Review of the First Nations Cigarette Allocation System in Ontario

Discussion Paper 2.0

August 2015
Executive Summary

Since its introduction in 1993, Ontario’s First Nations Cigarette Allocation System (sometimes referred to as the "cigarette quota") has not been reviewed. In its 2014 Fall Economic Statement, the government of Ontario committed to launching a formal review to modernize and improve the system, and engaging the services of a facilitator to carry it out.

We, Kathleen Lickers and Peter Griffin, as independent Facilitators agreed to conduct this review and we have prepared this brief Discussion Paper to provide some introductory information, illustrate how the allocation system currently operates and demonstrate what efforts have been made in other jurisdictions to address challenges that have emerged. While not a one size fits all approach, the approaches of other jurisdictions may not be widely known and may be informative of changes that may be possible here.

We have created a confidential website located at www.allocationreview.ca and invite citizens, community representatives, industry stakeholders and public health experts to access our material and submit comment there.

In meeting directly with interested participants, we are open to hearing the perspectives and experience of all of those directly involved as well as any recommendations for improving the current system. To ensure the fullness of this review, all information shared will not be attributed to any speaker or presenter. The Final Report will summarize the perspectives shared without identifying or disclosing any personal information.

The allocation system, in its current form, is intended to manage the amount of untaxed cigarettes that can be sold by on reserve retailers to First Nation consumers, using a prescribed formula set out in Ontario Regulation 649/93. On reserve retailers are required to acquire their allocation cigarettes from Ontario licensed wholesalers. First Nation individuals can purchase these cigarettes exempt from Ontario tobacco and sales tax for their exclusive use from authorized on reserve retailers.
We pose a number of questions at the conclusion of this paper to prompt further discussion. We hope to hear from as many interested participants as possible, either in person or via the website we have created.

Introduction

In 1993, the government of Ontario formally introduced the First Nations Cigarette Allocation System (sometimes referred to as "the cigarette quota") under the Tobacco Tax Act. Prior to this, the government had imposed a cigarette quota system on First Nation reserve retailers in Ontario intending to ensure that tax-exempt cigarettes would only be available to First Nation purchasers and not be available to non-First Nation consumers, not entitled to tax exemption.

The on reserve cigarette allocation system has been in place for over twenty years, without amendment. In its 2014 Fall Economic Statement, the government of Ontario committed to launching a formal review of the First Nation allocation system:

"As part of this review, the government will appoint a facilitator who will work with First Nation communities and other stakeholders across the province, such as industry and public health experts. It will listen to stakeholder perspectives, identify issues with the current system, and make recommendations for improving and modernizing the allocation system."

Ontario has retained us, Peter Griffin and Kathleen Lickers to carry out this review; our biographies can be found on our website http://allocationreview.ca

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1 The allocation system came into effect on October 21, 1993 by Ontario Regulation 649/93 pursuant to the Tobacco Tax Act, R.S.O. 1990, c. T. 10 (TTA).

2 The Ontario Divisional Court found Ontario’s cigarette quota system was without legislative authority in Bomberry v. ON (Ministry of Revenue) (Ont. Div. Ct) 70 O.R. (2d) 662.

3 2014 Fall Economic Statement, Minister of Finance.
The objectives of the review are as follows:

1. To listen to the perspectives and ideas of First Nations leaders, communities, industry, public health experts;

2. To identify gaps in the current allocation system, including whether to incorporate other tobacco products, such as cigars;

3. To conduct an assessment of exemption models used in other jurisdictions to identify best practices; and

4. To identify specific options to the government on improving and modernizing the current allocation system, or alternative approaches.

As Facilitators, we have been tasked to carry out this review through research, meetings and the review of any written submissions. We have prepared this short discussion paper to provide background information and to offer some topics for further discussion with key stakeholders.

Since 2009, the Ministry of Finance (then Revenue) has been working with a number of First Nations on matters concerning tobacco on reserve and in July 2011 this Ministry retained a Facilitator to continue this discussion by initiating a "process of listening" with First Nations leadership in an effort to better understand First Nations' interests and their views going forward.

