

***FIRST NATION PROPERTY TAXATION REVIEW***

**1998 - 1999**

**ANNUAL REPORT**

**OF THE**

**INDIAN TAXATION ADVISORY BOARD**

## Message From The Chairman

### *Securing Real Property Taxation Jurisdiction*

The evolution of the First Nation property tax system over the past ten years marks a significant accomplishment in the development of self-government in this important area of governance and finance.

Securing First Nation real property taxation jurisdiction and strengthening its regulatory framework has been an ongoing process and the focus of our attention. All who have participated in this process must be commended for helping to make our vision a reality. It is clear that First Nations are united in their determination to protect this jurisdiction and that there is a need to work together with all stakeholders to address the challenges that we face.

The Indian Taxation Advisory Board's (ITAB) work over the past decade in clearing the path for real property taxation has been an exciting and rewarding one for our organization. Now we must look to the future. Enthusiastic support is being garnered for the development of a First Nations Tax Commission (FNTC) as a successor to ITAB. This new institution will continue to serve the needs of all stakeholders in a framework of legislated independence and certainty. It starts from the premise that the basic mission of the FNTC will be to help First Nation governments build and maintain fair and efficient First Nation property tax systems, and to ensure that First Nation communities, and their taxpayers alike, receive the maximum benefits from those systems.

Our Annual Report which follows, describes the many and varied activities carried out by ITAB in fulfilling its ministerial mandate to assist First Nations and the Minister in implementing taxation jurisdiction.

Sincerely,

Chief C.T. (Manny) Jules  
Chairman

1998 - 1999

ANNUAL REPORT OF THE  
INDIAN TAXATION ADVISORY BOARD

**Mission**

*“To assist First Nations in achieving self-government through the establishment of taxation jurisdiction”*

**Executive Summary**

The year ending March 31, 1999 marked the end of the first decade in the operation of the Indian Taxation Advisory Board (ITAB) and an important and unprecedented milestone for the first independent Aboriginal-controlled institution involved in the decision-making of the Minister of Indian Affairs and Northern Development (DIAND). The work undertaken by ITAB during this period in “clearing the path” for First Nations real property taxation represents a significant step towards the establishment of a national First Nations governance institution.

Property tax systems have been a very effective means of developing First Nation economies, producing benefits far beyond property tax revenues alone. They have given First Nation communities the means to improve their infrastructure and thereby attract private investment and promote economic development, creating jobs and lease revenues. Property tax systems have also improved the administrative capacity and business culture of many First Nations. These improvements have built the confidence and capacity First Nation governments need to successfully meet the challenges of self-government.

ITAB’s mandate has been, in part, to promote the development and implementation of First Nation real property tax systems and ensure their overall integrity. As an illustration of ITAB’s success in fulfilling its mandate, some 72 First Nations have now established property taxation regimes. This new independent source of revenue totals more than \$130 million dollars in the last ten years which, in turn, has generated over 1,000 person-years of employment on reserve.

ITAB has been, and continues to be, instrumental in helping First Nation communities realize the economic benefits of real property taxation, while providing the tools and expertise necessary for building sound fiscal management. The experience of the Board and its achievements during the decade since its creation in 1989 is an excellent example of what can be accomplished to further the self-determination of First Nations, as well as to foster a creative and wholesome relationship with Canada and its provinces and citizens.

**Significant Accomplishments in 1998-1999**

- **Bylaws:** 61 bylaws enacted under Section 83 of the *Indian Act* were reviewed and recommended by the Board and approved by the Minister. A total of 596 bylaws have now been recommended by ITAB, covering areas such as property taxation, assessment, rates, expenditure, business licensing, financial administration, telephone companies and other related amendments.
- **New Fiscal Relationships:** the Royal Commission on Aboriginal Peoples (RCAP) recommended that a new fiscal relationship between First Nations and the Government of Canada be established. Encouraged by the Assembly of First Nations (AFN) and supported by DIAND, ITAB agreed to undertake a Canada-wide consultation process with First Nations leaders regarding the development of a new fiscal relationship. As a result of the consultation process, ITAB was then requested to coordinate and co-chair a national *Think Tank on First Nation Fiscal Relations*. This brought together the AFN Executive, AFN regional representatives, as well as professionals and government officials with related interests. Terms of reference were drafted for a national table on First Nations Fiscal Relations with Canada, which will be composed of the AFN Chief's Committee on Fiscal Relations and its working groups.
- **First Nation Tax Commission (FNTC):** the March 1998 *Memorandum of Understanding* between ITAB and the Minister invited the Board to "work with the Minister to develop legislative proposals for the establishment of a permanent body, which may include the Board as a statutory institution of self-government." The importance of this and its far reaching implications for First Nations in their movement towards self-determination and self-government has been the subject of much thoughtful debate by Board members over the past year.

In February 1999, ITAB Chairman Chief Jules, appeared before the Senate Standing Committee on Aboriginal Peoples to make a presentation on the history of the Board and its proposed transition to a legislated body as the First Nation Taxation Commission (FNTC).

Extensive consultation with First Nations leaders began in the spring of 1999. In addition, a concise business plan was completed which outlines the functions, processes, resourcing, and legislative steps required to move forward. Consultation with other stakeholders will begin in the fall of 1999.

- **Administrative Independence:** in June 1998, the staff of the Indian Taxation Secretariat (ITS), who provided professional and administrative support to the Board, were devolved from DIAND, thus giving ITAB complete operational and administrative autonomy. Subsequent to the devolution of the ITS staff, the Board formally restructured its organization,

responsibilities and accountabilities. Comprehensive policy and procedure manuals were developed covering all aspects of Board activities including its management, operations, human resources, staffing, finances and accounting.

