statistical Institute are to:

- collect and analyze data regarding the fiscal, social and economic conditions of members of First Nations, "other aboriginal groups" and other persons who reside on reserve land, to support First Nations policy-making;
- promote the quality, coherence and compatibility of First Nations statistics through collaboration with First Nations, federal, provincial and local governments; and
- build statistical capacity within First Nations governments.

4. Powers (Clauses 103 to 105)

Clause 103 lists the subjects about which the Institute may collect and analyze data for statistical purposes. Some of the items enumerated include: population, health, finance, education, administration of justice, labour and employment, and commercial and industrial activities. This information is to be made publicly available, but in a manner that protects the confidentiality of any identifiable individual, business or organization (clause 103(3)).

Clause 104 provides that the Institute may enter into information-sharing agreements with other departments, agencies or organizations, but is required to obtain prior consent of respondents before any information can be shared, unless otherwise required by law.

5. Protection of Information (Clauses 101, 106 to 110)

Notwithstanding certain exceptions, clauses 101 and 106 require that all employees of the Institute, including the First Nations Chief Statistician, take an oath not to disclose any information acquired in the course of their duties that can be related to any identifiable individual, First Nation, business or organization. According to clauses 109 and 110, any person who, after making such an affirmation, discloses such information is guilty of an offence. Clause 107 specifies that information obtained by the Institute cannot be used in legal proceedings, except for the purposes of conducting a prosecution under the Act.

H. Part 6: Financial Management and Control (Clauses 112 to 129)

This section of the legislation sets out a number of provisions regarding budgets, annual reports, auditing and reporting requirements.

I. Part 7: Provisions of General Application (Clauses 130 to 138)

This section of the legislation includes conflict of interest guidelines (clauses 130 to 135).

J. Part 8: Transitional Provisions, Consequential Amendments, Coordinating Amendments and Coming Into Force (Clauses 139 to 155)

Clause 139 provides that employees of the current Indian Taxation Advisory Board will be offered employment with the proposed First Nations Tax Commission. This is in keeping with the fact that the Tax Commission will essentially replace the ITAB. Clause 140 provides that the current directors of the First Nations Finance Authority shall continue as directors of the new FNFA until new directors are elected.

Clause 141 provides that by-laws adopted under section 83 of the *Indian Act* will be deemed to be laws made under sections 4 or 8 of the proposed First Nations Fiscal and Statistical Management Act to the extent that they are not inconsistent with those provisions. In other words, First Nations who have taxation by-laws enacted under section 83 of the *Indian Act* will automatically fall under the new legislation when it comes into effect, which will be on a day or days to be fixed by order of the Governor in Council (clause 155).

Clause 142(1) exempts all First Nations that have property taxation laws already in place under section 83 of the *Indian Act* from the requirement to have their financial administration laws approved by the Financial Management Board. Notwithstanding this provision, under clause 142(2), a borrowing member would still have to have its financial administration laws reviewed and approved by the Financial Management Board.

Clause 150 will repeal section 83(1)(a), 83(1)(e) to (g), 83(3), 83(5) and 83(6) and section 84 of the *Indian Act*. These are sections of the *Indian Act* that deal specifically with money by-laws, including property taxation and related functions.

COMMENTARY

The First Nations Fiscal Institutions Initiative has its roots in the 1988 Kamloops Amendments to the *Indian Act*. That legislation was spearheaded by a group of B.C. First Nations to clarify the capacity of First Nations to impose property taxes on all reserve land, including conditionally surrendered land. The current legislative package, developed as a result of a Memorandum of Understanding between INAC and the AFN through the National Table on Fiscal Relations, is seen by some First Nations as benefiting primarily the same small group of First Nations. This view reflects the fact that only about 107 First Nations in Canada – most of which are based in British Columbia and Alberta – currently collect property taxes. Accordingly, few First Nations currently benefit significantly from property taxation revenues from leaseholder interests on their lands (cottagers, businesses, etc.).

The situation has resulted in uneven support among First Nations for the proposed legislation. Opposition to the bill has come mainly from the Chiefs of Ontario, Assembly of Manitoba Chiefs, Association of Iroquois and Allied Indians, Manitoba Keewatinow Okimakanak Inc., and the Federation of Saskatchewan Indian Nations, as well as several individual First Nations.(39) Somewhat surprisingly, the Union of British Columbia Indian Chiefs has also criticized the legislative initiative.(40)

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(39) See Ross Montour, "Proposed Act Called Wolf in Sheep's Clothing," *The Eastern Door*, Vol. 11, No. 43, 22 November 2002. See also "Chiefs Reject Plan to Allow First Nations to Collect Taxes," CBC News, 2 December 2002.

