The Impact of Aboriginal Land Claims and Self-Government on Canadian Municipalities: The Local Government Perspective

Theresa M. Dust, Q.C.

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Foreword

As senior governments move toward granting Canada's native people systems of self-government, the country's local governments will inevitably have to deal with the repercussions of this action.

The Intergovernmental Committee on Urban and Regional Research (ICURR) is very pleased to offer a well-documented perspective on this question and which is found in this report, ***The Impact of Aboriginal Land Claims and Self-Government on Canadian Municipalities: The Local Government Perspective***.

This study is a logical extension of our work in the area of local governance (ICURR has already published two well-received studies in this area: ***Local Government Reorganization in Canada Since 1975***, by Andrew Sancton, and ***Municipal Consolidation in Canada and its Alternatives***, by Allan O'Brien). We are grateful to our board, which comprises deputy ministers of local government and a senior official of the Canada Mortgage and Housing Corporation, for their forethought in guiding our commissioning of what may be the first cross-Canada examination of the impact of native self-government and land claims on local governments. We are, of course, much indebted to the author, Theresa Dust, for both her dedication to the project and for the wide range of experience which she brought to it.

We are also pleased that the report was the subject of a presentation, given by the author, to the September 1995 annual meeting of Canadian ministers of local government, held in Charlottetown, Prince Edward Island. It was a privilege to be included in the agenda of such a significant meeting.

On a final note, our thanks go the Canadian Intergovernmental Conference Secretariat which undertook the translation into French of this report.

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Acknowledgments

I would like to thank the Intergovernmental Committee on Urban and Regional Research, and the City of Saskatoon for the opportunity to do this project. It should be made clear that the conclusions expressed are not theirs, but exclusively my own.

I would like to thank Ms. Laurie Miller, the Research Assistant on this project. The information contained in Chapter V, in particular, is the result of her work.

Many people across Canada, particularly from local government, took the time to talk to us during the course of this project, both by telephone and in person. I am especially grateful to them, and hope that this document will be of assistance in their endeavours.

Finally, I would like to thank Ms. Chris Krieger of the Saskatoon City Solicitor's Office, who typed, formatted and organized this document; Ms. Joan Campbell, the editor for the project, who provided assistance and advice at critical times; and Dr. Claude Marchand, Research Coordinator of the Intergovernmental Committee on Urban and Regional Research, for her patience and good humour throughout.

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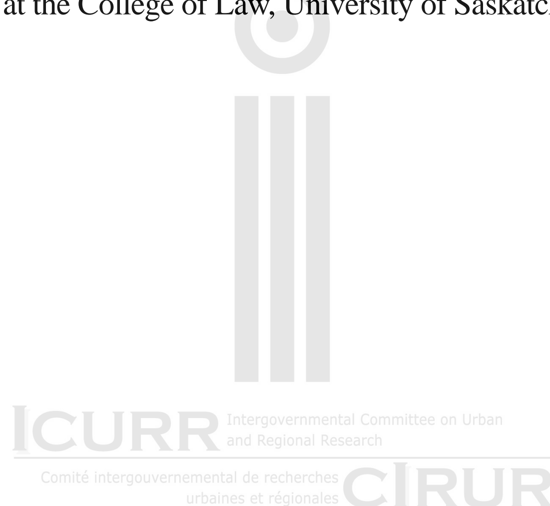
Biography

Theresa M. Dust, Q.C. is the City Solicitor for the City of Saskatoon, Saskatchewan. She has been the City Solicitor since 1987, and in that capacity, participated in the various agreements between the City of Saskatoon and the Muskeg Lake Cree Nation regarding the urban reserve which exists in that City. She has also acted as legal advisor to the Saskatchewan Urban Municipalities Association regarding Treaty Land Entitlement and land claims issues.

Ms. Dust has spoken extensively on the subject of aboriginal/urban jurisdiction at both the regional and national level, including forums sponsored by the Federation of Canadian Municipalities, the National Institute of Municipal Law Officers, Statistics Canada, Queen's University and the Canadian Bar Association.

Ms. Dust is a national director of the Canadian Institute for the Administration of Justice. She teaches Municipal Law at the College of Law, University of Saskatchewan.



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Executive Summary

This study is written from the perspective of the cities, towns and villages of Canada which have been, or are, affected by aboriginal land claims and self-government. It is not intended to be a comprehensive report. Rather, it describes communities and land claims agreements which are illustrative of the common issues which arise wherever land claims affect an urban centre.

The study includes a description of the Federal Government's Additions to Reserve Policy which applies to all urban centres, large and small, across Canada. It also lists those cities, towns and villages which have long-term existing relationships with First Nations, and reviews the provincial tax treatment of non-reserve, aboriginal-owned urban land. The study ends with a summary of urban issues and concerns about aboriginal land claims and self-government, and some suggested solutions.

The Case Studies

Three case studies are included which are illustrative of the different ways in which land claims can affect an urban centre. Each case study is an example of a different mode of aboriginal self-government. Each involves an Urban Council and a First Nation working together to create solutions. (The term "Urban Council" is used throughout this report to mean the elected government of a city, town or village, and the author's rationale is explained on p. 3)

Saskatoon, Saskatchewan is an example of a "stand-alone" (meaning not adjacent to any existing reserve land) urban reserve, created under the Federal Additions to Reserve Policy. It is illustrative of the issues which arise when reserve land under the Indian Act, governed by a Band Council, exists within urban boundaries. The Saskatoon case study is an illustration of an Urban Council and a First Nation negotiating written agreements to cover such issues as tax loss compensation, sale of municipal services, bylaw compatibility and dispute resolution. It also describes the difficulties which cities encounter because of the lack of clarity regarding the application of Provincial laws to reserve land.

Temagami, Ontario is an example of a community which depends for its livelihood on the Crown land which surrounds it. A new form of aboriginal self-government was proposed for the Temagami area, called shared stewardship or co-management, which was intended to give all residents, both aboriginal and non-aboriginal, a say in the use and management of Crown land. The Temagami case study is also illustrative of the concerns and frustrations of Urban Councils, regarding their participation, or lack of participation, in land claim negotiations. The Temagami Agreement was never signed and implemented. It is, nevertheless, an important example of an Urban Council and a First Nation resolving their differences and finding workable solutions. The ultimate failure of the Agreement was not because of problems between local aboriginal and non-aboriginal people.

Inuvik, Northwest Territories is an example of a self-government model which arises in the North where aboriginal people constitute a significant part of the population of a land claims area. In the Western Arctic this model is called "public government", by which they mean a "regular"

one-person, one-vote government for all residents, aboriginal and non-aboriginal alike. The First Nation, rather than creating a separate aboriginal government, wants to negotiate a regional government for the region where aboriginal people make up the majority of the population. The local Urban Councils have been invited to participate in those negotiations. This model raises wider questions of the appropriateness of negotiating a regional government through the land claims process, and the role of territorial or provincial central governments, vis-a-vis regional governments.

The Federal Additions to Reserve Policy

The federal Department of Indian Affairs and Northern Development has a policy, called the Additions to Reserve Policy, which applies whenever a First Nation asks that new reserve land be created. There is no absolute prohibition against First Nations claiming additional reserve land in larger cities not immediately contiguous to reserves. Theoretically at least, surplus federal Crown land within urban areas is available for land claim settlements. This was the situation in Saskatoon, Saskatchewan.

The Additions to Reserve Policy has a specific section (Article 9.3.2.2) which applies when land to be granted reserve status is located within urban boundaries. The Urban Council must be informed of the proposed reserve land and asked to respond. An Urban Council may ask to negotiate a formal agreement with the First Nation before the reserve is created. In that case, the issues to be negotiated are: measures to compensate for tax loss; arrangements for the provision of, and payment for, municipal services; bylaw application and enforcement; and dispute resolution. The one exception to this is Ontario. In that province, the federal Department of Indian Affairs and Northern Development does not require negotiations for tax loss. Their reasoning is that the Province of Ontario already exempts non-reserve aboriginal-owned land from urban taxation, therefore there is no loss to compensate when the land is given reserve status. This difference is of considerable concern to Urban Councils in Ontario.

Unfortunately, the existence of the Additions to Reserve Policy is not well known at the local level. The Department of Indian Affairs and Northern Development has no organized procedure for publicizing the Policy outside its regular constituency. In particular, most Urban Councils do not become aware that they can require a negotiated formal agreement before the reserve is created within their boundaries. The exception is Saskatchewan where all new urban reserves which result from specific claims are preceded by Urban Council/First Nation negotiations.

The Yukon and Saskatchewan Comprehensive Land Claims

Two examples of recent comprehensive land claim settlements are the Saskatchewan Treaty Land Entitlement Framework Agreement which was signed in September of 1992; and the Yukon Umbrella Final Agreement which was proclaimed into law in February, 1995. This study contains a detailed analysis of the sections of those Agreements which specifically relate to new aboriginal land within urban centres. In Saskatchewan, these are "urban reserves" under the Indian Act. In the Yukon, these are urban "Settlement Lands" which are not under the Indian Act but are subject to the Self-Government Agreements which are being negotiated in tandem with the land claims.

The two Agreements are illustrative of the two current "streams" of comprehensive land claims being pursued by First Nations. Southern Canada faces claims for new reserve land, with the land claims agreements leaving the wider issues of self-government for that land to a later date. The North is largely subject to claims for "traditional" land areas which are not dedicated as reserve, but which have new self-government powers in Provincial areas of jurisdiction. From an urban perspective, the issues are largely the same, regardless of where the urban centre is located, and regardless of size. Those issues are: the application of laws (both provincial and municipal), the compatibility of those laws with aboriginal laws within the urban boundaries, and the enforcement of laws, both aboriginal and non-aboriginal, on land claims land; taxation powers on land claims land for both aboriginal and non-aboriginal residents, compensation for any loss of tax revenue, and payment for the provision of municipal services to land claims land; and dispute resolution mechanisms, including effective procedures for enforcing Urban Council/First Nation agreements.

Provincial Survey

This chapter includes a province-by-province list of communities recommended by provincial officials as being urban centres which had established existing relationships with First Nations. The chapter also covers the question of whether or not urban land which is owned by a First Nation, but is not reserve land (described as "land held in trust for a band of Indians") is exempt from municipal taxation. British Columbia has special exemptions for Crown land in this category. Manitoba and Saskatchewan have recently repealed the legislation which gave such an exemption. Finally, the chapter provides a brief summary of the British Columbia situation, which is unique in Canada because of the extent of the land claims there, and the history and number of reserves which are adjacent to, or within, urban boundaries.

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Conclusions

Some 70 individuals were interviewed for this study, either in person or by telephone. Most were elected urban representatives, urban officials and provincial officials. All had some experience of aboriginal land claims in their area. Circumstances varied from community to community, but the issues and concerns which emerged were consistent across the country. The final chapter lists conclusions based on those concerns and proposes solutions to them. They are as follows.

1.The primary impact of aboriginal land claims on urban municipalities is aboriginal self-government.

Every land claim includes, or is immediately followed by, some form of aboriginal self-government, whether it is urban reserve land, shared stewardship, or public government. Whatever the form of self-government, it will immediately and directly affect Urban Councils for the simple reason that "local affairs" are those which a First Nation already controls on its existing lands and wants to continue to control on new lands.

2.Land claims negotiations cannot be done in secret.

Holding land claims negotiations in secret breeds suspicion and fear because the local community has no information or input. Secret negotiations also delay the implementation of any agreement because they delay the period of genuine public discussion and information-sharing which must take place within the affected community. The discussion needs the active participation of Urban Councils. Public information sessions by federal and provincial officials are no substitute.

3.Urban Councils are not third parties

Federal, and to a lesser extent provincial, officials have adopted the practice of lumping together all groups which are affected by aboriginal land claims, from tourist camp operators to mining companies to Urban Councils, and treating them as one "third party" constituency. This narrow constitutional law approach ignores the reality that Urban Councils are the elected governments of their communities, and are not just the Fish and Game League. This approach causes significant resentment at the local level, and that resentment is turned against the entire land claims process.

This problem is compounded when Provincial governments claim that Urban Councils do not need to play a role in land claims negotiations because the Province is acting for them, and then the Province ignores or denies the local government's concerns. Local concerns and issues are legitimate and need to be resolved if aboriginal and non-aboriginal people are going to be able to live together in harmony in the same community. The negotiating table is the place to resolve them. The Provinces should either be clearly representing the Urban Councils, or they should allow the Urban Councils to freely represent themselves.

4.Direct negotiations between Urban Councils and First Nations are important

Both Urban Councils and First Nations express a desire, despite their frustrations, to have a good working relationship within their community. Direct negotiations on a specific issue of mutual benefit or concern, are an opportunity for First Nation and Urban Councils to get to know each other and develop ways of working together for the future. Such negotiations are not a substitute for Federal/Provincial/First Nation negotiations but they can be an important parallel process. Both the Provinces and the Federal government could create opportunities for such negotiations.

5.Taxation is a key issue

The number one issue which Urban Councils want to negotiate is tax loss compensation and/or the sale of municipal services. This concern is not just a question of money but is fundamental to concepts of fairness and equity within the non-aboriginal community. Its importance should not be underestimated. Where good relationships between Urban Councils and First Nations exist, the tax issue has been dealt with in a way that is acceptable to both sides. Where the tax issue remains outstanding, it acts as a barrier to the resolution of other issues.

6.Local agreements require effective enforcement mechanisms

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Urban Councils are concerned with the enforcement of agreements which they make with First Nations. Comprehensive land claims agreements, such as the Yukon Agreement, address this problem by creating an alternate dispute resolution mechanism for issues, such as money, which are of particular concern to senior governments. Urban issues such as land use and environmental concerns are equally important. It would be of assistance to Urban Councils if they had access to the alternate dispute resolution bodies for enforcement of Urban Council/First Nation agreements.

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Chapter I

Introduction

This study is specifically written from the perspective of the cities, towns and villages of Canada which have been, or are, affected by aboriginal land claims and self-government. Federal and provincial government officials and members of First Nations were interviewed as well, but my primary goal was to try to illustrate both the problems and potential solutions from a local urban viewpoint.

Apart from Vancouver, the largest cities in southern Canada have not yet felt the impact of land claims. This story is emerging first in the smaller urban centres of the Yukon, the Northwest Territories, Saskatchewan, northern Ontario, northern Quebec and British Columbia. In these communities, aboriginal land claims and self-government are not an abstract discussion. Urban leaders must deal with the practical realities of developing a new relationship with the First Nations who are their neighbours. Many Urban Councils are looking for ways to adapt to this new reality, while at the same time addressing the legitimate concerns of their non-aboriginal constituents. This study is written especially for them. It therefore does not cover the effect of land claims on rural municipalities and counties, but focuses on the effect of land claims on cities, towns and villages.

It also is not an exhaustive listing of all of the urban communities in Canada that have been, or are being, affected by aboriginal land claims; nor does it cover all of the comprehensive land claim agreements that have been, or are being, negotiated. For example, the James Bay Agreement in northern Quebec has not been included, because it is already well-documented. In other words, this report does not seek to be comprehensive.

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Rather, it sets out a number of case studies chosen because they illustrate issues that arise in one form or another wherever land claims and aboriginal self-government are on the urban agenda. The cases are also illustrative of Urban Councils and First Nations working together to create solutions to those issues. Each is an example of a different model of aboriginal self-government, applied to an urban setting.

The study goes on to cover the Federal government's policy on creating new reserve land, and two recent comprehensive land claim settlements. It then lists communities which have existing relationship with First Nations, and reviews the tax treatment of non-reserve, First Nation land in each province. The study ends with a summary of urban issues and concerns about land claims and self-government, and some suggested solutions.

