

First Nation / Local Government Service Contracting by R. Bish and T Duerr 1995 (Summary)

There is a long history of local governments providing local services to reserve lands in British Columbia, with or without contracts. In those situations where municipal (or provincial or regional district) governments collected property taxes from non-native leaseholders on reserves, servicing arrangements varied. Some of these arrangements included contracts, but even in these circumstances, most services were provided informally and a majority of on-site services were not provided by the tax collecting government to its leaseholder taxpayers.

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

It is widely observed that contracts function well when both parties benefit and both parties want to make them work, and it should be noted that in the 1987 study of service relationships between municipalities and First Nations, very few contract problems were identified. Nevertheless, in the event that arrangements for service provision do break down, it is important to have a well drafted contract to protect the interests of both parties. Thus, the service agreements should be clear and functional, avoiding defects that make it easy for either party to avoid its contractual obligations.

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

Specific Contract Provisions

1. **Parties of the Agreement** –Legal capacity of Indian Bands has been recognized by courts and governments, therefore the parties should be the local government and the First Nation, not INAC.
2. **Description of Services** - *Specific service contracts* will specify individual services to be delivered to the reserve. *Comprehensive contracts* may indicate all local services and then list significant exceptions not to be delivered. The service agreement should also state the standard of services to be delivered. One way of dealing with this issue is to simply require the local government to supply services "at the same frequency and quality as those received by the rest of the area served" or "at a similar standard as that received by other areas serviced by the local government." *Hard services*

tend to be delivered directly to the recipient. They include road maintenance, water supply, sewers, fire protection and garbage collection. *Soft services*, on the other hand, are those *available* to the leaseholder to use, such as libraries, parks and recreation centres. Soft services are usually not available on the reserve itself and larger facilities such as a recreation centre may serve a population outside as well as inside a municipality's boundaries.

3. **Exceptions for Non-Delivered Services** - In comprehensive service contracts, it may be necessary to recognize that not all municipal services can be legally provided to a reserve. Services that cannot be provided include planning, zoning, and by-law enforcement (noise, animal control, etc.) unless the First Nation has enacted its own by-laws and designated local government officials as having enforcement authority.
4. **Police Services** - On reserves, as in other provincial rural areas and in municipalities with a population of less than 5000, the provincial government provides the police services and assumes 70% of the policing costs, with the federal government covering the remaining 30%. Thus, it is not necessary for First Nations to enter into a contract and pay for police services from a local government. A First Nation may wish to create an alternative agreement for police services with a nearby municipal police department where service from the municipal department would be more practical than obtaining it from a distant RCMP detachment.
5. **Party Responsibilities**- When establishing a sewage system or road maintenance scheme, each party must be aware of its respective responsibilities. For example, the First Nation may be responsible for ensuring that a reserve sewage system is built according to municipal specifications, and the municipality may be responsible for annual cleaning of lines and maintenance of a pumping station. There should be a clear list of things each is to be responsible for and some sort of mechanism that allows the parties to determine who should be responsible for unforeseen responsibilities that might arise.
6. **Term** – Automatic renewal provisions are useful, as well as notice provisions regarding discontinuance of a service.
7. **Rate Structure** - Generally, the easiest pricing approach is based on *tax equivalence* for general services or fee equivalence where the local government finances a service with a user charge. The advantage of these approaches is that they respond to changing conditions, without having to specify in advance a fixed total price for each year into the future. Simple tax equivalence involves the First Nation paying the local government "the amount that would otherwise have been collected with the local government's property tax." An additional benefit of this approach is that it is easy to adjust for non-delivered services such as planning or by-law enforcement. One simply subtracts from the full tax equivalent amount the percentage of the local governments expenditures devoted to non-delivered services. One should note that a tax equivalence approach, minus a proportion for services not delivered, does include paying for the full range of local services that are available, including off-site facilities such as libraries and recreation centres. If a First Nation does not want to contribute to these off-reserve services, the local government may want to move to *full cost pricing* (which will often be much higher than its tax equivalent) with a suitable adjustment for non-tax revenues.
8. **Pricing Services from Regional Districts** Under provincial legislation, regional districts are required to allocate a share of each specific service's costs among sub -areas (electoral areas, municipalities)

in relation to the adjusted assessed value of property, upon which property taxes are levied, in each area. Using the same approach for pricing services to a reserve is both practical and fair. First Nations should expect regional districts to want to use this approach for pricing services to First Nations.

9. **First Nation Taxation of Local Government Properties** While government properties on reserve are not generally taxed (and cannot be taxed if owned by the federal or provincial government), it is common that the owning government pay a "grant in lieu of taxes" to the government whose jurisdiction in which they are located if the facilities require any kind of local services. While First Nations can tax such facilities within their territory, better relations will be maintained with neighbouring jurisdictions if First Nations exempt such facilities from taxation in exchange for the local government providing all services for those properties or a grant in lieu of taxes to cover any services that the First Nation must provide.
10. **Clarification or Change** It is more than likely that the reserve areas to be serviced by a local government will grow over time. Therefore, this should be contemplated by the contract to avoid any future difficulties. One of the more innovative provisions relating to expansion changes in growth linked expansion provisions to the rate structure, noting specific changes that would occur if more lands were to be serviced.
11. **Termination** Notice requirements range from 2 weeks to 12 months. Because local services are complex (and therefore difficult to stop and start up), and because local governments must balance their budgets on an annual basis, a lengthy notice period is necessary and should be clearly stated. Common law also dictates that notice time be "reasonable", which can potentially be several years to replace some kinds of services.
12. **Default Remedies** A contract should include a provision detailing who to notify if there is a service delivery problem, a specific time limit to remedy the problem, and a penalty for failure to do so. Provisions pertaining to payment defaults should be equally clear, detailing a specific time lapse before a missed payment becomes a default, and any interim penalties.
13. **Indemnity Provisions** Indemnity clauses are a way of limiting one's liability by assigning it to another party. It is generally good policy to have each party indemnify the other, and take out insurance to protect themselves and the other party against liability.
14. **Arbitration/Dispute Resolution Provisions** Arbitration or dispute resolution clauses provide mechanisms by which disagreements may be settled. Such a provision is a safeguard that allows parties to work out their differences without having to enter a courtroom thereby saving time and litigation costs. Arbitrated or dispute resolution processes also tend to lead to a decision both parties can live with, as they have negotiated the result rather than having one imposed on them.
15. **Access to the Reserve** Because a First Nation has a legal right to exclude others from a reserve, it is important that they extend explicit permission to allow the supplier of services to enter.
16. **Definitions** Generally it is a good idea to have a separate section clearly defining important terms in the agreement.
17. **Other Provisions** Finally, there are a number of other minor conventional contract terms that should be included in any contract (no assignment, time is of the essence, information sharing, applicable law etc), but these should be addressed by the lawyers drafting the contract and will not really be of any concern to either party.

References:

Bish, R.L. & Duerr, T. (1995, September). Presented at First Nations Tax Administrator's Meeting, Quaaout Lodge, Little Shuswap Lake, BC: *First Nation / Local government service contracting*. Retrieved Feb 3, 2011 from <http://www.rbish.ca/ContractingManu.pdf> .