## INTRODUCTION

The amendment to Section 83 of the *Indian Act* in 1988 by Bill C-115 enabled First Nation governments for the first time to exercise property tax jurisdiction and derive revenue from property developments on their reserve land. Prior to this, provincial jurisdictions would impose themselves on “conditionally surrendered” land and extract the taxation revenue. When the *Indian Act* was amended, the federal government had no experience in the levying or administration of real property taxes, which are the constitutional prerogative of the provinces. It was to overcome this vacuum of knowledge that ITAB was created as an innovative approach to assist First Nations, the federal government and the Minister of Indian Affairs with the process of legislating bylaws and administering real property taxation regimes on reserve.

The First Nations property tax system has grown dramatically since its introduction in 1989. There are now 72 First Nation tax authorities across Canada and more are seeking to assume these powers. These tax systems operate in diverse circumstances. Many have extensive residential and commercial developments. Others are planning such developments. Many simply wish to ensure that their governments maintain taxation jurisdiction over utility corridors passing through their lands. As more and more First Nation governments have entered the field of property taxation, many complex issues have emerged involving the relationship among First Nation governments, the federal government, provincial governments, municipal governments, developers and taxpayers. ITAB has worked very hard to assist First Nations taxation authorities in gaining the confidence of investors and taxpayers, and in improving relations between First Nations and other governments.

ITAB now provides many of the functions of the provincial government bodies that regulate municipal property tax authorities. However, there are important differences. ITAB is merely “advisory” in nature, having only the power of recommendation. The Minister of Indian Affairs retains the power of allowance or disallowance of First Nation property tax legislation, although without exception, that power has been exercised in keeping with the Board’s recommendations.

## OPERATIONS

### *Authority*

In January 1989, the Minister of DIAND established ITAB to provide advice on the approval of real property taxation bylaws, promote and assist in the development of First Nation taxation powers under Section 83 and improve the administration of the Minister's statutory responsibilities related to this section of the *Indian Act*.

### *Mandate*

- Promoting the exercise of First Nation real property taxation jurisdiction in support of self-government and self-reliance.
- Examining taxation bylaws proposed by First Nations under Section 83 of the *Indian Act* and, once optimized, recommending their approval to the Minister.
- Advising the Minister on policy related to the taxation powers of First Nations.
- Assisting First Nations interested in developing taxation bylaws.
- Fostering harmonization between taxation by First Nations and by other authorities.
- Hearing from taxpayers whose interests are affected by taxation under Section 83, and considering information from such hearings in making recommendations to the Minister.
- Advising the Minister on means to improve the administration of the Minister's statutory responsibilities under Section 83.
- Ensuring First Nation tax bylaws are properly and adequately promulgated, and the context of the bylaws are accessible to the public through the publication of the *First Nations Gazette*.
- Continuing discussions with departmental officials on the Board's further development in the area of new fiscal relations between First Nations and Canada.
- Working with the Minister to develop legislative proposals for the establishment of a permanent body, which may include the Board as a statutory institution of self-government.

### *Membership*

The five-member Board is composed of respected members of First Nations who possess knowledge and experience in the areas of First Nation government, intergovernmental relations, property taxation, reserve land development, economic development and the provision of government services. Each has been given a mandate by their regional/provincial political organization to serve as a member of the Board and to reflect the various perspectives of First Nations across the country.

Each member was appointed by the Minister in December 1998 for a term of three years. The members are:

- Chief Clarence (Manny) Jules (Chair), Kamloops Indian Band, British Columbia
- Strater Crowfoot, Vice-Chair and Rates Committee Chairman, Siksika Nation, Alberta
- David Paul, Tobique First Nation, New Brunswick
- Chief William (Bill) McCue, Chippewas of Georgina Island, Ontario
- Ricky Fontaine, Innu Takuaikan Uashat mak Mani-Utenam (Sept Iles), Quebec.

### ***Process***

The Board has established policies, precedents and procedures regarding bylaw development, enactment, approval and implementation, including bylaw enforcement and assessment appeal procedures.

Although all real property taxation systems are built upon the twofold foundation of the *tax base* and the *tax rate*, taxation of property by First Nations has raised unique concerns:

- the fact that non-Indian ratepayers cannot vote in First Nation elections means that differences in perception often exist between First Nations, ratepayers and municipal, provincial and federal authorities. These differences affect how each views their relationship with each other, how they view tax and how they view land;
- the differences between the fiscal situation of a First Nation and that of a nearby municipal property taxation authority within a province may result in a requirement to establish quite different rate structures;
- voting, which ordinarily acts as an influence on rates, will give way to other mechanisms which will gain greater importance to ensure taxpayer interests are considered.

Recognizing these issues, the Board has established a Rates Committee with the mandate to review each First Nation's proposed annual rates bylaw with the objective of *balancing the need to respect ratepayers' rights to fairness and equity with the need to respect the accountability of First Nation governments to their citizens and inhabitants.*

Moreover, all bylaws proposed under Section 83 are reviewed to ensure conformity with the Charter of Rights and Freedoms, conformity with enabling legislation, comprehensiveness, equity and natural justice, fairness, adequacy of notification and appeal procedures and the absence of ministerial liability.

In addition, when formulating recommendations to the Minister, a comprehensive analysis of issues reflecting the perspectives and interests of First Nations, ratepayers and other affected parties is conducted. First Nations governments must provide evidence that they have consulted with potential taxpayers and other governments, and that all reasonable measures have been taken to ensure that there will be an orderly transition to the First Nation taxation regime. Furthermore, when necessary, ITAB requests comments from the appropriate federal government departments or sectors within DIAND in order to provide the Minister with the assurance that all interests and perspectives have been considered.

