

*HST and First Nations:  
An Introduction to the Issues Coming to B.C. in 2010*

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### A. INTRODUCTION

On July 23, 2009, the same day Canada signed an agreement on the subject,<sup>1</sup> British Columbia announced that it would be implementing the harmonized sales tax (the "HST") as of July 1, 2010. HST is the current regime in Nova Scotia, Newfoundland and New Brunswick, while Ontario made the decision to move to HST earlier this year and will also be implementing it in 2010.

Under the HST regime, British Columbia's Social Service Tax regime, commonly called the Provincial Sales Tax ("PST"), will be wound down and replaced with the B.C. Value-Added Tax ("BCVAT"), implemented under the federal *Excise Tax Act* ("ETA").<sup>2</sup> The BCVAT will have the same tax base as the GST, subject to a few exceptions. Basically, anything that got taxed under the GST will now be taxed under the HST rate of combined GST and BCVAT, except for a few supplies that will be exempt from the provincial portion in accordance with past practices.

This paper looks at the impacts and implications for First Nations tax planning under the HST from two points of view:

1. taxation by First Nations governments, and
2. exemptions based on s. 87 of the *Indian Act*.

On the whole, First Nations businesses and governments will probably benefit from the changes. Although there won't be any windfalls for those governments collecting the First Nations GST ("FNGST") or First Nations tax, it does appear that current *Indian Act*-based exemptions will be expanding. First Nations' businesses will benefit from the increased availability of tax inputs on capital costs but may lose some previous business advantages as other businesses receive similar benefits.

The federal government has always applied a somewhat broader view of the exemptions from the GST available to Indians and Bands than has the provincial government. The province only allows the *Indian Act* exemption, but Canada also recognizes a governmental exemption. The HST will therefore result in an expansion of exemptions to match the Revenue Canada policies under the current GST regime, especially in cases where the only exemption previously allowed was under the *Indian Act*.

Please note that parts of this paper are conjecture as there is not yet an actual comprehensive tax agreement in place between the Province and Canada. A comprehensive agreement will govern the particular treatment of certain commodities and services.

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<sup>1</sup> Memorandum of Agreement Concerning a Canada-British Columbia Comprehensive Integrated Tax Co-ordination Agreement, July 2009. Available at: [http://www.gov.bc.ca/hst/Documents/HST\\_MOA.pdf](http://www.gov.bc.ca/hst/Documents/HST_MOA.pdf)

<sup>2</sup> *Excise Tax Act*, R.S.C. 1985, c. E-15.

## 1. Current PST and GST Tax Bases

To understand the goals of the new HST framework and the way it will be implemented, we must understand the basis for the original operation of the PST and the GST.

The original base of the PST was the sale of "tangible personal property." Over the years this base was expanded to include a number of intangibles such as the sale or lease of legal services, telecommunications services, computer software, parking and some non-exempt fixtures. GST, on the other hand, is a form of "value-added tax" aimed at taxing the value of **all** goods and services at the final stage of consumption.

A value-added tax, like the GST, is generally supported by economists on the basis that the only tax paid under such a system is paid on the actual value of the product or services, and it avoids tax added on top of other taxes that adhere to a product, for example, through taxes added during the production process. One of the important "problems" that is supposed to be "fixed" through harmonization, is to prevent multiple taxes from being imbedded in production costs, forming a price on which final taxes are then payable. The idea is that businesses would then pass on to consumers, in the form of lower prices, the savings they made on taxes now avoided on goods used in the manufacturing process

## 2. HST Value-Added Tax Regime

Under the HST, goods and services are treated in three ways:

### 1. *Taxable*

- Most goods and services are taxable, which means that HST is charged on the supply of those items.
- Businesses making taxable supplies can claim input tax credits to recover tax paid on inputs used in making those supplies.

### 2. *Exempt*

- Consumers do not pay HST on exempt items (i.e., businesses or people selling "exempt supplies" to consumers do not charge HST).
- Those making exempt supplies cannot claim input tax credits to recover tax paid on inputs used in making those supplies.

Examples: health and dental services, financial services, long-term residential rental accommodation, child-care services, educational services.

### 3. *Zero-rated*

- Consumers do not pay HST on zero-rated items (i.e., they pay a 0 per cent tax rate).
- Those making zero-rated supplies can claim input tax credits to recover tax paid on inputs used in making those supplies.

Examples: basic groceries, prescription drugs, medical devices, exports.

