

A CITY'S EXPERIENCE WITH URBAN ABORIGINAL ISSUES

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One of the trends sweeping North America is a call to "reinvent government." Its proponents believe our governments are in deep trouble today. Staggering deficits, economic and social decay, tax revolts and public distrust face governments at all levels—national, provincial, municipal and band. Those advocating "reinventing government" stress the need to bring business technologies to the public service and promise that an entrepreneurial spirit will transform the public sector. Although many of their proposed remedies and suggestions concentrate on privatizing public service and generating non-tax revenues, they do make some very important points that are applicable to the theme of this Conference.

First, all societies have some form of government. Government is the mechanism we use to make communal decisions and to provide common services. Second, government is not something that is fixed or does not change. Governments must constantly change to adapt to the needs of the citizens they serve. And third, the challenge is to make government work efficiently and effectively to serve the needs of its constituents. These points must be borne in mind when we look at the fundamental restructuring necessary to redefine the roles and responsibilities of federal, provincial and Aboriginal governments.

With respect to the first point—that all societies have some form of government—Aboriginal Peoples have always had governments, laws and some means of resolving disputes within their communities. The form and structure of Aboriginal government—the values, customs, norms and laws that their constituents adhered to—historically varied and continue to vary today. Despite certain culturally induced personality characteristics that most Aboriginal groups share, they did not adhere to a single moral code, set of religious beliefs or philosophy. Rather, they developed strong, unique cultures that defined the structure and roles of their governments and society.

The notion that North American Aboriginals needed European settlement to give them the concept of governance is as unfounded as the notion that they needed to be provided with religion because it did not exist before European contact. Quite simply, both existed and were well established before the first European arrived. Equally important must be the acceptance that Aboriginal Peoples have never given up their original

right to govern themselves in accordance with their cultures and customs. Regrettably, it is only within the last decade that the Canadian public and courts have begun to recognize the inherent right to self-government, and the full extent of that right has yet to be recognized.

The second point that requires consideration when we talk about reinventing government is that government and governance must constantly change to adapt to the needs of constituents. This is particularly true when Canadians address the issue of Aboriginal self-government. The legislative framework enacted by the federal Parliament and provincial legislature, and the administrative structures through which that legislation is implemented, must be fundamentally overhauled, but in an orderly fashion. Similarly, the assumption of areas of jurisdiction by Aboriginal governments must be practical and in response to the direction of Aboriginal group members.

The tangled web of federal law, provincial law and band law, with its seemingly overlapping jurisdictions and contrary intents, presents a daunting task when one attempts to sort out who should be responsible for what services and programs and who shall exercise primary responsibility. No one can expect that this will be accomplished rapidly. Before there will be widespread public acceptance of the concept of Aboriginal self-government, there will have to be a greater degree of understanding by the Canadian public of the unique role and status of the Aboriginal community, both in the past and in the present. While fundamental legislative and structural changes are necessary, so in equal measure are fundamental changes in public attitudes.

The final point in any discussion of reinventing government is that the real challenge of any government, whether it be federal, provincial, band or Aboriginal, is to work efficiently and effectively to meet the unique needs and cultures of its constituents. To view Aboriginal self-government as an end in itself is wrong. Rather, the end of self-government should be to provide the type of community with the right services, delivered in a culturally acceptable manner and at a sustainable level that the Aboriginal community wants and controls. The challenge is to get "there" from "here."

As stated previously, the process of effecting this change may not be rapid, nor may the definition and application of the concept of self-government be uniform among different Aboriginal groups. No one model or pattern will work for all Aboriginal groups or work at all times. However, one place to start is with the current *Indian Act*. The Act should be amended to remove the authority of the minister to disallow bylaws enacted by bands pursuant to the *Indian Act*. Similarly the forty-day delay before bylaws come into force and the need to mail bylaws to the minister should be removed.

Section 81 of the *Indian Act* should be amended to expand the jurisdiction of band councils to replace provincial legislation that currently applies on reserves as a result of section 88 of the *Indian Act*. The amendment to section 81 should provide that band councils have the option to continue to function under applicable provincial laws, or to pass their own bylaws to deal with their circumstances in response to their band members. Consideration should also be given to giving bands the status of bodies corporate similar to the status of municipalities.

