



# CLEARING THE PATH

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A First Nations Tax Commission Quarterly Publication

## *Tsilhqot'in Decision: Opportunities to expand jurisdiction and advance Aboriginal title and rights*

This past June, for the first time in Canadian history, the Supreme Court of Canada (SCC) granted a declaration of Aboriginal title to the Tsilhqot'in Nation. After the decision was announced, Mandell Pinder LLP published a comprehensive case summary highlighting key aspects of the decision.

*"Through this decision, the SCC confirmed that the terra nullius (no one owned the land prior to Europeans asserting sovereignty) has never applied to Canada, affirmed the territorial nature of Aboriginal title, and reflected the legal test advanced by Canada and the provinces based on "small spots" or site-specific occupation.*

*The ruling overturned a prior ruling of the Court of Appeal that proof of Aboriginal title requires intensive use of definite tracts of land and it also granted a declaration that British Columbia breached its duty to consult the Tsilhqot'in with regard to its forestry authorizations. This case significantly alters the legal landscape in Canada relating to land and resource entitlements and their governance.*

*The SCC definitively concluded the trial judge was correct in finding the Tsilhqot'in had established title to 1,750 square kilometres of land, located approximately 100 kilometres southwest of Williams Lake.*

*The Court reaffirmed and clarified the test it had previously established in Delgamuukw for proof of Aboriginal title, underscoring the three criteria of occupation: sufficiency, continuity (where present occupation is relied upon), and exclusivity were established by the evidence in this case.*

*The Court reasoned that Aboriginal title holders have the 'right to the benefits associated with the land - to use it, enjoy it and profit from its economic development' such that 'the Crown does not retain a beneficial interest in Aboriginal title land.'*

*Expanding on its reasons in Delgamuukw, the SCC concluded Aboriginal title confers possession and*

*ownership rights including:*

- *The right to decide how the land will be used;*
- *The right to the economic benefits of the land; and*
- *The right to pro-actively use and manage the land.*

*This case provides First Nations with significantly improved opportunities to advance their Aboriginal title and rights in a manner that reflects their vision, values and perspectives.*

*The SCC's decision essentially requires that the Crown and industry meaningfully engage with Aboriginal title holders when proposing to make decisions or conduct business on their territories."*

As a result of this ruling, the FNTC has undertaken research to examine how First Nation taxation jurisdiction under the FMA can be expanded. The research will lead to an examination of how tax jurisdiction under the FMA could be applied off-reserve but within traditional territories.

The Court's judgment has been described as a game-changer and the implications of the decision to ongoing and future work of the FNTC is exciting.



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## Message from the Chief Commissioner



Our goal, for the past 30 years, has been the implementation of our tax jurisdiction on our reserve lands. We have expanded our jurisdiction to include property taxes, sales taxes, development cost charges, property transfer taxes and business activity taxes. We continue to explore all of these taxes, as well as mining taxes and hotel taxes, with First Nations across the country.

The First Nations Tax Commission has developed considerable experience in resolving service agreements with other governments, supporting First Nation law development, developing supportive legislation, building software systems, delivering university accredited training and negotiating taxation agreements with the Crown and private utilities and railways. This experience could prove to be particularly valuable after the recent Tsilhqot'in decision, which complemented the *Delgamuukw* decision in the establishment of Aboriginal Title.

Over the summer, I had the pleasure of speaking with many First Nation leaders about the Tsilhqot'in decision and how it could be implemented. Many leaders spoke of the importance of extending our tax jurisdiction to our traditional territories and establishing a new fiscal relationship with provincial and federal governments. They spoke of using tax jurisdiction as the foundation to implement other jurisdictions in their traditional territories. These leaders also discussed the importance of having our own institutions to implement these jurisdictions.

These are exciting proposals with the potential to significantly expand First Nation tax jurisdiction to traditional territories. The First Nations Tax Commission is well positioned to help interested First Nations work toward implementing tax jurisdictions on reserves and in their territories.