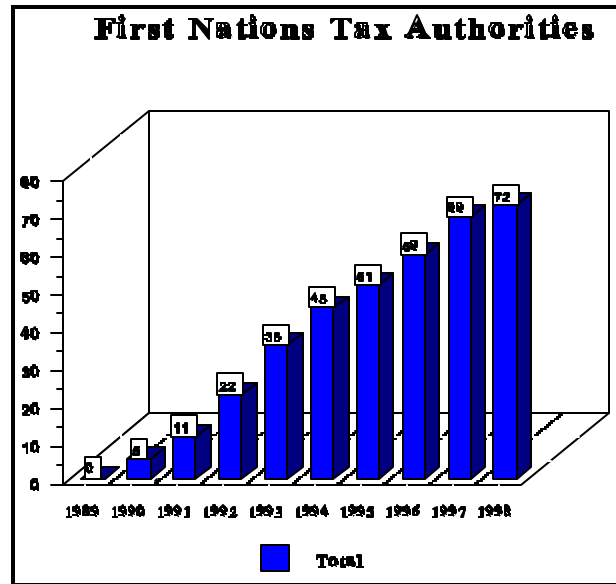
### *Support*

The Board is supported by a staff of ten employees, five in the Western Office (which also houses the Office of the Chairman) in Kamloops, and five in the Eastern Office in Ottawa. The staff provide professional and logistical support, and assist the Board by reviewing proposed taxation bylaws and developing related policy. The Board is also supported by a network of specialized consultants and First Nation advisors who contribute to various Board initiatives.

**PERFORMANCE**

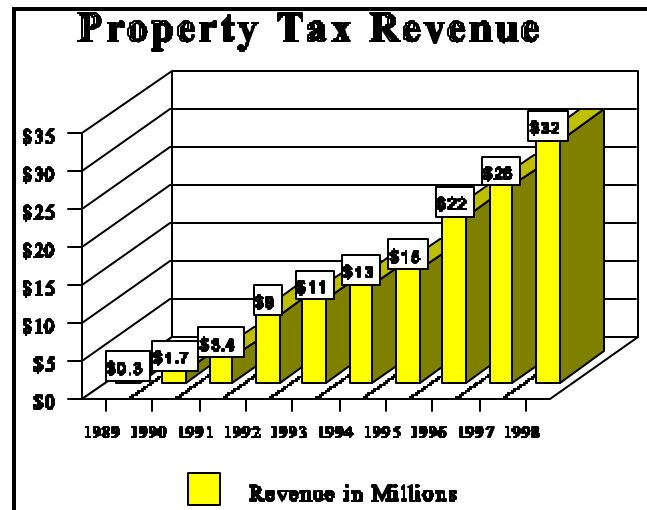
**First Nations Tax Authorities**

The number of First Nations that have enacted property taxation bylaws continues to increase annually, with seventy-two as of December 31, 1998. Over 12 percent of First Nations in Canada are now levying property taxes on reserve.



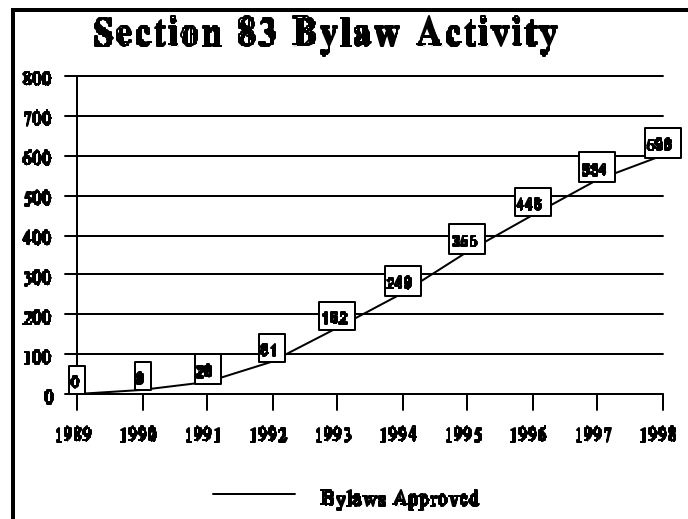
**Property Tax Revenues**

Revenue from on-reserve property taxation has grown steadily since 1989. ITAB has estimated that First Nation annual revenues from taxation exceeded \$32 million for the 1998-1999 period. Since 1989, more than \$132 million has been generated through property taxation on reserve.



### Section 83 Bylaw Activity

Since the amendment of the *Act* with the passage of Bill C-115, the number and variety of bylaws processed by the Board each year, and approved by the Minister, have steadily expanded. By the end of 1998, ITAB had processed 596 bylaws covering areas such as property taxation, assessment, rates, expenditure, business licensing, financial administration, telephone companies and other related amendments.



### **Accountability**

#### *Policy Development*

Clear policy objectives provide ITAB, its clients, government and other interested parties with accountable and transparent property tax systems based on national standards. These standards reduce distortions among the various First Nations tax systems and provide the basis for capacity development.

The six ITAB policy objectives are:

1. **Protecting and defending First Nation property tax jurisdiction.** Challenges to First Nation property tax jurisdiction come from municipal, provincial and federal jurisdictions and the courts. ITAB policy must constantly evolve to respond to these challenges.
2. **Encouraging economic development by First Nations.** Policies should promote tax administrative capacity and tax expenditure efficiency and increase local returns to investment through tax rate certainty.
3. **Supporting the expansion of First Nation revenue jurisdiction.** Creating trust and capacity in First Nation property tax systems will facilitate future First Nation expansion into other revenue-raising jurisdictions.

