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**TREATY SETTLEMENT LAND:**

**THE FISCAL IMPACTS  
ON LOCAL GOVERNMENT**

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**PREPARED BY:**

**Peter Adams  
Victoria Consulting Network Ltd**

**PREPARED FOR:**

**The Union of British Columbia Municipalities,  
The Ministry of Aboriginal Relations and Reconciliation, and  
The Ministry of Community Services**

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# ***CHAPTER ONE: INTRODUCTION TO THE PAPER***

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## **1.1 BACKGROUND**

The Federal and Provincial governments are in the process of negotiating modern-day Treaties with First Nations in British Columbia. Negotiations with four First Nations have reached the final stage of the process but have not yet been finalised. When concluded, each Treaty will include the transfer of title over land to the First Nation. Almost all of the land to be transferred is today either reserve land or land held by the federal or provincial Crown. In rare circumstances, parcels of privately-owned land acquired on a willing seller/willing buyer basis will also be transferred.

At the time of treaty, Treaty Settlement Land (TSL) will no longer fall under local government jurisdiction. In a very few cases, ownership will be transferred to the First Nation but the land will be held in ‘fee simple’ and jurisdiction will not change. Some local governments have raised concerns about the loss of tax revenue on land that becomes TSL and have suggested that some form of compensation or mitigation be considered to offset this negative impact. For example, both the Lower Mainland Treaty Advisory Committee and the Prince George Treaty Advisory Committee have indicated their concerns to the Union of British Columbia Municipalities (UBCM) and to the provincial government. The primary focus of these concerns is land located within municipal boundaries. This land is situated close to developed and urban areas where local governments provide a wide range of services and recover the costs of those services through a variety of fiscal instruments including property taxation, parcel taxation, development charges and user fees. This type of land is only a small proportion of the total quantum of land currently being considered for TSL at the four final stage Treaty tables. However, land within municipal boundaries has been identified as potential TSL at each of the tables and the quantum of such land is greater in the more urban areas of the province.

## **1.2 THE ASSIGNMENT**

In response to the concerns expressed by local government, the UBCM, the Ministry of Aboriginal Relations and Reconciliation (MARR) and the Ministry of Community Services (MCS) engaged us to undertake research that would identify, where possible:

- How servicing agreements could be used by local governments and First Nations to address treaty related impacts;
- The general potential benefits from treaty settlements on neighbouring local governments;
- Any local government adjustments that may not be offset by servicing agreements; and,
- The applicability of the Community Adjustment Fund or other existing provincial programs or policies that may be available to assist neighbouring local governments.

This report presents our findings. Chapter Two discusses the concerns raised by local government and puts them in the context of the Treaty interests of First Nations. Chapters Three and Four examine examples of land transfer and jurisdiction transfer (e.g., under the federal Additions to Reserve Policy or the criteria used by the provincial government for municipal boundary extensions) to see what lessons can be learned from these experiences. Chapter Five examines alternative approaches that may be taken to respond to the concerns of local government, including ways to reduce or mitigate any potential negative impacts. The paper is based on a review of existing documentation and selected interviews with provincial and local government officials.

Over the years local governments have expressed a number of related concerns about the creation of TSL including land-use harmonization, equity in property taxation and the potential creation of tax havens. While it is hard to completely separate out these issues, the focus of this paper is on the fiscal impacts of the change in jurisdiction.<sup>1</sup>

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<sup>1</sup> An examination of the broader range of issues can be found in the paper we prepared for the UBCM and the provincial government in 1999 entitled “Approaches and Options for Treaties in Urban Areas”.

