



October 30, 2023

Department of Finance Canada
Consultation-Legislation@fin.gc.ca

Dear Sir or Madam:

RE: Exempting Indigenous Settlement Trusts from Alternative Minimum Tax

We write today in response to the Department of Finance's News Release, dated October 5, 2023, in which Canada is consulting on whether to exempt Indigenous settlement trusts from the revised Alternative Minimum Tax ("AMT"). We will refer to the consultation on whether to exempt Indigenous settlement trusts from AMT as the "**Exemption Proposal**".

We received notice of the Exemption Proposal on October 24, 2023. Given the short timeline, we have reviewed the Exemption Proposal, including the relevant legislative changes and explanatory note, to the best of our abilities.

The First Nations Financial Management Board (the "FMB") is a First Nations-led organization established under the *First Nations Fiscal Management Act*.¹

In e-mail correspondence dated October 24, 2023, we were advised as follows:

Changes to the AMT rules were proposed in Budget 2023. It is possible that some Indigenous settlement trusts would, in certain circumstances, become subject to the AMT under the proposed reform. This would mean they would incur a larger than usual tax liability, primarily because they would not be able to claim certain credits and deductions in full, as they would under ordinary tax rules.

In addition to the government's previous consultation on AMT reform in August, the government is launching another consultation (link) inviting Canadians, particularly Indigenous communities and organization, to provide their feedback on a potential exemption for trusts established to hold funds paid pursuant to a settlement agreement between Canada (or a province) and an Indigenous group, community or people who hold rights under s.35 of the Constitution Act, 1982. This would apply where the only contributions to the trust before the end of the relevant year are amounts paid under the settlement agreement (or are reasonably traceable to amounts paid under the settlement agreement).

The term "settlement agreement" would refer to those agreements in respect of a breach of an Indigenous right recognized and affirmed by s.35 of the Constitution Act, 1982, a

¹ S.C. 2005, c. 9. The FMB works with clients to develop fiscal capacity and responsible fiscal governance, and further serves Indigenous people by advocating for the necessary inclusion of Indigenous interests in financial policy matters throughout Canada.



treaty right, an agreement with Canada, a judiciary decision, or an obligation of Canada with respect to the management of property.

The publicly available Exemption Proposal is not described in great detail:

Following the government's previous consultation on reforming the Alternative Minimum Tax (AMT), which will ensure the wealthiest Canadians pay their fair share, the government is considering exempting Indigenous settlement claim trusts to ensure they are not unintentionally affected by the AMT.

Specifically, the revised AMT would not apply to trusts established to hold funds paid pursuant to a settlement agreement between the Crown and an Indigenous organization, community, or people who hold rights under s.35 of the Constitution Act, 1982. Indigenous governments and organizations, and all Canadians, are invited to share their views on this proposal by October 30, 2023.²

There are no examples of how the exemption would work. It is not clear:

- what would happen to settlement funds that are deposited into an existing Indigenous trust;
- what would happen to Indigenous trusts to which the 21-year-deemed-disposition rule (the rule against perpetuities) applies; or
- what would happen if the trust was settled with Indigenous individuals as beneficiaries, as opposed to Indigenous governments or organizations as beneficiaries.

Comments regarding Canada's Consultation Process

Canada has not properly consulted with concerned Indigenous Peoples, contrary to its obligations under the *United Nations Declaration on the Rights of Indigenous Peoples Act (UNDA)*. This obligation exists because:

- the Proposal will affect Indigenous communities; and
- Canada is obliged to consult with concerned Indigenous peoples on legislative or administrative proposals that may affect them.

The Preamble to UNDA says:

Whereas the Government of Canada is committed to taking effective measures — including legislative, policy and administrative measures — at the national and international level, in consultation and cooperation with Indigenous peoples, to achieve the objectives of the Declaration.

² Government of Canada, Department of Finance, "Government advances measures to protect Canadian consumers and grow the clean economy", October 5, 2023, online (news release): <https://www.canada.ca/en/department-finance/news/2023/10/government-advances-measures-to-protect-canadian-consumers-and-grow-the-clean-economy.html>.



UNDRIP Article 19 says:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Canada has not met the substantive requirements of consulting with concerned Indigenous people regarding the Exemption Proposal.

Firstly, it is not clear whether Canada has consulted with Indigenous rights holders at all. We have reviewed the publicly available documents regarding the Proposal and the consultation. In our view, an online request for comments is not an adequate or effective consultation process. Although the October 5, 2023, News Release states that the Proposal comes “following the government’s previous consultation on reforming the AMT”, there is no obviously accessible consultation record. It is not clear whether Canada has consulted with concerned Indigenous rights holders regarding the Exemption Proposal or on the “previous consultation”.