The HST will retain those GST exemptions and zero-ratings that have been around for a while. As well, British Columbia has required that a certain number of existing provincial exemptions will continue to apply so there will be tax rebates at the till on certain supplies. Point of sale rebates of the provincial portion of the HST will include motive fuels, children's clothing and footwear, children's car seats, feminine hygiene products and books.<sup>3</sup>

Except for the *Indian Act* exemptions discussed below, consumers will be facing some immediate cost increases by having the 7% PST cost now added to a number of things that were previously PST exempt such as: domestic air travel, hair care, dry cleaning, accounting, funerals, cable, telephone, gardening, repairs, renovations and heating fuels.

The provincial government will be maintaining certain tax programs other than the PST. For example, the provincial tobacco tax will continue to apply as will the provincial regimes on carbon tax, motor vehicles, and property purchase tax.

## **B. IMPACTS ON FIRST NATIONS TAXATION**

Like the federal and provincial governments, a number of First Nations have their own tax regimes in place that ultimately interact with provincial and federal taxes through various collection agreements or development issues. The source of the power of Band taxation remains unclear and has not been resolved by jurisprudence. It comes from legislative grants, such as section 83 of the *Indian Act*,<sup>4</sup> or as an incident of the right of self-government.

### **1. Incidents of Self-Government**

That powers of taxation can be viewed as incidents of self-government is most clearly demonstrated through their importance as a subject-matter of treaty processes or legislative enactments.

A number of treaty processes have resulted in agreements that impact taxation power. The *Sechelt Indian Band Self Government Act*,<sup>5</sup> provides that the First Nation may make laws respecting local taxation of interests in Sechelt Land. The Umbrella Final Agreements in the Yukon provide powers of taxation with respect to Settlement lands. Under section 17 of the *Yukon First Nation Self-Government Act*,<sup>6</sup> the *Indian Act* no longer applies to the citizens whose First Nations have final agreements. As well, the Agreements in Principle negotiated in the BC Treaty Processes reflect the principles in the Nisga'a Final Agreement that renders the *Indian Act* inapplicable, eliminating s. 83, replacing it with special powers and, ultimately, doing away with s. 87 exemptions. The fact that taxation rights can be eliminated by treaty suggests that they are rights that stem from more than just a legislative enactment. It is our opinion that s. 87 codifies a continuation of one aspect of the inherent power of aboriginal self-government, but this has not been confirmed by any Canadian court decision (although there are good precedents from the United States to this effect).

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<sup>3</sup> See Memorandum of Agreement, supra note 1.

<sup>4</sup> *Indian Act*, R.S.C. 1985, c. I-5.

<sup>5</sup> *Sechelt Indian Band Self Government Act*, S.C. 1986, c. 27.

<sup>6</sup> *Yukon First Nation Self-Government Act*, S.C. 1994, c. 35.

The HST will apply differently to lands under the various contemporary treaties. We discuss this further below.

## 2. Consumer Taxes

### I. COWICHAN TRIBES TOBACCO TAX

Under the *Tobacco Tax Act*,<sup>7</sup> British Columbia collects a special tax on tobacco sales. Consumers currently pay a provincial tobacco tax of 18.5 cents per cigarette or gram of tobacco.<sup>8</sup>

Under the *Budget Implementation Act, 1997* there is special legislation whereby Cowichan Tribes may tax all tobacco sales on their reserves in place of this specific provincial tobacco tax.<sup>9</sup> Cowichan Tribes has used the authority provided under this legislation to make a tobacco tax bylaw in place of the provincial tax and enter into an administration agreement with British Columbia. Pursuant to this agreement, the Province collects and remits to Cowichan Tribes the tobacco tax revenues generated from tobacco sales made on the reserve lands of the Cowichan Tribes. The Province is authorized to enter into such agreements with First Nations pursuant to the *Tobacco Tax Act*.<sup>10</sup>

British Columbia's tobacco tax will not be changing when HST comes into effect as it is a separate regime from the provincial sales tax; the Cowichan Tribes Tobacco tax should remain unaffected.

### II. FIRST NATION TAX (FNT) UNDER THE BUDGET IMPLEMENTATION ACT, 2000

The *Budget Implementation Act*<sup>11</sup> allows First Nations listed in the Schedule to tax the on-reserve sales of three commodities - tobacco products, alcoholic beverages or fuel - at the same rate as the GST. The tax applies to all sales of the chosen commodity or commodities made on the reserves of the First Nation whether made to a non-Indian or Indian, and regardless of whether the purchaser is resident on reserve. All tax collected is remitted to the federal government and a portion, intended to represent amounts from those eligible for *Indian Act* exemptions, is returned to the Band under a service agreement.

