FIRST NATION/LOCAL GOVERNMENT SERVICE CONTRACTING

By

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INTRODUCTION

There is a long history of local governments providing local services to reserve lands in British Columbia. In some cases there were formal contracts between a local government and the Department of Indian and Northern Affairs, usually when large capital investments were involved. In other cases there were agreements with band governments, agreements between municipalities and individual certificate of possession or head-lease holders and in still other cases, services were provided by a municipality or regional district to a First Nation within its boundaries without any formal agreement. In those situations where municipal (or provincial or regional district) governments collected property taxes from non-native leaseholders on reserves there were also sometimes contracts, but even in these circumstances servicing arrangements varied, with most services that were provided being done informally and with a majority of on-site services not provided by the tax collecting government to its leaseholder taxpayers.[1]

To eliminate situations where leaseholding taxpayers were not receiving services and to enhance First Nation self-government, in 1988 amendments were made to the Indian Act allowing First Nations to assume jurisdiction over property taxation on their reserve. Complementary provincial legislation required the withdrawal of provincial and local government property taxation on reserves when the First Nation implemented its own taxation system.[2] As a consequence of implementing jurisdiction over property taxation on its reserve, First Nation governments also assumed responsibility for being sure that taxpaying leaseholders are provided with appropriate local services.[3] This responsibility has often been discharged through a contract for the purchase of local services from a local government.

It is widely observed that contracts function well when both parties benefit and

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[1]Robert L. Bish Property Taxation and the Provision of Government Services on Indian Reserves in British Columbia. Centre for Public Sector Studies, School of Public Administration, University of Victoria, 1987.

[2]The Indian Self Government Enabling Act, S.B.C. 1990, c. 52.

[3] The courts are available to see that services are provided to taxpayers even if the First Nation and local government cannot reach an agreement. In a case decided July 21, 1995, Justice Saunders of the Supreme Court of British Columbia, at the request of leaseholding plaintiffs on the Adams Lake Reserve, ordered the municipality of Salmon Arm to continue to provide water, sewer and fire protection services and for the Band to pay Salmon Arm $75,000. If the parties cannot come to an agreement within a year the Judge will make further orders. *238709 B.C. LTD., Macdonald's, et al v. District of Salmon Arm and Adams Lake Indian Band.* Vancouver Registry A952418. A subsequent decision was rendered in Delta for the Tsawassen First Nation. A recent appeal court decision on this issue for these cases is discussed in the section on Municipal Termination of Services.

both parties want to make them work, and it should be noted that in the 1987 study of service relationships between municipalities and First Nations very few contract problems were identified[4]. Nevertheless, in the event that arrangements for service provision do break down, it is important to have a well drafted contract to protect the interests of both parties. Thus, the service agreements should be clear and functional, avoiding defects that make it easy for either party to avoid its contractual obligations. This paper explores a number of issues that have arisen in local government/First Nation contracts. It is based on an examination of over 40 agreements between First Nations and local governments in British Columbia, from the large and complicated to the more limited and straightforward, and analyses of court decisions and an arbitration decision on First Nation-Municipal service relationships. Discussions were also undertaken with First Nation, local and provincial government officials, especially where contract problems had arisen and were reported in the media. Such an examination permits some insight into the trends, provisions, and problems that characterize these arrangements.

There is also at least one case where head-lease holders have contracted with a municipality to provide all services to the reserve in exchange for a payment equivalent to full municipal taxes. This contract should not be a problem for services wuch as water, sewer or fire protection, but such a contract does not give the municipality jurisdiction to perform regulatory functions on reserve lands. In order to perform regulatory functions the First Nation government would have to enact the appropriate bylaws and designate the municipal government to provide for implementing the regulation.

TRENDS IN FIRST NATION/LOCAL GOVERNMENT SERVICE AGREEMENTS

Local government/First Nation agreements may be broken down into three stages - 1) agreements undertaken prior to the assumption of First Nation Taxation, when local governments collected property taxes from reserve leasehold lands; 2) interim agreements following implementation of First Nation taxation, and 3) post-First Nation taxation long term agreements.

Pre-First Nation taxation agreements

Service contracts prior to First Nation taxation usually involved the local government, usually a municipality and occasionally a regional district or improvement district, charging the Department of Indian and Northern Affairs for services provided to native residents on reserve lands. In a few cases local governments also supplied services to reserve leaseholds (which they taxed) under a formal contract. These formal contracts usually involved situations where substantial infrastructure investments were

[4]Robert L. Bish Property Taxation and the Provision of Government Services on Indian Reserves in British Columbia. Centre for Public Sector Studies, School of Public Administration, University of Victoria, 1987.

required and with few exceptions were for only a limited number of services.