## ***CHAPTER TWO: THE CONCERNS OF LOCAL GOVERNMENT***

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### **2.1 CONCERNS EXPRESSED BY LOCAL GOVERNMENT**

Local governments have identified a number of fiscal concerns that could arise from the conversion of Crown land in urban or semi-urban areas to Treaty Settlement Land (TSL):

#### **Loss of revenue to finance services:**

- Local governments receive revenue from the use of Crown land because occupiers of Crown land are taxable.<sup>2</sup> Even where Crown land is used for Crown purposes, local governments can expect to receive payment in lieu of taxation from other governments. Therefore, when Crown land is converted to TSL, local governments lose an actual or potential source of revenue.
- Development on TSL post-treaty is likely to create incremental servicing costs for local governments but, after the change in jurisdiction, local governments would not have the ability to recover those costs through their regular fiscal instruments (e.g., taxes and development cost charges). Revenue could be generated through a servicing agreement with the First Nation but local governments are concerned that the revenue received would not match the revenue forgone or the cost of providing services.
- Local governments want to ensure that they receive adequate payment through a servicing agreement for the full range of hard and soft services<sup>3</sup> being provided to residents of TSL, including services supplied directly to settlement land and in services used outside of settlement lands (e.g., roads, policing, and recreation). In particular, there is concern among some local governments that the recovery of costs for community based "soft services" (that also tend to be the ones received off settlement land) is often overlooked in the development of servicing agreements. These community services typically represent the largest portion of local government spending on services in urban areas.
- Even where services could be withheld in principle, many local governments are not convinced that they would be able to withhold basic services, in practice, especially where the social and environmental consequences would be significant. As a result, conversion of land to TSL creates uncertainty about future servicing obligations and makes financial planning more difficult.<sup>4</sup>

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<sup>2</sup> Crown forest land is not taxable.

<sup>3</sup> Hard services could include public works, utilities, water supply and sewage disposal. Soft services could include recreation facilities, parks, library services, hospital costs, E911, and provincial emergency planning

<sup>4</sup> Local governments point out that their concerns are tied to their need to maintain budgetary stability. Local governments must adhere to strict budgetary processes, including reporting out cycles, capital financing and servicing provision commitments.

- If First Nations decide to provide services such as water supply and sewage treatment themselves, local governments may have very little ability to negotiate service agreements to recover other service costs.

### **Loss of opportunity to generate net revenue:**

- Local governments are also concerned that development on TSL may reduce the pace of development on other lands in the community. For example, TSL may be developed as a commercial centre and, as such, would reduce the opportunity for commercial development on land under local government jurisdiction. For local governments, this prospect is seen as a lost opportunity to generate net taxation revenue.<sup>5</sup>

### **Loss of economies in service delivery:**

- Where First Nations chooses to provide services themselves, it could still have an impact on local government. First, it could fragment service delivery and may reduce the opportunity for the community to deliver service in the most cost-effective way. Second, it could reduce the supply of capital (i.e., from development cost charges) that local government would have used to upgrade or expand services. These concerns are most frequently expressed in the context of water and sewer systems, which typically have a large capital component.

### **Loss of community amenities or opportunities:**

- The land in question may provide community amenities (e.g., green space, walking trails, watershed protection) that could be lost if the land became TSL and was developed. These amenities have value to the community and local government may have to incur costs to replace them.
- The land in question may also represent a unique opportunity for local government if the land could have been acquired by them (e.g., to complete a park or trail system).

## **2.2 ARE THESE CONCERNS REASONABLE?**

In conceptual terms, the fiscal concerns raised by local government are understandable and reasonable but they also need to be kept in context. First, the conclusion of Treaties is expected to create positive economic benefits for both First Nations and neighbouring communities through new investment and consumer spending. These impacts will benefit businesses located in neighbouring municipalities and will help support the tax base in those communities. Second, the actual magnitude of any fiscal impact could be quite modest depending on the specifics of the situation. In large

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<sup>5</sup> Because tax rates are higher on commercial property than on residential property and the service demands are generally lower than those created by residential development.

and growing communities, the fiscal effect of creating small amounts of TSL is unlikely to be significant in the context of the overall fiscal capacity of a typical urban municipality. Third, since local government is likely to be the least cost supplier of basic services such as water, sewer and fire protection services, the First Nation will be motivated to enter into a service agreement that will generate revenue for local government which will offset in whole or in part the negative fiscal consequences identified above. In some situations, therefore, the fiscal concerns may be real but overstated.