While there have been calls to repeal the *Indian Act*, a more appropriate interim position is to amend the Act to accommodate a rational transfer of jurisdiction and responsibility. The amendments should be driven by the wishes of Native people and drafted in consultation with First Nations representatives.

Unfortunately, in all the discussions of Aboriginal self-government, constitutional amendment and redefining the roles of governments, municipal government and urban issues are largely forgotten. A municipal government is a creation of a provincial legislature whose jurisdiction is limited to those areas of provincial authority that have been specifically delegated to a local council. In other words, municipal governments can only do those things and pass those laws that the provincial government chooses to let them pass.

There are, therefore, some parallels between band councils and municipal councils. Each currently has limited bylaw-making powers, each is a creation of statute and each must meet the expanding expectations for programs and services within a tight budget and a limited taxing authority.

With the broadening judicial interpretation of section 35 of the *Constitution Act, 1982*, and the signing of the Saskatchewan Treaty Land Entitlement Framework Agreement, Indian bands in Saskatchewan have both the constitutional basis and the economic means to fully pursue self-government. What impact these two developments will have on Saskatchewan urban municipalities is the subject of considerable debate within municipal councils and administrations.

After satisfying the requirement of minimum "shortfall" acreages by acquiring rural land to expand their current land base, Indian bands may use surplus funds to acquire either rural or urban land. This land can be acquired for any purpose designated by the band council and may be held in fee simple, or the band may apply to the minister of Indian Affairs to confer reserve status. If the band holds the land in fee simple, it acquires no special status and is subject to all federal, provincial and municipal laws. If, however, the land acquires reserve status, it must be administered in accordance with the *Indian Act*.

The implications of reserve status is causing concern within the ranks

of municipal administrators and politicians because no clear outline of the implications can be obtained. Unfortunately, little experience is available and even less expertise. The City of Saskatoon, with no background in the area of Native law and with no experience with reserves, is currently attempting to wade through one hundred years of history, laws and regulations to establish a working relationship with the Muskeg Lake Cree Nation to assist them in establishing a reserve within the city limits.

Muskeg Lake acquired surplus federal Crown land in partial settlement of a specific claim and had the minister of Indian Affairs designate it as a reserve. While not subject to the Treaty Land Entitlement Framework Agreement, many of the features of the Framework Agreement have been incorporated into the agreements between the City of Saskatoon and Muskeg Lake. These agreements are as follows:

1. An agreement between the City of Saskatoon and Muskeg Lake Band No. 102 and Her Majesty the Queen that recites that the land in question will have reserve status and is to be surrendered to the Crown to permit a lease to a band-owned company called Aspen Developments. The band agreed that the use and development of the land will be in accordance with provincial law and municipal bylaws. This is to be accomplished by making compliance a term of all sub-leases to tenants leasing land from Aspen Developments.
2. An agreement between the City of Saskatoon and Aspen Developments that provides for the installation of municipal services such as electricity, sewer, water and roads at a fixed price on a fixed payment schedule.
3. An agreement between the City of Saskatoon and Muskeg Lake Band No. 102 that in effect guarantees the performance of Aspen Developments' commitments in the above agreement.
4. An agreement between the City of Saskatoon and Muskeg Lake Band No. 102 on a formula for the supply of ongoing municipal services including police, fire protection, road, sewer, waterline maintenance, recreation and library services. The band will receive all normal municipal services and will pay an annual sum equivalent to the amount that would have been paid to the City if the land did not have reserve status.

The only exception is that the band will not pay the school board portion of the annual levy. A further condition of the agreement provides that the City will enforce and prosecute band bylaws.

The City of Saskatoon and the Muskeg Lake Band have excellent relationships, both at a political level—city council to band council—and at an

administrative level. In an area where there are few legal precedents and little legislation to give direction, there has been a sincere attempt by both parties to compromise and deal with some very complex unresolved issues by agreement.