Chapter II presents the three case studies. Saskatoon, Saskatchewan illustrates the concerns that arise when reserve land under the *Indian Act* is created within a larger urban community. Saskatoon is an example of an Urban Council and a First Nation directly negotiating agreements with each other, and in the process developing an ongoing relationship. The self-government model in Saskatoon is the urban reserve.

Temagami, Ontario, is a good illustration of the frustrations of Urban Councils during land claims negotiations, even though the Government of Ontario was much better than average in accommodating the concerns of local governments in the Temagami area. Temagami is also an example of an Urban Council and a First Nation working together to try to obtain greater local control over Crown land in their area. The model which developed there is shared stewardship, sometimes called co-management.

Inuvik, Northwest Territories, is an example of a community involved in actual self-government negotiations. It is typical of those communities that have a significant aboriginal population, making public government (one person, one vote) a possibility. It raises questions about adapting existing local or regional government to accommodate aboriginal aspirations. Such questions may also eventually arise in the cities of southern Canada.

Chapter III explains the Federal government's Additions to Reserve Policy. This Policy is intended to apply whenever new reserve land is created anywhere in Canada separate from a comprehensive land claim settlement. Most Urban Councils are not aware of the existence of this policy or its potential applicability to them. It is an important policy, because many First Nations have outstanding specific land claims and could, at least theoretically, ask for surplus urban federal land in settlement of their claims.

Chapter IV compares the Yukon and Saskatchewan comprehensive land claim agreements in some detail. The Yukon and Saskatchewan agreements were selected because they illustrate two different approaches to the main issues which are of concern to all Urban Councils, namely: application and compatibility of laws (both local and provincial), taxation and service agreements, and dispute resolution mechanisms.

The Saskatchewan agreement addresses issues common to all Urban Councils that have reserve land under the *Indian Act* within, or adjacent to, their boundaries. The Yukon agreement shows how some of these issues can be dealt with differently when the *Indian Act* is not part of the picture. It also begins to deal with the wider self-government aspirations of First Nations in areas such as the administration of justice.

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Chapter V summarizes the information collected from across Canada during this study. It lists urban communities that were identified to us as particularly noteworthy. At least some of these communities have long had a good working relationship with their First Nation neighbours. Urban leaders have asked for such positive examples, because all municipalities have problems, but few have found solutions. The Chapter also describes various agreements which First Nations and Urban Councils have made with each other. Again, urban leaders have asked for examples of such agreements (copies of which have been placed in the ICURR Library). Finally, Chapter V deals with provincial exemptions from municipal taxation for land owned or controlled by a First Nation, but not dedicated as a reserve.

Chapter VI sets out six conclusions derived from this study. It is hoped that the report’s findings will be of assistance to those (in particular the Provincial and Territorial governments) who will have to deal with the issues of aboriginal land claims and self-government in future.

One final note, on terminology. Throughout this study, I have used the term “Urban Council” to mean the elected government of a city, town or village. I have done so for two reasons. The first is to make a clear distinction between urban and rural areas, which are not covered. (The one exception is the Township of Temagami, which is a hybrid. A hybrid refers to a jurisdiction which has both urban and rural components.) The main justification for preferring the term "Urban Council" is that it helps me to address the "third party" problem. The practice has grown up in the Federal government, and to a lesser extent in the Provincial governments, of lumping together elected urban governments with natural resources groups, organizations of cottage owners, resort owners and hunting and fishing leagues; and referring to all of them as "interested third parties." In the context of constitutional negotiations, this terminology makes sense, as urban municipalities are legally delegated authorities and do not have constitutional status in their own right.

However, in the context of aboriginal land claims, that same terminology causes problems. Urban governments see themselves as having unique issues and concerns that need to be addressed if implementation of aboriginal land claims is to produce long-term good-neighbourly relations. Urban Councils are well aware that they are not just the Fish and Game League but are, in fact, the elected representatives of the local community. The failure of senior governments to acknowledge this reality can lead to significant resentment at the local level. Unfortunately, that resentment is often turned against the whole aboriginal land claims process, rather than against the senior government.

First Nations themselves have, in the past, faced this same problem of old terminology with harmful connotations. Their solution has been to lay claim to their rightful place and dignity by adopting new names and new ways of speaking. The term "Urban Council" follows this example — not as a claim for constitutional status for municipal governments, but as a claim for recognition and respect, which is a pre-condition for all parties who need to find their way to a new partnership.

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Chapter II

Three Case Studies

Saskatoon, Saskatchewan
Urban Reserves

In November of 1984, the Chief of the Muskeg Lake Cree Nation approached the Mayor of the City of Saskatoon regarding a possible land claim. The Muskeg Lake Cree Nation, which is based some sixty to seventy miles northwest of Saskatoon, wished to create a new reserve within the boundaries of the City for the purposes of economic development. They asked for the City's support and proposed discussions to pursue a possible agreement with the City.

The Council members of The City of Saskatoon agreed to discussions. Thus began a process that led to the creation of the first "stand-alone" commercial urban reserve in Canada.

Background

Saskatoon, Saskatchewan is a city of some 200,000 people. The land identified by the Muskeg Lake Cree Nation was a thirty-five acre parcel on the eastern edge of the City. It had been originally purchased by the Federal government as the location for a federal institution. The Federal government eventually built in another location and the land became "surplus" Crown land. It was thus available for selection by First Nations with land claims. In 1984, the land was totally undeveloped, with no internal roads or services or subdivided parcels. The zoning was industrial, in keeping with the adjacent properties.

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At the time that Muskeg Lake approached the City, there was no established precedent for creating a new urban reserve within city limits.[1] Most reserves within city limits (e.g. Vancouver, Fredericton) existed as a result of the urban centre growing up around the pre-existing reserve, rather than as the result of the creation of a new reserve. The few "stand-alone" (meaning separate from the main reserve) urban reserves that did exist tended to be very small parcels dedicated as reserve land by the Federal government because of unique circumstances.

In 1984, the Federal Additions to Reserve Policy[2] was still in the process of being created. The negotiations between the City and Muskeg Lake, which began late that year, were one of the first experiments in having an Urban Council and a First Nation work out an agreement prior to the creation of a reserve.

[1] Interview with Lester Lafond quoted in the Saskatoon *Star Phoenix* newspaper supplement dated November 18, 1993.

[2] See Chapter III.

Negotiations proceeded, off and on, over a period of some three-and-one-half years, culminating in what is known as the Original Agreement, dated October 1, 1988.[3] Most negotiations took place directly between the City and Muskeg Lake, although the Federal government was definitely involved and is a party to the Agreement. The Province was not involved.

Since 1988, further and other agreements have been signed, particularly a Development and Servicing Agreement[4] to provide for the orderly development of the property and for connections to City water and sewer mains; and a Municipal Services Agreement[5] to provide for standard municipal services such as firefighting, garbage collection and street maintenance to the property, and to settle how these should be paid for.

The issues raised during the Saskatoon/Muskeg Lake negotiations are common to such situations throughout southern Canada. They are primarily concerns of jurisdiction, land use and development, and taxation and sale of services. The key factor that brings them into play is the dedication of the land claimed by the First Nation as reserve land. (Land that has been dedicated by an order of the Federal Cabinet becomes reserve land under the *Indian Act* and subject to the jurisdiction, and lack of jurisdiction, established by the *Indian Act*. Land owned by a First Nation and not dedicated, but simply held in fee simple, is not reserve land and does not come under the *Indian Act*.)

Jurisdiction

One of Saskatoon's primary concerns regarding a new urban reserve was that the land and its occupants should be subject to the same or similar laws as applied throughout the City. This was not a major issue as far as the application of the *Criminal Code of Canada* was concerned. The more difficult question was in the area of provincial and urban jurisdiction. The *Indian Act* (particularly sections 81 and 83) gives the Council of a First Nation much the same power to make local legislation over reserve lands as Urban Councils have over urban land. More important, the Federal government has retained for itself exclusive authority to legislate over "Indians and lands reserved for Indians."

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Provincial laws of general application (those not specific to "Indians or lands reserved for Indians," even though they may affect them) apply to reserve lands. However, provincial laws regarding "lands reserved for Indians" do not apply to reserve lands. The courts have interpreted laws regarding "lands reserved for Indians" to include laws regarding land use planning, building standards and health regulations.[6] In other words, provincial and urban laws in these critical areas, may not apply to reserve land.

[3] Agreement between The Muskeg Lake Indian Band No. 102, Her Majesty the Queen in Right of Canada and The City of Saskatoon dated October 18, 1988.

[4] Agreement between The City of Saskatoon and Aspen Developments Inc. dated October 2, 1992.

[5] Agreement between The Muskeg Lake Indian Band No. 375 and The City of Saskatoon dated September 15, 1993.

[6] *Corp. of Surrey v. Peace Arch Enterprises Ltd. and Surfside Recreations Ltd.*, (1970) 74 W.W.R. 380.

The Muskeg Lake Cree Nation was adamant that it wished to retain and exercise such limited jurisdiction as it had, and not concede jurisdiction to either the Province or Saskatoon City Council. The City was equally adamant that an urban reserve and its occupants were a part of the urban environment and needed to "fit" that urban environment, particularly as regards land use and development, which could affect surrounding properties.

In the end, the Muskeg Lake Cree Nation retained all of its jurisdiction but agreed that the use and development of the reserve land would be in accordance with the laws of the Province of Saskatchewan and the bylaws of the City of Saskatoon. This could be accomplished in various ways.

For example, the Muskeg Lake Cree Nation agreed that, when it exercised its right to pass laws under the *Indian Act*, those laws would be consistent with provincial and urban legislation in the same area. In other words, a Muskeg Lake zoning bylaw would be the governing zoning legislation on the reserve, but the terms of any such bylaw, when passed, would be consistent with the Saskatoon Zoning Bylaw. In the absence of a Muskeg Lake zoning bylaw, it was still the First Nation's responsibility to ensure that land use and development consistency was enforced in some fashion. One method Muskeg Lake has used is to make lease agreements with sub-tenants, written so as to include terms that control what is built on the property, and what uses are allowed in the buildings.

The City was also concerned about enforcement of the Original Agreement. This was especially problematic because the Muskeg Lake Cree Nation, in order to carry out economic development, had to surrender the land and have it leased to a First Nation-controlled development corporation. The City believed that no effective mechanism existed to deal with a situation where the development corporation did not properly control land use. The Original Agreement therefore included a clause whereby the Federal government agreed to cancel the development company's lease upon receiving proof that the use and development of the land were not in accordance with the Agreement.

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This provision was only possible because the Federal government was a party to the Agreement, which is not usually the case. It is also not the most desirable solution, for it leaves final control with the Federal government, rather than with the City and the First Nation, the parties most directly involved. To date, the Agreement has in fact worked because Muskeg Lake and Saskatoon have made it work. However, there continues to be no efficient method of enforcing the Agreement in the unlikely event that this should become necessary.

Land Use and Development

The site chosen by the Muskeg Lake Cree Nation was "raw" land, which was not divided into saleable parcels and had no internal roads or services. A significant part of the negotiations between the parties was devoted to the subdivision and servicing of the land, and the question of "off-site" levies. Saskatoon's concern was two-fold. Firstly, it wanted the land to "look" very much like the rest of the urban environment in terms of streets, sidewalks, layout of lots, etc. Muskeg Lake was in agreement with this, particularly as it was developing an economic development reserve capable of attracting all types of commercial tenants. Muskeg Lake therefore agreed to subdivide the land and construct all internal services (e.g. local streets) to the same standard as was used in similarly zoned areas of Saskatoon.

Secondly, Saskatoon wanted to collect its usual off-site levies when the property was developed. Off-site levies are a charge collected by Urban Councils on all newly developed properties, to pay the cost of those services that benefit the property but are not exclusive to the property. Common off-site levies are arterial roads, trunk sewers, lift stations and primary watermains. Off-site levies differ from on-site services (such as internal roads, sidewalks, etc.) which are paid for by the developer of the site. Muskeg Lake agreed to pay all normal off-site levies in return for the right to connect to Saskatoon's water and sewer mains. A "pay-as-you-go" funding arrangement was negotiated, but the rates paid were the same as for all other properties.

In both of the above instances, the issue of jurisdiction was dealt with by the parties negotiating an agreement regarding specifics for that site. In this way, Muskeg Lake was able to not cede any jurisdiction, while the City achieved results on the ground that were compatible with those on adjoining urban land.

Taxation and Sale of Services

When land is dedicated as reserve it becomes exempt from property tax. Saskatoon, like all Urban Councils, was very concerned about this. The only way for Urban Councils to raise the money needed to provide essential services such as firefighting and snow clearing is through property taxes. Each time a piece of property is exempted from paying taxes, the remaining properties have to pay an increased amount to cover the cost of services. In Saskatoon's case, the Federal government had been paying a grant-in-lieu, equivalent to property taxes, on the land chosen by Muskeg Lake. This would end when the land was dedicated as reserve. Saskatoon wanted to continue to receive tax revenue from the property in some fashion. It also wanted to provide a full package of urban services to the reserve, rather than having Muskeg Lake pick and choose only a few services.

Moreover, Saskatoon sought a "level" taxation system. If Muskeg Lake was to be the sole taxing authority, Saskatoon wanted the total tax collected from any business on the reserve to be at least as much as an equivalent business would have to pay elsewhere in the city. In other words, there should be no tax advantage to locating on reserve.

Muskeg Lake's primary demand in negotiations was that it have sole and exclusive taxing authority on the reserve. This would be the case for both property and business tax, and for both aboriginal and non-aboriginal occupants.[7]

The Municipal Services Agreement[8] tied tax loss compensation directly to the sale of civic services. The Agreement provided that Saskatoon would receive a lump sum from Muskeg Lake in each year equivalent to the property, business and library taxes which would have been payable had the land not been a reserve. In return, Saskatoon would provide the full range of civic services. Muskeg Lake would be the sole and exclusive taxing authority on the reserve, even for non-exempt occupants. The minimum total tax bill for a business would be the equivalent of a Saskatoon tax bill, including the school board portion, although Muskeg Lake did not pass on this portion to the Saskatoon School Board. Direct services such as water and electricity would also be provided by Saskatoon, but these would be billed in the usual manner.

The issue of collection of provincial taxes on items such as gasoline and liquor was not discussed, as this is beyond Saskatoon's jurisdiction. The local business community expressed a concern that businesses on the reserve should not sell items such as gasoline to non-aboriginal people at a price lower than that offered by competitors, if this difference was due exclusively to differences in taxes collected. In fact, no such situation has arisen to date in Saskatoon.

Saskatoon and Muskeg Lake also agreed to hold a joint meeting of their respective councils at least once each year, to ensure the harmonious operation of the Agreement, and to resolve such issues as might arise.[9] By 1995, three such meetings had taken place. These provided opportunities for council members to get to know each other, as well as to learn how their respective councils operate. It is fair to say that these meetings have been a success.

Conclusion

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In 1995, the urban reserve in Saskatoon exists as a partially developed commercial centre. The main development is the McKnight Centre, a large office building with a variety of commercial and institutional tenants. The Saskatoon Tribal Council also has its office building on the property. In 1995, the City and Muskeg Lake are jointly financing the "local" share of a Federal infrastructure

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[7] Reserve land is exempt from urban taxation. However, someone who is not a status Indian but who is located on a reserve is not automatically exempt. Therefore, an urban council could levy a tax against a non-aboriginal tenant, even though it might have difficulty collecting.

In 1988 the Federal government passed Bill C-115 to ensure that First Nations had the right to tax all occupants of reserve land, including non-aboriginal leaseholders. Saskatoon's position was that this legislation gave Muskeg Lake the right to tax all businesses on the reserve, but that it did not eliminate the urban council's right to also tax non-exempt occupants. Both could tax, which would be a problem as a business cannot afford to pay twice. The Federal government did not agree with this position.