It appears that under HST, wherever the three-commodities tax applies, retailers and service providers will collect the entire HST but there will be point of sale rebates for some items, such as motor fuels (but not heating fuel). The important document will be the service agreement, in which the share to be returned to the Band is set out. Bands can argue that their share should increase, for various reasons: Firstly, the total amount being collected is likely to be greater, and Canada should not get that windfall. Secondly, the administrative costs will be higher. Thirdly, the point of sale rebates for motor fuel will be awkward to administer, and

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<sup>7</sup> *Tobacco Tax Act*, R.S.B.C. 1996, c. 452, s. 2, as amended.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Budget Implementation Act*, S.C. 1997, c. 26, Part II – Cowichan Tribes Tobacco Tax, as amended.

<sup>10</sup> *Tobacco Tax Act*, *supra* note 11, s. 43.1.

<sup>11</sup> *Budget Implementation Act*, S.C. 2000, c.14, part 4.

will increase administrative costs for the bands. Bands should get involved in negotiations with Canada on the service agreements well in advance of July 1<sup>st</sup>.

### III. FIRST NATIONS GST UNDER THE FIRST NATIONS GOODS AND SERVICES TAX ACT

The *First Nation Goods and Services Tax Act*<sup>12</sup> (“FNGSTA”) authorizes First Nations named in the schedule to collect a First Nation tax equivalent to GST on all taxable goods and services sold or provided on reserve. The 5% FNGST is collected from everyone, Indians and non-Indians, who buy taxable goods and services on reserve.

Under the FNGSTA, the First Nation and Canada enter into a tax administration agreement under which the tax is collected from the retailers or people providing goods or services on reserve. The retailers and service providers remit all tax collected to Revenue Canada. Revenue Canada sends to the First Nation each month an amount which Canada estimates is the FNGST taxes remitted that month by status-Indians living on reserve. Canada has a detailed formula for working this out based at least in part on the reserve population and the average income of reserve residents.<sup>13</sup> The tax administration agreements should be renegotiated to take into account the 12% rate. This is an important opportunity for First Nations to argue for a higher share of the funds collected.

There is an important technical issue here. After the HST comes into force FNGST will actually be made up of two different taxes: When HST applies to non-exempt people it consists of BC VAT (7%) and FNGST (5%) for a total of 12%. For status Indians and Bands who are exempt, the FNGST remains at 5%. So there is a different apparent tax rate between status Indians and non-exempt people. Merchants who are accustomed to charging the FNGST to everyone the same, will now be back in the business of asking to see status cards in order to give status Indians their exemption from the hidden portion of the HST (namely the BC VAT). This is particularly true in the restaurant context where food was previously PST exempt and FNGST resulted in a single tax application.

We do not know if Canada will attempt to fix this situation. There is a possibility that Canada will attempt to “harmonize” the situation as between exempt and non-exempt consumers to get back to the situation of only one tax rate on reserve. In the mean time, it is ironic that harmonization as between Canada and BC results in a lack of harmony on FNGST reserves, which briefly had enjoyed harmonized rates. In the rest of this paper we have commented on the situation on the assumption that nothing special will be done about this, and status Indians and bands will not be subjected to the BC VAT. In other words, status Indians will continue to pay 5% and non-Indians will pay 12%.

Things will be quite different for Nisga’a citizens. Currently, they have implemented the FNGST on Nisga’a Lands. The FNGST on Nisga’a Lands will change from the rate set out under 165(1)<sup>14</sup> of the ETA to the rate under section 165(2)<sup>15</sup> – from 5% to 12%. They will

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<sup>12</sup> *First Nation Goods and Services Tax Act*, S.C. 2003, c. 15.

<sup>13</sup> Available at: [http://www.fin.gc.ca/activty/firstnations/FNpam\\_-eng.asp](http://www.fin.gc.ca/activty/firstnations/FNpam_-eng.asp)

<sup>14</sup> 165(1) Subject to this Part, every recipient of a taxable supply made in Canada shall pay to Her Majesty in right of Canada tax in respect of the supply calculated at the rate of 5% on the value of the consideration for the supply.

continue to receive remittances from the Federal government for their 5% of the GST, however, they will be collecting the entire 12% from their citizens, who are no longer entitled to *Indian Act* exemptions. Currently, Nisga'a have a revenue-sharing arrangement with British Columbia that is, in part, related to the tax burden of Nisga'a citizens, but this is by revenue-sharing and not through a tax collection agreement so it will likely not change in response to the HST.