(40) Union of British Columbia Indian Chiefs, Press Release, "Our Land is Our Future," 15 August 2002.

Although the fiscal institutions initiative is said to be a "First Nations-driven" process, the proposed Act has been criticized as being part of a "suite" of legislation proposed by the government.(41) This concern is understandable, given the comments made to that effect by the Minister of Indian Affairs and Northern Development in the media.(42) Recent controversy surrounding the bill revolves around this point. Chiefs in favour of the fiscal institutions initiative have attempted to persuade opponents of the bill that it is, in fact, not companion legislation to the federal government's controversial proposed First Nations Governance Act.

Several First Nations see the current legislative package as part of an attempt by the federal government to "municipalize" Aboriginal governments.(43) Some First Nations leaders view the proposal as a significant departure from the principles articulated in the 1996 report of the Royal Commission on Aboriginal Peoples and the 1983 Penner report, both of which recommended the establishment of a new bilateral fiscal relationship and increased fiscal transfers to First Nations.(44) Instead, it is argued that the initiative promotes the opposite: expensive accountability guidelines and own-source revenue generation through on-reserve property tax. These measures are seen as reducing the federal government's liability for capital projects and placing the burden on already cash-strapped First Nations governments. Thus, rather than seeing the institutions as tools that will help First Nations develop their local economies and access capital markets, critics see them as an attempt by the government to diminish its fiduciary obligations to First Nations.

On November 2002, at a two-day Special Chiefs Assembly, the Assembly of First Nations passed resolutions rejecting the federal government's suite of legislation. Acknowledging that the First Nations Fiscal Institutions Initiative has been a First Nations-led process, an "accommodation resolution" was also passed affirming the AFN's respect for First Nations at the local and regional levels to enter into agreements with the federal government, as long as those agreements are not in the context of legislation that can potentially affect all First Nations wishing to exercise their taxation authority. Notwithstanding the change in

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(41) The other pieces of legislation include Bill C-7, the First Nations Governance Act (which died on the *Order Paper* on 12 November 2003), and Bill C-6, the Specific Claims Resolution Act (which received royal assent on 7 November 2003).

(42) "Deal Reached?" *Windspeaker*, Vol. 20, No. 8, December 2002.

(43) Lazar (2002), p. 13.

(44) See Chiefs of Ontario (2002), "Briefing Note."

leadership,[45] the official position of the Assembly of First Nations, rejecting the proposed legislation, remains unchanged.[46]

In June 2003, the Commons Committee on Aboriginal Affairs held hearings on the predecessor to Bill C-23, Bill C-19. First Nations witnesses representing national and regional organizations as well as individual communities from across the country continued to be divided on the merits of the proposed legislation. First Nations witnesses who opposed the bill suggested that it be withdrawn in favour of legislation that would apply only to those specific First Nations that wish to participate in this initiative, in a fashion similar to the *First Nations Land Management Act's* framework.

First Nations participation in this initiative is presented as optional. However, those First Nations that already have by-laws enacted under s. 83 of the *Indian Act* automatically fall under the proposed legislation upon its coming into force.[47] In effect, then, the proposed legislation will automatically apply to these First Nations, regardless of whether or not they have opted in. Accordingly, First Nations who currently have property tax by-laws enacted under the *Indian Act* may find themselves having to adhere to an entirely new regime to which they have not expressly consented.

There has been very little media coverage of the First Nations Fiscal and Statistical Management Act. What editorial commentary is available has been favourable, describing the proposed initiative, despite the mixed reaction it has received, as potentially a "major milestone in First Nations development."[48]

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(45) During elections held in July 2003, Phil Fontaine defeated Matthew Coon Come to become National Chief of the Assembly of First Nations.

(46) At an AFN Special Assembly held in October 2003, a resolution calling for support of the predecessor to Bill C-23, Bill C-19, was defeated, with 109 votes cast against the resolution and 65 votes in support.

(47) Under clause 4(2), however, laws under clause 4(1) do not have any force or effect unless they are approved by the First Nations Tax Commission.

(48) Doug Cuthand, "Fiscal Management Law Major Native Milestone," *The Star Phoenix* (Saskatoon), 6 December 2002.