4. **Balancing the various interests affected by First Nation property tax systems.** The interests of the First Nation government levying property taxes should be reconciled with the interests of the taxpayers.
5. **Protecting the integrity of the First Nation property tax system.** Systems should seek to ensure that the tax policies of one First Nation do not harm the tax policy environment of another First Nation.
6. **Promoting administrative efficiencies in the First Nation property tax system.** Tax policies should not unduly raise property tax administrative costs, but rather, should lower these costs if possible.

### ***Budget-Based Real Property Tax Rates Policy***

This amendment to the rates policy enhances the transparency and accountability of Band Council expenditures to First Nation community members and provides the non-voting taxpayer with an accounting of, and rationale for, the expenditure of their real property tax monies. It was adopted to ensure that real property tax rates are based upon an annual property tax expenditure plan derived from a duly approved Band Council budget.

### **Capacity Building**

#### ***Education and Training***

ITAB has recognized that the management of real property taxation is an emerging speciality within the growing field of First Nation governance. A broad set of skills is required to undertake bylaw management and maintenance of revisions, rates, assessment, appeals, financial management, budgeting and communications with community members and taxpayers on an ongoing basis. However, institutional training in these subject areas specific to First Nations has not been available. To fill this vacuum, ITAB worked in partnership with the University of Victoria to develop courses designed for First Nations tax administrators. The School of Public Administration now offers a course on *Property Tax Policy and Administration* both as a university credit and as a non-credit professional development seminar for experienced administrators. A one week seminar was held in Victoria from November 3-7, 1998.

#### ***First Nation Tax Administrator Training Initiatives***

The implementation of the new budget-based real property tax rates policy requires retraining tax administrators in the 72 First Nations with real property taxation regimes and helping them convert their

tax compilation methodologies. *Real Property Tax Rates* training course was developed to teach First Nations taxation administrators the skills required to implement the policies, methodologies, systems and software operations of budget-based real property taxation. Two courses were held in 1998 at the University College of Caribou, Kamloops, BC.

The development of the course included writing and producing comprehensive training manuals as well as designing new computer software. Research for its design was aided by meetings with the First Nation communities of Westbank, Sliammon, Tsawout and the Sto:Lo Nation.

### **Enhancing Jurisdiction - Taxation of Utilities**

#### ***New Bylaws enacted under Section 83 of the Indian Act***

The Board has undertaken the initiative of implementing discussions and negotiations with Public Utilities at the provincial level to expand potential revenue sources on behalf of all First Nations.

#### **Ontario Hydro**

The 1994 negotiations between ITAB and Ontario Hydro resulted in the creation of an Aboriginal Payments-in-Lieu of Taxes (PILT) program. At that time, unlike municipalities, First Nations were not given grants in lieu of taxes for Ontario Hydro assets located on their land. The PILT program resolved this inequality. ITAB and Ontario Hydro jointly developed a sample funding agreement which individual First Nations could use to access the PILT program.

In total, thirty-one First Nations are eligible for funding. Of these, seventeen have either signed agreements or are in negotiations. Payments since 1996 have been in excess of \$1,000,000.

#### **Bell Canada (Ontario)**

As an incorporated public utility, Bell Canada is governed by the *Ontario Municipal Act* in the conduct of its activities. The *Act* requires Bell Canada to return five percent of the gross receipts collected from telephone users to their respective municipal governments. Neither the *Ontario Municipal Act* nor the *Indian Act* clearly indicated that the Corporation was to treat First Nations in the same way.

ITAB concluded negotiations with Bell Canada in 1995, wherein the Corporation agreed that a First Nation bylaw enacted under Section 83 of the *Indian Act* and approved by the Minister would be the authorizing legislation required to make a gross receipts disbursement to an individual First Nation government. ITAB and Bell Canada developed a mutually satisfactory sample bylaw which is now available to all First Nations.

Under this bylaw, 127 communities in Ontario are eligible for an overall revenue potential of approximately \$1,000,000 annually. Seven communities have enacted legislation and another twenty-four Treaty communities have entered a special group agreement.

## COMMUNICATIONS

Two major objectives of the Board — creating awareness and understanding of First Nations jurisdiction to tax real property on reserve and reducing potential friction with affected ratepayers and local governments — are achieved through a variety of communications strategies.

### 1. Creating Awareness and Understanding

#### *Partnerships and Networks*

The Board has established partnerships and networks with a number of regional and national institutions including:

- Assembly of First Nations
- Native Law Centre, University of Saskatchewan
- Federation of Canadian Municipalities
- Canadian Energy Pipeline Association
- British Columbia Assessment Authority
- First Nations Tax Administrators' Institute
- First Nations Financing Authority
- Harvard University, Consensus Building Institute (CBI)

#### *First Nations Gazette*

The *First Nations Gazette*, launched on Aboriginal Day, June 21, 1997, is published twice annually as a joint partnership between ITAB and the Native Law Centre at the University of Saskatchewan. The *Gazette* is the authoritative vehicle by which legal notice is given to the public of First Nations legislation. Publication on a regular basis is intended to increase awareness of Indian taxation initiatives among First Nations and the general public, and to assist First Nations in the enforcement of their tax

laws by ensuring that regular notice is provided and that a register of all current tax bylaws is readily available. The target audience is the judiciary, members of the legal profession, First Nations and their citizens, provincial and municipal governments, ratepayers and academic institutions. The *First Nations Gazette* is actively marketed on a subscription basis with the goal of becoming financially self-sustaining.

### ***Centre for Municipal-Aboriginal Relations***

The Centre for Municipal-Aboriginal Relations (CMAR) was established in 1997. A joint initiative of ITAB and the Federation of Canadian Municipalities (FCM), the Centre is guided in its operations by a Steering Committee comprised of representatives from both ITAB and the FCM.

The Centre's primary objective is to promote effective relations between First Nations and municipal governments based upon the principles of mutual recognition, respect, sharing and mutual responsibility. An example of this was CMAR's participation with the National Association of Friendship Centres, the Aboriginal Council of Winnipeg and the Institute of Governance in the organization of the national conference "Closing the Circle - Aboriginal Governance in Urban Centres" held in Winnipeg from November 3-5, 1998.

In addition to participating and sponsoring problem-solving workshops and conferences, effective relations are also promoted by documenting and communicating effective "best" practices, as well as researching contentious issues and documenting solutions. CMAR has published several reports on municipal-aboriginal relationships, completed a national survey of FCM members regarding municipal-aboriginal relations in Canada and developed a website ([www.cmar-crma.org](http://www.cmar-crma.org)).

### ***Clearing the Path***

ITAB's newsletter, *Clearing the Path*, continues to be published regularly to keep First Nations informed of the evolution and issues challenging the implementation of real property taxation on reserve. The circulation base of the newsletter is now approaching 1,900.

### ***ITAB on the Internet***

Additions and improvements to the information on ITAB's website (<http://www.itab.org>) continued in 1998-1999. The site now contains the following information:

- ITAB's Mandate
- 

ITAB-DIAND  
Memorandum  
of

## Understanding

- ITAB Services
- Policies and Procedures
- ITAB Board Member profiles
- Sample bylaws (available for downloading)
- Frequently asked questions and answers (FAQ)
- Press Releases
- Annual Reports
- Back issues of “*Clearing the Path*”

***Advocacy***

To raise First Nations’ awareness of taxation issues and build their capacity to implement taxation regimes, the Board continued with its advocacy initiatives across Canada, primarily through workshops, seminars and presentations.

The goal is to impart a better understanding of property taxation on reserve. For many communities, taxation is an entirely new philosophy and requires time for discussion and reflection.

***Public Education***

Special information presentations regarding real property taxation on reserve were requested from the Board by:

- First Nations Tax Administrators’ Institute, BC;
- Council of Yukon First Nations, YT;
- University of Victoria, BC;
- University of Ottawa Law School, ON;
- Ocean Man First Nation, SK; and
- Interprovincial Tax Conference, BC.

## 2. Reducing Potential Friction with Affected Ratepayers or Local Governments

***Service Agreements***

The smooth transition and transfer of real property jurisdiction to First Nation control is one of the Board’s highest priorities. The concept of a First Nation administering the taxation of real property on

reserve continues to be a controversial and sensitive issue. The process of reaching an agreement between a First Nation and a municipal government for the continuation of services to taxpayers on reserve, and the resulting fee structure, can be complex.

ITAB supports the harmonious development of service agreements between First Nations and adjacent tax jurisdictions, and offers mediation and facilitation services for that purpose. Requests have been received from First Nation governments, municipalities, provincial governments and the Minister of DIAND for assistance in resolving disputes stemming from service agreement negotiations and taxation issues.

A new First Nation property tax regime will, in many cases, replace the previous provincial or municipal property tax system in the collection of revenues and the delivery of services to lessees on First Nation land. Since most First Nations do not have the service delivery infrastructure or capacity required, a service agreement is necessary to continue providing the same level of services to taxpayers.

To assist in these processes, ITAB sponsored the School of Public Administration at the University of Victoria in the development of *A Background Paper on the Essential Components of Service Agreements*. The document is used as an authoritative reference to assist First Nations engaged in service agreement negotiations.

One tool which has proved to be highly effective in this area is the specialized *Service Agreement Software*. The software was developed and copyrighted by ITAB for calculating tax equivalent costs for 34 services and is now widely used by First Nations in calculating the true cost of providing services to taxpayers. The *Service Agreement Software* application has been updated to be compatible with Windows 95 and is now Y2K compliant.

### ***Residential Tenancy Act (British Columbia)***

Representatives from ITAB, the Attorney's General Office of British Columbia, and DIAND's BC Regional Office, met to consider options for the protection of third party tenants on reserve lands. As a result of this meeting, it was agreed that ITAB would host and chair a series of workshops and meetings with stakeholders, sponsored by DIAND and the provincial government. The Residential Tenancy Steering Committee includes representatives from First Nations, resident tenants of First Nations, DIAND and the province of British Columbia.

The third in the series of these workshops was held at Kelowna, BC, on December 2, 1998. ITAB will continue to work on the residential tenancy issue as it addresses some of the concerns raised by First Nation taxpayers with respect to dispute resolution and "taxation without representation". A number of requests from First Nations for information and possible workshops outside of British Columbia have been received by the Board, reflecting the national scope of this issue.



### ***Musqueam Indian Band Property Taxation/Lease Issue***

The Board has been working closely with both the Musqueam Indian Band and the Musqueam Park Residents' Association in an attempt to resolve some of the controversy around this property taxation/lease issue since the federal court decision in December 1998. The ITAB Chairman met with the Musqueam Chief and Council in January and with the leaseholder representatives on three occasions in January and February. All parties are supportive of ITAB's role in facilitating dialogue and exploring possible solutions to some of the issues, particularly the "taxation and representation" issue.

## **MEDIATION AND NEGOTIATION**

ITAB is often called upon to mediate disputes between First Nations and public utilities, commercial/industrial entities, agricultural interests, and non-First Nation residents. These disputes may be over service agreements, assessments, government accountability, the expenditure of tax monies, new tax rates or increases in tax rates.

In the past year, ITAB has convened meetings with:

- Westbank First Nation and Lakeridge Tenants' Association;
- Adams Lake Indian Band and a concerned ratepayer;
- Tsawwassen First Nation and Corporation of Delta;
- Burns Lake Indian Band and Village of Burns Lake;
- Tobacco Plains First Nation and Edwards Lake Ratepayers' Association;
- BC Hydro and 19 First Nations to negotiate grants-in-lieu of taxation; and
- Musqueam First Nation and Musqueam/Salish Park Residents Association.