### 3. Real Property Taxation

#### I. FIRST NATIONS TAXATION BY BYLAW

The change to HST should not impact First Nation real property taxation under a section 83 bylaw.<sup>16</sup> First Nation individuals are not protected from Band taxation through such bylaws by section 87 because it is "subject to" section 83.<sup>17</sup> In practice, many First Nations afford an exemption to their own members, though this practice is controversial.<sup>18</sup> The real property taxation powers under this section are restricted to reserves and to "designated lands." In order to retain powers of taxation over designated lands, the language and relationship under

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<sup>15</sup> Subject to this Part, every recipient of a taxable supply made in a participating province shall pay to Her Majesty in right of Canada, in addition to the tax imposed by subsection (1), tax in respect of the supply calculated at the tax rate for that province on the value of the consideration for the supply.

<sup>16</sup> 83. (1) Without prejudice to the powers conferred by section 81, the council of a Band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,

- (a) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;
- (a.1) the licensing of businesses, callings, trades and occupations;
- (b) the appropriation and expenditure of moneys of the Band to defray Band expenses;
- (c) the appointment of officials to conduct the business of the council, prescribing their duties and providing for their remuneration out of any moneys raised pursuant to paragraph (a);
- (d) the payment of remuneration, in such amount as may be approved by the Minister, to chiefs and councillors, out of any moneys raised pursuant to paragraph (a);
- (e) the enforcement of payment of amounts that are payable pursuant to this section, including arrears and interest;
- (e.1) the imposition and recovery of interest on amounts that are payable pursuant to this section, where those amounts are not paid before they are due, and the calculation of that interest;
- (f) the raising of money from Band members to support Band projects; and
- (g) with respect to any matter arising out of or ancillary to the exercise of powers under this section.

(2) An expenditure made out of moneys raised pursuant to subsection (1) must be so made under the authority of a by-law of the council of the band.

(3) A by-law made under paragraph (1)(a) must provide an appeal procedure in respect of assessments made for the purposes of taxation under that paragraph.

(4) The Minister may approve the whole or a part only of a by-law made under subsection (1).

(5) The Governor in Council may make regulations respecting the exercise of the by-law making powers of bands under this section.

(6) A by-law made under this section remains in force only to the extent that it is consistent with the regulations made under subsection (5).

<sup>17</sup> *Tsilhqot'in Economic Development Corporation v. Johnny*, (October 10, 1985) Doc. Williams Lake 95-9661 (BC Provincial Court).

<sup>18</sup> See *Canadian Pacific Ltd. v. Matsqui Indian Band* (1999, 1 CNLR 21 (Fed. CA.)) where it was found that a bylaw taxing only non-Indians is not discriminatory but a dissenting opinion found otherwise.

which the lands are designated must be carefully managed to make it clear that surrender was conditional and not absolute.<sup>19</sup>

Section 83(1)(f) is very broad and may, in fact, provide powers with respect to taxation of both income and other forms of tax and broaden the application of this section beyond real property.

## II. TAXATION UNDER THE *FIRST NATIONS FISCAL AND STATISTICAL MANAGEMENT ACT*<sup>20</sup>

A number of First Nations have signed on to the Schedule that allows them to use real property taxation powers to access capital markets to finance governance and economic development activities under the *First Nations Fiscal and Statistical Management Act* (“FSMA”). The FSMA integrates property taxation, fiscal management, borrowing power, and the ability to obtain equity financial and statistical information management into a unified code. As with section 83(1)(a) of the *Indian Act* taxation under the FSMA is restricted to real property on reserve.

As with section 83 bylaws, the change to HST should not impact First Nation real property taxation under the FSMA. Non-exempt persons will be taxable on lease payments on reserve at the HST rate.<sup>21</sup>

## C. HST AND THE *INDIAN ACT*

### 1. Sections 87, 89 and 90 of the *Indian Act*

The British Columbia FAQ entitled "HST Basics" promises that: "Nothing that is currently exempt from GST will be subject to HST. If you do not pay GST on any item now, you will not pay HST after harmonization."<sup>22</sup> We love such assurances – down the road we call these “admissions.”

