

October 31, 2002

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Dear First Nations' Leaders:

**Re: *First Nations' Fiscal and Statistical Management Act* ("FSM")
Aboriginal Rights Issues**

You have asked legal counsel for the four institutions involved in the development of the *FSM* to respond to various legal opinion dealing with the apprehended impact of the *FSM* on various inherent rights of Indigenous Peoples.

We welcome this opportunity to respond to the opinions as they are part of the necessary debate and exchange of ideas involving the *FSM* initiative. We hope that, as a result of our response, further dialogue can occur which will lead to seeing the *FSM* clearly with respect to what it does and does not achieve.

General Comment

To summarize the *FSM*, there are four First Nations institutions created by legislation: the Tax Commission (to deal with First Nations real property tax on reserve), the Finance Authority (to deal with raising money through public debt financing), the Financial Management Board and the Statistics Institute.

Some of the opinions are of limited assistance insofar as they merge criticism of the *FSM* with an overall criticism of the federal initiative embodied in the *First Nations' Governance Act* ("*Governance Act*"). As a result, some opinions are built on the faulty premise that the two pieces of legislation work "hand-in-glove." The concerns about the *Governance Act*, a purely federal initiative, are improperly visited on the *FSM*, which is First Nations led. This response will, therefore, deal only with the *FSM*.

Some points need to be noted which distinguish these two legislative proposals:

- The *FSM* is a logical development from Bill C-115 introduced into legislation in 1988. The *FSM* builds on the experience of the Indian Taxation Advisory Board and of First Nations in dealing with section 83 since Bill C-115 was passed 14 years ago.
- Bill C-115 came about as a result of the B.C. Court of Appeal's decision in *Leonard*, which held that the provisions of the *Indian Act* were such that when reserve land was leased, following a surrender, it fell out of the jurisdiction of Band Council. This flaw in the statute meant that provincial real property tax laws applied to lessees holding interests in reserve land. Band governments had no jurisdiction to tax these interests.
- The amendments to the *Indian Act* through Bill C-115 were made with the support of over 100 First Nations. The Bill clarified the jurisdiction of First Nations over their reserve land when it was designated for leasing purposes, and it clarified their taxation jurisdiction.

- As a result of these amendments nearly \$ 200 million has been directed to support First Nations' governments. This money would otherwise have gone in to provincial and municipal coffers.
- These taxation dollars have come to First Nations as a result of their occupying the field of real property taxation on reserve. Provincial jurisdiction was ousted.
- In the result, the *FSM* is an expansion of the existing section 83 of the *Indian Act*. The legislation would repeal s. 83 in its entirety and take it out of the *Indian Act*, creating a separate legislative base to replace s. 83 and fixing the problems which First Nations have experienced in exercising their jurisdiction over the years (such as enforcement, discussed below).
- In addition to the foregoing, the *FSM* enables First Nations to use their real property tax base on reserve in order to have access to the money markets (as other governments can) at a lower rate of interest than would otherwise be the case.
- ITAB was created along with Bill C-115. Its purpose was to provide advice to the Minister of Indian Affairs, who had, under section 83 of the *Indian Act*, the power of by-law approval for taxation purposes.
- ITAB was merely an advisory body. Since its inception it had been the intention of ITAB to move towards a statutory base for its operation, and remove ministerial control over by-law approval in the area of real property taxation. This was part of the very first Memorandum of Understanding between ITAB and the Minister in 1996.
- In other words, the initiative embodied in *FSM* has been under development for approximately 14 years. The First Nations' Finance Authority came into existence in 1995. By contrast, Minister Nault's *Governance Act* came about as a result of his own initiative, which started to develop a few years ago.
- *FSM* is meant to provide a viable alternative to the *Governance Act* for those First Nations wanting to engage in real property taxation on reserve, debenture financing,

financial management and statistics, and wanting to rely on their own First Nation's institutions for these purposes.