The Treaty Land Entitlement Framework Agreement, in speaking to urban reserves (section 9), does not address some fundamental issues that are basic to establishing a harmonious relationship between urban municipalities and Indian bands. These issues are the following:

1. **TAXATION.** Property and business taxes account for at least 50 per cent of the annual revenues of urban municipalities. Facing a declining number of taxpayers and increasing costs of operations, municipalities are naturally concerned about any urban property acquiring tax-exempt status, particularly if the development of that property itself leads to a greater demand for services. The Framework Agreement requires that a band attempt to enter into servicing agreements with the urban municipality where a reserve is proposed that will deal with payment for municipal services, compatible municipal and band bylaws, and a dispute-resolution mechanism. However, this section of the Framework Agreement fails to address the enforcement of agreements between bands and urban municipalities, the issues of whether bands must contract for all normal services or whether they may choose to receive only some services, and whether municipalities must charge for the service at cost or at an inflated rate that generates a profit.

Also as-yet unresolved is the obligation of municipalities to assess property and business taxes against all non-exempt occupants of exempt land. In other words, the municipality must tax as though they were property owners all occupants of reserve land who are not status Indians, including corporations owned or controlled by status Indians. The issue becomes fuzzier yet when a band passes a taxation bylaw pursuant to *Bill C-115*. Does the band acquire exclusive jurisdiction to tax (which the city understands is the federal position) or does there remain concurrent jurisdiction to allow both the city and the band to tax non-exempt occupants? British Columbia, when faced with the issue, opted to pass *Bill 64*, which legislatively eliminated a municipality's right to tax where a band passed a taxation bylaw.

A further issue concerning taxation arises from the municipality's obligation to collect school taxes on behalf of school boards. The City of Saskatoon and Muskeg have attempted to avoid this thorny issue by the City recognizing Muskeg as the exclusive taxing authority on their reserve and by the City abandoning its jurisdiction to tax

non-exempt organizations. In return, the band agreed to buy services from the City at an amount equivalent to the tax that the City would have collected from the non-exempt leaseholders, less the school portion. The City further passed a bylaw granting a blanket exemption of all occupants of reserve land from taxation; thereby dealing with the school tax issue.

2. ENFORCEABILITY OF BAND BYLAWS ON RESERVES. There is a need for a practical enforcement mechanism for the band to enforce its own bylaws. Who polices reserves with respect to bylaw compliance? Who prosecutes bylaw infractions? In what courts do these prosecutions take place? Since the Framework Agreement obligates Indian bands to enter into agreements with host municipalities to pass compatible bylaws, each band could have literally hundreds of bylaws ranging from regulations about noise and smoking in public places to complicated zoning and subdivision regulations. To be meaningful, there must be an effective enforcement mechanism.
3. COMPATIBLE BAND BYLAW. Given the provisions of the *Indian Act* and current case law, it appears that, in general, municipal bylaws do not apply to urban reserves located within a municipality and that a band has the right to pass its own bylaws. To deal with this issue, the Framework Agreement in section 9 requires bands, in a service agreement, to pass bylaws compatible with municipal bylaws. The basic problem is that municipal bylaws are enacted within a framework of provincial legislation. Much of this provincial legislation may not apply to reserves, since it infringes on the federal jurisdiction concerning Indians. In the absence of federal legislation, the only route to deal with this issue is by agreement with a band at the time of creation of the reserve.

CONCLUSION

Despite my recitation of the challenges facing both Indian bands and urban municipalities in Saskatchewan in dealing with the establishment of urban reserves, the City of Saskatoon is excited by the possibilities not only of the establishment of the existing Muskeg Lake reserve, but also by the possibility of partnerships with other Saskatchewan Indian bands.

At the opening of my presentation I spoke of reinventing government. I believe that the expanding definition of the Aboriginal inherent right of self-government, the Saskatchewan Treaty Land Entitlement Agreement and the relationship between the Muskeg Lake Band and the City of Saskatoon take a significant step toward reinventing government for both Aboriginal people and their non-Aboriginal fellow Canadians.