[8] 1993 Agreement, Section 10.

[9] 1993 Agreement, Section 28.

project, which will improve access to both the Muskeg Lake property and the surrounding urban lands.

The Muskeg Lake Cree Nation is developing a zoning bylaw. Actual land use is also controlled through the leases. All buildings are constructed to current building, fire and health code standards.

The Saskatoon/Muskeg Lake experiment is not complete. It is an example of an aboriginal jurisdiction and an urban jurisdiction working together to create practical solutions to the unique issues of the urban environment. This is being done at a time when the wider questions of aboriginal self-government, and the replacement of the outdated *Indian Act*, remain unresolved.

Two factors stand out in this story. One is the willingness of both parties to take a chance on being first, and to do things before all the relevant questions are answered. The other is the fact of direct negotiations between a First Nation and an Urban Council. Muskeg Lake's cooperative approach to Saskatoon, and Saskatoon's positive response, were rare in 1984 and remain rare to this day.

Temagami, Ontario
Shared Stewardship

One of the proposed methods of governance that has grown out of land claims in Ontario, in particular, is the concept of shared stewardship (sometimes called co-management). Shared stewardship is a possibility in areas where there are significant amounts of Crown land, and where both the First Nation and the local Urban Council depend on that land for their economic livelihood. Neither claims exclusive jurisdiction over the land. Both seek a voice in the use and management of the land.

Issues of concern are tourism and resort development, particularly along the shoreline of the lakes, logging and mining activity, and licenses that affect hunting, trapping and fishing rights. At the present time, all such activity on Crown land is controlled by provincial governments through their natural resources ministries.

At the suggestion of the Ontario Native Affairs Secretariat, I visited the Lake Temagami area of Ontario between May 27 and May 30, 1994, to interview local people who had been involved in the land claims negotiations that had just been completed.

Background

The Lake Temagami area lies some 96 kilometres to the north of North Bay, Ontario on The King's Highway No. 11. It is a beautiful place of lake, river and pine, well known to canoeists, hunters and fishermen. In addition to tourism, local industries include mining, logging and trapping. It is the traditional homeland of the Teme-Augama Anishnabai.

The Teme-Augama Anishnabai count among their members all people, both status and non-status, who trace their ancestry to the original occupying families. They are some 1700 in number, many of whom no longer live in the area. The Temagami First Nation are those members of the Teme-Augama Anishnabai whose ancestors were registered by Indian Affairs, and who are therefore recognized by Ottawa as "status Indians." There are approximately 130 members of the Temagami First Nation, most of whom live on the Bear Island Reserve on Lake Temagami.

In 1975, the "non-status" members of the Teme-Augama Anishnabai people and the "status" members of the Temagami First Nation agreed to pursue their land claims together, under one umbrella Teme-Augama Anishnabai organization (referred to as the "TAA"). The leader of the Teme-Augama Anishnabai people, throughout the negotiations, was Chief Gary Potts. The Chief of the Temagami First Nation in 1994 was Chief Holly Charyna.

The area of the Bear Island reserve is one square mile. There are no other "reserve" lands under the *Indian Act* in the traditional homeland of the TAA which surrounds Lake Temagami. Patented lands (to which an individual has title) and lands owned by or within the Township of Temagami (which sits at the end of the Eastern Arm of Lake Temagami) are minimal. Most of the land in the area is unpatented Crown land under the control of the Ontario Ministry of Natural Resources. All residents of the Lake Temagami area, aboriginal and non-aboriginal, town and country, are directly affected by what is allowed to occur, or not occur, on the Crown land.

As a result of a land claims case, the Province of Ontario and the Teme-Augama Anishnabai entered into a series of negotiations. The negotiations resulted in the completion in 1993 of a draft Agreement in Principle[10] on shared and sole stewardship of land in the Lake Temagami area.

The Agreement in Principle was ratified by the Teme-Augama Anishnabai and the Province of Ontario. However, the Temagami First Nation of Bear Island did not agree to sign. In May of 1995, it is not clear whether the Agreement will eventually be renegotiated, or simply abandoned.

In spite of this, Temagami remains an important example for this study. The Township Councils in the Lake Temagami area were actively involved in the land claims process. Most differences between the aboriginal community and the non-aboriginal community were resolved during the negotiations. Additionally, the Wendaban Stewardship Authority, which was created during the negotiations, is a working model of a shared stewardship body.

The Agreement in Principle

The Agreement establishes sole stewardship areas and shared stewardship areas from lands around Lake Temagami that are now unpatented Crown lands. It does not affect existing patented (privately-owned) land.

The sole stewardship areas are called the Teme-Augama Anishnabai Lands. They are created by the Province transferring 112 square miles of land in trust for the benefit of the Teme-Augama

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[10] Agreement in Principle between Her Majesty the Queen in Right of Ontario, and the Teme-Augama Anishnabai dated October 18, 1993 (unsigned).

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Anishnabai "in fee simple or at the option of the Teme-Augama Anishnabai any other tenure, such other tenure to be identified by the Teme-Augama Anishnabai and agreed to by Ontario. ... It is understood and agreed that all or some of the lands transferred may subsequently be set aside by Canada with the concurrence of the Teme-Augama Anishnabai as reserve lands."[11]

The location of the lands to be transferred to the Teme-Augama Anishnabai is set out in the Agreement. This was the subject of much negotiation, as land along the shoreline of Lake Temagami has great potential both as a site for a new First Nations community and as a site for potential resort development. Shoreline development directly affects all other users of the Lake.

The Agreement contains two other key terms relating to the sole stewardship lands. Firstly, it provides that "Ontario and the Teme-Augama Anishnabai will negotiate taxation arrangements dependent on, among other things, the tenure of Teme-Augama Anishnabai Lands."[12] Secondly, it states that the "parties agree that no conveyances, new developments, permits, licences or any other form of permission will be given respecting the disposition or use of lands or resources within Teme-Augama Anishnabai Lands except with the consent in writing of the Teme-Augama Anishnabai."[13] The intent is that the Teme-Augama Anishnabai, and/or the Temagami First Nation, will control land use and development on all sole stewardship lands.

The Agreement also creates shared stewardship areas called the Lake Temagami Stewardship Lands. These are unpatented Crown lands intended to come under a newly created shared stewardship body that will exercise planning and regulatory authority over land use and resource management. Teme-Augama Anishnabai sole stewardship lands, lands owned by the Township of Temagami, and lands owned by private individuals are all excluded from the shared stewardship jurisdiction.

The shared stewardship area is the wider area around Lake Temagami. This land is primarily used for mining, logging, hunting and trapping, as well as for tourist and resort development. It is now essentially governed by the Ontario Ministry of Natural Resources. What occurs on this land is of great interest to all local residents, because their livelihoods in the various industries depend on keeping a balance among competing and conflicting land uses.

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For example, much of the attraction of Lake Temagami lies in its pristine appearance. This is achieved by prohibiting development on the shoreline and limiting it to the islands only. It is also achieved by prohibiting logging along the shoreline. However, these prohibitions reduce the possibilities for the logging and resort industries, as well as limiting the areas available for new communities, either aboriginal or non-aboriginal.

The shared stewardship body is intended to have one-third representation from the Teme-Augama Anishnabai and two-thirds representation appointed by the Province of Ontario. The local Urban

[11] Agreement in Principle, Article 3.1.

[12] Agreement in Principle, Article 3.4.

[13] Agreement in Principle, Article 3.6.

Councils have no right to representation, although the Province agrees to "consult" regarding appointing local residents. Decision-making is by consensus, with 75-per-cent support required.[14]

Mr. Ivan Beauchamp, the Reeve of the Township of Temagami, said that the local Urban Councils wanted one-third representation on the shared stewardship body.[15] This would result in one-third Teme-Augama Anishnabai, one-third local residents and one-third Provincial representatives. However, the Province of Ontario has not made a commitment on this point.

The shared stewardship body has the right to keep the revenues from the lands over which they have jurisdiction. This would include existing and future permits, licences and leases. Tax revenues would appear to be retained by the Province of Ontario.[16]

The Process of Negotiations

The actual negotiations for the Agreement in Principle took place between the Teme-Augama Anishnabai people, both status and non-status, represented by the TAA, and the Government of Ontario, represented by the Ontario Native Affairs Secretariat. The Federal government was not part of the process. The local Urban Councils formed a Municipal Advisory Group, which received some provincial funding and some information, but was never at the negotiating table.

All parties with whom I spoke mentioned the fact that, before negotiations ever began, a working relationship existed between the aboriginal and non-aboriginal residents of the Lake Temagami area. Unlike many other areas of Canada, members of the aboriginal and non-aboriginal communities meet each other frequently in the course of going about their regular business, and know each other on a personal basis. This existing relationship affected the role which the Urban Councils played in the TAA-Ontario negotiations.

Mr. Doug Mackenzie, the Chief Negotiator of the Teme-Augama Anishnabai, said that, early on in the negotiations, the TAA passed a resolution saying that the negotiations were open and that, if the Province of Ontario did not invite the Urban Councils to the table, then the TAA would do so.[17] The TAA always promoted the fact that their dispute was with the Ontario government and not with the local people. They wished to make sure that the local people were kept informed of what was going on. They also wished to explain to local residents that the regional government that they sought would increase the powers of the local residents, especially in relation to the Ontario Ministry of Natural Resources.

The Ontario government, according to Mr. Mackenzie, refused to allow the local Urban Councils at the table. The Provincial negotiators said that if the Urban Councils came to the table, then they

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[14] Agreement in Principle, Articles 5.10 and 5.11.

[15] Interview with Ivan Beauchamp, Reeve, Township of Temagami, May 29, 1994.

[16] Agreement in Principle, Articles 5.7 and 5.8.

[17] Interview with Doug Mackenzie, Chief Negotiator, Teme-Augama Anishnabai, May 28, 1994.

would have to let other interest groups come, too. Mr. Mackenzie said that the TAA did not agree with this. The TAA believed that an elected government was different from an interest group.

Mr. Mackenzie mentioned that the first round of the public consultation process arranged by the Ontario government went badly because of this problem. The Urban Councils did not participate as organizers. They were just treated as another interest group. As a result, it was a "typical government consultation. People come out, take a few swipes at the government. Then the government goes away and does what it was going to do."[18] The second round of consultations was much better. The Urban Councils were asked to appoint people to participate in structured workshops, with a facilitator and lots of information.

When asked what he would do differently, if he did the negotiations over again, Mr. Mackenzie said that he would somehow get the Urban Councils, or at least one of their representatives, right at the table. Mr. Mackenzie believes that, had the Urban Councils been at the table, they would have been able to see the advantages of supporting the TAA, and the TAA would, in turn, have known about the Urban Councils' concerns directly.

Mr. Ivan Beauchamp, Reeve of the Township of Temagami, also discussed the role of the Urban Councils in the negotiations. The Temagami Council had an existing relationship with the aboriginal community, which opened the door for the others. Mr. Beauchamp agreed that the TAA had tried to have the Urban Councils at the table and the Ontario government had said no. The Ontario government eventually agreed to meet with the Municipal Advisory Group to tell them what was happening, but the Municipal Advisory Group was already getting information directly from the TAA.

According to Mr. Beauchamp, the Municipal Advisory Group did take the position that it wanted to be at the table. However, he felt that the Municipal Advisory Group as a whole did not wish to be part of negotiations regarding Provincial financial commitments, etc. The Municipal Advisory Group did want to be involved in issues such as land development. Mr. Beauchamp felt that the relationship between the Urban Councils and the TAA is very important and must be developed over time. He believes that part of the problem is that aboriginal and non-aboriginal people still do not understand each other, and that only education and working together will correct this.

Mr. Beauchamp said that the Agreement would have been improved if the Urban Councils had been allowed to bring the question of infrastructure costs to the negotiating table. The TAA did not negotiate monies to pay for infrastructure costs. As a result, the Teme-Augama Anishnabai could eventually own land, but would have no money to develop it, and no way of raising development money except by selling some of their land. Mr. Beauchamp was concerned that the TAA could go through all of this and still not have what it intended. Missing were solid negotiations on the true cost of sustainable development. The Urban Councils could have been of great assistance in this area.

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[18] Doug Mackenzie interview.

Mr. George Lefebre, the Reeve of the Township of Latchford, was involved in the Municipal Advisory Group from the beginning.[19] He, too, agreed that the TAA had wanted the Urban Councils at the table and that the Province had refused. Mr. Lefebre said that the Municipal Advisory Group wanted observer status at the table to watch the Province, which was supposed to be representing the Urban Councils. Mr. Lefebre said that the Province deemed the Urban Councils to be third parties, and did not seem to understand that they represent the local ratepayers who would be paying the bill. He felt that the "side table" status they were eventually given did not work, as they did not know what was really going on.

Ms. Cathy Dwyer-Smith, Assistant Negotiator for the Ontario Native Affairs Secretariat, agreed that the Urban Councils had wanted to be at the table and that the Ontario government said no.[20] She said this decision of the Provincial government was justified by three reasons. First, the Urban Councils, although special, are "third parties." Second, many things which were negotiated did not involve them. Third, had they been present, confidentiality would have been compromised.

She agreed that local people should have some structured input into negotiations, as they have to live with the results. However, she felt that the local Urban Councils would not have been specific and practical, had they negotiated. She did reiterate the importance of existing relationships between aboriginal and non-aboriginal people, and the value of local decision-making within the community.

The Concept of Shared Stewardship

Mr. Doug Mackenzie, the chief negotiator for the Teme-Augama Anishnabai, explained that the concept of shared stewardship was something that they discovered in their early research into various governing structures: it had been used by the Laplanders as a working model of co-management of the land. Mr. Mackenzie said that, from the beginning, the TAA recognized that non-aboriginal people came to the area in good faith. The TAA did not want to "evict" anyone.

Its goal was some form of regional government that would include all residents of the area, both aboriginal and non-aboriginal. The TAA liked the municipal model of government to the extent that it gives government control over land without owning the land. However, constitutional status would have to be obtained.

The TAA started out by trying to achieve a regional government of half TAA and half local people. This government would be separate from the existing Township government and First Nation government, each of which would retain jurisdiction within their own areas. The TAA believed that regional government would give the local people more power, especially in relation to the Ontario Ministry of Natural Resources. Mr. Mackenzie stated that the Ontario government was not in favour of this, because Provincial departments would have to give up their power under such an arrangement.

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[19] Interview with George Lefebre, Reeve, Township of Latchford, May 29, 1994.

[20] Interview with Cathy Dwyer-Smith, Assistant Negotiator, Ontario Native Affairs Secretariat, May 29, 1994.

Mr. Mackenzie said that the TAA would rather work with local people, rather than provincial negotiators, whenever possible. This is because local people want to deal with local issues. Provincial negotiators can only deal with what is in policy, which is province-wide.

Mr. Ivan Beauchamp agreed with Mr. Mackenzie's assessment of what they were trying to achieve with shared stewardship. He said that the TAA was tired of decisions coming from Toronto and that it wanted true local decision-making. The Township of Temagami, under shared stewardship, would have more power in areas traditionally reserved exclusively for the Province (particularly land use and resource management on Crown land). He was also interested in shared stewardship because of the revenue potential. If all local revenues remained with local people, they would, over the long term, be better off.

On the other hand, he believed that other members of the Municipal Advisory Group did not share his views. The mayors and reeves did not want extra responsibilities, and preferred the Ontario Ministry of Natural Resources to remain in charge. He felt that differences among Urban Councils over the extent of their powers in large part explained why some people were for, and others against, the shared stewardship concept.

Mr. George Lefebre confirmed that he was opposed to the concept of shared stewardship. He felt that shared stewardship (or regional government) would just be yet another level of government that would interfere with development in the area. He did not believe that there would be benefits. He said that he was willing to accept the shared stewardship proposed in the Agreement in Principle because it was in the Temagami area, and the Township of Temagami was in favour of shared stewardship.