The perspectives of First Nations leaders captured by this 2011 Report went beyond the allocation system that is now specifically the subject of review. However, regarding the allocation system, First Nations leaders "resent not only the introduction of this system but the maintenance of it as well. First Nations characterize Ontario's allocations as akin to "rations" founded on what they view as Ontario's desire to stop gap the loss of tax revenue."\(^4\)

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Review of Ontario’s First Nation Cigarette Allocation System

Seen as a new economy on reserve, the Facilitator’s Report noted that leaders questioned the definition of contraband tobacco adopted by Ontario, resenting the broad characterization of on-reserve tobacco as being illegal. Further, the report noted First Nations voices who challenged the province’s jurisdiction to monitor and regulate the sale of tobacco on reserve.

In addition to summarizing the views of First Nations, the Facilitator was asked to provide recommendations to help the government of Ontario better understand First Nations interests in tobacco on reserve\(^5\). Some of these recommendations include:

- Noting that many First Nation communities in Ontario have generated local economies based on participating in the tobacco industry as growers, manufacturers and sellers of tobacco products, including some of the allocation cigarettes;
- Ensuring that engagement take place on tobacco initiatives;
- Recognizing the importance of tobacco economies on reserve;
- Committing to explore solutions that encourage partnerships, investments and a range of economic opportunities not limited to tobacco in First Nation communities; and
- Recognizing the importance of jurisdiction to First Nations that see land-use, business, trade and commerce as embedded in treaty relationships.

The Ministry of Finance is also aware that in addition to the perspectives of First Nation communities, the statistics related to the health effects of tobacco reveal that more than 13,000 smoking-related deaths and health care costs of more than $2.2 billion occur in Ontario annually\(^6\). To this end, public health advocates believe the allocation system should be reformulated; it is seen by these advocates as too generous and may not

\(^5\) A copy of this report is available from the Ministry of Finance.

\(^6\) 2014 Ontario Budget, Chapter V: A fair and efficient tax system.
discourage smoking, particularly amongst youth, resulting in poorer health outcomes. This review will invite the participation of public health advocates with a view toward identifying constructive solutions.

This review will examine the allocation system in great detail. It is known that when the allocation system was introduced, the regulation focused only on cigarettes and fine cut tobacco; other forms of tobacco products (i.e. cigars) were omitted. The review will therefore examine whether the system should be expanded to include all tobacco products. Further, some on reserve retailers and Band Councils find the allocation system process to be administratively burdensome. Owing to the fact that there are two methods of administering the system (through the Band Council or through the Ministry), this review will explore whether an exchange of best practices between the Province, Band Councils and retailers might create improvements.

The Taxing of Cigarettes in Ontario (generally)

All provinces charge tax on tobacco products and most provinces also charge a retail sales tax. In Ontario, a harmonized sales tax is applied\(^7\). Both kinds of taxes (tobacco and sales) are considered taxes on personal property and are therefore not charged to status Indians who purchase tobacco products on reserve for their personal use. Under section 87 of the federal *Indian Act*, “the personal property of an Indian or a band on a reserve is exempt from taxation.”\(^8\)

Tobacco products purchased for personal consumption by status Indians on reserve are considered personal property and are therefore exempt from federal and provincial sales tax and provincial tobacco tax under the *Tobacco Tax Act*.\(^9\)

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\(^7\) On July 1, 2010 a harmonized sales tax took effect in Ontario. The 13% tax replaces the federal goods and services tax (GST) of 5% and the provincial sales tax (PST) of 8%. The Canada Revenue Agency (CRA) administers the HST. First Nations in Ontario negotiated a “point of sale exemption” from paying the 8% Ontario portion of the HST for qualifying off-reserve purchases. The CRA administers the rebate on behalf of the Government of Ontario. (www.fin.gov.on.ca)

\(^8\) Indian Act, R.S. C. 1985, c.I-5, s. 87 (1)(b)

\(^9\) TTA
which are intended for consumption by status Indians (First Nations individuals) therefore do not include Ontario’s tobacco tax of $27.95 per carton (of 200 cigarettes) nor the harmonized sales tax of 13%.