Secondly, Canada should put concerted effort into educating people about the scope, intent and effect of a proposed legislative change. This is particularly the case where the subject matter of the proposal is complex. The Exemption Proposal is about the income tax regime in Canada, which is a technical and complex scheme. It is not clear whether Canada has undertaken the appropriate steps, or any, to socialize the Proposal and to educate concerned Indigenous people about the Exemption Proposal.

Thirdly, the timelines set for consulting on the Exemption Proposal are inadequate for at least two reasons:

1. Generally, Indigenous governments require more than approximately 3 and a half weeks (October 5-30) for a consultation. This is especially the case for a consultation of a technical and complex nature. We note that the timeframe provided for the Exemption Proposal is significantly shorter than timeframes commonly used in the public sector to engage with interested and affected persons.
2. This consultation is taking place at an inopportune and highly busy time for Indigenous communities and governments. Fall is a very busy season for Indigenous governments which have many pressing local priorities that are already on their agendas. For many Indigenous communities, summer, in particular, and fall are times of being on the land and engaging in traditional activities. Indigenous governments will thus use the fall for attending to local priorities that could not be attended to during the summer, in addition to current issues. This year, in particular, many Indigenous communities were impacted by wildfires, adding to important and urgent local priorities. Thus, Indigenous communities must decide between grappling with the highly technical Exemption Proposal, on its very short timelines, or attending to their own local priorities, possibly with less capacity as staff members are on the land.

We recommend that:



- Canada extend its comment period well into 2024 and consult rights holders directly regarding the Exemption Proposal;
- Canada should ensure that the timeframe for consultation is responsive to local community agendas and priorities;
- The technical nature of the Exemption Proposal should be reduced to plain language;
- The Exemption Proposal should be socialized to Indigenous governments and communities, as well as to other national Indigenous organizations such as NATOA, AFOA Canada, and the First Nations Bank Trust; and
- Canada should make funding available to Indigenous governments to retain experts in tax and trust law for the purposes of this consultation.

Comments regarding the Exemption Proposal

FMB agrees that Indigenous settlement trusts should be exempt from AMT. Generally, we recommend that Indigenous trusts be treated in the same manner as trusts controlled by any other level of government.

Specifically, we recommend that:

1. The exemption must apply to all “Indigenous Trusts”. Indigenous Trusts should be defined to include any trusts settled by any organization for the benefit of Indigenous governments, communities, organizations or individuals.
2. The exemption must be drafted broadly enough to ensure the following:
 - a) any amounts paid to beneficiaries under an Indigenous Trust are exempt from AMT;
 - b) any loans made from and/or repaid to an Indigenous Trust are exempt from AMT;
 - c) any deemed dispositions of an Indigenous Trust are exempt from AMT; and
 - d) attribution rules do not apply to any Indigenous Trust income.
3. The exemption should include both Indigenous Trusts that are established to hold new funds, as well as already-existing Indigenous Trusts into which funds are deposited.
4. Canada should undertake a complete review of all trusts established for the benefit of Indigenous governments, communities, organizations or individuals to ensure that no Indigenous Trusts are unintentionally captured in the AMT rules.

Closing Remarks

In concluding, we urge Canada to extend its timeline well into 2024 to ensure proper consultation may take place on this important legislative proposal. Canada should engage with experts in tax and trust law as these issues specifically apply to Indigenous nations.

We also recommend that Canada engage with Canada’s Chartered Professional Accounting tax firms to request that these firms provide professional services to Indigenous governments or organizations. These professional services could be provided *pro bono* or at reduced rates as part of the firms’ Reconciliation Action Plans.



First Nations
**FINANCIAL
MANAGEMENT
BOARD**

**CONSEIL
DE GESTION
FINANCIÈRE** des
Premières Nations

Finally, we recommend that Canada should make its consultation process – for this and any other consultation – more transparent. To that end, we recommend that Canada should make public the steps and efforts it has taken to consult with impacted Indigenous nations. Canada should further disclose all recommendations it receives during these processes. Canada could achieve this by establishing a publicly accessible consultation record, as used by other consulting bodies.³

FIRST NATIONS FINANCIAL MANAGEMENT BOARD

Per:

A handwritten signature in black ink, appearing to read 'Geordie Hungerford', written in a cursive style.

Geordie Hungerford, CFA, CAIA, MBA, LLB
Chief Executive Officer

³ See, e.g., the public consultation record for the [Canadian Securities Administrators' Diversity Disclosure Proposal](#).