Chief Holly Charyna of the Temagami First Nation (which did not ratify the Agreement in Principle) explained that the First Nation was not opposed to the concept of shared stewardship of land.[21] She emphasized that the Township of Temagami, in particular, has the respect of the Bear Island residents, and that they are in favour of a partnership with the Township to achieve local decision-making and control.

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Her concern was with the specifics of the proposed Agreement in Principle. First of all, she said that the First Nation would prefer to have a shared stewardship body that was half aboriginal and half non-aboriginal, rather than one-third/two-thirds. She also wanted both the Temagami First Nation and the Township of Temagami to have a clear right to representation on the shared stewardship body, (rather than relying on the willingness of the TAA and the Province of Ontario to appoint local people), to reflect the need for people who live in the area to have the decision-making power. She was also concerned to ensure that the shared stewardship body would be ultimately accountable, in financial matters, to the local people.

Secondly, she felt that the Agreement should make clear that the Bear Island reserve lands, like the Township of Temagami, would be exempt from the authority of the shared stewardship body. Thirdly, she believed that the Agreement should more clearly confirm that the sole stewardship lands that the Temagami First Nation was to receive would have reserve status.

[21] Interview with Holly Charyna, Chief, Temagami First Nation, May 30, 1994.

While Chief Charyna believed that regional government by local residents, both aboriginal and non-aboriginal, has a place, she also felt that the Temagami First Nation should clearly have its own land and its own government. Shared stewardship would only be appropriate for those Crown lands that were not owned by the First Nation, but affected them because of their close proximity.

Ms. Cathy Dwyer-Smith, the Assistant Negotiator from the Ontario Native Affairs Secretariat, said that shared stewardship was a stepping stone to true self-government. It was a unique concept that was appropriate to the Lake Temagami area for two reasons: the TAA was not demanding exclusively reserve status lands; and the local community, both aboriginal and non-aboriginal, had an existing relationship that made working together feasible.

Wendaban Stewardship Authority

The Wendaban Stewardship Authority, created in May 1991, is an example of how a shared stewardship body might work. It has jurisdiction over four townships (which have virtually no permanent residents) to the north of Lake Temagami. Its mandate is to plan, implement and regulate all land use within its area. Its membership is appointed half by the Teme-Augama Anishnabai and half by the Province of Ontario. All decisions must be made with a majority of 75 per cent. As such, it is a working model of a body that makes decisions by consensus.

The Wendaban Stewardship Authority was created, at least in part, because of disputes surrounding the forestry practice of clear-cutting, particularly in areas of old-growth white pine. Not surprisingly, therefore, the main activity of the Authority, to 1994, has been to prepare a forest stewardship plan. For this reason, the Authority is more of a resource management model than a governance model.

The Government of Ontario has appointed members of "interest groups" as its representatives on the Authority. These include a lumber company official, a member of an environmental group and a representative of the local cottage owners. Of the six Ontario government appointments, five are local residents and the sixth is a long-term summer resident. The local Urban Councils do not have the right to appoint members to the Authority. However, one of the Provincial appointments was the Reeve of the Township of Temagami, Mr. Ivan Beauchamp.

I asked Mr. Beauchamp what he thought of decision-making by consensus, as set out in the 75-per-cent majority rule for the Authority. He said that he at first opposed the idea as being unworkable. However, after two years of experience, he now believes that it works, at least within the Wendaban situation.

Mr. Beauchamp stressed that, in order for consensus to work, you must have the right people at the table. Consensus decision-making takes more time than rule by a simple majority. People need to feel comfortable speaking their mind. Every issue must be looked at from all angles, with the pros and cons discussed fully. However, he said, in the end there always seems to be a way.

Moreover, once agreement is reached, people really do support the decision. Simple majorities sometimes produce decisions that people felt pressured into making, and to which they are not truly

committed. As well, in his experience in dealing with the aboriginal community, consensus decision-making results in decisions which the whole community supports. This is not always the case with 50-per-cent majorities. So, in the long run, consensus is worth the extra time.

As to Wendaban itself, Mr. Beauchamp felt that it had resulted in a resource management plan that local people, both aboriginal and non-aboriginal, liked. He was not so sure that the Ontario Ministry of Natural Resources would like it, but that was exactly the point of shared stewardship. It is an important way to bring decision-making to the local level.

Both Mr. Beauchamp and Mr. Doug Mackenzie said that the experience of aboriginal and non-aboriginal people working together on the Wendaban Authority had other benefits. Both mentioned that the aboriginal representatives were seen, sometimes for the first time, as individuals. Non-aboriginal people realized that aboriginal people can be, for instance, pro-development. Also, because issues were discussed fully and directly by all parties, there was less chance of misunderstandings arising because of cultural or linguistic differences.

Inuvik, Northwest Territories:
Public Government

Another proposed method of governance which has grown out of aboriginal land claims, particularly in the North, is the concept of "public government." Most self-government models assume that there will be a separate aboriginal government. Citizenship in that government will be based upon membership in the First Nation, or "ethnicity."

"Public government", is a term used in the Western Arctic to mean government for all of the residents of an area, regardless of whether they are aboriginal or non-aboriginal, with citizenship based on residency, not ethnicity. Public government is usually proposed as a new form of regional or area government. In those parts of Northern Canada where First Nations constitute the majority of the population on their traditional lands, public government is a realistic self-government alternative.

From August 8 to August 11, 1994, I visited the Town of Inuvik and the surrounding area. Inuvik was chosen because the Beaufort Delta region of the Western Arctic, of which Inuvik is the main community, is the farthest advanced in proposing a new form of public government. At the time of my visit, the "Committee for the establishment of a Western Arctic Regional Government," which included Mr. Tom Zubko, the Mayor of Inuvik, was preparing to begin negotiations with the Federal government.[22]

[22] For clarification, "Western Arctic" means the Beaufort Delta region of the Northwest Territories. "Western Territory" means the whole western portion of the Northwest Territories, with Yellowknife as its capital. Nunavut is the eastern portion of the Northwest Territories.

Background

The town of Inuvik (population approximately 3,000) sits in the Mackenzie Delta north of the Arctic Circle, less than an hour's flying time from the Beaufort Sea. In urban circles it is famous for its permafrost, which means that all buildings must be built on pilings well above ground, and its "utilidors" -- above ground utility corridors containing water pipes, sewer pipes, etc. It is a new town, built in 1954 by the Federal government to replace (because of flooding) the traditional trading centre of Aklavik. Aklavik did not, in fact, cease to exist, but Inuvik has become the centre of government and business for the region.

Inuvik is at the centre of the traditional lands of the Inuvialuit and Gwich'in peoples. These lands are now officially owned by the First Nations, as a result of comprehensive land claim agreements. To the north is the Inuvialuit Settlement Region, created in 1984 and containing the communities of Inuvik, Sachs Harbour, Holman, Paulatuk, Tuktoyaktuk and Aklavik. To the south is the Gwich'in Settlement Area, created in 1992, that also contains the communities of Inuvik and Aklavik, as well as Ft. McPherson and Arctic Red River. The population of Inuvik itself reflects this history. Something less than 50 per cent of the population are non-aboriginal, 30 per cent are Inuvialuit, and the remainder are Gwich'in.

The settlement lands are owned by the Inuvialuit and the Gwich'in in fee simple. They are specifically not "lands reserved for Indians" within the meaning of the *Indian Act*. All laws of general application apply to these lands. Settlement lands within the boundaries of Urban Councils are subject to property taxation when developed. As a result, the concerns of southern Canadian Urban Councils regarding reserves within their boundaries are not an issue in Inuvik.

What is at issue is whether there will be a new regional public government, and the role of non-aboriginal residents in the negotiating process to create that government. These topics are especially interesting because they are approached in the North in a manner that is, in many ways, the reverse of the southern Canadian approach to self-government. In the South, it is assumed that the new aboriginal governments will be ethnic self-governments, specific to a First Nation or group of First Nations, and that they will be totally separate from existing (public) governments, with no role for non-aboriginal people.

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Public Government in the Western Arctic

The Gwich'in Comprehensive Land Claims Agreement[23] specifically provides for the negotiation of self-government agreements. One of the options listed in the appended Self-Government Framework Agreement specifies that self-government agreements

(c)may provide for Gwich'in participation in public government institutions and may set out appropriate powers and responsibilities of such institutions in the settlement area.[24]

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[23]Gwich'in Comprehensive Land Claim Agreement between Her Majesty the Queen in Right of Canada, the Gwich'in and the Government of the Northwest Territories dated April 22, 1992.

[24]Gwich'in Agreement, Appendix B, Section 3.2.

The Inuvialuit Final Agreement[25] is not as specific. However, Section 4(3) there of provides that,

> where restructuring of the public institutions of government is considered for the Western Arctic Region, the Inuvialuit shall not be treated less favourably than any other native groups or native people with respect to the governmental powers and authority conferred on them.

Therefore, once the Gwich'in initiate self-government talks that affect public government, the Inuvialuit also have the right to negotiate.

In 1993 the Inuvialuit Regional Corporation and the Gwich'in Tribal Council developed a Position Paper[26] that became the basis for self-government negotiations with the Federal government for a new Western Arctic Regional Government.

It is important to note that the right to have self-government negotiations arises out of the land claims agreements. Therefore, the main parties are the Inuvialuit, the Gwich'in and the Federal government. Because their proposal is for public or regional government for everyone in the area, the Inuvialuit and the Gwich'in invited the eight Urban Councils in the area to participate in the negotiations. The Western Arctic negotiating committee consists of two representatives each from the Inuvialuit Regional Corporation, the Gwich'in Tribal Council and the eight Urban Councils.

Why public government?

The 1993 Position Paper states:

> The Gwich'in and the Inuvialuit recognize the many advantages of integrating structures of government in the Western Arctic. Both believe a regional public government that includes non aboriginal residents is the ideal approach for all people of the Western Arctic.

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And again:

> The Inuvialuit hold the view that self government can be expressed as public government. This has always been an Inuit preference ....[27]

Why this interest in public government? One reason is simply, numbers. As Mr. Roger Gruben of the Inuvialuit Regional Corporation explained, the Inuvialuit and the Gwich'in constitute the majority of the population within the Western Arctic region.[28] They are also the majority of the

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[25]The Inuvialuit Final Agreement between The Committee for Original Peoples' Entitlement and The Government of Canada dated June 5, 1984.

[26]Draft paper entitled, "*Western Arctic Regional Government - Inuvialuit and Gwich'in Proposal for Reshaping Government in the Western Arctic,*" dated November 1993.

[27]Western Arctic, page 4.

[28]Interview with Roger Gruben, Chief Negotiator, Inuvialuit negotiating team, August 9, 1994.

population in the urban areas in the region. This means that, if a new public government is limited to their own region, public government will be aboriginal self-government. It will be elected by, and accountable to, a majority of aboriginal voters, both at the regional and community level. This is quite different from southern Canada where aboriginal voters are a very small percentage of most public government memberships.

Second, the aboriginal population in the Western Arctic participates actively in existing forms of public government. Urban Councils in the region all have aboriginal members, and many have a majority of aboriginal members. As a result, the aboriginal community is familiar with public government. In southern Canada, on the other hand, aboriginal members of Urban Councils are rare.

In the Western Arctic, local Urban Councils, in turn, are familiar with existing forms of aboriginal self-government. In Ft McPherson, for example, the local Gwich'in Band Council and the Hamlet Council co-exist as governments in a community of some 700 people. They meet together monthly. The Hamlet of Aklavik also has a joint committee of the local Band Council and Hamlet Council. Again, this is quite different from southern Canada, where the historical segregation of the aboriginal population in rural reserves has meant that non-aboriginal people have had very little experience of aboriginal government.

A third reason was expressed by all of the people interviewed, but especially by Mr. Piet van Loon, the Mayor of Ft. McPherson.[29] In the North, he said, communities are small and isolated. People must stick together to survive. It is part of the tradition of the North that no one is to be left out. This gives people, especially at the community level, a very strong sense of democracy. In the North, "one person, one vote" means something.

A final reason, as explained by Mr. Roger Gruben, is jurisdiction. An ethnic-based government would presumably have jurisdiction only over its own settlement lands. A public government could have jurisdiction over public (Crown) lands. This could include the right to tax property and improvements. The latter is a major consideration, as explained in the 1993 Position Paper:

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> The potential for own source revenues is significant in the long term. This is one of the major advantages of regional public government. The long term potential for oil and gas development in the MacKenzie Delta and the Beaufort Sea offers this opportunity. A regional authority with the ability to tax Crown lands could generate significant revenue. The Regional Government would then be in a position to provide superior government programs and services, and additional services not expected from a jurisdiction of comparable size.[30]

Regional Public Government

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[29] Interview with Piet van Loon, Mayor, Ft. McPherson, August 10, 1994.

[30] Western Arctic paper, page 10.

The primary issue among the people I interviewed was the question of regional public government, as opposed to community or territory-wide public government. This issue in many ways reflected the southern debates on forms of urban metropolitan government. Opponents and proponents did not divide along ethnic lines. Both aboriginal and non-aboriginal groups have members who are for and against the concept of regional government. The key concern is the question of accountability to the local communities.

The Inuvialuit, the Gwich'in, and the Mayors of Inuvik and Ft. McPherson, all agree that public government must be community-based. As Mr. Piet van Loon of Ft. McPherson explained, this is because of the isolation of Northern communities, which traditionally have had to be self-sufficient to survive. Also, communities in the North are few in number, far apart and individually unique in their characteristics. What suits one community may not necessarily suit another. To ensure that programs can be tailored to the needs of the local residents, the more local decision-making power there is, the better.

Where people differ is on whether a new regional government would, in fact, give more power to the local communities. The proponents of a Western Arctic Regional Government (Mr. Tom Zubko, the Mayor of Inuvik, and Mr. Roger Gruben of the Inuvialuit Development Corporation) say that it would.[31] First, they claim, a regional government would increase the power of local communities because the regional government "would hold many powers currently held by either the Government of the Northwest Territories or the Government of Canada."[32] The exercise of these powers, moreover, would bring decision-making closer to home.

Second, they say that the proposed regional government would be accountable to the communities, because it would be composed of members elected by their local communities. Also, the regional government would be limited to exercising such legislative powers as the elected representatives of the community decided it should have.

Third, the Inuvialuit, the Gwich'in, and urban leaders such as Mr. Tom Zubko of Inuvik, clearly favour strong regional government over strong central (territorial) government. They believe that more local and regional authority will create better government and better services.

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Mayor Piet van Loon of Ft. McPherson expressed the concerns of those who are less enthusiastic about regional government. He is not opposed to the new regional government model, but questions whether it will, in fact, be better than the existing central (territorial) government system. Will a regional government provide better and cheaper services? Would it not be a better option to increase the powers of existing Urban Councils, rather than to create a new regional government?

A second concern is the role of local communities. What powers will they have, exactly? And will the regional government be truly accountable to the local communities in practice? In particular, will the money controlled by the regional government devolve to the local communities? How does regional government become -- and stay -- community-driven?

[31] Interview with Tom Zubko, Mayor, Inuvik, August 8, 1994.

[32] Western Arctic paper, page 8.

All communities, says Mr. Piet van Loon, would like to see more dollars coming directly to the communities, to be spent by them according to their needs. And they would like fewer middlemen. They do not want any reduction in existing community powers. They do not want to see extra bureaucracy created. They want the government model most likely to meet these criteria. They are not convinced that the proposed Western Arctic Regional Government is that model.