How the *FSM* Improves on the Existing Section 83 of the *Indian Act*

- The new legislation details the enforcement powers which First Nations have in the event of non-compliance with their laws. For many years, the Department of Justice took the position that First Nations' taxation laws were limited in their powers of enforcement. While this was clarified in ITAB's sample by-law, the issue was continually raised, and has now been put to rest. Detailed powers of enforcement are set out in the *FSM*.
- The legislation makes clear that First Nations can charge both interest on unpaid amounts, as well as penalties.
- First Nations have clear jurisdiction to licence businesses on reserve, as well as regulate them.
- The process for First Nations to pass their taxation laws is clarified while at the same time First Nations are able to define these processes themselves.
- First Nations have the jurisdiction to address how taxpayers can represent their interests to Chief and Council if Chief and Council deem that to be appropriate.¹ This is markedly different from the mandatory provisions of redress in the *Governance Act*.
- First Nations are able to delegate their powers to pass real property taxation laws. This deals with the complicated issue of what happens when a number of First Nations hold reserve land in common. Further, delegation to an institution created by First Nations – such as a tribal group – is now possible.

¹ See section 3(1)(c).

- *FSM* completely removes the Minister’s disallowance power over First Nations’ real property taxation laws, which currently exists under s. 83 of the *Indian Act*. FNTC review of these laws is founded on ensuring due process and transparency.
- As a result of feedback, and so that it is beyond doubt, First Nation leaders are considering an appropriate preamble to the *FSM*, as well as having a “non-derogation clause” included.

How the *FSM* Improves on First Nations’ Financial Needs

The First Nations Finance Authority does not act like a bank to use the combined funds of borrowing members to finance operations of its members. Instead, the borrowing members collectively raise capital through the Authority which issues debentures that are purchased by private investors. This is how other governments finance their activities, using property taxes to lever debt. Legislation is required in order to establish this structure, so that there will be the necessary legal certainty for investment to occur. The FNFA securitizes property tax streams which are paid by leasehold taxpayers. The purpose is to add value to reserve land by putting in infrastructure. In this way the legislation works to assist First Nations to benefit economically from their land and resources, rather than the opposite.

Primary Allegations

The main concerns expressed in the opinions on the legislation are as follows:

1. It is alleged that although the *FSM* is being “sold as ‘voluntary’”, it is not really voluntary because existing s. 83 taxation by-laws will be automatically continued under the *FSM Act*.
2. The *FSM* is said to violate inherent self-determination rights of Indigenous Peoples because these rights are defined in legislation suggesting that they flow from and require federal recognition, and are not inherent.

3. It is alleged that the federal fiduciary obligations are reduced and transferred as a result of the *FSM* through delegating authority for the approval and oversight of financial matters to federally created and controlled “boards.”
4. It is said that the federal financial obligations to First Nations are reduced through the *FSM*.
5. It is argued that the *FSM* imposes corporate structures on the First Nations.

We will address each one of these allegations in turn.

1. It is alleged that although the *FSM* is being “sold as ‘voluntary’”, it is not because existing s. 83 taxation by-laws will be automatically continued under the *FSM Act*.

Firstly, it is correct that existing First Nations’ by-laws passed under s. 83 of the *Indian Act* are continued under the new legislation. This is normal practice, and it avoids First Nations having to re-enact their laws under *FSM*. Having said that, if for some reason a First Nation decided that it did not want to continue to exercise its real property taxation scheme under *FSM*, and take advantage of the expanded opportunities (and protections) for this regime, First Nations are free to apply to the Commission to repeal these laws and withdraw from real property taxation. The Tax Commission would work with the First Nation to ensure that service contracts, for example, which had been assumed by the First Nation from municipalities, would be transferred to proper authorities. The unwinding of the tax system would have to be done carefully, but there is no doubt that the First Nation could choose to withdraw from the system. In this event, provincial tax laws would, in all likelihood, again occupy the field of taxation on reserve, and these monies would go to the provincial and municipal authorities.