The contracts themselves, entered into by the Department of Indian and Northern Affairs on behalf of First Nations, tend to be exceptionally one-sided in favour of the local government[5] and even then do not appear to have been enforced[6]. In most cases where a local government supplied services to leasehold lands on a reserve, however, it was without a formal contract, and in a majority of cases where local governments taxed leaseholders, on-site services were simply not provided.[7] In spite of the weaknesses in the contrtacts themselves, however, with very few exceptions services were provided and payments made.

Interim Agreements

As First Nations began to enact taxation by-laws and be explicitly responsible for local services, interim agreements were often forged to provide continuity in service provision and payment to the local government. These agreements were made in many political and economic situations and as such they differ in a number of ways. One noticable aspect is that the interim agreements were often very one sided, usually in the sense that there was a focus on being sure the local government was paid, but with no concern for the quality of or actual delivery of services. Many of these agreements also left out important elements of a contract because they were intended for only short (one to two year) terms. However, many of these interim agreements have been used for longer periods of time than they were intended.

Long Term Agreements

The third group of contracts are those agreements negotiated after the First Nation had enacted taxation by-laws and was collecting its own taxes, often following initial interim agreements. These agreements tend to be the most substantial of the three types, as they are intended to provide a long-term service arrangement under which the local government and the First Nation can operate. They are usually

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[5]For example, in some of these earlier agreements, the municipality was protected against liability for failing to provide services to the First Nation, but was able to demand payment from the Minister for unpaid service charges.

[6]The failure of the federal government to ensure certain surplus monies be repaid to a First Nation, in accordance with an early service contract, is illustrative. In another case contracts between the Department and a municipality went missing and were never executed in Ottawa. Services and payments from the Band continued anyway and the contracts were not missed until a dispute many years later.

[7]In fact, it was largely the issue of non-delivery of services to leasehold taxpayers that generated the demand for First Nation taxation to replace non-native government taxation on reserves. See Robert L. Bish, Eric G. Clemens, and Hector G. Topham; Study of the Tax and Service Implications of Bill C-115. Centre for Public Sector Studies, School of Public Administration, University of Victoria, 1991.

negotiated by the First Nations themselves without the participation of Indian Affairs as a party to the agreement. Moreover, these agreements are usually less one-sided than the preceding arrangements.

Barriers to New Long Term Agreements.

With a long history of successful contracting and informal local government provision of local services on reserve lands, it would seem relatively easy to continue this tradition with the First Nation assuming jurisdiction over taxation. This has been the case where the local government formerly provided local services (with or without a contract) and the First Nation has simply formalized that relationship and, with comprehensive contracts instead of a contract for a single service, the First Nation also makes a contribution (usually equivalent to the leasehold taxes that would have otherwise gone to the local government) for the cost of off-reserve services (recreation centres, playing fields, parks, libraries, etc) that are available to reserve residents.

There are three situations, however, where the changed tax jurisdiction has complicated negotiations over service contracts. One problem is posed for local governments that were formerly collecting taxes from reserve leaseholds but not providing services to those lands. These local governments formerly enjoyed revenues that they now have lost and many of the complaints about First Nation taxation have emerged from these local governments. The local government's dilemma is that because they were not providing services in the past, the First Nation had developed alternative suppliers and simply saw no need to purchase a full range of local services from governments which in the past took tax revenues from their lands without providing services to reserve taxpayers. Unfortunately, the concern over municipal revenue loss has sometimes complicated negotiation over a service contract where the First Nation wanted to purchase only a few services, but the local government wanted to sell all services to recoup lost revenues.

A second transition issue occurrs where a municipal or regional district provides expensive off-reserve facilities such as recreation centres, playing fields, parks, and libraries, which are available for use by both leaseholders and native reserve residents, and these facilities are partially financed with tax revenues from leasehold properties. Some First Nations have not wanted to continue to contribute to the cost of these facilities. Where these situations exist, First Nations will find it extremely difficult to get a local government to sell it on-site services such as water, sewer and fire protection unless the First Nation is willing to support the off-reserve services that are available to its reserve residents. As contracting has proceeded comprehensive contracts are including payment for off-reserve services and this problem appears to be diminishing if not disappearing altogether.

The third situation that is creating some difficulty in arriving at a service agreement is where a large non-residential tax base on leasehold lands generates far more tax revenue than the cost of financing local services, including the financing of soft service facilities. In these cases the local government, before First Nation taxation,

collected and used these revenues to provide its local services elsewhere in its area. With First Nation assumption of taxation, First Nations plan to obtain this surplus of revenues over local service costs to provide extra services to its own members. This will leave some local governments with lower revenues, but there remain opportunities for both the local government and First Nation to obtain revenues greater than service costs for their use elsewhere and they should be able to come to some agreement.

There is no simple solution for overcoming historical anomalies that interfere with developing new relationships. The perspective adopted in this analysis, however, is that taxpayers should "get what they pay for and pay for what they get," and that new relationships will work best if based on this philosophy. It also appears desirable, in case disagreements do arise, that contracts based on this philosophy be well drafted to protect the legitimate interests of both parties.