Tax on Tobacco Products

The current tobacco tax rate in Ontario (most recent increase effective May 2, 2014) is:

- 13.975¢ per cigarette
- $2.80 per package of 20 cigarettes
- $3.49 per package of 25 cigarettes
- $27.95 per carton of 200 cigarettes
- 13.975¢ per gram of cut tobacco
- 56.6 % of ‘taxable price’ of a cigar

The ‘taxable price’ of a cigar is the price paid by the retail dealer, multiplied by a factor of 1.22

A federal excise duty is imposed on manufacturers and importers ($21.03 per carton of 200 cigarettes)

Finally, tobacco products are also subject to the 13% HST

What is the First Nation Cigarette Allocation System?

In 1993, the government of Ontario introduced Ontario Regulation 649/93 under the Tobacco Tax Act creating a system to regulate the sale of unmarked cigarettes (ie. tax-exempt) to Status Indians (First Nations individuals) on reserve in Ontario. The
regulation does not deal with other forms of tobacco (e.g. cigars). The stated purpose of the regulation was twofold:

(a) To ensure that there is sufficient quantity of unmarked cigarettes available for purchase on a reserve by adult members of a band for their own consumption; and

(b) To prevent the purchase of excess quantities of unmarked cigarettes that could be resold to non-Indians.\(^\text{10}\)

The *Tobacco Tax Act* and its regulations, including the First Nation cigarette allocation system is administered and enforced by the Ministry of Finance\(^\text{11}\).

Ontario makes available a certain quantity of "unmarked cigarettes" for sale on reserve (products where an amount equal to the tobacco tax has not been paid in advance by the retailer to the wholesaler and where the retailer is not required to recover this amount from the consumer). In other words, the Ontario tax has been deliberately taken out of the cost of the package/carton. It does this using its allocation system.

The quantity of “unmarked cigarettes” allocated to each “reserve” in Ontario is determined using an annual formula:

\[
[(R \times 2.5 \times 0.423) + (OR \times 2.7 \times 0.423)] \times 12 = \text{Base Allocation (in cartons of 200 cig)}
\]

**Where:**

*R* is the number of adults (aged 15+) in the on reserve population of the First Nation

2.5 is the number of cartons smoked monthly per smoker on reserve

0.423 is the percentage of smokers

\(^{10}\) O.Reg s. 2(1)

\(^{11}\) In collaboration with the Ontario Provincial Police and local police services for enforcement.
OR is the number of adults (aged 15+) in the off reserve population of the First Nation and

2.7 is the number of cartons smoked monthly per smoker off reserve

The formula takes into consideration the adult population of the First Nation (living both on and off reserve), and the smoking patterns of First Nations. This formula results in a base allocation. All First Nation communities receive a 10% increase to their base allocation to account for sales to visiting First Nation individuals for reasons such as special events on the reserve. The First Nation may obtain a 20% increase in their base allocation if the First Nation enters into a Retail Agreement with the Ministry.

The Ministry relies upon population data received from Aboriginal Affairs and Northern Development Canada (AANDC) on an annual basis. AANDC considers an “adult” to be someone 15 years and older yet, the legal smoking age today is 19\(^\text{12}\). The consumption data (i.e., 2.5 cartons on reserve and 2.7 cartons off reserve) is based upon the federal 1991 Aboriginal People’s Survey and has not been updated.

The allocation year operates from April 1 to March 31.

Only Ministry authorized tobacco wholesalers are permitted to deliver to Ministry authorized retailers on reserve. The Tobacco Tax Act defines a reserve retailer to mean a retail dealer who, in the ordinary course of his or her business, sells cigarettes to First Nation consumers. An authorization to purchase allocation cigarettes for sale to First Nations is issued by the Ministry to a reserve retailer based on proof that the retailer is authorized to deal in tobacco on the reserve (i.e. from a Band Council resolution).