### **Harvard University - Consensus Building Institute Negotiation Workshop**

Both ITAB and the Canadian Energy Pipeline Association (CEPA) realized that First Nation communities and the energy industry face a changing environment due to self-government and continued industry growth on reserve. These two factors have the potential to create tension and conflict due to different objectives surrounding land use and property taxation. Although these issues pose many challenges, they also provide an opportunity to establish new methods for resolving differences and forging relationships based on a mutual gains approach.

The MIT-Harvard Public Disputes Program has developed a powerful and proven process for avoiding conflict and building lasting relationships between groups with different objectives. It is based on mediation and negotiation techniques pioneered at the Program on Negotiation at Harvard Law School.

Representatives of ITAB and CEPA worked with Professor Lawrence Susskind, Director, MIT-Harvard Public Disputes Program to develop a customized workshop entitled *Mutual Gains Approach to Building Positive Relationships*. The workshop proposed new methods for resolving differences and forging relationships based upon an approach of mutual gains for both First Nations and Canadian oil and gas companies.

The first workshop, held at Lake Louise, Alberta, on November 2-3, 1998 was deemed a success by the participants from First Nations, the energy industry and the federal and provincial governments. Based on this success, the workshop may be held on a regular basis.

ITAB asked a professional First Nations video recording company to produce an educational videotape of the *Mutual Gains* workshop. The objective was to produce a permanent record of the key steps for avoiding conflict and building lasting relationships between groups with different objectives and goals. The video record is intended to serve as an educational tool for future workshops and provide an informative summary for those who could not attend.

### ***ITAB Mediation Program Development***

ITAB has developed a number of processes that have proven to be effective in taking on its role as a neutral third party in the resolution of disputes between First Nations, municipal governments, provincial governments and First Nation taxpayers. With the expansion of taxation to more than 70 communities across Canada, there is greater pressure on this mediation service. In 1998-99, the Board identified the need to establish mediation procedures and standards that can be used to guide Board members and staff in dispute resolution across the country.

With the assistance of the Consensus Building Institute (CBI) at Harvard University, ITAB is attempting to formally establish a mediation program that will provide the basis for third party neutral intervention to be used to resolve tax-related disputes. This will include seven phases:

- mediation program planning and partnership session;
- curriculum and specialized mediation training course development;
- formal training for intervenors and mediators;
- mediation policy development, including standards and procedure guidelines;
- the creation of a roster of mediators;
- development of communications materials for First Nations and First Nations taxpayers; and,
- annual mediation assessment and review process.

Phase one is underway. The partnership arrangement with the Canadian Energy Pipeline Association that successfully produced the *Mutual Gains Approach to Building Positive Relationships* workshop is being considered, along with the benefits of continuing an ongoing working relationship between ITAB

and the CBI. The partnership session will provide for an exchange of views related to third party intervention and the role that ITAB can play in dispute resolution issues. It will be conducted in a workshop format at Harvard and facilitated by CBI staff, including Professor Susskind. The results of this workshop will finalize the project requirements, confirm the work plan and conclude the terms for academic services.

## **POLICY IMPLEMENTATION**

### ***National Property Taxation Rates - Policy***

The amendment to the ITAB Rates Policy in 1998 means that all First Nations with real property taxation regimes approved under Section 83 of the *Indian Act* must by 2002 base tax rates upon an annual property tax expenditure plan derived from an approved Band Council budget (a budget-based methodology). Currently, First Nations can adopt one of two methods to set their annual tax rates: the “comparative method” whereby a First Nation will adopt the same tax rate structure as set by a neighbouring municipal jurisdiction; or, the setting of budget-based tax rates. Under the latter method, a First Nation calculates tax rates for each class of property, which are then applied to the assessed values to yield the required level of tax revenue as determined by the budget-setting process. Virtually all municipalities in Canada determine their taxation rates through a budget-setting exercise.

The setting of property taxation rates based upon a property tax budget enhances the autonomy of First Nation governments and at the same time, better reflects the local conditions driving tax revenue requirements. Most importantly, it provides the non-voting taxpayer with an accounting and a rationale for the required levels of property tax revenues and for the expenditure of these monies.

### ***National Real Property Assessment - Policy Development***

The Rates Committee is reviewing the feasibility of developing a national real property assessment policy for First Nations. The absence of a Canadian national standard for both assessment methods and assessment appeals processes makes the development of a First Nation policy very challenging. Provincial jurisdiction in this field results in a wide variety of property valuation methods. A national policy must reflect First Nations values, yet be flexible to reflect the legislative and policy differences between provinces. At the same time, an assessment policy must enable an individual First Nation to set rates based on its own budget/expenditure requirements. In the context of fairness to taxpayers, as well as attracting new economic and commercial enterprises to locate on the reserve, First Nation assessments and tax rates should be equitable with those of their neighbouring municipal jurisdiction.

A twofold approach is being pursued:

1. The first would apply to properties where a market value method is easily applied. Under this approach, the key evaluation guideline of a First Nation's proposed assessment method is the degree to which it conforms to the market value assessment systems used by neighbouring jurisdictions. The ideal situation would have First Nations adopting the identical assessment methods.
2. The second approach must be developed for properties which are difficult to assess using market value techniques. These properties can be referred to as non-market value properties and would include "linear" properties (e.g. rights-of-way interests held by railways, pipelines, telecommunications and power corporations) and other types of "special" properties, such as agricultural, forest, industrial resource or recreational properties. For these properties, policy guidelines must be developed to evaluate alternative assessment methods as advanced by First Nations.

Discussions are underway in British Columbia with the BC Assessment Authority and the Ministry of Municipal Affairs to assess the practicality of developing a policy that will accommodate the different provincial systems of assessing real property while still remaining responsive to First Nations' requirements.