The Process

The Western Arctic Regional Government is to be negotiated by a committee that includes two representatives from Urban Councils. This is a greater role than any offered to Urban Councils in self-government negotiations in southern Canada. However, Ms. Pat McMahon, the Mayor of Yellowknife and President of the Northwest Territories Association of Municipalities, has concerns about the process.[33] She points out that the Urban Council members of the Western Arctic are at the negotiating table at the invitation of the Inuvialuit and the Gwich'in. This is because the process being used is that set out in the Gwich'in and Inuvialuit land claim settlements.

Ms. McMahon questions this. She believes that when government for a region is being negotiated, the Urban Councils should be at the table as of right. She questions whether an aboriginal land claims process is the right process for negotiating a public government that will include both aboriginal and non-aboriginal residents.

Secondly, she says that the process of negotiating any form of new government needs to be a public process where all can know what is going on. Land claims negotiations tend to be secretive. This has the potential to create a negative reaction simply because people lack information. The situation is made worse where new forms of government, not land claims, are being discussed behind closed doors.

Integrated versus Parallel Public Government

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Because of the interest in public government in the North, the question arises: How will public government relate to aboriginal self-government? There are two possibilities - - “integrated” or “parallel”.[34]

Integrated public government means a single (public) government adapted to accommodate the needs and aspirations of aboriginal self-government. Adaptations would normally include special provisions regarding language, culture and child welfare. They could also include, for example, guaranteed minimum representation for ethnic groups, or veto power for aboriginal members in certain critical areas of jurisdiction.

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[33] Interview with Pat McMahon, Mayor, Yellowknife and President, Northwest Territories Association of Municipalities, August 11, 1994.

[34] This question may also become an issue in southern Canada as part of urban aboriginal self-government.

Parallel government, on the other hand, means that public government would stay as a pure "one person, one vote" government. Any critical areas for aboriginal jurisdiction would be dealt with through a separate, parallel, aboriginal government.

The 1993 Position Paper states that integrated public government is not the goal of the Western Arctic negotiations for two reasons. First, the "introduction of ethnic components to a public government model would limit the authorities of that government."[35] In other words, regional powers over all residents will only be given to true public government. Second, a "public government that included special powers or authority for aboriginal groups might not be accepted by non-aboriginal residents";[36] but the support of Urban Councils (and their non-aboriginal members) is required in order to achieve a new regional government.

The 1993 Position Paper does not eliminate the possibility of separate parallel aboriginal self-government initiatives in order to gain jurisdiction over key areas such as language, culture, child welfare and custom adoption.[37] Mr. Gruben of the Inuvialuit spoke of incorporating features such as the question of language in delivery of government programs, and the role of elders in the justice system, as part of the negotiations for public government. However, he did not suggest any special privileges for aboriginal people with respect to voting or representation. Mr. Tom Zubko, the Mayor of Inuvik, was confident that he would be negotiating true public government.

Ms. Pat McMahon, the Mayor of Yellowknife and the President of the Northwest Territories Association of Municipalities, was concerned that the proposed public government for the Western Region would not be “one person, one vote”. She believed that the Federal government was willing to negotiate a regional government with guaranteed representation for specific ethnic groups and an aboriginal veto in certain areas of jurisdiction. She opposed this as not being true public government and as having the potential to divide communities that are not divided now. She favoured side agreements to provide alternative models of service delivery, for example, one that would accommodate aboriginal language needs.

Ms. McMahon represents all Urban Councils in the Western Territory. She is concerned that the Western Arctic regional government proposal may become a model that the Federal government will try to impose on other regions. This is a concern because other regions (such as Yellowknife) do not have a majority aboriginal population. It is, therefore, more likely that, in those regions, there will be a demand for special ethnic voting rights or vetoes as part of public governments. Ms. McMahon opposes this. She believes that any new form of public government must guarantee equal rights for all.

In the summer of 1994, the Western Territory was in the process of separating from Nunavet. Discussions regarding what kind of government the new Western Territory should have, were just beginning. The issues raised in the Western Arctic, particularly strong central vs. strong regional

[35] Western Arctic paper, page 5.

[36] Western Arctic paper, page 5.

[37] Western Arctic paper, page 6.

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government, and the status and role of aboriginal and non-aboriginal residents, will no doubt be major factors in these wider discussions.

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Chapter III

The Federal Additions to Reserve Policy

Introduction

At the present time, First Nations in Canada are settling their land claims in two ways. The first, of which the Yukon and Saskatchewan agreements in Chapter IV are examples, is the comprehensive claims method. The second, the specific claims method, is represented by the Saskatoon/Muskeg Lake experiment described in Chapter II.

Specific claims usually involve a single First Nation that has a shortfall in the land to which it feels entitled, and is negotiating with the Federal government for additional land. Where such additional land is granted, the Federal Additions to Reserve Policy applies.

Except in Saskatchewan, new reserve creation has been mostly limited to adding land to existing reserves. Therefore, only Urban Councils that contain, or are adjacent to, existing reserves have been affected.

However, there is no absolute prohibition against First Nations claiming additional reserve land in larger cities not immediately contiguous to reserves. Theoretically at least, surplus federal Crown land within larger urban areas is available for land claim settlements. First Nations may not want to pursue that option, and The Department of Indian Affairs and Northern Development may negotiate limitations on exercising it, but Urban Councils should be aware that the option exists. For this reason, the Federal Additions to Reserve Policy should be of interest to all Urban Councils in Canada.

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Creation of New Reserves

In southern Canada, most land owned by First Nations has "reserve status." This means that the land is legally owned by the Crown but has been set aside for the use and benefit of the First Nation. The federal *Indian Act* applies.

While reserve status has many drawbacks, many First Nations still consider it the best option that is available currently. Reserve status provides a form of communal ownership in a legal system designed for private ownership. Reserve land cannot be sold or pledged for security in the normal fashion. This means that commercial activity is extremely difficult. However, reserve status also provides a safety factor for those members of the First Nation who are concerned with ensuring that land be kept from generation to generation as an asset of the community.

The Federal government has also tied the existing law-making powers of First Nations, as well as most exemptions from taxation, to reserve status. In other words, a First Nation cannot govern, or benefit to the same extent from, land that is not dedicated reserve land. For these and other reasons, First Nations continue to request that most new land acquired by them be dedicated as reserve land.

Exceptions are the Northwest Territories and the Yukon, which traditionally have not had reserve land.

From the perspective of Urban Councils, creating reserve status land within, or adjacent to, their boundaries is a significant event. First Nation land that has not been dedicated as reserve land is subject to municipal taxation and municipal bylaws. Reserve land, however, is not subject to municipal taxation and is not subject to most municipal bylaws.

Reserve status does not happen automatically whenever a First Nation purchases land. Reserve status can only be acquired through an Order-in-Council of the Federal Cabinet. The Federal Additions to Reserve Policy[38] sets out the guidelines followed by the Federal government in assessing proposals for an addition to an existing reserve or the creation of a new reserve. This is a policy, not a law. However, all regional offices of the Department of Indian Affairs and Northern Development treat the Additions to Reserve Policy as applying to all new reserve land acquisitions. Whenever a First Nation asks for urban land to be dedicated as reserve, the Policy comes into play.

Article 9.3.2.2 of the Policy sets out the municipal considerations.[39] In essence, the Policy says that, where land to be granted reserve status is located within an urban centre, the Urban Council must be informed of the proposal and asked to respond. Reasonable concerns of the Urban Council are to be addressed. The Urban Council may request a First Nation/Urban Council agreement. Where a formalized agreement has been requested, the land will not normally be granted reserve status until agreement has been reached. The exception is where the Federal government has a legal obligation to proceed, or where there had not been good-faith bargaining on the part of the Urban Council.

The issues that the Federal government expects to be discussed in every instance are:

- measures to compensate for the Urban Council's tax loss once the land attains reserve status;
- arrangements for the provision of, and payment for, municipal services;
- bylaw application and enforcement on the reserve (First Nation bylaws which relate to activities that may affect neighbouring urban lands or residents should be consistent with the Urban Council's bylaws); and
- a joint consultative process for matters of mutual concern (such as land use planning) and a dispute resolution mechanism.

Formal negotiated agreements may address some or all of these issues. Other issues (such as subdivision of land, development standards and charges) may be included if the parties agree.

The one exception to this process is in the Province of Ontario. There, the Federal Additions to Reserve Policy does apply, but First Nations are not required to negotiate tax loss compensation with an Urban Council when new reserves are created. The reason for this is that *The Ontario Assessment Act* already exempts from taxation property held in trust for a band of Indians and not

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[38] Part I of Additions to Reserves Policy dated November, 1991.

[39] Article 9.3.2.2 is set out in Appendix "A."

dedicated as reserve land. The Department of Indian Affairs and Northern Development Regional Office takes the position that a First Nation in Ontario should not have to compensate for lost taxation when a reserve is created, since the Province of Ontario has already given a blanket tax exemption for all land held in trust, whether reserve or not.

In researching this issue, we were able to find very few urban centres in which an Addition to Reserve had recently occurred. Saskatoon, Saskatchewan; Calgary, Alberta; Yorkton, Saskatchewan; and Haldimand, Ontario are examples of new urban reserve land. Formal agreements under the Policy, such as have been signed by The City of Saskatoon and the Muskeg Lake Cree Nation, are rare.

Policy Considerations

Mr. Rick Siminson, Manager of Land Management for the Department of Indian Affairs and Northern Development, confirmed that the Additions to Reserve Policy applies nationally.[40] He advised that it is Department policy to notify an Urban Council, usually in writing, when an addition to reserve is requested by a First Nation. However, the amount of information or type of notification varies. Some regional offices may give Urban Councils a summary of the contents of the Policy. Others may provide such information only upon request.

No general public information for distribution to Urban Councils is currently available, although the Department is considering preparing a brochure for distribution through the Federation of Canadian Municipalities. The Department also does not specify whether or not Urban Councils and First Nations should enter into negotiations for a formal agreement or whether they should only have much more informal arrangements.

Urban Councils report an absence of adequate information. For example, Mr. Al Harrison, the Administrator of the Regional District of Central Okanagan reported that a local land owner did his own private research and, as a result, obtained a copy of the Additions to Reserve Policy.[41] He gave a copy to Mr. Harrison, which is how the District found out about the Policy. Mr. Harrison further advised that his fellow British Columbia administrators did not seem to be aware of the existence of the Policy.

The City of Calgary had land within its boundaries converted to reserve status. The City Administration was not aware of the Additions to Reserve Policy at the time of the actual dedication.[42] After the fact, the City entered into a Memorandum of Understanding with the Tsuu T'Ina Nation. The Memorandum was an initiative of the City and the Tsuu T'Ina Nation, not the Department of Indian Affairs and Northern Development.

[40]Interviews with Rick Siminson, Manager, Land Management, Department of Indian Affairs and Northern Development, October 6, 1994 and May 29, 1995.

[41]Interview with Al Harrison, Administrator, Regional District of Central Okanagan, September 30, 1994.

[42]Interview with Delbert Kvemshagen, City Solicitor, City of Calgary, October 6, 1994.

Marie Trainor, Mayor of the Town of Haldimand, Ontario, says that the Department of Indian Affairs and Northern Development did initiate a meeting between the Mississaugas of the New Credit and the Town.[43] However, the Town was not aware of the existence, much less the specifics, of the Policy, and did not realize that it could ask for a formal agreement.

The problem would appear to be that The Department of Indian Affairs and Northern Development and Urban Councils have different understandings of what is needed and expected in the circumstances. There is a difference between "notifying" an Urban Council, and providing it with an actual copy of the Policy. There is also a difference between asking an Urban Council to "express their concerns" and advising it of the right to request a formal negotiated agreement. Most Urban Councils are not aware that they have the right to ask for a negotiated agreement as a precondition to dedication of reserve land. Nor are they aware that Urban Councils have signed agreements with First Nations.

The Federal Additions to Reserve Policy is an internal document of the Department of Indian Affairs and Northern Development. While the Department does not keep it secret, it is also not in the business of educating Urban Councils. The Department consults simply by asking for concerns.

Urban Councils, for their part, are entering unknown territory. Much of Department of Indian Affairs and Northern Development policy is a separate world with which only the Department and First Nations are familiar. Urban Councils have no experience in this setting and lack the necessary context for dealing with these issues. They need significant amounts of information just to understand what is going on.

In order to be effective, a Federal Additions to Reserve policy must be widely distributed. Urban Councils must have accurate and detailed information. In particular, Urban Councils should be told of the possibility of negotiations, and informed of the parameters within which they must negotiate (time frames, topics). Urban Councils also need to know the general issues and concerns of the First Nations. Both sides should have access to all relevant information.

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The situation in Saskatchewan is an exception. There, all parties are aware of their rights and obligations when a new urban reserve is proposed under the Federal Additions to Reserve Policy, and signed agreements are the rule.

The Saskatchewan experience is that formal direct negotiations between a First Nation and an Urban Council create the opportunity for building a long-term relationship. Information as to what others have done, or not done, and what concerns each party can be expected to have, improves the chance of successful negotiations.

[43] Interview with Marie Trainor, Mayor, Town of Haldimand, Ontario, August 10, 1994.

Chapter IV

Two Comprehensive Land Claims

The effect of land claims on Urban Councils is that they often create new aboriginal land within the urban boundaries. Such land claims include, or are followed by, some form of aboriginal self-government for that land.

Following are two examples of recent comprehensive land claims, the Treaty Land Entitlement Framework Agreement[44] in Saskatchewan, and the Umbrella Final Agreement[45] in the Yukon. The Saskatchewan Agreement creates new urban reserves under the existing *Indian Act*. The jurisdiction and taxation issues are similar to existing reserves in urban areas. The Yukon Agreement avoids the *Indian Act* and provides a new aboriginal self-government framework for aboriginal land, one that includes some provincial (territorial) areas of jurisdiction.

These Agreements represent the two principal streams of land claim settlements in Canada today. Southern claims are largely for *Indian Act* reserve lands, while Northern claims are primarily for Yukon-style settlement lands. The two Agreements also provide an interesting contrast in proposed solutions to various issues close to the hearts of Urban Councils.

Overview of the Agreements

The Saskatchewan Treaty Land Entitlement Framework Agreement

This Agreement sets out the overall terms of a settlement of outstanding treaty land claims for twenty-six First Nations in Saskatchewan. It was signed in September of 1992 by all twenty-six First Nations, the Federal government (as the signatory of the treaties) and the Provincial government (which has land claim responsibilities dating from the 1930s when federal Crown land was transferred to provincial jurisdiction). The Framework Agreement is the umbrella agreement. Each First Nation involved must also negotiate and sign an individual agreement specifically for their situation.

The Saskatchewan Agreement provides cash compensation, rather than Crown land, for treaty land settlements. This is necessary in Saskatchewan because most First Nations are in the southern part of the Province and earn their primary income from agriculture, whereas most of the Crown land is in the northern part of the Province and is unsuitable for agriculture.

[44] Saskatchewan Treaty Land Entitlement Framework Agreement among Her Majesty the Queen in Right of Canada and The Entitlement Bands and Her Majesty the Queen in Right of Saskatchewan dated September 22, 1992.

[45] Umbrella Final Agreement between The Government of Canada, the Council for Yukon Indians and the Government of Yukon dated May 29, 1993.

Each Treaty Land Entitlement First Nation receives a specific amount of money to be used for buying land on the open market, in a "willing buyer, willing seller" relationship. The First Nation must first purchase "shortfall acreage," which is primarily rural agricultural land. Any remaining monies can be used as the First Nation sees fit. The First Nation may purchase urban land for economic development, educational, residential or other purposes.