The principal benefit to First Nation individuals, governments and band-empowered entities from the new HST regime derives from Revenue Canada’s policy on the *Indian Act* exemptions in sections 87, 89 and 90 and the inclusion of a governmental exemption in addition to those *Indian Act* exemptions; the combined effect is broader than provincial regulations and policy have been.<sup>23, 24, 25</sup>

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<sup>19</sup> *St. Mary’s Indian Band v. Cranbrook (City of)*, [1997] 3 CNLR 282 (SCC).

<sup>20</sup> *First Nations Fiscal and Statistical Management Act*. S.C. c.9.

<sup>21</sup> CRA Bulletin 19-1. Updated to January 21, 2002.

<sup>22</sup> Available at: <http://www.gov.bc.ca/hst/faq.html>

<sup>23</sup> 87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal and Statistical Management Act*, the following property is exempt from taxation:

(a) the interest of an Indian or a Band in reserve lands or surrendered lands; and  
(b) the personal property of an Indian or a Band situated on a reserve.

(2) No Indian or Band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(a) or (b) or is otherwise subject to taxation in respect of any such property.

The federal interpretation recognizes in an oblique way something of the sovereign right of First Nations not to be taxed by other governments. They have done this by recognizing that First Nations governance activities, even those performed off-reserve, should not be taxed. Part of that broader interpretation includes, for example, the fact that band-management activities undertaken by Bands or "Band-empowered entities," which includes incorporated bodies, escape the GST (and henceforth the HST). In the new context, this means those activities will also escape the provincial portion of the HST.

The British Columbia interpretation of *Indian Act* exemptions, for the purposes of applying the PST was:

- The purchaser or lessee must be either an Indian or an Indian Band and the item purchased or leased must be for the personal use of the individual or for the use of the Band.
- Corporations or co-operatives with Indian shareholders, tribal council and band-empowered entities do not qualify as Indian under the *Indian Act*. Purchases and leases by such organizations are therefore subject to the PST and applicable levies, even if the organization is located on reserve land, or if the goods are located on such land at the time of sale or lease.
- The goods must be located on reserve land at the time the sale takes place or title to the goods must only pass to the Indian purchaser once the goods have been delivered to the reserve location.
- If the purchase occurs on designated land, the seller must be in possession of a letter from the ministry authorizing exempt sales from that location.

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(3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(a) or (b) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.

<sup>24</sup> 89. (1) Subject to this Act, the real and personal property of an Indian or a Band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

(1.1) Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.

(2) A person who sells to a Band or a member of a Band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.

<sup>25</sup> 90. (1) For the purposes of sections 87 and 89, personal property that was

(a) purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands, or

(b) given to Indians or to a Band under a treaty or agreement between a Band and Her Majesty, shall be deemed always to be situated on a reserve.

(2) Every transaction purporting to pass title to any property that is by this section deemed to be situated on a reserve, or any interest in such property, is void unless the transaction is entered into with the consent of the Minister or is entered into between members of a Band or between the Band and a member thereof.

(3) Every person who enters into any transaction that is void by virtue of subsection (2) is guilty of an offence, and every person who, without the written consent of the Minister, destroys personal property that is by this section deemed to be situated on a reserve is guilty of an offence.

- Respecting leases, the Indian or Band lessee must reside on reserve land whether the lessee takes possession on or off reserve.
- Respecting taxable services, services provided to install, dismantle, repair, adjust restore, recondition, refinish, or maintain tangible personal property, PST applies to the purchase of these services unless all the service is provided on reserve.<sup>26</sup>

The Revenue Canada interpretation of exemption entitlements, for the purpose of determining application of GST and HST, is:

- Indians, Indian bands, or unincorporated band-empowered entities may acquire property on a reserve without paying the GST/HST, provided they have the appropriate documentation to show the vendor.
- Corporations are considered to be separate legal persons from either an Indian or an Indian Band and would not usually be eligible for relief from the GST/HST but the tax will not apply to incorporated band-empowered entities purchasing supplies for Band management activities.
- Indians, Indian Bands and unincorporated band-empowered entities, as well as incorporated band-empowered entities purchasing for band-management activities, may acquire property off a reserve without paying the GST/HST provided the property is delivered to a reserve by the vendor or the vendor's agent.
- Intangible personal property (i.e. leases, memberships) will be considered to be situated on a reserve where there are sufficient factors to connect it to the reserve.
- Memberships are exempt if the place where rights under them are exercised is on reserve.<sup>27</sup>