Band Councils can allocate the annual quantity of allocation cigarettes among each reserve retailer pursuant to the terms of a Retail Agreement\(^\text{13}\). If the Band Council has

\(^{12}\) Currently, the allocation formula includes the population data from AANDC. AANDC considers an adult to be anyone 15 years and older. In early 1993, when the allocation system was created the legal smoking age was 16 and later that year was raised to 18. In 1994 the smoking age was raised to 19. Relying on AANDC’s data makes it very difficult to exclude 15-18 year olds however, it is illegal to sell cigarettes to this age group in Ontario.

\(^{13}\) O. Reg. s. 4(1)
not entered into such an Agreement or has not made the allocation, the Minister (of Finance, then Revenue) may do so directly instead.\textsuperscript{14} For 2015/16, 92 First Nations in Ontario have a Retail Agreement with the Ministry.

If the Band Council has entered into a Retail Agreement, then the Council agrees to allocate the annual quantity of cigarettes \textit{and} monitor those sales to ensure that sales are not made to non-First Nations.

The allocation system was not intended to provide non-First Nations consumers with tax exempt cigarettes.

If the Minister receives a complaint that unmarked cigarettes intended for Indian consumers have been sold to non-First Nations, the Minister may investigate such complaints.

If sales to non-Indians have in fact taken place, and the Band Council does not promptly transfer the unpurchased portion of the allocation to another reserve retailer, the Minister may suspend or cancel the Retail Agreement\textsuperscript{15}.

If suspended or cancelled, the Minister will (also) reduce the unpurchased portion of the annual quantity by applying a determined formula.

\textbf{Allocation System Scenario}

Ontario Regulation 649/93 provides a formula for calculating the quantity of allocation cigarettes available to each reserve annually. The formula is based on the on- and off-reserve population of each community (updated annually), and smoking and cigarette consumption rates of First Nation individuals. The smoking and consumption data used in the formula is based on the 1991 Aboriginal People’s Survey.

\textsuperscript{14} O. Reg, s. 5.(1)

\textsuperscript{15} O.Reg 649/93, s. 8(3)
The Ministry of Finance (MOF) is responsible for administering Ontario’s First Nations Cigarette Allocation System, including computing annual allocation amounts.

**Hypothetical Community Information:**

On-Reserve Population: 500 members
Off-Reserve Population: 500 members

**Allocation System Formula:**

\[
[(R \times 2.5 \times 0.423) + (OR \times 2.7 \times 0.423)] \times 12 = \text{Base Allocation}
\]

(in cartons of 200 cigarettes)

MOF’s electronic system calculates the base allocation amount according to the order of operations rule: Brackets, Exponents, Division, Multiplication, Addition, Subtraction.

The system multiplies the on-reserve population (500) by 2.5, which represents the number of cartons consumed by on-reserve smokers each month. This provides a total of 1,250 cartons. The system then multiplies this amount by 0.423, representing the smoking rate of First Nation individuals (42.3%).

This provides a total value of 528.75 cartons of cigarettes required per month to accommodate on-reserve smokers.

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16 The information presented below is intended to illustrate how the system works only and is not intended to reflect an actual community allocation.
Review of Ontario’s First Nation Cigarette Allocation System

Following the same approach for off-reserve membership, the system multiplies the population (500) by 2.7, representing the consumption patterns of off-reserve membership. The system then multiplies this amount (1350) by 0.423, again representing smoking rates of First Nation individuals (42.3%). This provides a final total of 571.05 cartons of cigarettes required per month to accommodate off-reserve smokers.

Adding these amounts together provides the total monthly amount of cartons required to accommodate on- and off-reserve membership: 1099.80.

MOF’s system calculates the annual base allocation by multiplying the monthly total (1099.80) by twelve, which, in this case, provides a base allocation of: 13197.60 cartons of cigarettes for the allocation year. This number would be rounded up to 13,198 cartons of cigarettes.

Increase(s) to Base Allocation

All communities receive a 10% increase to their base allocation to accommodate situations such as special events and purchases made by visiting members of other First Nation communities. This would result in an annual allocation of 14,517.80 cartons (rounded up to 14,518 cartons).