### ***Minimum Taxes and Manufactured Homes***

The cost of providing services to properties that have low assessed values, usually trailers or manufactured homes, often exceeds the tax revenues received from these properties. In most municipal property tax systems this problem is alleviated by cross subsidization from properties with higher assessed values or from higher tax rates on other classes of properties.

The problem is particularly acute for First Nations with a tax base dominated by manufactured homes. The problem is further exacerbated on residential lands that do not have improvements and thus have low assessed values. Many of these First Nations have implemented a minimum tax system to offset the cost of services. The purpose of minimum taxes historically has been to cover nominal taxation administration costs (usually \$100) and not to pay for services. A minimum tax distorts the relationship between assessment-based taxation and tax rates. As well, a minimum tax used for the payment of services has no reference point in Board policy.

The collection of minimum taxes has been raised with a number of First Nations which now recognize the importance of staying within the assessment-based taxation system. However, pressures to reach a practical solution are mounting as a result of the increasing costs of providing services to these types of

properties. ITAB is currently examining the possibility of creating a separate property class for manufactured homes. A working committee will be established in 1999 with participants from ITAB, First Nations and taxpayers to hold discussions with the British Columbia Assessment Authority. The objective will be to create a separate assessment class for manufactured homes and develop the requisite policies.

## NEW FISCAL RELATIONSHIPS

### *Fiscal Relationships: National Table*

ITAB fully endorsed the recommendation of the Royal Commission on Aboriginal Peoples (RCAP) that a new fiscal relationship between First Nations and the Government of Canada be established. Encouraged by the position of the federal government in *Gathering Strength*, the Assembly of First Nations passed two resolutions concerning fiscal relations, one establishing the principles to which the AFN wished to adhere, the second creating a mandate within the AFN to establish a Chief's Committee on Fiscal Relations and a National Round Table.

ITAB, in keeping with its mandate, agreed to undertake a Canada-wide consultation process with First Nations leaders regarding the development of a new fiscal relationship. The Board coordinated a national *First Nation Fiscal Relations Process* meeting in October 1998, under the chairmanship of Chief Jules and AFN Vice-Chief for British Columbia, Herb George. Participants included the AFN Executive, representatives from the various First Nations regional processes (currently negotiating or working towards a new fiscal relationship) and observers from a wide variety of government and other organizations. The workshop was designed to stimulate discussion about a new fiscal relationship and possible roles for a national table.

Participants overwhelmingly supported the development of a new fiscal relationship and the creation of a national fiscal table as a necessary step to improve conditions on reserves and promote economic growth.

### *Expanding Commercial Activity on First Nation Land*

ITAB and the Research and Analysis Directorate within DIAND is co-steering a study entitled *Expanding Commercial Activity on First Nation Land with a New Fiscal Relationship*. The objective is to identify those elements of the current fiscal relationship that raise the cost of doing business on reserve and thereby lower the return to investment on reserve. All specific barriers to investment, an estimate of their costs and the specific causal factors behind them, will be identified and categorized.

The analysis will include a review of all background materials for *Gathering Strength*, the economic development literature associated with the Royal Commission on Aboriginal Peoples and previous studies conducted by DIAND, Aboriginal Business Canada and First Nations organizations. It will also consolidate previous research on the factors that prevent investment and business location on First Nation lands.

The study, which will be completed by November 1999, will identify strategies to make First Nations more attractive for business investment by improving the productivity of the regulatory environment.

### ***First Nations Finance Authority***

Representatives of the First Nations Finance Authority (FNFA) made a special presentation to ITAB in June 1998 to provide ITAB members with an overview of the FNFA, its long term goals, and the obstacles to its continued development. The FNFA also sought financial, administrative, marketing and political support from ITAB.

The FNFA is a First Nation institution that aims to provide investment and capital-raising services to First Nation governments for a small service fee. The goal is to raise the rate of return on invested monies for First Nation governments and greatly expand their access to capital. It is modelled after the British Columbia Municipal Financing Authority (BCMFA), which borrows on behalf of BC municipalities and generates considerable savings for them, especially for smaller communities. The BCMFA is supplying considerable technical expertise and support to the FNFA, which has also received start-up support from the federal government.

The goals of the FNFA support the goals of ITAB. The capital-raising function of FNFA through bond issues could significantly increase the number of First Nations able to use property tax revenues to finance infrastructure improvements to their communities. ITAB views the goals of the FNFA as an important complement to First Nation governance and fiscal ideals.

## **RESEARCH**

### ***Fostering Harmonization - Government Accountability Regimes***

ITAB, at the request of DIAND's Transfer Payments Directorate, conducted a special study entitled *Accountability Regimes, A Comparison of Municipal Governments Frameworks to that of First Nation Governments*. The objective of the study was to analyze current trends in accountability frameworks for municipal governments, assess the applicability of municipal accountability regimes to First Nation governments and identify specific components of regimes that could be adopted by First Nation governments.

The study encompassed a detailed review of accountability regimes and trends in provincial/ municipal and also provincial/non-governmental organization relations in British Columbia, Alberta and Newfoundland. It documented and assessed municipal government experiences with ISO 9000 and the extent of municipal government compliance and certification. The study also included interviews with personnel at the Canadian Standards Council.

### *Jurisdictional Legal Issues*

Constitutionally and historically, the ability to levy taxes on real property belonged solely to the provinces. This changed with the passing of the amendment to Section 83 of the *Indian Act* in 1988, which enabled First Nations to pass bylaw legislation to levy real property taxes on reserve land. The federal government, consequently, had no legal precedent, experience or capacity to manage this jurisdictional area. Numerous legal issues and challenges have arisen over this potential jurisdictional duplication, many of which have been resolved through ITAB's active intervention.