A band-empowered entity is a corporation, board, council, association, society, or other organization that is owned or controlled by a band, a tribal council, or a group of bands other than a tribal council. In order to benefit from the exemption, they must maintain a presence on reserve.<sup>28</sup> An entity is considered to be owned by a band, a tribal council or a group of bands other than a tribal council if the band, tribal council or group of bands owns all or substantially all (90%) of the shares or holds all or substantially all of the memberships of the entity; or the band, tribal council or group of bands holds title to the assets of the entity or controls its disposition, such that in the event of wind up or liquidation, these assets are vested in the band.<sup>29</sup>

Band management activities are activities or programs undertaken by a Band or band-empowered entity that are not commercial activities for which they would otherwise be entitled to an input tax credit. In making this determination, the output of the activity or program, will be the determining factor, as opposed to the objectives of the activity or program.<sup>30</sup>

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<sup>26</sup> BC Ministry of Finance Bulletin SST 034, "Procedures for Making Exempt Sales or Leases to Indians and Indian Bands." Revised to June 2008.

<sup>27</sup> GST/HST Technical Information Bulletin, B-039. Updated to August 2006.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

We suggest that the Federal government recognition of band-management activities, whether performed by First Nation governments or their incorporated or unincorporated entities, is significant. It appears to be, tacitly, recognition of the right of First Nations to govern themselves, and of the inappropriateness of enforced taxation by other governments.

## 2. Specific Cases

### I. LEGAL SERVICES

The previous exemptions from the PST and the GST taxation regimes for legal services are set out in the table below. Currently, a lawyer must consider the nature and the location of legal services provided to a First Nation or a First Nation entity and determine whether to collect: no tax, PST, GST, or both. You will note that there is a difference in the Province's position on legal services in comparison to its usual policy on exemptions. Indeed they have chosen to actually place how they deal with legal services directly into the regulations, rather than simply governing the issue by policy.

PST Exemption	GST Exemptions
The legal services relate to real property situated on a reserve. <sup>31</sup>	The service performed is related to property and is performed totally on reserve and the property is situated on reserve at that time. <sup>32</sup>
The legal services are performed on a reserve. <sup>33</sup>	The service to an individual is performed totally on reserve for an Indian who is on reserve at the time the service is performed.
The legal services are related to Aboriginal treaty or land claims negotiations if purchased by an Aboriginal organization representing the interests of Indians and Indian bands in such negotiations. <sup>34</sup>	The services are acquired on or off reserve by an Indian Band or band-empowered entity for Band management activities or for real property on reserve. Band management activities are activities or programs that are not commercial activities for which the Band entity would otherwise be entitled to an input tax credit.
The legal services were provided in respect of consultation related to treaty negotiations or land claims or the use of Crown land and fisheries in asserted traditional territory. <sup>35</sup>	

<sup>31</sup> *Social Services Tax Act Regulation*, B.C. Reg. 84/58, s. 8.5(2)(a).

<sup>32</sup> *Supra*, note 27.

<sup>33</sup> *Social Services Tax Act Regulation*, B.C. Reg. 84/58, s. 8.5(2)(b).

<sup>34</sup> *Social Services Tax Act Regulation*, B.C. Reg. 84/58, s. 8.5(3).

<sup>35</sup> *Social Services Tax Act Regulation*, B.C. Reg. 84/58, s. 8.5(3) and Letter from Ministry.

British Columbia asserts<sup>36</sup> that, unless exempt, legal services purchased by Indians or Bands are taxable and taxable services include: litigation; criminal matters; offences; corporate or commercial matters; and applications under federal or provincial legislation unless they relate to the use of Crown land and fisheries in a First Nation's asserted traditional territory or traditional fishing area.

With respect to legal services, British Columbia had broadened its exemption somewhat to include "aboriginal organizations" involved in certain band-management activities. However, the activities exempted were those that would appear to involve the advancement of treaty talks, consultation, and other tasks that are central to land succession or, in province-speak "certainty".

The GST position, that uses band-management activities as its basis, remains considerably broader. Fortunately, there will be greater clarity moving forward as now the federal position will apply across the board. As the British Columbia policies were ultimately narrower with respect to exemptions, it seems likely that this will result in savings for First Nations.

## II. RESTAURANTS ON RESERVE

Restaurants on reserve will now be required to collect the full 12% HST from non-First Nations customers on the total bill; previously, restaurant food was exempt from PST. Status-Indian customers will continue to enjoy an exemption in accordance with the GST/HST policy.