Retail Agreements

If the Band Council signs a Retail Agreement with the Ministry, the base allocation is further increased by 20%. This would result in an annual allocation of 17,421.60 (rounded up to 17,422 cartons).
Retail Allotments

A Band Council which has signed a Retail Agreement with the Ministry is required to assign or allot its total annual allocation to reserve retailers. In this case, the Band Council tells the Ministry how much of the annual allocation (17,422) each authorized reserve retailer is allotted for the allocation year.

If the Band Council does not have a Retail Agreement, the Ministry determines the allocation allotments for reserve retailers. Generally, the Ministry’s policy is to evenly allot the reserve’s allocation to the reserve retailers. In this case, the annual allocation (14,518) is divided evenly between the authorized on-reserve retailers. For example, if there were three retailers in this hypothetical community, each retailer would have an annual allotment of 4,839 cartons of cigarettes.

Federal Excise Duty

The federal government, under the *Excise Act* and enforced through the Canada Revenue Agency also attaches a duty on tobacco products in the form of an excise duty. This duty is applied directly to the manufacturer/importer. The current federal excise duty is equal to $21.03 per carton of 200 cigarettes. The Canada Revenue Agency explains that "a federal excise duty is imposed on tobacco products at the manufacturing level and is payable by the manufacturer, or in the case of imported tobacco products, by the importer"\(^{17}\). It is treated as a cost of the manufacturer or importer and therefore, becomes embedded in the price of the product. This federal excise duty is *not* exempt under section 87 of the *Indian Act*.

While Ontario’s allocation system is intended to regulate cigarettes that may be sold tax-exempt (federal stamp only) to status Indians on reserve, the Canada Revenue Agency (CRA) permits the delivery of Ontario yellow stamped cigarettes for sales to non-First Nation consumers, without the imposition of the HST (13%) to First Nation reserves.

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\(^{17}\)Canada Revenue Agency, Information Bulletin, June 2013, Manufacturers of Tobacco Products.
There is no specific legislative authority for CRA to restrict quantities. What this means is that both kinds of stamped cigarettes (peach/allocation and yellow/CRA) are lawfully available for sale to status Indians on reserve. Non-First Nation purchasers of these cigarette products are not entitled to the tax exemption attached to these tobacco products.

**Cigarette and Fine Cut Tobacco Markings**

All packages of cigarettes and packages of fine cut tobacco for sale to consumers who have to pay tobacco tax in Ontario must be marked with the Ontario-adapted federal stamp.

Cigarette cartons (200 cigarettes) must have a yellow and black rectangle marked ‘ONTARIO’ on both ends.

Cigarette cases (50 cartons) must have “ONTARIO” on the top of any two opposite face sides of the case.

All packages of cigarettes and packages of fine cut tobacco for sale to persons who are exempt from the payment of tobacco tax (First Nations and diplomats) must be marked with the federal peach coloured stamp on the package.
Development of low cost tobacco market on reserve

At the time the allocation system was introduced in 1993, the tobacco industry was dominated by manufactures located entirely off reserve. Between the federal Canada Revenue Agency and the then Ontario Ministry of Revenue, these levels of government controlled the licensing of and taxes/duties on cigarettes entering the retail market on reserve.

Over the past 20 years the growth, manufacture, distribution and sale of tobacco products on reserves in Ontario has emerged. The on reserve tobacco industry has not only emerged but in some communities, solidified itself as a viable economy.

To be clear, the low cost tobacco products manufactured on reserve and allocation (tax exempt) cigarettes sold on reserve by retailers from Ministry approved wholesalers are not the same products. While the products may differ, where the consumer is a non-First Nation individual, the transaction is the same: the non-First Nation consumer is not entitled, in law, to purchase tobacco products tax free.

The availability of tobacco products on reserves to non-First Nations free of tobacco and harmonized sales tax in Ontario has resulted in a difference of pricing between on reserve and off reserve retailers and raises a complexity of issues that Ontario and First Nations are seeking to address.