Municipal Termination of Services

Disputes have arisen when agreements have not been forthcoming and municipalities have provided notice that services would be terminated to reserve lands. Two cases have reached the appeal court level and should set precedents for this issue in the future.

The provincial Indian Self Government Enabling Act provides for a First nation to request the Minister to direct a municipality to continue services for up to one year following the introduction of first Nation taxation upon request by the First Nation. No First Nation made such a request as in practice the parties have been negotiating during the first year. Two municipalities that have later given notice that they will discontinue providing services to reserve lands are the District of Delta to the Tsawassen First Nation and the Districct of Salmon Arm to the Adams lake First Nation.

In the Delta case the municipality had requested that the First Nation submit its development plans to a municipal hearing (as would be done with municipal planning and zoning decisions) and the First Nation refused. As elsewhere, Delta had no history of consulting Twawassen on developments in Delta. In Adams lake the municipality wants to sell all local services to a reserve populated by commercial leaseholds and the Adams Lake First Nation wants to purchase only water, sewer and Fire protection services. Following Supreme Court decisions requiring the continuation of services, the Court of Appeals consolidated the cases and ruled that there is a common law duty for a municipality to continue to provide services for a reasonable payment, but not indefinately. The court ruled that the one-year requirement provided for in the provincial Indian Self-Government Enabling Act, S.B.C. 1990, c. 52 is a minimum requirement and does not eliminate common law obligations. The common law obligation is that "reasonable" notice is required, and that reasonable depends on the time it would take and the capacity of the First Nation to provide a reasonable alternative. The questions of what is "reasonable" for each of these cases has been referred back to trial court judges. (Tsawassen Indian Band, Chief Sharon Bowcott, Councillor Kimberly Baird, Councillor Marvin Joe, Councillor Candy Adams, Councillor Tammy Williams v.

Corporation of Delta and Adams Lake Indian Band v. District of Salmon Arm, August 6, 1997. CA22377/VI02883).

SPECIFIC CONTRACT PROVISIONS

1. Parties of the Agreement

Initially, agreements involving service provision to native reserves were made between the Department of Indian and Northern Affairs on behalf of the First Nation, and a local government. More recent contracts tend to be between local governments and First Nations, and it is much less common for Indian and Northern Affairs to be involved. This change is mainly the result of two developments. First, there are the numerous Canadian court decisions recognizing the legal status of "Indian Bands". The British Columbia Court of Appeal, for example, found that an Indian band is a body of persons with "unique corporate status," in *Joe* v. *Findlay*.[8] Further, in *In Re Public Service Alliance of Canada and Francis*[9] the Supreme Court of Canada decided an Indian Band Council could be considered an employer within the meaning of the Canada Labour Code and in *Mintuck* v. *Valley River Band*,[10] the Manitoba Court of Appeal found that an Indian Band was capable of suing or being sued through its councillors or agents. It can also be noted that in the Adams Lake--Salmon Arm case referred to above, the party to the suit was the Adams Lake Indian Band in its corporate capacity.

Second, the recognition of the legal status of Indian Bands by the Courts has also been facilitated by the actions of both the federal and British Columbian governments. The federal government has adopted a policy that recognizes the inherent right of First Nations to govern themselves and encourages bands to be responsible for their own contractual relationships. The Minister of Indian and Northern Affairs will generally no longer be a party to First Nations contracts with local governments, and even when he/she is, it is only in a clearly defined (and often very limited) way. In terms of provincial government action, s.286.1 of the B.C Municipal Act explicitly allows municipalities to contract directly with First Nations and the previously cited Indian Self Government Enabling Act directs local governments to "make room" for Aboriginal taxation and service delivery.[11]

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[8]see *Joe v. Findlay*, [1981] 3 W.W.R. 60.

[9](1982), 139 D.L.R. (3d) 9.

[10][1977] 2 W.W.R. 309. More recently, an Ontario District Court came to the same conclusion. See: *Clow Darling Ltd.* v. *Big Trout Lake Band of Indians* (1989), 70 O.R. (2d) 56 [1990] 4 C.N.L.R. 7.

[11]*Supra*, note 3.

2. Description of Services

The first problem encountered in First Nation / local government agreements usually concerns the description of the services. In terms of services, there are two main types of contracts. *Specific* service contracts will specify individual services to be delivered to the reserve. *Comprehensive* contracts may indicate all local services and then list significant exceptions not to be delivered. Such a listing is important for determining the amount that should be paid for the services, as it is not appropriate that the First Nation pay for any undelivered services. Nevertheless, quite often the description of the services contracted for is not sufficient. There is either a failure to properly list the services to be provided by the local government or, more frequently, there is a failure to include a provision requiring the local government to supply a certain standard of services. One way of dealing with this issue is to simply require the local government to supply services "at the same frequency and quality as those received by the rest of the area served" or "at a similar standard as that received by other areas serviced by the local government." Such provisions are simple but will likely be sufficient to ensure that the local government services the reserve lands as it does its own, unless there is some specific desire for different service levels.