For all other First Nations there is no automatic application of *FSM*. Each First Nation can choose whether they wish to avail themselves of the structures and procedures of *FSM*. First Nations who do not like the approach can, in the exercise of their self-governing rights, use other avenues to revenue raising and borrowing and, if challenged, defend their actions based on their asserted aboriginal right of self-government.

Secondly, is not correct that a First Nation would automatically fall under the Financial Management Board when it is continued under the *FSM*. Except for the certification of financial management laws,² the Financial Management Board's primary purpose is to protect all First Nations who are borrowing money from the First Nations' Finance Authority and, of course, this is a voluntary choice. The only other limited power which the Financial Management Board has over non-borrowing Bands is that, in the event that a First Nation did not comply with the *FSM*, then the Financial Management Board is brought in as a last resort.

Opinions also have said that it can be anticipated that Canada may tie future Band funding to an agreement to participate in the institutions established under the *Act*. There is no basis for suggesting a link between Band funding and *FSM*. The local revenue account, which is the account under *FSM* where taxation and business licensing revenues are kept, is absolutely isolated from the transfer account and other funds of the First Nation. Canada has no power over the local revenue account, nor any discretion in relation to it.

2. The *FSM* is said to violate inherent self-determination rights of Indigenous Peoples because these rights are defined in legislation suggesting that they flow from and require federal recognition, and are not inherent.

It is not correct to say that if inherent rights are reflected in federal legislation, the rights then require federal recognition or that they are thereby reduced. The opposite view has been confirmed in a number of cases, two of which will be discussed below.

In *Roberts v. Canada*, [1989] 1 S.C.R. 322, Wilson, J. for the Court confirmed that pre-existing aboriginal rights are part of the federal common law. As such, they are binding on the Crown of their own force. Importantly, the Court said that:

... the obligation owed by the Crown in respect of lands held for the Indians is recognized in, although not created by s. 18(1) of the *Indian Act* ... (at page 335)

... Other sources we must look at are the provisions of the *Indian Act* which, while not constitutive of the obligations owed to the Indians by the Crown, codify the pre-existing duties of the Crown towards the Indians ...

² Again, the *FSM*, in this regard, provides a real non-coercive and voluntary alternative to the *Governance Act*.

‘It cannot be seriously argued that the law of aboriginal title is today anything other than existing federal law.’ (at page 337)

While, as was made clear in *Guerin*, section 18(1) of the *Indian Act* did not create the unique relationship between the Crown and the Indians, it certainly incorporated it into federal law ... (at page 340)

(Emphasis added.)

It is clear from the case law that no statute can operate to eliminate common law rights, unless it expressly says so, and in the Aboriginal context, the “clear and plain” rule applies. Thus there is no doubt that the meaning and content of the *FSM* will be influenced and guided by pre-existing Aboriginal rights and interests.

Clearly, statutory recognition by the federal government of inherent rights is not required. But if a federal statute speaks to the implementation of inherent rights, it is enabling only. This is why the voluntary nature of the legislation is so important (as discussed above). First Nations can take advantage of this enabling legislation as they choose. Their rights are not reduced. They can be exercised separately from the statute, subject to the perplexing problem (which the *FSM* answers) about enforcement against non-First Nations members on reserve. Again, we will touch on this issue later.

Support for our position – that the existence of the *FSM* will not affect the inherent rights of Indigenous Peoples - comes from litigation involving s. 83 of the *Indian Act* itself. In *Canadian Pacific Limited v. Matsqui Indian Band* (“*Matsqui I*”),³ the Chief Justice held that the amendments to s. 83 were intended to facilitate the development of Aboriginal self-government.

... it is important that we not lose sight of Parliament’s objective in creating the new Indian taxation powers. The regime which came into force in 1988 is intended to facilitate the development of Aboriginal self-government by allowing bands to exercise the inherently governmental power of taxation on their reserve... (at page 103)

And further, the court commented:

³ [1995] 2 C.N.L.R. 92

The purpose of Parliament in enacting the Indian tax assessment scheme was to promote the development of Aboriginal governmental institutions. It is therefore preferable for issues concerning Indian tax assessment to be resolved within the statutory appeal procedures developed by Aboriginal peoples. In particular, it is preferable that assessment errors be corrected within the institutions of the bands.

This is a powerful recognition of these institutions.

*Matsqui II*⁴ applied the reasoning in *Matsqui I* to go even further:

Accordingly, the tax exemption for reserve lands in section 87 may be seen as an inherent Aboriginal right, stemming from the historic occupation of such lands by autonomous Aboriginal societies. While such a characterization will undoubtedly lead to questions as to the scope of the exemption and extinguishment, it is not necessary to decide those issues here. It is sufficient to note that, to the extent that the tax exemption for the Indian interest in reserve lands flows from notions of Aboriginal sovereignty, such exemption should be protected in the absence of statutory directions to the contrary.⁵

The point is that these cases upheld the inherent power of First Nations in the context of the statutory scheme involving First Nations' governmental powers over real property taxation. There is nothing in the *FSM* which would change this analysis. We are confident that the statutory scheme is facilitative and not in derogation of these powers. Out of an abundance of caution, we have put forward a non-derogation clause to be added to the Act.

Clearly, if the courts were going to hold these powers were merely delegated powers, they would have done so in *Matsqui I* or *II*, which dealt with the same statutory scheme which is expanded upon in the *FSM*.

Other examples of where the Supreme Court has acknowledged the connection between federal legislation and pre-existing rights and legal relationships include:

⁴ 2000 1 CNLR 21 (FCA)

⁵ Arguably, the tax exemption in the *Indian Act* is merely a codification of an Aboriginal or treaty right to immunity from taxation: see R. Bartlett, *Indians and Taxation in Canada*, 3rd ed. (Saskatoon: Native Law Centre, 1992) at 26-27. If so, the preservation of this immunity in the impugned by-laws may be protected from a *Charter* challenge under section 15 by section 25, which provides that the *Charter* shall not derogate from Aboriginal, treaty or other rights of Aboriginal peoples.

- *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85: where in the context of interpreting the meaning of section 89 of the *Act*, Dickson C.J. stated at page 109 that the *Indian Act* represents a “confirmation of the Crown’s historic responsibility for the welfare and interests of these peoples.” (see also pages 99 and 100)
- *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344 (particularly at page 358) where the Court concludes that questions respecting dealings with reserve lands cannot be answered by the application of common law principles of real property, but must be answered in light of the Aboriginal people’s historic relationship to their land and the Crown.
- *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 where the Chief Justice states that “... the same legal principles governed the aboriginal interest in reserve lands and lands held pursuant to aboriginal title.” (at para. 120)
- *Osoyoos v. Oliver (Town)*, [2001] S.C.J. 82 where the Court held that the Crown’s statutory power under section 35 of the *Act* is constrained and limited by its general fiduciary obligations and the law of extinguishment of Aboriginal title.

In *R. v. Sparrow* the Court began to articulate how Aboriginal rights are to be defined. It began by rejecting the notion that current regulation of those rights was relevant:

Far from being defined according to the regulatory scheme in place in 1982, the phrase “existing aboriginal rights” must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery’s expression, in “Understanding Aboriginal Rights”, supra, at p. 782, the word “existing” suggests that those rights are “affirmed in a contemporary form rather than in their primeval simplicity and vigour”. Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate “frozen rights” must be rejected.

In *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 the Court further elaborated the test for defining and establishing an Aboriginal right:

... in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the

aboriginal group claiming the right.

We will not attempt here to define the scope and content of the Aboriginal right to self-government. It is sufficient for our purposes that whatever it might be, the cases support the conclusion that aboriginal rights should be defined by looking to the pre-existing Aboriginal societies themselves, and not at the manner in which those societies may be regulated by the *Indian Act*⁶ at any point in time.