In other situations, local government's concerns may be well-founded. The reality will vary from situation to situation:

- The magnitude and nature of impact will depend on the location of the land relative to the location of services in the community. Development at the edge of a community may have less of an impact on community based services than development in the core area.<sup>6</sup> It may also represent a net new investment in the community rather than a displacement of other investment.
- The magnitude of the servicing impact would depend on the nature of development on TSL. Residential development tends to generate larger servicing costs than commercial development. Large scale servicing impacts on local government are less likely to come from residential and community uses of the land by First Nation citizens themselves because of their generally small population numbers compared to surrounding communities. The larger impacts are expected when land is developed for use by visitors, tourists or non-First Nation occupants.
- The overall scale of impact may be quite modest where the amount of land transferred is small relative to the overall amount of developable land in the community.
- The capacity of local governments to absorb any impact will vary from community to community and will depend on a variety of factors such as the strength of the tax base, population size and the pace of development.
- Development on TSL may slow or may accelerate development on other lands in the community; much will depend on the overall pace of development in the community. Even in a slower growing community, development on TSL will benefit businesses based off TSL.

The immediate impact of the change in jurisdiction is likely to be small because most of the land being considered for inclusion as TSL is not currently occupied and is generating very little, if any, tax revenue for local governments. The greater concern is with impacts some time in the future. Unfortunately, these impacts are hard to predict at the time of Treaty because:

- The intended use of the land and the expected timing of development is unknown to local government. The First Nation itself may have only some very general

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<sup>6</sup> Development at the edge may result in high costs for water and sewer services but these costs would not be incurred by a local government unless a service agreement was in place.

intentions for the land; these intentions can change and make take a long time to materialize.

- The impact on local government services may be different in the future than it is today because the pattern of development in the community may also be different (e.g., it may be more densely populated than it is today). Therefore, even if the land development plans for TSL were known with certainty, the servicing consequences could not be easily predicted.
- Satisfactory servicing agreements may or may not be put into place.

Some local governments are not greatly concerned about the creation of TSL because: the amount of land involved is not large in the context of the overall community; they anticipate positive outcomes for the First Nation and the community from development on TSL; they have developed a collaborative relationship with the First Nation; and they are confident that the fiscal impacts will be addressed in any future servicing agreement. In other communities, local governments are less certain that the positive impacts will offset the negative impacts, that the First Nation will enter into a servicing agreement, or that a servicing agreement will fully compensate them for the cost of services provided.

Even if the tax loss could be shown to be small in the context of their community's fiscal capacity, some local governments would still object to the loss of taxing jurisdiction. For them, the issue is more one of principle than a pragmatic calculation of benefits and costs. For others, the issue is really one of uncertainty both about the impacts and the possibility of avoiding or mitigating unfavourable impacts through a suitable and satisfactory servicing agreement.

In Chapters Three and Four we will examine how this uncertainty has been addressed in other circumstances. In Chapter Five, we will present some alternative ways of responding to this uncertainty. Before doing so, we conclude this Chapter with an examination of the interests of First Nations in the creation of TSL and the negotiation of service agreements. Without this understanding, it is not possible to fully understand the implications of alternatives that will be presented in Chapter Five.

### **2.3 WHAT ARE THE INTERESTS OF FIRST NATIONS?<sup>7</sup>**

In looking at this issue, we must consider not just the concerns of local governments but also the interests of First Nations in the Treaty process. First and foremost they are seeking clear jurisdiction over land that is included in a Treaty. Hence, they want to see that land converted to Treaty Settlement Land rather than hold the land in 'fee simple'. In the more urban areas of the province, it is not possible to identify a sufficient area of TSL without considering parcels of Crown land inside municipal boundaries.