Under FMA taxation First Nations have gained the experience and expertise to establish First Nation taxes and harmonize them with other governments. Over the past 20 years FNTC has undertaken research and development working toward new fiscal relationships, and we have begun to investigate the challenges and the necessary changes to implement an Aboriginal Title tax.

I strongly believe the foundation of our future fiscal framework is our tax jurisdiction. We have created our own institutions to help us implement that jurisdiction and ensure First Nations receive the maximum benefit from their tax system. The FNTC is looking forward to working with these interested First Nations to create a strong foundation for the future.

Sincerely,

C.T. (Manny) Jules  
Chief Commissioner

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## *Whitecap Dakota First Nation: Building an economy through jurisdiction*



*Founder's Statue in downtown Saskatoon commemorating Chief Whitecap as one of the founding fathers of the city of Saskatoon.*

Whitecap Dakota is a progressive First Nation with a proud culture, a strong sense of community and a passion for creating business relationships that support the community's economic vision. With a traditional territory that extends from Saskatchewan to Manitoba, south and west to the Great Lakes and the United States, Whitecap has a rich history filled with stories of the First Nation's involvement in defining moments in Canadian and American histories. In August, 1882, Chief Whitecap counseled John Lake on the location for a new temperance colony that would later become the city of Saskatoon and he is recognized as one of the city's founding fathers.

Whitecap's members have mandated their leadership to implement a nation-building vision geared toward strengthening community and building opportunity. To that end, Whitecap has created a land code under the federal government's *First Nations Land Management Act* that

allowed them to open the door to business with commercial and residential leases giving the First Nation the flexibility to meet the needs of investors.

As developers became interested in investing in Whitecap, the First Nation began looking into options for implementing property taxation to assist in the development of infrastructure. Whitecap held community meetings to consult with members, who ultimately voted in favour of implementing a property tax system as they had seen the economic success that the First Nation was already experiencing with an unemployment rate of 4.1%, down from 70% prior to the development of the land code.

Since implementing their property tax system, Whitecap Dakota First Nation has made significant improvements to the community's infrastructure and services, including upgraded power supply, signage, paved roads, street lighting, a fibre optic network, two water treatment plants, and a solid waste transfer station. Whitecap's property tax system has also allowed the First Nation to assert its jurisdiction as a government and develop and create jobs for their community members.

In 2013, Whitecap updated their property assessment and property taxation legislation by repealing their prior *Indian Act* by-laws and putting in place new laws more suitable to working under the FMA. Also, in conjunction with the planned infrastructure expansion, Whitecap is currently working with FNTC regarding implementing the first development cost charges law under the FMA in Saskatchewan. Much of the legal drafting on the new law has been done, but the law cannot be finalized until the new infrastructure has been designed and fully costed.

*Continued on Page 8...*

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## *Changes to taxation of agricultural properties in Saskatchewan*

At its meeting in September 2014, the FNTC amended its Standards for First Nation Property Assessment Laws and Standards for First Nation Tax Rates Laws to enable First Nations in Saskatchewan to establish an alternative mechanism to assess and tax properties in two agricultural classes: arable and non-arable.

The changes to the Standards were first proposed in October 2013 as a part of FNTC's public input process which involved input from assessment services providers and First Nations.

First Nations in Saskatchewan can now opt to tax agricultural properties on the basis of area (i.e., per acre), instead of on the basis of assessed value. This method of property taxation involves a First Nation setting a tax rate per acre for agricultural classes in its Annual Rates Law,

and then applying that rate against the number of acres leased/occupied. Under the changes, the First Nation's rate would be reviewed against the level of taxation in the First Nation's neighbouring jurisdiction. For example, if a First Nation's neighbouring jurisdiction collected \$200,000 from properties in an agricultural class and those properties totalled 100,000 acres, the tax rate a First Nation could apply would be up to \$2.00/acre in that class.

