Bill C-45: Legislative updates provide enhanced support to First Nations Financial Management

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On June 20, 2023, the federal government adopted a wide-ranging set of updates to the *First Nations Fiscal Management Act*, S.C. 2005, c.9 (FNFMA). This article gives an overview of the institutions and supports established under the FNFMA almost two decades ago, explains what's new as a result of the legislative updates, and gives some insights into current trends and issues for First Nations finance.

About the FNFMA

Enacted in 2005, the FNFMA created "opt-in" regulatory frameworks for financial management, property taxation and borrowing that allow First Nations[1] to move beyond antiquated approaches embedded in the *Indian Act.* The FNFMA also established several First Nations institutions:

- the First Nations Tax Commission (FNTC);
- the First Nations Financial Management Board (FMB); and
- the First Nations Finance Authority (FNFA).

First Nations Tax Commission

The FNTC operates as an independent, non-political body, providing oversight and guidance with the objective of ensuring fair, effective, and transparent property tax systems for First Nations. Its primary role is to support First Nations communities in developing and implementing their own property tax regimes, instead of relying on out-dated approaches to property taxation found in section 82 of the *Indian Act*

The FNTC supports First Nations in formulating and implementing property tax systems, enabling them to impose property taxes on reserve lands. The FNTC reviews and must approve property tax laws and regulations proposed by First Nations, as opposed to the Minister of Indigenous Services Canada who reviews and must approve property taxation bylaws under s.82/83 of the *Indian Act.*

Since its creation, FNTC has helped over 145 First Nations assert jurisdiction over property taxes under the FMA.[2]

First Nations Financial Management Board

The FMB supports First Nations in achieving sound financial management practices and greater fiscal independence. The FMB establishes standards for various levels of certification, the highest level of which is a precondition to accessing the “pooled borrowing” offered by the First Nations Finance Authority. Since its creation, the FMB has worked with over 320 First Nations, helping over 240 First Nations pass Financial Administration Laws, certify the financial performance of over 195 First Nations, and certify the financial management systems (the “highest” level of certification” of over 50 First Nations.[3]

First Nations Finance Authority

The FNFA provides qualified First Nations with access to long-term, low-cost, and flexible financing, which has similarities to “pooled borrowing” programs available to municipalities in some provinces. The FNFA uses various revenue streams for individual First Nations who participate in the pooled borrowing as security and issues bonds on behalf of qualified First Nations. By pooling the revenues and risk, and managing the bonds on behalf of individual First Nations, FNFA allows First Nations to access financing options that have been historically out of reach of individual First Nations.

Since its creation, the FNFA has worked with over 150 First Nations and supported over $1.8 Billion in financing for First Nations across the country[4].

2023 Updates to the FNFMA

With the enactment of Bill C-45 on June 20, 2023, the federal government expanded the mandates of the FNTC, FMB and the FNFA in several ways:

- The FMB may offer their services to more than just First Nations that are recognized as bands under the *Indian Act*, to now include:
    - Tribal Councils,
    - Modern Treaty Nations, like Tsawwassen and Nisga’a,
    - Self-governing Groups, like Westbank and Shishalh, and
    - Indigenous not-for-profit organizations that provide services like social welfare, infrastructure, housing, recreational or cultural activities, health or education.
- The FMB may now provide review and monitoring services to First Nations, following a request from the First Nation or pursuant to an agreement between a First Nation and any level of government. Monitoring and review services may consider implementation and compliance with respect to the financial administration laws of the First Nation and FMB standards, and may provide findings and recommendations.
- The FNFA has broader borrowing powers, including the ability to secure loans for capital assets that are to be wholly or partly owned by the First Nation; land that is to be wholly or partly owned; and short-term financing to meet cash flow requirements for capital purposes or to refinance short-term debt incurred for capital purposes (s. 74). Significantly, the FNFA retains priority over all other creditors of the borrowing member for all moneys authorized or obligated to be paid (s. 78(1)).

- The FNTC now has several new and expanded mandates that call for its greater involvement in the development of First Nations administrative and legal frameworks, economies, and local revenue systems, including an expanded role for conducting research and analysis.

Perhaps most notably, the amendments to the FNFMA provide statutory support for the First Nations Infrastructure Institute (FNII), a First Nations led initiative that, for several years, has operated in parallel with the FNFMA institutions. Interested First Nations may opt into using FNII services to support practices and standards for infrastructure planning, procurement, design, financing, construction, operation and maintenance.