For clarification, it is worth drawing a distinction between hard or on-site and soft, off-site, services. Hard services are those generally viewed as essential by the community, and tend to be delivered directly to the recipient. They include road maintenance, water supply, sewers, fire protection and garbage collection. Soft services, on the other hand, are those *available* to the leaseholder to use; such as libraries, parks and recreation centres. Soft services are usually not available on the reserve itself and larger facilities such as a recreation centre may serve a population outside as well as inside a municipality's boundaries.

There is no single approach to the treatment of off-site services. Most comprehensive contracts include payment of a tax-equivalent share by the First Nation to the local government. Specific service contracts, in contrast, tend to be for a few on-site services only and do not include off-site services.

The approach in contracts examined appears to be that if the First Nation leaseholders had been receiving services from the local government that was levying a property tax on them, and the leaseholders (and usually the entire reserve) are considered part of the community, services contracts tend to be comprehensive and include off-site services.[12] Thus the First Nation\locaal government service

[12]If the First Nation attempts to contract only for hard services, the local government may attempt to change the pricing mechanism from a tax equivalence system to a full cost pricing system, which is much more expensive for the First Nation. The First Nation generally benefits from tax equivalence pricing. Nevertheless, it is worth noting that the marginal cost of supplying some services to the reserve is quite low for the local government and thus it is to the local government's benefit to sell services to the First Nation, even at tax equivalence rates. See Robert L. Bish, Eric G. Clemens and Hector G. Topham. Indian Government Taxes and Services in British Columbia. Centre for Public Sector Studies, School of Public Administration,

arrangements continue to reflect the pre-First Nation taxation attitude that leaseholders are part of the local community.

In contrast, where the tax-collecting local government did not provide on-site services to leaseholders, or provided them only under a separate contract as is often done for water supply, sewage collection and fire protection, First Nations do not appear willing to expand their a purchase of services to include off-site, or even additional on-site, services. In this latter situation it would appear that the local government did not treat the leaseholders as part of their community prior to the implementation of First Nation taxation and the First Nation simply continues that perspective now that it possesses taxation jurisdiction.

3. Exceptions for Non-Delivered Services

In comprehensive service contracts it may be necessary to recognize that not all regional district or municipal services can be legally provided to a reserve. Services that cannot be provided include planning, zoning, and by-law enforcement (noise, animal control, firearms, pollution, etc.) unless the First Nation has enacted its own regulatory by-laws and designated local government officials as having enforcement authority. For example, no case was identified of a First Nation allowing a municipality to perform planning and/or zoning of First Nation lands. Of course, the list of services not supplied by the local government is useful here once again, as it is not appropriate for the First Nation to pay for services that the local government cannot legally provide, or that the First Nation is entitled to without payment, such as police services from the R.C.M.P.

4. Police Services

The situation regarding police services on reserves deserves some comment as it is a rather large expenditure for municipalities with a population greater than five thousand. Generally, the province is responsible for providing police services on reserves by virtue of s.92(14) of the Constitution Act, which grants the provinces power to administer justice within provincial lands, and several court decisions that have found reserves "not to be federal enclaves in provincial territory."[13] The province of B.C. has assumed its policing responsibilities via the B.C. Police Act and obtained federal funding via the B.C. Provincial Police Services Agreement (which also designates the RCMP as the B.C. Provincial Police Force). The result is that on reserves, as in other provincial rural areas and in municipalities with a population of less than 5000, the provincial government provides the police services and assumes 70% of the policing costs, with the federal government covering the remaining 30%.[14] Thus, it is not necessary for First

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University of Victoria, 1991.

[13]See in particular: *Cardinal* v. *A.G.* of Alberta, [1974] S.C.R. 695 and *Dick* v. *the Queen*, [1985] 2 S.C.R. 309.

[14]Municipalities become responsible for providing police services when their population exceeds 5,000, though the federal government does contribute a percentage of the costs. When the

Nations to enter into a contract (and pay for) police services from a local government.

A First Nation may wish to create an alternative agreement for police services with a nearby municipal police department where service from the municipal department would be more practical than obtaining it from a distant RCMP detachment. However, the funding sources for such arrangements are only currently evolving. In the case of Tsawwassen, for example, there is an informal policing arrangement that has developed between Delta Municipal District Police, the Surrey detachment of the R.C.M.P. and the Tsawwassen First Nation, on the request of the Band Council. Because the Delta municipal force is much closer than the Surrey R.C.M.P., Delta provides first response and emergency service, followed up by the R.C.M.P. The relationship between Delta Police and the Tsawwassen First Nation developed largely out of convenience the professionalization of police who want to do a goodjob regardless of jurisdictional boundaries. In the Tsawwassen situation it appears that Delta is assuming some extra costs of policing on the reserve, but these may be covered by agreements it has with a couple head-lease holders for full payment equivalent to municipal taxes.