Where FNGST is in effect, all customers will pay the 5% FNGST and only non-exempt customers will pay the BC VAT portion of the HST. To clarify, previously restaurants in places where there was FNGST only collected the 5% tax from all customers, doing away with identity checking and different taxes.

If the restaurant is band-owned or Indian-owned, and not incorporated, they will be in a position to enjoy the standard *Indian Act* exemptions as well; however, with the availability of input tax credits back to the business owner, non-Indian operators are now in a competitive position with unincorporated Indian businesses respecting on-reserve business expenses.

## III. LIQUOR SALES ON RESERVE

Alcohol will apparently be taxed at the HST rate of 12%.<sup>37</sup> The BC government plans to make up the loss from its current 10% portion by keeping prices at government-owned liquor stores consistent after the change. So while they predict that most retailers will have lower prices as a result of the shifting tax burden, they don't intend to lead by example.

First Nations collecting tax on alcohol, whether through FNGST or through First Nations "three-commodities tax," will continue to collect 5% from all clients, including Indians, and

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<sup>36</sup> *Ibid.*

<sup>37</sup> Comments of Minister Colin Hansen to media, August 29, 2009:

[http://www.ctvbc.ctv.ca/servlet/an/local/CTVNews/20090827/hst\\_bc\\_090827?hub=BritishColumbia](http://www.ctvbc.ctv.ca/servlet/an/local/CTVNews/20090827/hst_bc_090827?hub=BritishColumbia)

receive funds back from the federal government in accordance with their negotiated formulae. Non-exempt customers will pay the further 7% BC VAT portion.

Those who qualify for exemptions under the *Indian Act* will continue to enjoy them.

#### **IV. HOTELS ON RESERVE**

The hospitality industry is probably the one business with serious concerns about the potential impacts of the HST on a number of services, such as restaurant meals and lift tickets, which were previously PST exempt and which will now see a full 7% BC VAT increase. However, it is anticipated that this will be offset by cancellation of the provincial hotel room tax of 8% meaning the tax on a hotel room may actually drop by 1%.

Previously a number of municipalities benefited from a 2% municipality tax share of the hotel room tax and, while this is being extended to June 2011, this share may not endure.

Hotels on reserve will be collecting the entire 12% HST, with the standard exemptions from the tax available to status individuals, Bands and band-empowered entities, including incorporated band-empowered entities engaged in band-governance activities. Hotel owning First Nation corporations will have the advantage of collecting inputs on most of their costs in bringing the service to customers.

#### **V. TOBACCO SALES ON RESERVE**

The province will continue to be in the business of collecting its tobacco tax. As well, the HST will now apply to the price at the till. Because B.C. is not backing out of the provincial tobacco tax, this will result in a real increase of 7% in the price of tobacco products across the board, unless the standard *Indian Act* exemption applies. The “band management” exemption under the GST rules will seldom apply because there would only be rare instances where a Band purchases tobacco products for such purposes such as certain ceremonial purposes.

First Nations who collect FNT or FNGST will be required to charge the full 12% HST to non-exempt customers, while status Indians will pay only the 5% First Nations tax portion. First Nations who have released their exemptions through agreements will have to charge the entire HST to their citizens as well.

#### **VI. NEW HOME CONSTRUCTION ON RESERVE**

The *Indian Act* exemptions will continue to apply to exempt individuals and businesses. However, for non-Indians the HST will apply to new housing. British Columbia will provide a rebate for new housing so that purchasers of new homes up to \$400,000 will not pay any more provincial tax due to harmonization than is currently embedded as PST in the price of a new home. Purchasers of new homes above \$400,000 will be eligible for a rebate of \$20,000 (i.e., a rebate on the first \$400,000 of value). The rebate will be available whether the new housing is to be owner occupied or rented.

Of course, builders, whether exempt or non-Indian, will receive most of their tax payments on the capital costs of building back through input tax credits. This may actually put non-First Nation businesses in competition with First Nation-owned businesses for on-reserve contracting work.

New homes on reserve purchased by Indians, Bands or band-related entities engaged in band-management activities, will not attract HST but may be subject to section 83 bylaws or FNGST where it applies.

#### **VII. LAND LEASES AND RENTALS ON RESERVE**

Leases of reserve lands to non-Indians and to incorporated Indian-owned entities for commercial activities will now be subject to the entire HST amount. Where a First Nation collects the FNGST, there will be a 5% tax on on-reserve commercial leases to status Indians.

Non-exempt persons will be taxed on lease payments on reserve at the HST rate. So in a situation where leases of real property, for non-residential purposes or as a head lease, are being made by the Band council, the lessor is responsible for collecting the HST.