The recent amendments to the FNFMA have enhanced the support available to First Nations for fiscal administration and economic advancement. By modernizing and expanding the mandates of the FNTC, the FMB, and the FNFA, and establishing the FNII, participating First Nations have greater access to financing, property tax frameworks, enhanced financial administration methodologies and infrastructure planning.

The current state of First Nations Financing

First Nations face substantial obstacles and challenges to obtaining financing for infrastructure and other capital projects, as well as economic development opportunities they may wish to pursue. One key factor has been section 89 of the *Indian Act,* which was adopted a century ago as a paternalistic protection, and prohibits lenders from seizing assets of First Nations or status Indians that are located on reserve lands. Many lenders have simply shied away from lending to First Nations or their members as a result of section 89 over the past several decades.

For several decades, he Government of Canada has supported on-reserve housing through Indigenous Services Canada (ISC) and the Canada Mortgage and Housing Corporation (CMHC). ISC provides Ministerial Loan Guarantees for the loan security required by lenders who are financing housing loans on-reserve. CMHC typically provides about 80 per cent of these loans and 20 per cent are provided by other lending institutions, but there are upper limits on the financing available, both for any one loan but also in aggregate, which limits the scale of development.

Especially before the passage of the FNFMA in 2005, most First Nations seeking funding for infrastructure or other capital projects on reserve lands have had to rely on grants and contributions from ISC. While ISC currently administers over $2 billion in capital funding, this represents a fraction of the need. While grant funding is of course preferable to loans, most First Nations often have to wait decades for their “turn” to access ISC capital funding. All of this has contributed to what is commonly called the “infrastructure gap” for First Nations.

The enactment of the FNFMA in 2005 was a major step in opening-up financing opportunities for First Nations. Partly this was a direct result of the FNFA offering pooled borrowing to qualified members. However, there have been indirect benefits from the passage of the FNFMA. Many of the First Nations certified by FMB have not participated in FNFA borrowing, but instead have used FMB’s services to “get their financial house in order” and better qualify for other financing opportunities, as well as qualifying for Indigenous Services Canada’s “10 Year Grant” funding model.

Alongside the work of the FMB and FNFA, there has been slow but clear increases in the number and activity of lenders willing to lend to First Nations. Organizations like the First Nations Bank of Canada, Peace Hills Trust, and Waubetek Business Development Corporation have been providing financing and lending services to First Nations governments for several decades now. As First Nations gain financial management capacity, and financial resources from settling historic grievances with Canada or economic development projects in their territories, conventional lenders are showing more interest in lending to First Nations in situations that were historically outside their mandates.

The federal government has also expanded financing options through a variety of programs, most notably the Canada Infrastructure Bank’s Indigenous Community Infrastructure Fund (**ICIF**). The ICIF was recently endowed with $4.3B in government funding, over the course of four years starting in 2021 to 2022. Infrastructure projects eligible for funding include, but are not limited to, projects relating to water and wastewater facilities, health facilities, cultural facilities, schools, housing, and energy. The ICIF is open to not just First Nations under the *Indian Act*, but also self-governed and modern treaty communities, Inuit and Metis communities.

As with the FNFA pooled borrowing, ICIF financing requires First Nations to offer extensive security for the loans. A First Nation that then wants to secure financing for an unrelated matter may have to engage in complex negotiations between multiple lenders to sort out priorities to such security.

Looking Forward

As First Nations gain access to long-term financing, property tax regimes, and enhanced financial management practices, they become better equipped to undertake critical infrastructure projects, develop natural resources sustainably, and foster economic growth on their lands.

The landscape of financing opportunities for First Nations is continually evolving. Indigenous communities now have access to specialized infrastructure financing options and a variety of government funds. As these financing options continue to expand and diversify, Indigenous communities are increasingly able to remove themselves from the bounds of the *Indian Act* and take back control over their financial affairs and resources.

The increase in financing opportunities for First Nations is coinciding with increased desire by governments and industry to incorporate Indigenous groups in economic opportunities outside their reserves.

More Information

For advice or support in indigenous financing, please contact the lawyers identified below.

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[1] In this article, the term “First Nation” is largely intended to refer to entities recognized as “bands” under the *Indian Act, R.S.C. 1985, c.I-5,* although legislative changes we discuss in this article opens up the scope of indigenous organizations that may participate in various initiatives.

[2] See 2022-23 FNTC Annual Report.

[3] See the FMB Annual Report for the year ended December 2022.

[4] See FNFA’s 2022-23 Annual Report

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