Aboriginal Nations are at liberty to assert the inherent right to tax non-members who are using their reserve lands outside of the *FSM*. Users of reserve land would be able to raise their constitutional right to avoid “taxation without representation,” because the taxation was not imposed upon them through a law approved by Parliament. Aboriginal Nations could claim the right and would have to establish it based upon customs and practices prior to contact (under the *Van der Peet* and *Pamajewon* tests).⁷The concern expressed in the opinions is that any attempt to define and legislate “self-government” is an attempt to prevent the full realization of nationhood. The concept of self-determination was the subject of some consideration by the Supreme Court of Canada in the *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 (the “*Quebec Secession Reference*”). The Court held (from the headnote):

The Court was also required to consider whether a right to unilateral secession exists under international law. Some supporting an affirmative answer did so on the basis of the **recognized right to self-determination that belongs to all “peoples”**. Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the “people” issue because, whatever may be the correct self-determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of people at international law where “a people” is governed as part of a colonial empire; where “a people” is subject to alien subjugation, domination or exploitation; and possibly where “a people” is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. **In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state.** A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality

⁶ Note that this is consistent with the decision of the Supreme Court of Canada in *Re Eskimo*, [1939] S.C.R. 104 where the Court held that the scope of the term “Indian” found in section 91(24) of the *Constitution* was not affected or limited by the legislative definition of the term “Indian” in the *Indian Act*.

⁷ Of course, one of the benefits of *FSM* is that, reflecting these rights in legislation avoids the real possibility of litigation.

and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the “National Assembly, the legislature or the government of Quebec” do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally. (Emphasis added.)

The Court discusses this at paragraphs 126-130:

The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through self-determination -- a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.

In light of the findings of the Supreme Court in the *Quebec Secession Reference*, it is our view that a right to self-determination exists in international law. This gives to all peoples the right to freely determine their political status and freely pursue their economic, social and cultural development. Where a people is subject to the law of another governing people, the right to self-determination also includes the right to secession. This will be particularly true where a people is denied any meaningful exercise of their right to self-determination within the state of which they form a part.

In other words, where a people within a state has a meaningful exercise of the right to self-determination, then it is not necessary for the people to draw on the larger, always existing right of self-determination. If there is no meaningful right of self-determination within the existing state, then international law recognizes a right of self-determination, which includes a right of secession.

Said another way, section 35 of the *Constitution* protects the rights of Aboriginal Peoples in Canada to self-government, or the meaningful exercise of their right to self-determination, within the existing Canadian state. The *FSM* could not eliminate or reduce this right.

3. It is alleged that the federal fiduciary obligations are reduced and transferred as a result of the *FSM* through delegating authority for the approval and oversight of financial matters to federally created and controlled “boards.”

There is no question but that the role of Canada, as fiduciary, is a complicated one.⁸

There is a tension between the dependency involved in fiduciary obligations, and the independence involved in self-government. The analysis of fiduciary obligations, and whether they exist in any particular situation, usually starts with the case of *Frame v. Smith*. It is this case which puts the fiduciary relationship within the context of power. The more power that can be exerted by someone who has a discretion over the affairs of another, the higher the fiduciary obligation.

The irony in trying to maintain all aspects of the fiduciary obligation – however it is defined – is that it requires the continuing vulnerability of First Nations to the power of the Crown over First Nations’ affairs.

The concept which, perhaps, provides the rationalization between these disparate obligations and aspirations is what was expressed in the *Mitchell*⁹ case. There the Court said that the pre-existing obligation on the Crown to protect the property of an Indian arose because the Crown imposed a legal regime on Indian land which made it inalienable, except to the Crown. This created a disability for the Indians and obligations on the Crown. This is the source of the Crown’s fiduciary obligations. These will never disappear as long as the Crown continues to interpose itself between Aboriginal Nations and third parties. Nevertheless, the obligations will become attenuated as the First Nations establish more and more real independence from government. This is a concept well set out in *Easterbrook*.

Nevertheless, until the Crown releases its hold on reserve land, and fulfils its obligations under the *Constitution*, the relationship will continue until First Nations consent to its removal.

⁸ See, for example, *Tsartlip Indian Band v Canada* [2000] 2 FC, 315 (FCA), where the Court attempts to delimit the sphere of fiduciary responsibility by not relying on the special relationship between Indians and the Crown.