As First Nations establish their taxation jurisdiction, legal issues - some in varying stages of consideration before the courts or under negotiation - continue to emerge. These include land title challenges, discrimination and disputes over rights-of-way.

#### **(a) *Rights-of-Way***

The Board has provided leadership on the rights-of-way issue through legal and historical research and by providing notice and analysis of emerging legal developments and significant court decisions affecting First Nations taxation powers.

Recent cases of relevance include *St. Mary's Indian Band v. City of Cranbrook*, *Matsqui Indian Band v. Canadian Pacific*, *Opechesah Indian Band v. Canada*, *Delgamuukw v. British Columbia*, *Westbank First Nation v. British Columbia Hydro*, and *Union of New Brunswick Indians v. New Brunswick (Minister of Finance)*. In fact, all court decisions are reviewed to ensure that Board policies are in keeping with the developing case law.

#### **(b) *Intervenor Status***

**Protecting Jurisdiction:** ITAB will, in specific precedent-setting cases which may affect First Nations' jurisdiction of real property taxation on reserve, seek leave to appear before the Court with *intervenor status* to defend First Nation property tax jurisdiction. ITAB, with its knowledge, experience and history of First Nations real property taxation, is able to provide the court with authoritative evidence and information which others may not have. Two cases before the courts at this time in which ITAB has been granted *intervenor status* are:

- *Matsqui Indian Band et al. v. Canadian Pacific Limited*; and
- - *Matsqui Indian Band et al. v. Canadian National Railway*  
and  
*Kamloops Indian Band et al. v. Canadian National Railway*

## **CHALLENGES CONFRONTING FIRST NATION PROPERTY TAXATION**

### **First Nation Taxation Authorities**

The challenges to First Nation governments with property tax systems are the formal establishment of their tax jurisdiction, maintaining their tax system, providing services to taxpayers, and realizing the benefits that can be derived from the exercise of this jurisdiction.

### **First Nation Taxpayers**

The primary challenges to on-reserve property taxpayers and investors are stability and receiving services appropriate for their tax dollars, at fair cost. In a municipality, regulatory guidelines ensure stability and appropriate services. Taxpayers can also vote out of office any government that does not deliver. While taxpayers' interests cannot be met through the privilege of voting in First Nation elections, they still want and deserve reassurance that their primary interests will be served, regardless of changes in First Nation governments.

### **Federal Government**

The federal government is also a stakeholder in the First Nation property tax system. It passed the legislation that established the system and has an active interest in its success. The federal government wishes to see an administratively sound and fair system that delivers economic opportunity to First Nations, supports self-government and enhances the Canadian economic and social union.

## **RESPONDING TO CHALLENGES**

### **First Nation Taxation Commission (FNTC)**

Much thoughtful debate by the Board has been devoted to responding to the challenges confronting First Nations property taxation.

Supported by consultation with First Nation tax authorities, and the interest of DIAND and the Senate Committee on Aboriginal Peoples, the next step in the evolution of the Indian Taxation Advisory Board is the creation of the First Nation Taxation Commission (FNTC). The delegated authority of ITAB will be replaced by a new statute-based FNTC. The FNTC will employ a strategy that reconciles the interests of First Nation tax authorities, taxpayers and the federal government. This strategy will also be consistent with the objective of further asserting First Nation jurisdiction and promoting stronger, healthier First Nation communities.

A principal objective of the FNTC will be to protect the integrity of the First Nation tax system and thereby increase its value to First Nations and taxpayers. The FNTC can do this by ensuring administrative efficiency, preventing disputes and generally reconciling the seemingly divergent interests of taxpayers and First Nation tax authorities. Many disputes result from a failure to fully realize the potential of reconciliation. A core function of the FNTC will be constant communication and consultation with all affected parties. Stakeholder groups will be represented on the FNTC to ensure that this happens.

The reconciliation of interests becomes possible if the primary objective of First Nations is viewed “as what is best for the collective future of all First Nations”. In fact, this allows the interests of taxpayers, investors, the federal government, and First Nation tax authorities to be served by essentially the same strategy: building an attractive investment climate on-reserve.

This strategy serves First Nations best because it generates the highest social and economic returns from property tax. What can be earned from new investment far outweighs the value of additional funds drawn from the existing tax base. New investment means new taxpayers, an increase in the value of the tax base, higher lease revenues and most importantly, social and economic improvements resulting from new job and investment opportunities. This strategy also demonstrates the benefits of First Nation jurisdiction and hence builds a sound political base for self-government and the expansion of First Nation tax jurisdiction.

The strategy serves taxpayers because it protects the value of their investment. The guarantee of quality services at a fair price over the life of their investment is precisely what taxpayers want.

The strategy serves federal interests because it creates jobs and economic self-sufficiency in First Nation communities. The federal government also wishes to avoid self-government developing in a way that entails a patchwork of different regulatory regimes across the country. This compromises their interest in maintaining the economic union. If First Nations seek to attract investment, then harmonizing regulations and standardizing administrative systems is also in their best interest.

The core strategy and rationale for the FNTC is to bring about this reconciliation of interests and allow First Nation property tax systems to be used as a lever for the economic development of First Nation communities.

The role of the FNTC is to do what individual First Nation governments require, but cannot accomplish individually. The FNTC will provide broad-based reassurance to investors that it can ensure administrative and regulatory harmony and stability and it will assure investors that it is responsible for sound administrative practices and efficiently providing essential services such as timely dispute resolution.

The FNTC represents another step on the path towards self-government: moving from an advisory body answering to the Minister to into a service agency for First Nations, taxpayers and other stakeholders. As a service agency, the FNTC will be a model of First Nation governance.