The Musqueam First Nation has chosen to formally contract with the city of Vancouver for policing its reserve lands, which are surrounded by the city. This is in contrast to the Tsawout First Nation's decision to continue receiving police services from the Sidney R.C.M.P. detachment instead of contracting with the municipality of Central Saanich, which surrounds the Tsawout reserve.

There are also additional federal/provincial cost sharing arrangements that are evolving with regard to police services. For example, where a First Nation desires additional police services for its First Nation population, it may now enter a tripartite agreement in which the federal, provincial and First Nation governments share the costs incurred.[15]

4. Party Responsibilities

Another weakness in many contracts is the failure to clearly articulate the responsibilities of both parties. When establishing a sewage system or road maintenance scheme, each party must be aware of its respective responsibilities. For example, the First Nation may be responsible for ensuring that a reserve sewage system is built according to municipal specifications, and the municipality may be responsible for annual cleaning of lines and maintenance of a pumping station. There should be a clear list of things each is to be responsible for and some sort of

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municipality has a population of 5,000 to 15,000 the federal government contributes 30%, the municipality 70%. When the population is greater than 15,000, the federal contributions shrink to 10%.

[15]An example of such an agreement is the one signed on December 21, 1994 between the government of Canada, the government of British Columbia and the Nisg'a Tribal Council for a Royal Canadian Mounted Police - First Nations Community Policing Service.

mechanism that allows the parties to determine who should be responsible for unforeseen responsibilities that might arise. A link to the dispute resolution provisions of the agreement (to be discussed below) might be a useful strategy. Further, the parties may also include provisions limiting their responsibilities to further clarify their respective legal obligations.

5. Term

The duration of the agreement is always stated. However, often services are provided and payments are made long after the agreement has expired. As a result, it may be most useful for the parties to include in the contract a provision that automatically extends the agreement unless one or the other party requests renegotiation. Automatic renewal is especially useful where the terms of payment are based on tax-equivalency and the local services are routine. When renegotiation is requested it would be useful to specify a protocol that can include extending the contract term as well as other aspects of renegotiation. More important than requests to extend the agreement are any consideration of a discontinuation of a service. There should be clear deadlines by which a request to discontinue a service be received so that local service production arrangements can be adjusted to both meet the balanced budget requirements of the local government and provide continuity in services for the taxpayers. The parties may also want to ensure that the procedure for clarification or change can be utilized after the expiration of the contract to make any necessary adjustments prior to completion of a new contract.

As noted earlier, even interim agreements are frequently extended and utilized far beyond their intended term. Knowing this, the parties should take this contingency into account in their agreements.

6. Rate Structure/Billing Protocol

The rate structure and billing protocol are important contractual issues. Given the diversity in local government accounting systems and the difficulty of separating costs to service a reserve from costs to service the rest of the municipality, prices are usually related to assessed values or tax equivalence - unless there is a specific fee, such as for water or sewage hook-up. The advantage of these approaches is that they respond to changing conditions, without having to specify in advance a fixed total price for each year into the future. Generally, the easiest pricing approach is based on tax equivalence for general services or fee equivalence where the local government finances a service with a user charge.

Simple tax equivalence involves the First Nation paying the local government "the amount that would otherwise have been collected with the local government's property tax."[16] This sort of arrangement is easily understandable and recognizes that

[16]Robert L. Bish "Implementing Aboriginal Self-government Taxation and Service Responsibility in British Columbia," in Canadian Public Administration, Vol. 36, No. 3 pp. 451-460. (specifically pp. 458-460).

property tax revenues seldom cover the full cost of general services but that reserve lands generate other revenues such as user charges or revenue sharing due to the population on the reserve. The tax equivalent approach treats reserve lands as if they are part of the local community. An additional benefit of this approch is that it is easy to adjust for non-delivered services such as planning or by-law enforcement. One simply subtracts from the full tax equivalent amount the percentage of the local governments expenditures devoted to non-delivered services to obtain the percentage of full tax equivalence to be paid to the local government. It is also possible to go one step further and credit the First Nation for services it provides that are available to non-reserve residents of the municipality.[17] As noted elsewhere, this type of arrangement has also been adapted to situations involving Reserves that have no non-native held leaseholds or tax revenues where the amount of taxes that would have been raised from native properties if they were taxable is used to determine the price paid to a municipality to provide comprehensive local services to a reserve.[18]

One situation where tax equivalence will work less well is for those few First Nations that have very high tax revenues relative to service costs, usually because of a large non-residential tax base. In the past, revenues from these leaseholds has exceeded service costs and the surplus used for services in other areas of the local government. First Nations in this situation plan on using these surpluses for improving their own services to their members. One mutually beneficial approach that can be taken in this situation is to base the contract price on tax equivalent from applying the residential property tax rate to the non-residential property. This amount would exceed service costs to the local government and provide a surplus to the First Nation by the amount the non-residential tax rate levied exceeds the residential rate.