To establish this form of property taxation, First Nations will need to have enabling provisions in their Property Assessment Law. To assist with this, FNTC has developed sample Property Assessment Law provisions for First Nations to consider and use. Interested First Nations are encouraged to contact the FNTC to learn more about establishing this form of property taxation. ■



## Profile: Commissioner Leslie Brochu



FNTC Commissioner Leslie Brochu is the vice-president of marketing at Sun Rivers in a residential development in Tk'emlups te Secwepemc lands, near Kamloops, BC. Commissioner Brochu represents residential taxpayer interests in her role as Commissioner for the FNTC and has an extensive background in housing, land development and leasehold lending primarily on First Nation lands, as well as participating in taxpayer associations and developing

relationships between First Nations and their taxpayers.

*Clearing the Path* recently had the opportunity to sit down with Commissioner Brochu to talk about her experience and involvement with the FNTC.

### **Sun Rivers is often touted as a successful model of residential development on First Nation lands. Can you explain why?**

I think the success really stems back to the time spent in planning and the comprehensive nature of the agreements. One really fundamental piece is that the First Nation and Sun Rivers worked together for several years to develop those agreements. Consultants for Sun Rivers and the First Nation worked in tandem toward a common goal.

Another big part of the success has been the fact that while we don't have a taxpayer relations law, we have something very similar embedded in the master development and servicing agreement. The lease agreement itself sets out how taxes will be structured. It's clear, it's contractual, and it's public information that every person that buys is privy to. Then at the same time, we have a contracted relationship that outlines when we meet, how we meet, who meets and what's discussed at the meetings, which happen twice a year between the developer and the First Nation. Then the First Nation meets with the taxpayers at least annually to consult on rates and answer questions.

The relationship works because there is consultation at many levels throughout the year and the agreements are public and shared with purchasers. The First Nation is very good about communicating with taxpayers in terms of what the rates are going to be, how rates are structured and how they spend the money. The expenditure laws are published on the *First Nations Gazette* so anybody can see how the budgets are being used and managed and that gives taxpayers a lot of comfort.

### **How is the *First Nations Gazette* useful for taxpayers?**

The *First Nations Gazette* is an online service that has all of a First Nation's laws published in very short order after they are approved. If taxpayers ever have any questions about the tax laws of a First Nation, they can visit the FNG website and see similar laws that guide municipalities in terms of how they structure their tax regime. That provides a lot of security and comfort to taxpayers that are thinking about investing on First Nation land. It's an excellent resource for taxpayers.

### **What are the main elements of a strong relationship between taxpayers and First Nations?**

The biggest one is that there is clarity around the relationship - what is the purpose of tax, what are the obligations of tax and how is the tax used? There needs to be transparency and accountability, as well as a plan for communication and how taxpayers are consulted. I really believe if the structure is set up and there is transparency, as well as regularity around communications and consultation, that it sets the stage for a very successful relationship.

### **What are some of the biggest concerns residential taxpayers on First Nation land have?**

I think the biggest concern is the perception that they may not be treated fairly because they don't have the right to vote. They want to ensure they have the opportunity to be heard and consulted with on matters that affect them. Taxpayers also want to know there's adequate protection within legislation around how tax rates are structured.

### **Tk'emlups te Secwepemc taxes under the FMA, how does that legislation support taxpayer interests?**

The FMA is designed to serve both First Nations and their taxpayers. The legislation is clear and thorough and provides structure around how taxes are set. There are also regulations around how the relationship between taxpayers and the First Nation will be conducted. Further, laws developed under the FMA set up the consultation and communication structure.

### **How are disputes between taxpayers and First Nations best resolved?**

The best way is through consultation and discussion and trying to arrive at a mutually-beneficial resolution. First, the parties should be able to talk about issues. If we've done a good job from the start in terms of setting out the structure and communicating it, and we're open and transparent and people understand it, most disputes should be able to be resolved by the parties. When that can't happen, the next option would be some kind of mediated resolution. The last resort would be arbitration and then going to court. ■

## *Pre-Budget Submission: FNTC recommends new approach to First Nation Fiscal Accommodation for Resource Projects*

The First Nations Tax Commission submitted its Pre-Budget Submission for the 2015 federal budget. In its submission for the upcoming year, FNTC emphasizes the importance of creating a connection between resource projects on First Nation traditional territory and the fiscal resources made available to that First Nation.