All land purchased under Treaty Land Entitlement is intended to be dedicated as reserve land under the *Indian Act*. Therefore land purchased in urban communities will become urban reserves. These will be "free-standing" or "spot" reserves, separate from the original rural reserves of the First Nation. Article 9 of the Treaty Land Entitlement Agreement sets out the terms under which urban reserves are created.[46] It provides for direct negotiations between a First Nation and an Urban Council, and the signing of an agreement prior to the creation of an urban reserve. The issues to be covered are tax loss compensation, sale of services, bylaw compatibility and dispute resolution.

The Treaty Land Entitlement Framework Agreement was a land claims settlement only. It did not include separate self-government negotiations. The jurisdiction of First Nations on the new urban reserve is the same as already exists for reserve lands under the *Indian Act*. The wider issues of self-government powers, particularly in provincial areas of jurisdiction such as the administration of justice, education, health, social services, and child welfare, are still to be addressed.

The Yukon Land Claim Agreement

The Yukon Umbrella Final Agreement sets out the overall terms of the land claims settlement. It was signed in May 1993 and proclaimed into law in February 1995. The Agreement covers fourteen Yukon First Nations. It was negotiated over a period of twenty-two years, starting in 1973.

The Umbrella Agreement is the framework for the individual agreements which must be reached with each of the fourteen First Nations. In June of 1995, four First Nations have completed their individual agreements. Each First Nation negotiates two separate agreements: a Final Agreement and a Self-Government Agreement.

The Final Agreements establish the "Settlement Lands" for each First Nation. Settlement Lands are the territories over which the First Nation will exercise its self-government powers. Settlement Lands are primarily non-urban Crown lands, although land within existing urban communities can be included. The First Nation of Nacho Nyak Dun, for example, has Settlement Land within the boundaries of the Village of Mayo.

The Final Agreements also deal with "traditional territory." This is land which is the traditional hunting and fishing territory of the First Nation. The Final Agreements provide for certain specific First Nation rights on such territory, as well as for joint management structures.

[46] Saskatchewan Agreement, Section 9, entitled "Urban Reserves."

The Final Agreements provide for considerable First Nation jurisdiction over delivery of key services to "citizens," especially services relating to language, culture and adoption. They provide for the possibility of "public government" by the establishment of common administrative or planning structures within a community, region or district of the Yukon. They also provide for self-government powers on Settlement Land. The self-government powers of each First Nation are set out in a separate Self-Government Agreement, which is negotiated concurrently with the land claims Final Agreement.[47]

The Self-Government Agreements contain special provisions for urban communities.[48] Before the First Nation is able to exercise its self-government powers fully on Settlement Lands within an urban community, there must be direct negotiations between the First Nation and the Yukon, and/or the Urban Council, on key local issues.

Application of Laws and Compatibility of Laws

First Nations do not just want ownership of land. They also seek to be the government of that land, with separate law-making jurisdiction. This means that land claims land can be subject to separate aboriginal jurisdiction. For Urban Councils, this raises three key questions. First, which Federal and Provincial laws will apply on aboriginal lands? Second, where a First Nation makes its own laws, how compatible will these be with the Urban Council's laws, and how can one ensure that the urban community works as a composite whole? And, third, how will laws (both First Nations and federal/provincial laws) be enforced on First Nations land?

Saskatchewan

Urban reserves become dedicated reserve land under the existing *Indian Act*. All federal and provincial laws of general application apply on reserve lands, except to the extent that they are inconsistent with the *Indian Act*. *The Criminal Code of Canada*, for example, does apply. Because there are no definitive lists of laws that do, or do not, apply, considerable confusion exists. This is true especially in areas of provincial jurisdiction.

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The Saskatchewan Agreement does not deal with the first question directly. Whatever laws apply to existing reserve lands, also apply to new urban reserves; and whatever laws do not apply to existing reserve lands, do not apply to new urban reserves.

The second topic is dealt with in Article 9 of the Framework Agreement. This provides that, before the urban reserve is created, an agreement is to be negotiated between the First Nation and the Urban Council, to address the question of compatibility of Urban Council and First Nation bylaws and their enforcement. This provides an opportunity for potential agreement

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[47] All references in this study are to the First Nation of Nacho Nyak Dun Final Agreement and the First Nation of Nacho Nyak Dun Self-Government Agreement, both dated May 29, 1993. The Nacho Nyak Dun Agreements are quite representative of all of the individual agreements signed to date.

[48] See especially Self-Government Agreement, Section 28 and Appendix B.

regarding compatible zoning bylaws, for example. Each Urban Council and First Nation must jointly devise their own method of creating compatible bylaw enforcement.

A major gap in Article 9 is that it assumes that bylaw compatibility will be the main issue. In fact, in many key areas such as building safety, Urban Councils do not pass bylaws, but instead enforce provincial legislation. No process exists for compatibility between provincial legislation and First Nation bylaws, or for compatibility of enforcement.

The question of law enforcement on urban reserves is not addressed at all. In Saskatchewan, the RCMP police smaller urban centres and rural reserves. Larger urban centres have their own police forces. First Nations, together with the RCMP, are developing aboriginal police forces for rural reserves. The Agreement does not deal with the question of who should police urban reserves in larger urban centres, or how urban reserve policing should be coordinated with that in the remainder of the urban community.

The Saskatchewan Agreement also does not address potential problems of compatibility and coordination where more than one urban reserve exists within one urban community. This could become complicated if different First Nations have different bylaws and enforcement mechanisms on each separate urban reserve.

Finally, the Agreement fails to address the question of a minimum size for urban reserves. This is a concern, because "lot-by-lot" jurisdiction and policing is not a practical reality within a large urban community.

Yukon

Settlement Lands created under the Yukon Agreement do not become reserve lands under the *Indian Act*. All laws apply to Settlement Lands in exactly the same way as to any lands held in fee simple title. However, this is subject to change once First Nations exercise their law-making powers under the Self-Government Agreements.

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Section 2.6.0 of the Final Agreement specifies that all federal, territorial and municipal laws shall apply to Yukon Indian People, Yukon First Nations and Settlement Land, except where there is inconsistency or conflict, in which case the Settlement Agreement and Settlement Legislation shall prevail. This is echoed in Section 8 of the Self-Government Agreement which provides that, where the federal or Yukon law is in conflict with the Self-Government Agreement, the Self-Government Agreement shall prevail.

Section 13.3 of the Self-Government Agreement lists the areas within which the First Nation has the power to enact laws of a local or private nature on Settlement Land. These powers include most areas of jurisdiction of an Urban Council (e.g. business licensing, planning and zoning, building safety). They also include some areas of traditional provincial jurisdiction (e.g. administration of justice, hunting and fishing, environmental protection).

The overall result is that all federal, territorial and municipal laws apply on Settlement Lands unless and until they are replaced by First Nation laws passed under Section 13.3. Once the First

Nation exercises its authority, its law prevails. Taxation powers are an exception to this rule. As discussed below, First Nation taxation does not automatically exclude territorial and municipal taxation.

Section 28 of the Self-Government Agreement creates a special exception to this general rule for certain Settlement Lands within the boundaries of an Urban Council. It provides that the First Nation will not exercise its powers to enact laws in a number of areas, unless otherwise agreed to by the First Nation and the Urban Council or the Yukon Government, whichever has responsibility in the matter. Until an agreement has been reached by the First Nation and the Urban Council, Yukon and Urban Council laws will continue to apply. The named areas are:

- signs and billboards
- construction, repair and demolition of buildings
- prevention of overcrowding of residences
- control of sanitary conditions
- planning, zoning and land development
- animal control
- administration of justice
- threats to public order, peace or safety
- dangers to public health
- environmental protection
- control or prohibition of firearms

The administration of justice (enforcement of laws) on Settlement Lands within an urban community can also be negotiated under Section 28 of the Self-Government Agreement. For all other Settlement Lands, Section 13.6.0 of the Self-Government Agreement applies. That Section provides that further negotiations shall take place among the parties regarding First Nation powers over administration of justice on Settlement Lands, including law enforcement. The First Nation is precluded from exercising administration of justice powers for five years from the date of the Self-Government Agreement, unless an agreement on the administration of justice has been negotiated and signed before then.

One other provision of the Self-Government Agreement should be noted. Section 13.4.7 of the Self-Government Agreement provides that, notwithstanding the First Nations' powers to make laws for Settlement Lands that supersede general laws in those areas, "Laws of General Application shall apply with respect to an Emergency arising on Settlement Land which has or is likely to have an effect off Settlement Land." An Emergency is defined as including "apprehended, imminent or actual danger to life, health, safety, or the environment;...."[49]

Section 13.4.7 is noteworthy as an attempt to address practical concerns where land is in such close proximity that the use and development on one property can have a major impact on neighbouring properties. Until now, compatibility has been limited to compatible zoning

[49] Self-Government Agreement, Section 13.4.7.

and planning arrangements; it has not been used to address issues such as pollution of drinking water flowing from one jurisdiction to another.

Section 13.4.7 is just a beginning. It does not speak to a First Nation's right to stop its neighbours from harming it. Nor does it address the question of fast and effective enforcement measures in an emergency situation. What it does do is recognize that parallel jurisdictions need coordination of laws in more areas than just planning and zoning. This is of particular importance in an urban setting where what happens in one jurisdiction is so likely to affect the other jurisdiction, simply because they are so close together.

Taxation and Services Agreements

Urban Councils are very concerned about tax loss compensation and payment for any municipal services related to First Nations lands. This is probably the first and most important issue raised by Urban Councils across Canada when they face land claims situations.

Urban Councils raise money through property taxes to provide services to the urban community. These services are both direct (e.g. garbage pick-up and firefighting) and indirect (e.g. freeways, sewage treatment plants, landfill sites).

Newly created reserve lands under the *Indian Act* are exempt from taxation by Urban Councils, as are Indian occupants of that land. Newly created First Nation lands which do not have reserve status, such as the Settlement Lands in the Yukon, may or may not be subject to Urban Council property taxation, depending on what has been negotiated.

First Nations lands increasingly have non-aboriginal occupants. Unlike their fellow residents who are status Indians under the *Indian Act*, such individuals are not exempt from Urban Council taxation. First Nations are beginning to exercise their right to tax non-aboriginal occupants of reserve lands. This creates a potential "double taxation" situation which must be resolved.

Both the Yukon Agreements and the Saskatchewan Agreement deal with tax loss compensation and sale of services. They also address, in some fashion, the question of double taxation of non-exempt occupants.

Saskatchewan

Reserve lands under the *Indian Act* are exempt from property tax. This occurs as soon as the land is dedicated, regardless of whether or not a First Nation has passed its own tax laws. Article 9 of the Framework Agreement provides that, before an urban reserve can be created, the First Nation must negotiate with the Urban Council respecting "the provision of and payment for compensation to the Urban Municipality ... for loss of taxes, levies or grants-in-lieu, which, but for the setting apart of the Entitlement Reserve, could reasonably have been expected to have been received by the Urban Municipality ... for its own purposes...."[50]

[50] Saskatchewan Agreement, Article 9.01.

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Tax compensation can take one of two forms. The First Nation and the Urban Council can negotiate a specific sum for one-time compensation, and arrange for its orderly payment. Alternatively, the First Nation and the Urban Council can negotiate an agreement whereby the Urban Council provides municipal services to the urban reserve in return for an annual fee. In either case, the First Nation is responsible for paying the cost of the compensation, without assistance from the Federal government.

The Framework Agreement does not define "municipal services," although it does expressly deal with levies and grants-in-lieu, as well as property tax. Urban Councils in Saskatchewan take the position that services include both direct and indirect services, because urban reserves benefit from freeways, bridges, sewage treatment plants and other communal services just as much as any other urban property.

The Framework Agreement also does not address the problem of double taxation. This can occur because a First Nation has the power to tax a non-Indian occupant of reserve lands, but the exercise of that power does not automatically eliminate the Urban Council's power to tax that same occupant. This issue is left to the Urban Councils and First Nations to negotiate, or not, as part of their Article 9 Agreement.

In June of 1995, only one Article 9 Agreement has been negotiated.[51] In that Agreement, the Town gives up any right to tax occupants of the urban reserve, so making the Band the sole taxing authority at the local level. In return, the Band purchases full municipal services for the urban reserve from the Town and pays full price for them (100 per cent of what the Town would have collected in property taxes, off-site levies, local improvements and business tax, were the land not a reserve). The Band is invoiced once per year. Direct service charges, such as for sewer and water, are extra.

Yukon

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Settlement Lands in the Yukon are not automatically exempt from Urban Council property tax. First Nations are given the power to pass tax laws for local purposes regarding both Settlement Land and the occupants of Settlement Land.[52] This power cannot be exercised for three years after signing the Agreement, or until a tax agreement has been reached with the Yukon, whichever comes first.

A First Nation's power to tax does not automatically exclude the Yukon Government or the Urban Council. The Yukon is only required to "ensure a sharing of tax room in respect of property taxes consistent with equitable and comparable taxation levels."[53] In other words, an occupant could receive two property tax bills from two different governments, but the total bill would stay the same.

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[51] Agreement between the Town of Fort Qu'Appelle and Star Blanket Band No. 83, dated February 19, 1994.

[52] Self-Government Agreement, Section 14.0.

[53] Self-Government Agreement, Section 14.6.

The Agreement also assumes that the levying of property tax by a First Nation will be accompanied by an assumption of responsibility for the delivery of services (either directly or by purchase): The First Nation which imposes property taxation shall enter into negotiations with the Yukon for the "efficient delivery of local services and programs."[54] The Yukon must ensure that Urban Councils "do not incur any consequential net loss."[55] Presumably this means that an Urban Council will continue to be paid for any services it provides to Settlement Lands.

Section 26.0 of the Self-Government Agreements gives a First Nation the power to enter into direct negotiations with an Urban Council for the provision of local services to Settlement Lands. This is an option, not a requirement. Where such an agreement is negotiated, it must take into account the cost of providing that service, and contain a dispute resolution mechanism[56] different from the one set out in the Umbrella Agreement.

The Federal government agrees to provide property tax assistance to each First Nation for a transitional ten-year period. The Final Agreement provides for 100-per-cent assistance for the first year after signing the Agreement.[57] Federal assistance decreases by 10 per cent per year thereafter, until the end of the ten years. At that time the First Nation is fully responsible for the payment of any property tax owing on the land. Since property tax is so closely tied to local services, this would appear to be a transfer of responsibility for payment for services from the Federal government to the First Nation.

Dispute Resolution

Dispute resolution mechanisms are an attempt to avoid the traditional court system in settling disputes between the parties. Usually, they involve some form of mediation and/or arbitration. This typically sets out how the process can be invoked (by one party unilaterally, or only by mutual consent), and how the arbitrator is chosen when the parties cannot agree.

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Dispute resolution mechanisms are most useful where the parties cannot agree on what a particular term of the agreement means, a problem that also often arises when interpreting a collective bargaining agreement in labour law. Dispute resolution mechanisms have not been of much use in situations where all parties agree on what is supposed to happen, but one party refuses to live up to their obligations.

Typically, an Urban Council will not be a party to the land claims agreement which establishes the dispute resolution process, and will therefore have no right to invoke it. The Territory or Province

[54] Self-Government Agreement, Section 14.6.2.

[55] Self-Government Agreement, Section 14.6.1.

[56] Self-Government Agreement, Section 26.2.

[57] Final Agreement, Section 20.7.1.

makes the decision to invoke the process on behalf of the municipality. Some agreements give "affected third parties," meaning Urban Councils, the right to be represented during the process, once someone else has started it.

Saskatchewan

The Framework Agreement includes a dispute resolution mechanism[58] that is basically a commercial arbitration process. There are no clear provisions for enforcement where one party refuses to live up to its obligations.

For urban issues, the dispute resolution mechanism may only be invoked by the Province in a situation where an Urban Council and a First Nation cannot reach agreement under Article 9, and the First Nation wishes to proceed to create the urban reserve. Once the process is invoked, the Urban Council has standing to appear before the arbitration board. The Urban Council has no power to invoke the process on its own.

Article 9 agreements may not access the dispute resolution provisions of the Framework Agreement. All Urban Council/First Nation agreements under Article 9 of the Framework Agreement must contain a separate dispute resolution clause. This must be negotiated for each agreement, and would normally involve some form of arbitration. The assumption seems to be that dispute resolution will only be needed for issues over which the parties disagree. There is no provision for enforcement when both agree, but one does not carry out its obligations.

Yukon

The Final Agreement, signed by each First Nation with the Federal and Yukon Governments, sets out a dispute resolution mechanism.[59] It provides for a mediation process. If that is unsuccessful, the matter goes to arbitration. Arbitration decisions are final and binding. Access to the courts is limited in favour of the dispute resolution process.

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The arbitrator has the power to deal with a situation where one party is refusing to live up to its obligations. The arbitrator may order a party to cease and desist from activity contrary to the Agreement, order a party to comply with the terms of the Agreement, or make an order providing interim relief. These decisions are enforceable as court orders.

Disputes regarding the interpretation of a Self-Government Agreement may be referred to the Final Agreement dispute resolution process.[60] However, only financial matters of special concern to the Federal and Territorial governments can be unilaterally referred. In all other cases where there are problems, the referral must be by mutual agreement of the parties. It is not clear what enforcement mechanism, if any, exists where only one party believes there is a problem.

[58] Saskatchewan Agreement, Article 19.

[59] Final Agreement, Section 26.

[60] Self-Government Agreement, Section 24.

Urban Councils do not, except in the case of compatible land use issues, have the right to refer a matter to the Final Agreement dispute resolution process on their own. They must go through the Yukon Government, which is a party to the Agreements. It is not clear whether Section 28 agreements between Urban Councils and First Nations regarding the applicability of laws on urban land can include a provision that allows disputes to be referred to the dispute resolution process. Service agreements between First Nations and Urban Councils must create their own dispute resolution mechanism and may not use the Final Agreement process.

The Saskatchewan and Yukon agreements are, in June of 1995, in the early stages of implementation. Their impact on urban municipalities is still unknown. However, both are examples of agreements which at least recognized that the urban community has special needs which require special solutions.

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Chapter V

Other Communities

Because Urban Councils so often ask for "positive" examples, we especially looked while doing the research for this study, for communities which had established working relationships with the First Nations in their area. Wherever possible, we collected agreements that First Nations and Urban Councils had negotiated between themselves.

Our research included questions to municipal councillors and provincial officials about land claims in the area (either large comprehensive claims or specific small claims) and arrangements, if any, regarding municipal services or tax loss. In particular, we asked about the situation regarding payment of taxes for "land held in trust for a band of Indians." This is land owned by someone (e.g. a development corporation) in trust for a First Nation, but which is not dedicated as reserve land under the *Indian Act*.

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British Columbia

The circumstances surrounding land claims in British Columbia are unique in Canada. First of all, British Columbia has many reserves that are immediately adjacent to, or within, urban centres. These reserves were there first; the urban centres have grown up around them. Such situations exist elsewhere in Canada, but not to the same extent.

Secondly, as of June, 1995 British Columbia is preparing for major land claims negotiations throughout the Province. Again, this situation exists in other provinces, but to a lesser degree than in British Columbia.

Following is a brief summary of the British Columbia situation. More detailed material is available from the British Columbia Ministry of Municipal Affairs and from the Union of British Columbia Municipalities.

Land Claims Negotiations

On March 22, 1993 the Province of British Columbia and the Union of British Columbia Municipalities executed a Memorandum of Understanding regarding the upcoming land claim negotiations.[61] In the memorandum the Province agreed to ensure that British Columbia's urban municipalities had a role in the upcoming treaty negotiations. The Memorandum specifically itemizes issues of local concern as follows:

[61] Memorandum of Understanding between the Province of British Columbia and the Union of British Columbia Municipalities dated March 22, 1993.

- any proposed changes to legislation that may directly or indirectly affect urban municipalities
- fiscal arrangements between the Province and urban municipalities
- land selections in areas within or adjacent to urban municipalities
- creation of new institutions of governance where urban municipality interests are affected
- terms of settlement related to service production and deliveries
- issues relating to the financing, construction and maintenance of urban infrastructures
- issues related to land use, planning, zoning, regulation, standards and codes
- emergency services within urban municipality service boundaries;
- bylaw enforcement

The Union of British Columbia Municipalities is also to be involved in any process of public information and education, and any process of public consultation.

The specifics of urban municipality participation are outlined in a subsequent Protocol Agreement dated September 19, 1994.[62] Proposals include having an urban municipal representative present at the negotiating table to observe negotiations, and establishing "side-tables" to negotiate specific local issues.

Servicing Agreements

Urban Councils and First Nations throughout British Columbia either have negotiated, or are now negotiating, service agreements for reserve lands within or near urban centres.

The impetus for these negotiations was Bill 64, *The Indian Self-Government Enabling Act*, passed by the Province of British Columbia in 1990. Prior to Bill 64, many Urban Councils in British Columbia taxed non-aboriginal occupants of reserve lands such as sawmills. Bill 64 gave all First Nations the option of being the exclusive taxing authority on reserve lands. Bill 64 provided that, when a First Nation asserted its right to be the exclusive taxing authority, it was to enter into negotiations with the Urban Council for the purchase of municipal services.

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As a result, many Urban Councils entered into negotiations with First Nations for the sale of services to reserve lands. Bylaw compatibility is not negotiable. The primary issue is usually the amount of money to be paid for the municipal services. A complete list of service agreements between First Nations and Urban Councils is available from the Union of British Columbia Municipalities.[63] In June of 1995, final agreements have not been signed in all areas.

The situation in British Columbia was unique in that many Urban Councils were faced with losing a considerable portion of their existing tax revenue as the result of Bill 64. This created a

[62] Protocol Agreement between the Province of British Columbia and the Union of British Columbia Municipalities for implementing the Memorandum of Agreement on local government participation in aboriginal treaty negotiations dated September 19, 1994.

[63] A sample number of British Columbia service agreements are available in the ICURR Library, including those referred to under Noted Communities.

different climate than, say, in Saskatchewan, where the Urban Council had never received taxes from non-exempt occupants of reserve land.

Additionally, in British Columbia, the reserve land already exists. There is therefore no lever available to Urban Councils to encourage a First Nation to reach an early agreement on sale of services. Again, this is different from the situation in Saskatchewan, where negotiations for sale of services occur prior to the reserve being created.

Taxation Exemption for Land Held in Trust

The Municipal Act of British Columbia exempts land held in trust by the Crown for a band of Indians, except where it is leased or occupied by a person who is not a member of the band. There is no general provision in the *Municipal Act* for an exemption from municipal taxation for all land held in trust for a band of Indians (which could include band-owned development corporations).

Notable Communities

The following are a number of communities in British Columbia that are of special interest:

- City of Duncan and Cowichan First Nation

The City of Duncan and the Cowichan First Nation have had excellent relations for many years. The reserve is located within the boundaries of Duncan. The City provides municipal services to the commercial portion of the reserve, but not to the residential portion. The City of Duncan is actively involved in enforcing bylaws, including building inspection on reserve land.

The Cowichan First Nation has bylaws for taxation and assessment. The City of Duncan collects taxes on behalf of the First Nation and turns over 40 per cent to the First Nation. This represents that portion of taxes collected in excess of the cost of City services. Disputes between the First Nation and the City are referred to the Urban Council and Band Council for resolution. Any dispute outstanding after one month may go to a mediator or to arbitration.

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- Regional District of Central Okanagan and Westbank First Nation

The Westbank First Nation has a reserve within the District. The five thousand non-aboriginal occupants on the reserve receive full municipal facilities and services. There are two agreements, one regarding sewer services and one regarding the provision of local services such as building inspection. The First Nation levies and collects all taxes and pays $150,000 per year to the District for the local services. This amount increases by an amount equal to the annual rate of inflation according to the Consumer Price Index. The tax collected is less than the amount the District would receive under tax assessment. However, the District has made a compromise in this situation.

If the First Nation fails to pay any amount owing under the agreements, the District may demand payment from the Minister of Indian Affairs and Northern Development, which is a signatory to the agreement. This was a concession by the First Nation to the District. Indeed, the Westbank First Nation opposes having the Minister of Indian Affairs as party to the Agreement. In its opinion, this is both unnecessary, and contrary to the objectives and principles of aboriginal self-government and the development of relationships of mutual trust and respect between First Nations and other levels of government.

In the summer of 1994, negotiations were underway regarding raw land acquired by the First Nation through the Federal Additions to Reserve Policy. This land is partially within Kelowna city limits, and does not abut nor adjoin other reserve land.

- District of West Vancouver and Squamish Nation

West Vancouver has an interim servicing agreement with the Squamish Nation for the Capilano Indian Reserve, which is within the boundaries of West Vancouver. The Squamish Nation has agreed to pay an amount equal to 75 per cent of the taxes that the District would normally receive. The Capilano Indian Reserve includes the Park Royal Shopping Centre -- a major shopping centre in West Vancouver. This situation creates unique circumstances for both the District of West Vancouver and the Squamish Nation in terms of effective government of a large commercial development. West Vancouver and the Squamish Nation have reached agreement on a building inspection program for improvements to the shopping centre. The District reports that relations between it and the Squamish Nation were not good in the past, but have significantly improved in recent years.

- Village of Burns Lake/Burns Lake First Nation and Lake Babine First Nations

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The Village of Burns Lake is a classic example of the problem created for villages by Bill 64. The Babine Forest Products Mill is located on the Burns Lake First Nation Reserve. In the past, the Village taxed the sawmill and received 25 per cent of its total tax revenue from the mill. Since Bill 64, the Burns Lake First Nation has asserted its taxing authority over the mill, and the Village no longer receives the tax revenue. Negotiations between the Burns Lake First Nation and the Village for a services agreement had not been successful to the summer of 1994. This has caused difficulties between the two.

The Village of Burns Lake, on the other hand, reports a good relationship with the Lake Babine First Nation. A municipal services agreement has been reached whereby the Village receives a fee from the First Nation each year similar to the amount of taxes it would have received, had it been the taxing authority.

The Federal Additions to Reserve Policy does come into play quite frequently in British Columbia because of the number of reserves, and the fact that they are so close to urban centres. The

Federal and Provincial governments frequently notify Urban Councils of claims. However, written agreements negotiated between a First Nation and an Urban Council are not common.

Yukon

Land Claims Negotiations

Chapter IV contains a detailed discussion of recent comprehensive land claims in the Yukon. In June of 1995, agreements between Urban Councils and First Nations as a result of the land claims settlement were in the very early stages. The Villages of Haines Junction and Mayo are examples of communities that have developed good working relationships with First Nations over the years.[64]

Alberta

Land Claims Negotiations

Alberta is presently involved in treaty land entitlement negotiations on a case-by-case basis. However, most land claims in the Province are in Northern Alberta, in areas that do not have urban centres. Therefore, the issue of urban land and land claims settlements has not really arisen in the Province.

Servicing Agreements

Written agreements between Urban Councils and First Nations are not common. The exception is Calgary.

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Taxation Exemption for Land Held in Trust

There is no legislation exempting land held in trust for a band of Indians. Only reserve land is exempt.

Notable Community

- City of Calgary and the Tsuu T'Ina Nation

The Tsuu T'Ina Nations reserve land is immediately adjacent to the City of Calgary. Department of Defence land on the edge of the City was returned to the Tsuu T'Ina Nation in the early 1990's. The City of Calgary was not involved in this process. In 1992 the City and the Tsuu T'Ina Nation entered into a memorandum of understanding to work together in a spirit of cooperation regarding development of the property and servicing.

[64] A copy of the Service Agreement between the Village of Mayo and the Nacho Nyak Dun First Nation is on file in the ICURR Library.

The Tsuu T'Ina Nation proposed a golf course development and a business park. The City agreed to supply water and sewer services. Calgary also has agreements to provide water and sewer services to the Sarcee community complex and to the residential reserve adjacent to the City.[65]

Northwest Territories

Land Claims Negotiations

The case study of Inuvik and public government in Chapter II briefly describes the Inuvialuit and Gwich'in land claims agreements.

In June of 1995, the following had signed land claims agreements: the Gwich'in in the Mackenzie Delta, the Sahtu Dene and Metis around Great Bear Lake, the Inuvialuit of the Western Arctic, and the Inuit of the Eastern Arctic. Negotiations were ongoing with the Dogrib of the North Slave region. These negotiations create Settlement Land, which is not reserve land under the *Indian Act*.

The southern part of the Northwest Territories, including Yellowknife, have a somewhat different situation. The Treaty 8 Dene in the South Slave region are interested in "southern-style" treaty land negotiations. These could result in dedicated reserve lands under the *Indian Act*, both within and adjacent to urban boundaries.

Saskatchewan

Land Claims Negotiations

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The Saskatchewan Treaty Land Entitlement Agreement has been extensively documented in Chapter IV. The creation of new urban reserves is just beginning in Saskatchewan. These are created either under the treaty land entitlement process or the Federal Additions to Reserve Policy as a result of specific claims. Urban Councils in Saskatchewan draw few distinctions between the two, because their effects are so similar.

Prince Albert, Meadow Lake, Saskatoon, Fort Qu'Appelle, and Yorkton, have urban reserves. To June of 1995, all urban reserves have been for commercial or educational purposes.

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[65] Copies of the Calgary Agreements are available from the ICURR Library.

Servicing Agreements

All new urban reserves, except Prince Albert, have an agreement that was negotiated by the Urban Council prior to the creation of the reserve. These agreements include tax loss compensation, sale of municipal services, and bylaw compatibility. Most Urban Councils are receiving a fee for municipal services from the First Nation equal to the revenue they would have received, had they been the taxing authority.[66]

The Federation of Saskatchewan Indian Nations and the Saskatchewan Urban Municipality Association have undertaken joint projects to prepare the parties for negotiations on urban reserves. As well, a liaison committee has been created to address potential problems.

Taxation Exemption for Land Held in Trust

The Saskatchewan Urban Municipality Act used to have a provision that exempted land held in trust for a band of Indians from municipal taxation. This provision was repealed in 1993. Only reserve land is exempt from taxation in Saskatchewan.

Manitoba

Land Claims Negotiations

Manitoba is negotiating treaty land entitlement in the Province. Urban reserves may or may not be a possibility. Specific claims that could involve the Federal Additions to Reserve Policy are also being negotiated.

Manitoba contains very few reserves that are immediately adjacent to urban centres. Portage LaPrairie and The Pas are two examples of communities with reserves nearby. Agreements between Urban Councils and First Nations are not common.

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Taxation Exemption for Land Held in Trust

The Manitoba Municipality Assessment Act used to contain a clause exempting from municipal taxation all land held in trust for a band of Indians. That provision has since been deleted. As a result, only reserve land is exempt from taxation in Manitoba.

[66] Copies of the Saskatoon, Fort Qu'Appelle and Yorkton Agreements are available in the ICURR Library.

Ontario

Land Claims Negotiations

Various self-government and land claim negotiations either have been completed, or are in progress, in Ontario. These include the areas of Thunder Bay, Sudbury, North Bay, Brantford and the Ottawa valley. The Temagami negotiations described in Chapter II are an example of Northern Ontario negotiations. Southern Ontario, except for the Brantford region, has not been affected by land claims.

The Federal Additions to Reserve Policy comes into play in Ontario because a number of First Nations have specific claims that involve additions to reserve under that Policy. In Ontario, tax loss compensation is not part of the negotiations under the Federal Additions to Reserve Policy because of the existing exemption for non-reserve land through the *Ontario Assessment Act*. Urban Council/First Nation agreements are not common.