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18 Today, these manufacturers trade under Imperial Tobacco; Rothmans, Benson & Hedges; and JTI-Macdonald.
## Approximate Carton Price/Tax Structure

<table>
<thead>
<tr>
<th>Type</th>
<th>Approximate Total Price</th>
<th>Taxes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yellow Stamped</td>
<td>$85-$110</td>
<td>$21.03 (federal excise) + $27.95 (PTT) + HST</td>
</tr>
<tr>
<td>Allocation Cigarettes</td>
<td>$45-$70</td>
<td>$21.03 (federal excise)</td>
</tr>
<tr>
<td>Contraband Cigarettes</td>
<td>$10-$45</td>
<td></td>
</tr>
</tbody>
</table>

19 Prices noted are for illustrative and discussion purposes only and are not to be used as market data.
On June 1, 2011, Ontario’s *Supporting Smoke-Free Ontario by Reducing Contraband Tobacco Act, 2011* that amended the *Tobacco Tax Act*, received Royal Assent. As a result, the Minister of Finance may enter into arrangements and agreements with a Council of the Band with respect to tobacco or for the purposes of the administration and enforcement of the Act. The potential to negotiate a new arrangement has resulted in the Ministry exploring the possibility of self-regulatory models regarding tobacco on reserve with two First Nation communities. During the course of exploring this potential, the pilots have examined approaches that have emerged outside of Ontario.

**Models in other jurisdictions**

All Canadian provinces employ a variety of approaches to managing tax exempt tobacco for First Nations individuals. In addition to methods used in the United States, these are approaches that Ontario can potentially learn from.

**Personal Purchase Amounts**

Some provinces use a similar allocation system as Ontario’s but also include a personal purchase limit in order to ensure that consumers are only purchasing for their own use. For example, in British Columbia, a First Nations consumer may purchase a maximum of the equivalent of two cartons of cigarettes per day, to a maximum of the equivalent of eight cartons per month.
Refund to Retailer Models

Several provinces use a refund approach, where cigarettes are sold to on-reserve retailers with all taxes included (federal and provincial). However, sales to First Nation consumers are exempt of the provincial taxes. Retailers keep track of these sales, and then typically provide the province with the amount of sales made to eligible First Nations consumers. Retailers are then refunded for the provincial taxes that were collected. Alberta, Saskatchewan, and Quebec are examples of provinces with refund systems.

Most refund systems also include a personal purchase limit as described above.

Tobacco Agreements/Compacts

Some provinces and other jurisdictions also have reached specific tobacco agreements with First Nations, where tobacco tax revenues are retained or are remitted to the First Nation community. For example, in Manitoba, 59 First Nations have signed agreements where the First Nation places an assessment on cigarettes equal to the province’s tobacco tax. The province then collects the assessment amount at the wholesale level and remits to the First Nation the portion attributable to First Nation purchasers.

In New Brunswick, through tax sharing agreements signed with First Nations, the province returns 95% of the provincial tobacco, gasoline, motive fuel and sales tax collected on-reserve to the First Nation, from sales to non-First Nation consumers.

In British Columbia, communities like Cowichan Tribes have imposed their own tobacco levy to fund community services.

Similarly, several tribes in the United States have entered into compacts or formed other agreements with state governments regarding the sale of tobacco on tribal lands. For example, Washington State has agreements, known as compacts, with the majority of their federally recognized tribes. Typically these compacts include a tribal levy on
cigarette sales, with the tribe retaining most, or all of, the revenue that is generated from the sales of cigarettes on tribal lands. The revenue is then used for programming or services delivered by the tribe.

**Common Elements of Agreements/Compacts:**

In most cases, where a First Nation and Province (in the USA, where a US Tribe and US State) enter into an Agreement (Compact) regarding tobacco sales on reserve, there is often a recognition of the tax immunity of the Nations' members or the Tribe may introduce its own levy. The Agreements define the roles and responsibilities of each government (First Nation or Province) and the kinds of tobacco transactions covered by the Agreement. There are provisions for First Nation oversight, for information sharing, audit, dispute resolution and use of proceeds.