FNTC's Pre-Budget Submission recommends a new approach be taken in addressing First Nation interests in resource and resource infrastructure development. Canada needs strong investment in resource development to financially sustain government programs, to provide quality jobs that support families, and to provide opportunities in remote regions.

First Nation participation is needed to create and sustain a strong investment climate. First Nations cannot fully participate until they are better able to share in the fiscal benefits generated by resource development. Accommodating First Nation interests with resource development will help balance the budget, ensure fiscal sustainability, and provide opportunities to all Canadians.

The FNTC proposes to work with the federal government to make a fiscal accommodation work. The FNTC, and its predecessor Indian Taxation Advisory Board, has a long history of working with First Nations in establishing First Nation taxation and related fiscal issues.

With its broad base of knowledge of the unique fiscal issues that arise at the First Nations/provincial level, the FNTC could help facilitate agreements between provinces and First Nations. The FNTC's work on service agreements and First Nation expenditure laws is particularly important in this regard.

Working with the FNTC, more than 150 First Nations have successfully developed property tax systems. Many of these First Nations have since entered into service agreements with local and provincial governments that have given all parties a stake in bringing investment to their region.

The FNTC's submission addresses four key issues regarding fiscal accommodation:

- While there are many issues pertinent to determining First Nation positions, the fiscal accommodation of First Nations is pre-condition for support in almost every case;
- The federal government must take a leadership role with respect to this fiscal accommodation;
- Resolving fiscal accommodation will create a better environment for resolving other First Nations issues; and
- The First Nations Tax Commission can, and should, play an important role in designing and implementing a new federal fiscal accommodation strategy related to development.

The FNTC is prepared to help develop and implement a new fiscal accommodation policy. The FNTC has worked with First Nations to develop sophisticated tax collection systems, expenditure laws and fiscal planning, and greatly improved their services and infrastructure through financing and supportive service agreements with local and provincial governments. This administrative infrastructure and related capacities is available to help advance a new approach on how First Nation interests can be better accommodated in resource development. ■



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# Building prosperity through capacity development

First Nations have a long history of trade and markets to create sustainable economies; however, the *Indian Act* largely eliminated First Nation markets in the last 140 years. While the rest of Canada developed modern markets supported by legislative and administrative frameworks, First Nations were unable to do so. As a result, the majority of First Nation land is undervalued and there are far fewer economic opportunities.

However, many First Nations have competitive advantages, such as their location, human resources, innovative strengths or access to natural resources. Implementing a legal and administrative framework is the key to opening the door for First Nation economic potential.

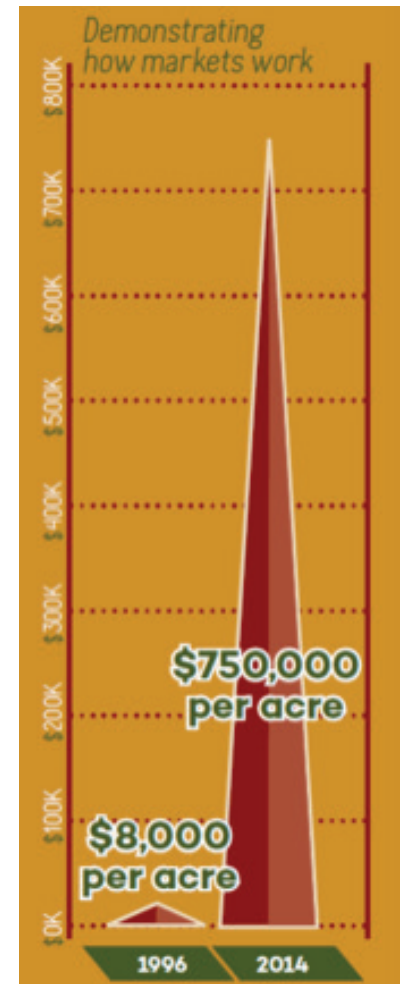
The Tulo Centre for Indigenous Economics has examined cases across Canada where investment on First Nation land has been successful. Tulo is committed to transferring lessons learned into best practices so other First Nations can learn from this research.