One should note that a tax equivalence approach, minus a proportion for services not delivered, does include paying for the full range of local services that are available, including off-site facilities such as libraries and recreation centres. If a First Nation does not want to contribute to these off-reserve services, the local government may want to move to full cost pricing (which will often be much higher than its tax

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[17] The arbitration of pricing for services provided by the District of Central Saanich to the Tsaawout Reserve takes First Nation contributions into account by adjusting the proportion of the price paid for a service received by the First Nation to 90 percent of the tax equivalency amount. The decision also deals with soft services (they are included) and policing (Tsawout will continue to receive services from the Sydney R.C.M.P.). This decision, written by Colin Taylor, is an excellent one and should be regarded as an appropriate model for both municipalities and First nations.

[18]The main example being the contract between the Lake Babine First Nation and the Village of Burns Lake, where the BCAA assesses the Reserve lands and the First Nation pays the Village an amount equivalent to the property taxes that would have been collected for municipal services to the Reserve. See discussion in: Robert L. Bish "Implementing Aboriginal Self-government Taxation and Service Responsibility in British Columbia," in Canadian Public Administration, Vol. 36, No. 3 pp. 451-460.

equivalent) with a suitable adjustment for non-tax revenues. Because of the complicated nature of full cost pricing, none of the comprehensive contracts reviewed in this survey utilize such an approach.

The most important services where tax equivalence is not used are utilities. Most local governments use separate funds for utilities, including water and sewage. Common practice is for local governments to contract to provide water and sewer with the same hook-up fees and user charges as are charged off the reserve. Of course, because local government practices tend to vary, contract pricing terms will also vary.

7. Pricing Services from Regional Districts

While municipalities do not allocate tax revenues specifically to different services in the areas where the services are provided, under provincial legislation regional districts are required to allocate a share of each specific service's costs among sub-areas (electoral areas, municipalities) in relation to the adjusted assessed value of property, upon which property taxes are levied, in each area. The adjusted assessed value is determined by utilizing provincial government specified ratio's to different classes of property (e.g. residential property has a ratio of 1; commercial may be 2; unitities 4, farms .5, etc). Municipalities remain free to use different ratios in setting their own tax rates, but the amount they pay the regional district for the service is determined by their share of the adjusted assessed values.

While it is not clear if regional districts are required to treat First Nations like other sub-areas within the service area for a specific service, to use the same approach for pricing services to a leasehold area of a reserve is both practical and fair. Such pricing practice is practical as regional districts cannot really charge less as there are no other taxpayers to make up the difference. Such a pricing practice is also fair in that the costs of a services are shared proportionally by all sub-areas in the service area receiving the service. First Nations should expect regional districts to want to use this approach for pricing services to First Nations.

8. First Nation Taxation of Local Government Properties

Local governments themselves sometimes hold leaseholds on reserves. Such properties can legally be taxed by the First Nation. There is a long tradition of governments not taxing other governments, however, as long as those properties are used for a public purpose. Properties having a public purpose include such things as water wells and reservoirs, sewage disposal plants, roads, parks, recreation facilities, and airports.

While such properties are not generally taxed (and cannot be taxed if owned by the federal or provincial government), it is common that the owning government pay a "grant in lieu of taxes" to the government whose jurisdiction they are located in if the facilities require any kind of local services. While First Nations can tax such facilities within their territory, much better relations will be maintained with neighbouring

jurisdictions if First Nations exempt such facilities from taxation in exchange for the local government providing all services for those properties or a grant in lieu of taxes to cover any services that the First Nation must provide.[19]

9. Clarification or Change

The lack of provisions allowing for clarification or change was a notable deficiency in many service agreements between First Nations and local governments. These include terms that address such issues as the expansion of the number and size of reserve leaseholds, renegotiating payment procedures and/or the rate structure in the future. It is more than likely that the reserve areas to be serviced by a local government will be expanded over time, and hence this should be contemplated by the contract to avoid any future difficulties. One of the more innovative provisions relating to expansion actually linked expansion provisions to the rate structure, noting specific changes that would occur if more lands were to be serviced. One advantage of tax equivalence pricing, of course, is that as the assessed value of the reserve leasehold increases prices will be adjusted automatically.