⁹ [1990] 2 FCR 85

Having said that, an examination of whether or not the *FSM* reduces federal fiduciary obligations cannot be dealt with in the abstract, but must be grounded in the actual terms of the legislation.

There is a delegation of approval of real property tax laws to the Commission. In order to ensure that First Nations' laws approved by the FNTC have the status of federal regulation – and therefore have priority over any other federal regulation of a more limited character – it has been decided that the FNTC needs to be an agent of Her Majesty for this approval function only. This will help to ensure that First Nations' laws are not vulnerable to a challenge of “taxation without representation.”¹⁰ Having said that, the existing case law casts doubt on whether or not the Minister's “duties” in relation to s. 83 of the *Indian Act* are a function of a fiduciary obligation. The case of *Twinn v. Minister of Indian Affairs*, [1987] 3 F.C. 386 has held that the Minister need not provide any reasons for the disallowance of By-laws. Indeed, this case has held that there is no requirement that a notice of disallowance even be sent to the Band. It is hard to imagine, given these reasons, how this could be based on a foundation of fiduciary obligations to a beneficiary.

Obviously, a very positive aspect of the FNTC legislation is that it would provide due process for the review of First Nation laws in the area of taxation, where none exists now.

Finally, it is incorrect to say that the FNTC is “created and managed by Canada.” Appointments to the Commission will not be made without First Nations' input. Seven of the ten Commissioners will be representatives of First Nations. Federal Regulations will only be made at the initiative of the FNTC. Standards will only be set by the FNTC.

4. It is said that the federal financial obligations to First Nations are reduced through the *FSM*.

Some opinions suggest that *FSM* reduce its federal funding responsibilities by “imposing ‘own source revenue’ [“OSR”] requirements” going towards Canada's goal that Indigenous Peoples will be required to “self-finance the programs and services that Canada currently provides.”

¹⁰ See, for example, the *Campbell* case, which makes this challenge under the existing s. 83 of the *Indian Act*.

This is nowhere set out in *FSM*, nor is there a linkage between *FSM* and governments which allows this conclusion to be drawn. Indeed, taxing First Nations are using their money derived from taxing the interests in the reserve in order to finance programs and services that are not being provided by Canada. Where there are leaseholders on reserve, the government does not, as a matter of policy, pay for infrastructure for economic development. That is the major point of *FSM*. Again, if First Nations do not wish to participate in *FSM*, they do not have to.

It is said that the *FSM* is flawed because:

There is no recognition of Indigenous Peoples' Aboriginal title and right to benefit economically from their lands and resources.

As we have noted, these are rights which do not have to be recognized in order to exist. These rights exist as part of Aboriginal title, and the Supreme Court of Canada in *Delgamuukw* clearly stated this. This is the crux of the matter. The problem does not lie with the *FSM*, it lies with Aboriginal Nations being impoverished because the resources in their territories are being denied to them, and enriching others. The modest attempt of the *FSM* is to ensure that taxation resources on reserve land do not also enrich other governments, rather than First Nation governments.

5. It is argued that the *FSM* imposes corporate structures on the First Nations.

Firstly, there is no imposition of a corporate structure on First Nations through *FSM*. For “greater certainty” First Nations who borrow from the FNFA are described as having the powers of “natural persons”. That is decidedly not a corporate structure. Secondly, the accountability provisions in *FSM* pertain mainly to requirements on First Nations who choose to borrow money from the FNFA. These provisions are intentionally on a par with the requirements which other governments must meet when they are borrowing money which is raised through the issuance of bonds and debentures. The provisions assist First Nations in getting lower rates of interest, and protect other First Nations who are also part of the borrowing pool.

We trust this opinion will be of assistance to you and First Nations interested in this initiative. Please do not hesitate to let us know if you have any questions or require further clarification.

Yours truly,

MANDELL PINDER

Original signed by

Leslie J. Pinder
Barrister & Solicitor

LJP/djg