For example, in 1991 an acre of land in Westbank cost about \$10,000. Today, that same acre of land is worth almost \$1 million due to the development of infrastructure and private investment. At the Sun Rivers development in Kamloops, an acre of land cost \$8,000 in 1996. Today, that same acre of land is worth about \$750,000.

Although Kamloops and Westbank used different approaches, in both cases they created the legal and administrative certainty that allowed markets to develop. The dramatic increase in property values is evidence of this.

Tulo offers outstanding programs that teach students how to run property taxation systems and successfully manage economic development projects. There are accredited certificates in First Nation Tax Administration and First Nation Applied Economics.

Visit [www.tulo.ca](http://www.tulo.ca) for more information or contact [info@tulo.ca](mailto:info@tulo.ca). ■



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## 2014 Tulo On-campus Schedule

Tulo's 2014/2015 Certificate in First Nation Tax Administration cohort began in April 2014.

Upcoming on-campus courses:

**October 6 - 12, 2014**

APEC 1650: Communications and Taxpayer Relations

**January 12 - 16, 2014**

APEC 1660: Service Agreements and Joint Contracts

For more information on the certificate programs, how to register, or how to apply for a bursary from the FNTC, please visit the Tulo website at [www.tulo.ca](http://www.tulo.ca).



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## *Moving forward with proposed FMA Amendments*

Since its inception in 2007, the FNTC has been tracking a host of needed changes to the First Nations Fiscal Management Act (FMA), many of which were raised by First Nations, to make the legislation more flexible and responsive to the needs of First Nation governments and taxpayers. In 2012, the Minister of Aboriginal Affairs and Northern Development (AANDC), in response to a FMA statutory requirement, tabled a Report to Parliament outlining legislative recommendations advanced by the FMA fiscal institutions (First Nations Tax Commission, First Nations Financial Management Board, and First Nations Finance Authority).

In recent months, the proposed amendments in the Minister's Report, along with new recommendations, have served as the basis for discussions between AANDC officials and the FMA fiscal institutions.

An important recommendation from the Report is to bring about a single regulatory framework for First Nation property taxation in Canada.

This recommendation aims to achieve greater efficiencies by removing duplication and was a key objective of the original FMA legislative initiative.

Other recommendations call for expanding local revenue to include fees and charges, providing clear authority for First Nations to collect costs of enforcement, reducing the administrative burden of section 6 notification, and clarifying annual law timing requirements and expenditure law authority.

A detailed presentation of FNTC's recommendations will be made at the First Nations Tax Administrators 21st Annual National Forum to be held at Songhees Nation, BC on September 23-25, 2014. A similar presentation will be given the following week at the Canadian Property Tax Association's Annual National Workshop in Winnipeg, MB.

As the discussions with AANDC officials evolve, FNTC will provide updates on the recommendations and any legislative timetable proposed by federal officials. ■

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## *Indian Act Amendment Bill to continue: First Nations Gazette an effective and reliable option for First Nations*

With the return of Parliament on September 15, the Senate Standing Committee on Aboriginal Peoples is set to begin its hearings on Bill C-428, officially known as "An Act to Amend the *Indian Act* (Publication of By-laws) and to Provide for its Replacement".

The Private Member's bill is sponsored by Member of Parliament Rob Clarke (Desnethé-Missinippi-Churchill River), himself a member of the Muskeg Lake First Nation. Mr. Clarke described the changes proposed in his bill as "housekeeping in nature and are designed to remove the underbrush from the (Indian) Act."

Under Bill C-428, section 81 *Indian Act* by-laws could no longer be disallowed by the Minister of Aboriginal Affairs and Northern Development. Instead, First Nations would have the option of publishing their by-laws in a newspaper, on their own website, or in the *First Nations Gazette* (FNG).

The *First Nations Gazette* has long been an effective and reliable option for First Nations. Launched on Aboriginal Day in 1997, and published in a partnership between the First Nations Tax Commission and the Native Law Centre, University of Saskatchewan, the *Gazette* has been recognized as the only national repository of its kind in Canada.

The *Gazette* is available online ([www.fng.ca](http://www.fng.ca)), complete

with a searchable database, which is updated daily, and includes a notification component similar to Part I of the *Canada Gazette*.

“Should it be the wish of Parliament to approve Bill C-428, the *First Nations Gazette* is ready to assist First Nations in meeting their requirements under this Act, should they choose this vehicle to do so.”

Commissioner Lester Lafond, Chairman of the *First Nations Gazette* Editorial Board

Today, over 180 First Nations use the *Gazette*, where more than 2,800 by-laws, laws and land codes are published. The *Gazette* provides direct access to First Nation citizens, leasehold and other residents living on reserve lands, electors, legal practitioners, and those with commercial and other interests in reserve land. FNG is a service provided by the FNTC. There is no cost for First Nations to use the *Gazette*.

It is anticipated that the Senate hearings will begin at the end of September. Bill C-428 was first introduced in the House of Commons in June 2012. ■

## Summer Intern Shelby Lindley on her time with FNTC



Over the summer, Ms. Shelby Lindley worked as summer intern for the FNTC. Hailing from the Upper Nicola Indian Band, Ms. Lindley was admitted to the UBC Law Program in the Spring of 2014, after spending several years working in the financial services sector.

Her internship program focused on assisting in policy development, support in law development and review, and support in legal drafting. In completing her internship, Ms. Lindley reflected on her four months working at the FNTC.

During my time with FNTC, I learned about the FNTC mandate and I began to understand the basics of how the Commission helps First Nations communities establish their tax jurisdiction on their land. I also completed the Tulo Centre course: An Introduction to First Nation Taxation. This gave me a much more comprehensive view of First Nation taxation, and the role that FNTC plays in helping First Nations communities to become self-sustaining.

I learned that laws are developed by communities and are and put forward to the Commission for approval. I was given the opportunity to learn about the FNTC's technical review process of laws. I also had the opportunity to attend the Commission meeting in Halifax, Nova Scotia and to participate in the policy discussion where detailed information, technical reports and presentations were given over a three day period. My attendance, left me with the impression that FNTC and its counterparts are a family working towards a collective goal.

I was also given the opportunity to travel to four different First Nation communities to assist in providing First Nations with informative presentations about taxation and the role FNTC plays. These were educational trips and working with the First Nations on a more personal level further broadened my perspective. During the latter part of my internship, I was able to gain experience in working with the law drafting process when I worked on the revision of annotations for the BC Taxation Law and the BC Assessment Law.

It was inspiring to meet, interact, learn and work with the staff at the First Nations Tax Commission. They have proven to be leaders and mentors in many First Nations communities, and have provided me with support moving forward in my career, wherever it may take me. ■

Continued from Page 3.

## Whitecap Dakota First Nation

Recently, Whitecap leased 10 lots to a private developer that developed residential units as a pilot project with 10 homes for families on 99-year leases. The new initiative is building the local economy.

Whitecap is currently looking into a \$10 million infrastructure expansion to complement a planned hotel and business park with service and tourism opportunities that will create 400 to 500 jobs in the next three to four years.

Future plans include to developing a residential resort community. Whitecap Dakota continues to create new and innovative ways to expand their jurisdiction and move business forward.

Whitecap's Lands Manager and Tax Administrator Dalyn Bear is currently enrolled in the First Nation Tax Administrator certificate program at the Tulo Centre for Indigenous Economics and is expected to graduate from the program in the spring of 2015.

*"The program is extremely helpful. It provides tailored education for tax administrators for their regions with the various provincial laws taken into consideration. It is proactive with up-to-date scenarios that encompass all aspects of a Tax Administrator's role. I have learned a lot about tax administration and would recommend the program to any tax administrator not currently certified." ■*



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