10. Termination

There are also often problems with the contractual provisions addressing termination of the contract. Typical difficulties include a lack of specific protocol each party must follow when terminating the agreement. Even more troubling are those contracts that confuse the issue by containing several reasons and/or routes by which the agreement may be terminated. There is also the amount of notice that is necessary to terminate; notice requirements range from 2 weeks to 12 months, and some contracts fail even to address the issue. Because local services are complex (and therefore difficult to stop and start up), and because local governments must balance their budgets on an annual basis, a lengthy notice period is necessary and should be clearly stated. Common law also dictates that notice time be "reasonable", which can potentially be several years to replace some kinds of services.

11. Default Remedies

The main problem observed in default remedy provisions is that they are usually one-sided; generally only the municipality may obtain remedies for a breach of payment. This relates to one of the problems pertaining to the description of services. If service descriptions do not contain requirements that the services supplied by the local government be of a certain standard or quality, it becomes difficult to accuse the local government of not meeting its contractual obligations. As a result, there are often no remedies for the First Nation to demand when the local government fails to provide sufficient services.

[19] Of the forty or so service contracts between First Nations and local governments examined, two contracts contained such a provision. It was not possible to determine if First Nations were taxing local governments in other situations.

No local government would purchase services from a private supplier without specifying service quality and including penalties for inadequate performance. Local governments should also expect the First Nation to insist that service quality and penalties for inadequate performance be specified when the local government is the seller. In general, a contract should include, in addition to some specification of service levels, a provision detailing who to notify if there is a service delivery problem, a specific time limit to remedy the problem, and a penalty for failure to do so. Provisions pertaining to payment defaults should be equally clear, detailing a specific time lapse before a missed payment becomes a default, and any interim penalties. Once again, it might be wise make a clear link to the dispute resolution provisions of the contract, to prevent possible disputes over the existence of a breach.

12. Indemnity Provisions

Indemnity clauses are a way of limiting one's liability by assigning it to another party. Thus, local governments can avoid being liable for problems arising from a failure or accident in service provision to the reserve by having provisions in the contract that assign this legal burden to the First Nation. This means that if the local government workers, while providing the services are negligent and cause some sort of accident, it is the First Nation that will likely be sued rather than the local government. Quite often the First Nation will "indemnify and save harmless," the local government - and not the other way around. By indemnifying the local government, the First Nation may be assuming an unreasonable and onerous legal burden.[20] Furthermore, there are often limitation of liability clauses protecting the local government, but no similar provisions protecting the First Nation.[21] As it is the First Nation that is paying for the services it does not really make sense that they should also be expected to assume all liability for the local government's work, especially when local government practice when purchasing services from a private supplier is to require that the private supplier insure themselves and be responsible from failures in service delivery. A First Nation should expect the same when it purchases services from a municipality or any other organization.

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[20]In a recent Supreme Court of Canada decision, Iacabucci, J., for the majority of the Court, differentiated contracts of indemnity from a guarantee, which involves a much more limited form of liability. The Justice noted that "[i]n a contract of indemnity, the indemnifier assumes a primary obligation to repay the debt, and is liable regardless of the liability of the principal debtor. An indemnifier will accordingly be liable even if the principal debt is void or otherwise unenforceable." See: *Communities Economic Development Fund* v. *Canadian Pickles Corp.,* [1991] 3 S.C.R. 388 at 413.

[21]These clauses are often in First Nation/ local government service agreements, however the British Columbia Municipal Act also limits the types of damages for which a municipality can be liable, and protects municipal agents from liability. (see, in particular ss. 750 - 765.1 of the Act.) As far as the authors can tell, similar liability limitations have not been enacted for Aboriginal governments, thus far.

If the local government controls conditions of service delivery it may be appropriate for the First Nation to have the local government indemnify them. Further, they may request the local government take out insurance to cover any eventualities and add the First Nation as an insured. This would parallel how a local government purchases services for itself. In addition, the First Nation may also want to take out an insurance policy from an insurance agent well acquainted with such issues, and add the local government as an insured. The local government may be apprehensive about assuming all liability and may push the First Nation to take out insurance - especially if there are problems with water systems, narrow roads, or lack of snow removal - all of which may make it difficult to efficiently supply fire suppression or other services.

The reasons behind a service provision accident resulting in a liability may be complex and occur as a result of negligence by both parties. Civil negligence is unique as a common law action in that it allows the court the flexibility of apportioning liability. This means that several parties may be found liable for an injury suffered by another. For example, a reserve water system, supplied in part by a nearby municipality may become contaminated and cause severe sickness in several people. The court may find that the reason for the contamination may be threefold - a failure of the local government to maintain the reserve water main properly, poor enforcement of water protection by-laws by the First Nation, and contamination of the water supply by someone that negligently kept several leaking petroleum barrels on a leasehold adjacent to a water main. The Court may find the municipality and the band each 40% liable and the individual 20% liable, if it so chooses. This is why it is generally good policy to have each party indemnify the other, and take out insurance to protect themselves and the other party against liability. This would be a positive move toward ensuring that both parties are protected against legal actions that may be brought by others.