As part of the land selection process, First Nations are seeking parcels of land that will provide a foundation for economic development opportunities. In rural areas, these lands may be intended for resource extraction. In urban or semi-urban areas, the intended uses of the land are likely to include commercial, tourism or residential uses. In most

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<sup>7</sup> This observations in this section are based on interviews with provincial government officials who have participated in Treaty table discussions with First Nations.

parts of the province, the most suitable parcels of land for these purposes will lie within or close to existing municipal boundaries.<sup>8</sup>

To develop urban properties for member housing or for economic development purposes, First Nations will need to supply water, sewer and fire protection services. In many circumstances, the only practical way of receiving those services will be to contract with local government. Even where the service can be provided in an alternative way, the most cost-effective method of delivering the service may be in partnership with local government. Therefore, First Nations recognise that, at some time in the future, they may need to negotiate service agreements with local governments. Like some local governments, First Nations may be cautious about this prospect but for different reasons:

- They may not have had a good relationship with local governments on servicing issues and, in some cases, local governments may have been reluctant to extend services to reserve lands. As a result, they do not expect local governments to assist them by providing local services to TSL at an affordable price.
- In most cases they will be facing high costs to develop TSL and they do not want to pay more for local services than is absolutely necessary. They do not want to pay more for a service than it costs local government to provide that service.
- They may not wish to pay for community based services that, in their view, provide little benefit to their members or other residents of First Nation lands.
- They may not wish to pay for community services without some say over the level of service provided or the cost of those services (e.g., they may prefer a lower level of service for a lower payment).
- They may not want to become overly dependent on local government for essential services but to retain some degree of self-reliance.
- They will not want to pay local government for a service they are providing themselves.
- They do not want to pay for community services if there is no development on the land (i.e., they do not want to make payments in lieu of taxes on undeveloped land because, without development, they will not have the capacity to make such payments).
- First Nations may initially have limited revenue streams from which to pay for services and will face pressure from their communities to use limited funds for catch-up investments in community housing and infrastructure.

Therefore, First Nations expect to enter into negotiations with local government for services but want the outcome of those negotiations to reflect the interests of both parties, not just the ‘tax loss’ interest of local government.

Like local government, First Nations cannot be certain of the outcome of these negotiations. But this uncertainty is only one of a great number of challenges that face

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<sup>8</sup> There are a number of striking examples of First Nations in BC using reserve lands in urban or semi-urban areas to create economic development opportunities for their members, e.g., the Squamish First Nation and the Westbank First Nation near Kelowna.

First Nations post-Treaty. Moreover, Treaty negotiations are putting severe pressures on the time and resources of the First Nations involved. These pressures will not become any less severe after final agreements are reached and they begin to implement the process of self-government. As a result, First Nations may be on a different timetable to local governments when it comes to resolving issues around future service agreements. For First Nations, negotiation of a service arrangement may not become a priority until they need to develop a specific parcel of TSL.

## ***CHAPTER THREE: ADDITIONS TO RESERVE LAND AND TREATY SETTLEMENT LAND***

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### **3.1 INTRODUCTION**

This Chapter examines how the impacts on local governments that result from changes in jurisdiction over land are handled in the context of existing federal policy. Currently, in response to the request of a First Nation, the federal government is willing to convert land to reserve land under a range of specified circumstances. These additions to reserve (ATR) land can be in rural or urban areas. Since reserve land is generally not within the taxing jurisdiction of local government, local governments may face a tax loss when additions to reserve are approved.<sup>9</sup> This situation, therefore, is similar to the creation of TSL.<sup>10</sup>

The Chapter begins with an overview of ATR policy as it relates to relationships with local government and, after that, examines the application of ATR policy in Saskatchewan, Manitoba and British Columbia. The Chapter also discusses the way TSL inside the City of Whitehorse is treated in a recently signed Agreement among the Kwanlin Dun First Nation, the Government of Yukon and the Government of Canada. It concludes with some observations drawn from these experiences.

### **3.2 ADDITIONS TO RESERVE POLICY**

The federal government's ATR policy requires the First Nation seeking an addition to approach the affected municipal<sup>11</sup> government to seek its views regarding the addition, including its views on:

- Measures to compensate for the municipality's loss of tax revenue once the land attains reserve status;
- