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

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Part I - 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.

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 to 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 negotiation 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.

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.

Part 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.

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.

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."

Laws of general application (those not specific to "Indians or lands reserved for Indians," even though they may affect them) apply to reserve lands, unless and until federal laws or

First Nation laws are enacted that are in conflict. In that situation, the new federal laws or First Nation laws may supersede the provincial or urban laws.

However, provincial and urban laws regarding "lands reserved for Indians" do not apply to reserve lands, even though there may be no federal laws or First Nation laws to replace them. The courts have interpreted laws regarding "lands reserved for Indians" to include provincial and urban laws regarding land use planning, building standards and health regulations.[6] The status of provincial environmental legislation is not clear.

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.

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 cases, the issue of jurisdiction was dealt with by the parties negotiating an agreement regarding specifics for that site. This is important because Muskeg Lake was primarily concerned not to cede any jurisdiction, whereas the City was primarily concerned that the results on the ground (the layout of lots, the level of services provided and the amount paid for those services, adherence to basic building, fire and health codes) be compatible with surrounding urban land. This trade-off re-occurred throughout the negotiations.

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 and that its jurisdiction be recognized. 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. This was a concern of In fact, no such situation has arisen to date in Saskatoon.

In the 1993 Agreement, Saskatoon and Muskeg Lake also contracted 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 from the two jurisdictions 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

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 government tenants. The Saskatoon Tribal Council also has its office building on the property. Finally, the City and Muskeg Lake are jointly financing the "local" share of a Federal infrastructure 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 unwillingness of both parties to wait for someone else to create solutions, but, instead, 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.

Endnote References

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

2. See Chapter III.

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. (Copy available in the ICURR Library.)

4. Agreement between The City of Saskatoon and Aspen Developments Inc. dated October 2, 1992. (Copy available in the ICURR Library.)

5. Agreement between The Muskeg Lake Indian Band No. 375 and The City of Saskatoon dated September 15, 1993. (Copy available in the ICURR Library.)

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

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.