Where Agreements or US Compacts redistribute tax proceeds from the Province (i.e. BC, MB, NB) or State (i.e. Washington) to the First Nation or Tribe, the province or state has amended its legislation to permit the redistribution.
## Summary of Models Across Canada

<table>
<thead>
<tr>
<th>Model</th>
<th>Description / Details</th>
<th>Examples*</th>
</tr>
</thead>
</table>
| Allocation System      | - Tax-exempt product made available to retailers on-reserve based on allocation formula                                                              | - Ontario  
                          |  | - Nova Scotia  
                          |  | - British Columbia |
| Refund System          | - On-reserve product is tax-in;  
                          | - For eligible First Nations consumers, retailer sells the product tax exempt and applies to the Province for a rebate/refund. | - Alberta  
                          |  | - Saskatchewan  
                          |  | - Quebec |
| Tobacco Agreements     | - On-reserve product is tax-in; periodic repayment via rebate/refund to First Nation.  
                          | - Some communities impose a levy or royalty equivalent to the tobacco tax rate to all consumers (e.g., through Band assessment). Revenue is then shared with the First Nation. | - Manitoba  
                          |  | - British Columbia |

*There may be overlap with the above, depending on agreements in place, as some jurisdictions have more than one type of model in place*
**Defining the Challenge in Ontario**

Tobacco is not an illegal substance but it is highly regulated. Ontario uses a tax regime as one method to discourage smoking (i.e. the higher the cost for a pack of cigarettes, the less likely a young person may be to start smoking). Ontario’s tax regime is integrated at every level of the supply chain, except where tobacco products are made available for sale on reserves in Ontario. Then Ontario operates what may be called a "tax-out" system; neither the Ministry approved wholesaler nor reserve retailer are required to collect or remit the tobacco tax to Ontario for sales to First Nation consumers.

First Nation consumers are not required to pay provincial tobacco or sales tax on cigarettes purchased on reserve. First Nation retailers are not collecting tax on sales of allocation cigarettes to *any consumer*, First Nation or not; however, the sale of allocation cigarettes to *non-First Nation consumers* is a breach of the *Tobacco Tax Act*. These consumers are not entitled to the s. 87 tax exemption available to Status Indians on reserve.20

A factor that has emerged since the creation of the allocation system is the development of a tobacco economy on some First Nations in Ontario. This new landscape will have to be taken into consideration in this review.

Today, allocation (tax exempt) cigarettes, yellow stamp (CRA) and low cost on reserve manufactured cigarettes are all available for sale on reserve. The volume of tobacco products both regulated and unregulated available for consumption may run counter to positive health outcomes.

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20 Some First Nation retailers, operating under the *Tobacco Tax Act*, may be collecting tax on the sale of yellow stamped cigarettes where they have acquired yellow stamped as a deemed retailer under the Act.
Adding to the complexity of these taxable transactions is the fact that there is not a shared understanding of the term “contraband” tobacco.21

Topics for Further Discussion:

1. Does the current allocation system work? Should changes be made? If yes, what changes?

2. Jurisdictions outside of Ontario have developed a variety of approaches to manage the sale of tobacco on reserve. Would any of these approaches work in Ontario?

3. The current allocation system is restricted to cigarettes. Should all tobacco products be included?

4. The non-payment of tax on purchases of tobacco products on reserve by non-First Nations consumers creates competition amongst on reserve and off reserve retailers that some see as unfair. What solutions may be found to balance competition?

5. Smoking is not illegal but its health impacts are severe. The current allocation formula does not align with the legal smoking age (19yrs). How can this be corrected, if at all?

6. The allocation formula reflects the smoking patterns of status Indians based upon 1991 data. How can this be corrected, if at all?

7. How would the tobacco manufacturers like to see the allocation system changed, if at all?

21 The use of this terminology and its negative impacts was discussed in the Facilitator’s Report (2012). Since this report, the Government of Canada introduced Bill C-10, An Act to Amend the Criminal Code (Tackling Contraband Act). The Bill received Royal Assent on November 6, 2014 and amends the Criminal Code to create a new offence of trafficking in contraband tobacco and provides minimum penalties of imprisonment for repeat offenders.
8. There is not a shared definition or common understanding of “illegal” tobacco products and the “illegal” sale of tobacco products. How can this be resolved?

Conclusion:

To find out more about the Review of the First Nations Cigarette Allocation System in Ontario, to contact the Facilitators or make any further enquiries, please visit the allocation review website at: http://allocationreview.ca