13. Arbitration/Dispute Resolution Provisions

An important part of any contract involves addressing disputes that may arise out of confusion or problems with the contract terms. Commonly referred to as arbitration or dispute resolution clauses, such provisions provide mechanisms by which disagreements may be settled. Such a provision is a safeguard that will allow the parties to work out their differences without having to enter a courtroom. This may save time and litigation costs. It is also more likely to lead to a decision both parties can live with, as they have negotiated the result rather than having one imposed on them.

There are a number of common errors that relate to arbitration clauses. The first involves a failure to outline a clear, workable mechanism by which disputes may be solved. A proper arbitration clause should function on its own, over and above the opposition of any one party. A second, more common, oversight involves having an overly broad arbitration clause that refers all disputes that may arise under the agreement to the dispute resolution mechanism. It may be argued that it is of no benefit to refer only rate disputes to the arbitration clause if the agreement breaks down

because of a disagreement over payment procedures or expansion provisions, however an overly wide arbitration clause can easily be abused or utilized to renegotiate parts of the agreement that subsequently become unpalatable to one of the parties. The unfortunate situation involving the Westbank First Nation and the Central Okanogan Regional District is illustrative. In this case, Wilkinson, J. of the British Columbia Supreme Court permitted the Regional District to challenge a flat rate price for services which was negotiated by the parties, because it is now viewed by the Regional District as being unsatisfactory.[22] The B.C. Court of Appeal, however, ruled that the Central Okanagan Regional District could not use the arbitration clause to renegotiate price.[23]

The Commercial Arbitration Act[24] provides one good dispute resolution mechanism that can be utilized by contracting parties. One approach that avoids both of the difficulties mentioned above is to explicitly refer *any* disputes that may arise under the agreement to the mechanism found in this Act. The Act provides the means by which an arbitrator may be appointed should the parties fail to agree on an individual. It also grants the arbitrator the authority to prescribe remedies, apportion costs, and provides for a variety of administrative procedures - from oath swearing to removal of an arbitrator.

The two positive characteristics of the Commercial Arbitration Act are 1) that it is comprehensive, addressing a wide variety of issues, and 2) the existence of case law that the courts may rely on for interpreting certain provisions. On the negative side, the Act is a large, unwieldy document that is not specifically tailored to the contracting parties' situation. In some cases the First Nation may want a more customized way of dealing with disputes - for example, a specific arbitrator (or panel of arbitrators) or a specific cost sharing arrangement for arbitration may be preferred.

14. Access to the Reserve

Also worth mentioning is the need to allow the local government providing the services access to the reserve. Because a First Nation has a legal right to exclude others from a reserve, it is important that they extend explicit permission to allow the supplier of services to enter. Such a provision affirms the First Nations rights and may prevent subsequent misunderstandings between the two parties.

15. Definitions

Generally it is a good idea to have a seperate section clearly defining important

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[22] *Regional District of the Central Okanogan* v. *Westbank Indian Band* (unreported, No.25666, Kelowna Registry)

[23] Regional District of Central Okanagan v. Westbank Indian Band February 26, 1996. Victoria Registry VO2597.

[24] S.B.C. 1986, c.3.

terms in the agreement. Such definitions must be clear and consistent with the use of the term throughout the contract. Examples of terms that are often clarified include the "reserve," "leasehold lands," "services" (i.e. a list of the specific services to be supplied may be included here), and details on certain service structures, such as a "reserve sewage system."

16. Other Provisions

Finally, there are a number of other minor issues that should be addressed within the agreement. These include such things as forbidding the assignment of the contract rights to third parties, (to prevent contractual actions being brought by some party not privy to the agreement) and provisions allowing information sharing between the local government and the First Nation. There are, of course, a plethora of other minor, conventional contract terms that should be included in any contract, but these should be adressed by the lawyers drafting the contract and will not really be of any concern to either party.[25]

CONCLUDING COMMENTS

Each of the provisions discussed above are important elements in service agreements between First Nations and local governments. In a long history of service relationships between First Nations and local governments there have been relatively few problems. This history of basically satisfactory service relationships needs to be continued and is even more likely to be important in the future as First Nation lands are developed and expanded. In spite of a basically satisfactory past, however, a survey of over 40 contracts indicates that if problems had arisen, contract deficiencies could have had serious consequences. The provisions discussed in this short paper are relatively easy to include in a service agreement and should be considered for future contracts. Then, if and when problems do arise, they will be easier for both parties to resolve and thus make it easier to continue mutually beneficial relationships into the future.

[25]These include provisions stipulating that "time be of the essence," forbidding waiver of contractual terms by either party without the consent of the other, *etc*.