Long-term residential rentals are HST-exempt. Even though the lessor does not charge HST to any renters, the lessor is unable to collect input tax credits on the costs of building or acquiring the rental property so the advantage remains firmly with a First Nation Band or individual landlord who enjoys the benefits of tax exemptions.

#### **VIII. EQUIPMENT LEASES ON RESERVE**

Any lease paid for tangible personal property is subject to the HST. If, however, the *Indian Act* exemptions or the “band management” exemptions are met when the property is transferred, then all lease payments for the duration of the lease will be exempt from HST. The subsequent location of the property is not a factor in this case as tax relief applies regardless of whether the property remains on the reserve or not. This situation is somewhat broader than the current provincial taxes on leases, so the result is an improvement for First Nations.

Where first possession under the lease is not given on a reserve, the location of the property during the lease agreement becomes important to determine the tax obligations related to the lease payments. Where possession under the lease is first given off reserve, lease payments will be subject to HST, unless later in the lease period the property becomes located on reserve. Normally, CRA accepts that the property is located on reserve when there is evidence that the Indian is resident on reserve. There are a number of strategies available to argue connecting factors that would result in a finding that property is located on reserve, particularly when the property is owned by a band-empowered entity.

#### **IX. GASOLINE SALES ON RESERVE**

The current plan is to have a point-of-sale rebate for motor fuels. The provincial 7% portion of the HST would not apply to gasoline, ethanol, diesel and biodiesel when used in motor vehicles as well as locomotive fuel used for trains, marine diesel used for boats, and aviation

fuel and jet fuel used for aircraft. However, the tax would be applied to the purchase price including any motor fuel tax on all other fuels such as, propane, natural gas and hydrogen. As well, it looks like the rebate would also apply to the carbon tax which would not be applied to motor fuels but would continue to apply to propane and natural gas for other purposes.

As previously, Indians, Bands and unincorporated Band entities would continue to enjoy exemptions from the HST.

Bands and band-entities should be aware of the risks their refunds or inputs are at of credit attachment even though they are on reserve. In *Maracle v. Ontario (Minister of Finance)*,<sup>38</sup> the court held that government refunds owing to the applicant, a registered Indian residing on reserve, for tax exempt gasoline sales was not protected by section 89 by engaging in the business of retailers of gasoline, the applicant chose to enter into the commercial mainstream, giving up his immunity.

#### **X. REBATES**

Conference fees (the right to attend) for officials or employees of Bands or band-empowered entities engaged in band-management activities are relieved of tax provided a certificate is supplied to the conference organizer.<sup>39</sup>

Similarly, either entity may apply for a number of forms of rebate when performing band-management activities off-reserve for thing like transportation, short-term accommodations, and meal expenses. These are claimed under code 8 of form GST 189.<sup>40</sup>

## **D. IMPACTS ON FIRST NATIONS BUSINESSES**

### **1. Inputs**

Input tax credits on the provincial portion of the HST may not be available immediately but could be subject to a 5-year lag period; this issue is under consideration by the province right now, but they may simply determine that inputs of more that \$10 million from a single business entity will not be available for that period.

Sales to Indians, Bands and band-empowered entities will be treated as taxable sales, even when subject to *Indian Act* exemptions, and the supplier will be entitled to input tax credits. This stands to be a tremendous boon to on-reserve businesses.

### **2. Off-Reserve transfer of business assets**

There are a number of provisions of the ETA that allow for the sale of a business without paying GST. Under the older regime it was more difficult to avoid PST during a transfer of business assets.

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<sup>38</sup> *Maracle v. Ontario (Minister of Finance)*, (1992) 1 G.T.C. 6214 (Ont. Gen. Div.).

<sup>39</sup> *Supra*, note 27.

<sup>40</sup> *Supra*, note 27.

Accounts payable, shares, partnership interests and other "financial instruments" are exempt from GST payments, and therefore HST. It is also possible for a vender and purchaser of a business to make an election not to pay GST under section 167 of the ETA where the property transferred includes a whole business.

## **E. CONCLUSION**

It appears that, on the whole, First Nations will benefit from the implementation of the HST, particularly where goods and supplies are available to them on-reserve. As well, band-management activities, and their availability as exempt services for First Nation government, will result in savings on a number of different fronts.

This period of transition may be an opportune time to approach the federal government about taxation opportunities and the renegotiating of existing administrative agreements.