Taxation Exemption for Land Held in Trust

The Ontario Assessment Act exempts from taxation all land or property held in trust for a band of Indians. As a result,, land does not have to be dedicated as reserve land in Ontario, in order to be tax exempt. This is definitely a concern for Urban Councils in Ontario.

Notable Community

- City of North Bay and Nipissing First Nation

The Nipissing First Nation has a residential and industrial reserve near the boundaries of the City of North Bay. The City, which has an agreement to provide services to part of the industrial park, reports that it has good relations with the Nipissing First Nation. The City's major concern is that the Nipissing First Nation can offer tax incentives to non-aboriginal occupants of the industrial park. The Urban Council meets with First Nation chiefs to discuss various issues that arise from time to time.[67]

Quebec

Land Claims Negotiations

The Province of Quebec has settled extensive land claims with the Inuit in the James Bay area. In June of 1995, land claim and self-government discussions with First Nations were just beginning.

Reserves immediately adjacent to or within urban boundaries are rare in Quebec. There are few existing agreements between Urban Councils and First Nations.

[67] A copy of the North Bay agreement is available in the ICURR Library.

Taxation Exemption for Land Held in Trust

Quebec has no provincial legislation exempting land held in trust for a band of Indians from municipal taxation. Only reserve lands (other than for Settlement Lands in the North) are exempt from taxation.

Notable Communities

- Quebec City and the Huron Wendat Nation

The Huron Wendat Nation has various agreements with Urban Councils in the Quebec City area. Agreements are usually for specific services such as garbage collection and fire protection.[68]

- Restigouche Area

The Restigouche area is an interesting reversal of the normal situation, because the aboriginal population is in the majority, and is seeking to assume full responsibility for all municipal services for both aboriginal and non-aboriginal members of the community.

New Brunswick

Land Claims Negotiations

New Brunswick did not have significant land claims as of the summer of 1994.

Taxation Exemption for Land Held in Trust

The Province of New Brunswick has no provincial legislation which exempts land held in trust for a band of Indians from taxation. Only reserve lands are exempt from taxation.

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Notable Community

- City of Fredericton and St. Mary's First Nation

The City of Fredericton is an example of an Urban Council that has a good working relationship with a First Nation. The St. Mary's First Nation residential reserve is within City boundaries. The City of Fredericton provides most services to the reserve, including policing. Agreements are negotiated to cover these services. The St. Mary's First Nation does hope to take over most of its own servicing in the future.[69]

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[68] Copies of the agreements are available in the ICURR Library.

[69] Copies of the agreements are available in the ICURR Library.

Nova Scotia

Land Claims Negotiations

There were no extensive land claims in Nova Scotia in the summer of 1994.

Servicing Agreements

The municipalities of Sydney and Truro have residential reserves within their boundaries. They have negotiated servicing agreements for the reserve lands of the Millbrook First Nation and the Membertou First Nation. The agreements are negotiated between the municipalities and the Minister of Indian and Northern Development rather than with the First Nation itself. The municipal councils provided policing to the residential reserves in the past. However, the First Nations are moving to aboriginal policing arrangements.

Taxation Exemption for Land Held in Trust

The Province of Nova Scotia does not have any legislation exempting from municipal taxation land held in trust for a band of Indians. Only reserve lands are exempt from taxation.

Prince Edward Island

Prince Edward Island has no land claims as of the summer of 1994, and no agreements between First Nations and Urban Councils. There is no legislation regarding tax exemption for land that is not reserve land, held in trust for a band of Indians.

Newfoundland

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Land Claims Negotiations

The Province of Newfoundland land claims are primarily in Labrador, and involve the Inuit. The Urban Councils that will be affected are northern communities with primarily aboriginal populations.

In the remainder of the Province, there are no agreements between Urban Councils and First Nations, and no land claims that presently affect Urban Councils.

Taxation Exemption for Land Held in Trust

Newfoundland has no legislation regarding tax exemption for lands held in trust for a band of Indians.

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Chapter VI

Conclusions

The information in this study is derived from personal and telephone interviews with some seventy individuals in all ten provinces and the two territories. The majority of the people interviewed were municipal councillors and administrators, and provincial officials.

While circumstances varied from one community to another, the issues and concerns raised were consistent across the country. The conclusion set out in this chapter are an attempt to both summarize the issues raised and identify potential solutions for the future.

The primary impact of First Nation land claims on Canadian urban municipalities is aboriginal self-government

Land claim negotiations in Canada are conducted as though they are simply negotiations to settle land entitlements owed to First Nations by the Federal government. Self-government is not usually officially on the table. In fact, however, every land claim includes or is followed by, some form of aboriginal self-government. This is hardly surprising given that First Nations have always tied land ownership to control of their own affairs on that land. The separation of the two is not their choice, but rather that of the Federal government.

The aboriginal self-government that emerges may be a new version of old powers, as was the case with the urban reserve in Saskatoon, Saskatchewan; or it may be an attempt to create new structures of self-government, such as the shared stewardship of Temagami, the public government of Inuvik or the Settlement Lands of the Yukon. Whatever the form, aboriginal self-government will immediately and directly affect Urban Councils within the land claims area, for the simple reason that "local" affairs are those which a First Nation already controls on its existing lands and wants to continue to control on new lands.

All parties to land claims negotiations should openly acknowledge this reality. One of the primary causes for suspicion and mistrust by Urban Councils, and for continuing bad relations between Urban Councils and First Nations, is the perception within the urban community that people are not being told the truth of what is going on at land claims negotiations.

Negotiations cannot be done in secret

Secrecy breeds suspicion, which breeds rumour, which breeds misinformation, which breeds hostility and fear. This is so on all public issues. Land claims and self-government negotiations are no exception.

Urban Councils and their communities need to come to terms with the reality of First Nations aspirations. They need information on what might be involved, and what is not involved. They need to know that there will be an opportunity, at some point, for them to have significant input into the form that aboriginal government will take on land within their urban community.

Holding land claims negotiations in secret does not save time in the end. In order for effective implementation of an agreement to occur, there must be, at some point, a period of genuine public discussion and information-sharing within the community. If negotiations are open, this process can occur at the same time as the negotiations. When negotiations are kept secret, this process cannot occur simultaneously. The result is that it occurs after the negotiations are complete or nearly complete, and either delays the actual signing of an agreement (as happened with the Nisga'a' land claim in British Columbia in June of 1995) or delays the implementation of the agreement (as occurred in Saskatchewan with the Treaty Land Entitlement settlement).

Public information about land claims and self-government will, no doubt, produce opposition. On the other hand, secrecy leaves the field to those in the urban community who are absolutely opposed to First Nation claims and aspirations. Those urban leaders who are ready and willing to play a positive role in community understanding and accommodation have no opportunity to do so.

Substituting a few federal and provincial "public consultation" sessions for genuine community debate does not work. It is too little effort -- and by the wrong people. Government officials who work in the field consistently underestimate how little the public knows of the world of First Nation land claims and self-government, how far back they have to start in explaining what is going on to the wider community, and how much time is needed before that knowledge filters through the community. They are also in danger of being perceived as having a vested interest in pushing for any settlement -- no matter how inadequate its content or damaging its effects -- in order to have a "success" that will further their own, or their Minister's, career.

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Urban Councils are not third parties

Probably the single most harmful thing for First Nation/Urban Council relations is the treatment of Urban Councils as third parties. Too often, because Urban Councils do not have a role at constitutional talks, they are treated as though they have no role at all, other than as ordinary citizens or as a special interest group.

Urban Councils are elected governments, and elected governments are not at all like special interest groups. This is a matter of reality, not constitutional law.

The "third party" approach tends to be justified by saying that Provinces act on behalf of Urban Councils. However, Provincial Secretariats for Indian Affairs often claim that they are "neutral" as between an Urban Council and a First Nation. They also, not infrequently, deny the legitimacy of the Urban Council's position on an issue.

Issues can only be resolved if everyone first acknowledges that there are two sides, both legitimate. The point of negotiating is for the two sides to meet somewhere in the middle. Either the Province

must be clearly on the Urban Council's side and represent that side, or the Urban Council must be able freely to represent itself. To deny both options means that the settlement that is reached has no hope of being accepted by the Urban Council, and that the issue has not, in fact, been resolved. This may be acceptable at the national level. It is not acceptable at the community level where people are long-term neighbours.

The third-party approach also falls short because it absolves Urban Councils from responsibility for finding negotiated solutions to community issues. It encourages Urban Councils to simply demand that the Federal/Provincial government "do something" and then complain that their actions are not satisfactory.

Finally, the practice encourages First Nations to refuse to deal directly with Urban Councils that do want to negotiate and compromise. The most common question asked of Saskatoon by other Urban Councils is: "How did you get the First Nation to sit down and talk to you?" First Nations who want to work with Urban Councils cite fears that dealing with Urban Councils in any way, on any issue, will be used by the Federal government to downgrade their self-government aspirations, since Urban Councils are so clearly non-entities in the federal scheme of things.

Direct negotiations are important

Both Urban Councils and First Nations express a desire, despite their frustrations, to have a good working relationship within their community. They want to know, above all else, how such a relationship can be created. This study contains examples of communities where such a relationship exists. In each case, the First Nation and Urban Council dealt directly with each other on a specific issue of mutual benefit or concern. As a result of those dealings, they got to know each other, learned to trust each other, and developed ways of working together for the future.

Direct negotiations between First Nations and Urban Councils are not a replacement for Federal/Provincial/First Nation negotiations on land claims and self-government. They are, however, a critically important parallel process. This study shows that, where good relations between an Urban Council and a First Nation already existed, the land claims negotiations benefited. If the Federal and Provincial governments and First Nations are serious about successfully implementing land claims and aboriginal self-government within urban communities, such relationships must be fostered in every way possible.

The key is to create numerous opportunities for specific First Nation/Urban Council discussions, so that those who want to pursue a direct relationship can do so. These opportunities are not necessarily at the land claim negotiation table, although specific issues could be identified and split off. They must be specific issues with defined parameters and of specifically local urban concern. Negotiations must be face-to-face, without interference. The parties need to know their rights and obligations regarding the issue under discussion. A written agreement should be the result wherever possible.

Direct negotiations can be encouraged by creating a framework that protects First Nation self-government aspirations. First Nations need to deal at all levels -- Federal, provincial and local

-- to achieve their overall self-government objectives in a practical way. Their ability to do so should not be impaired by concerns that the Federal government will attempt to relegate them exclusively to "municipal" status if they work with Urban Councils on local issues.

The Federal government, through funding and encouragement of joint First Nation/Urban Council projects, could do much to create other opportunities for local interaction. Such projects can be of direct and immediate benefit to First Nations and Urban Councils, while at the same time providing opportunities for creating the ongoing relationships that are basic to all effective urban communities. Such projects must be funded so as to create "added value" for all parties, rather than being financed by taking funding away that would otherwise be available to either the First Nation or the Urban Council on its own.

Taxation is a key issue

The main issues that Urban Councils want to negotiate are tax-loss compensation and/or sale of municipal services. The depth of concern on these issues should not be underestimated: it is not just a question of money, but involves fundamental concepts of fairness and equity within the non-aboriginal community. Concerns about tax loss and servicing cannot simply be argued or rationalized away.

Where good relations between First Nations and Urban Councils exist, the tax issue has either been dealt with in a way that the Urban Council sees as reasonable (e.g. Saskatoon) or is not an issue in the particular circumstances (e.g. Temagami). Where the tax issue remains outstanding, it acts as a barrier to good relations on other issues.

The Saskatchewan experience has been that direct talks between First Nations and Urban Councils are of great assistance in explaining taxation concerns on both sides of the table. Such talks lead to greater understanding and frequently end in successful negotiated arrangements whereby the Urban Council officially recognizes and accepts First Nation jurisdiction in return for First Nation agreement to some form of tax compensation.

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Local agreements require effective enforcement mechanisms

Urban Councils are concerned about the enforcement of agreements that they have made with First Nations. Normally, when an Urban Council negotiates an agreement with someone, it knows that the courts are available if the other party does not honour its commitments. When dealing with a provincial or Federal agency, political pressure is also a possibility.

Neither of these options are perceived to be available when dealing with First Nations. This is a concern, not because Urban Councils expect to have difficulties, but because all agreements, no matter with whom, need a court of last resort.

Agreements such as the Yukon Final Agreement contain provisions for dispute resolution bodies that are intended to fill this role. At the present time, these bodies are used for disputes over Federal

concerns such as the amount of money to be paid, but are not available for equally important community issues such as land use and environmental concerns. It would help Urban Councils greatly to have the right to access these alternate bodies included in their agreements with First Nations.

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<u>APPENDIX A</u>

Excerpt from Federal Additions to Reserve Policy

vii)Every effort should be made to ensure that the land to be acquired forms contiguous parcels.

viii)Every effort should be made to ensure that parcel boundaries follow natural water boundaries.

ix)If title to mines and minerals is not included in the land to be added to reserve, ensure that the band is aware of the exclusion.

x)The long-term business, resource, employment and taxation potential of the proposed reserve site(s) must be considered in relation to its impact on the economic self-reliance of the band.

9.3.2 Provincial/Municipal Considerations

9.3.2.1 Provincial Considerations

In all cases, consultation in writing with the relevant province must be undertaken with respect to the potential implications of the proposal for provincial programs and services. Such consultation should culminate in written correspondence setting out the issues discussed and whether/how they were addressed. If the region wishes to proceed with a proposal notwithstanding the fact that provincial concerns have not been resolved, the proposal should be forwarded to the ADM of LRT for review, along with the region's recommendations.

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9.3.2.2 Municipal Considerations

Where land to be granted reserve status is located within the boundaries of a municipality (either rural or urban, see definitions under section 9.1.2), the municipality must be informed in writing of the proposal and asked to identify its views and concerns (if any) in a written response. Normally, the issues which the region can expect to be raised are:

i)measures to compensate for the municipality's tax loss once the land attains reserve status;

ii)arrangements for the provision of, and payment for, municipal services;

iii)by-law application and enforcement on the reserve (band by-laws which relate to activities which may affect neighbouring municipal lands or residents should be consistent with the municipality's by-laws); and

Excerpt from Federal Additions to Reserve Policy

iv)a joint consultative process for matters of mutual concern (such as land use planning) and a dispute resolution mechanism, where possible.

Any reasonable concerns of the municipality (rural or urban) with respect to the above-noted issues must be addressed, e.g., by means of a letter from either the mayor or city manager or by way of a municipal resolution or, where requested by the municipality, through a written agreement between the municipality and the band (the department will not normally be a party to such agreements). Prior to the execution of a band-municipality agreement by the parties and before further processing of a proposal by the region, the agreement should be reviewed by the Department of Justice, the HQ Additions Committee and the ADM of Lands, Revenues and Trusts (LRT).

A reserve will not normally be established where a municipality has requested a formalized agreement with a band but an agreement has not been reached. However, the DM may choose to proceed with a proposal in the following circumstances:

a)the Department of Justice advises there is a legal obligation to proceed; or

b)the band is prepared to enter into an agreement on the concerns raised by the municipality, the municipality is unwilling to respond in good faith and any of the following conditions exist:

i)the proposed reserve does not adjoin an urbanized/developed area and is not located in an area which is covered by an approved urban use development plan; or

ii)the land has traditionally and up to the present time been used for Indian purposes, or was once part of an Indian reserve which was surrendered and remains unsold; or

iii)the proposal involves an addition to an existing reserve, as opposed to the creation of a new one.

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9.4 PROCEDURES

9.4.1 General Considerations

The procedures for acquiring land for an addition to a reserve or a new reserve vary slightly depending on whether the land to be acquired is federal land under DIAND's control, federal land under the control of some other department, provincial Crown land or land which is privately owned.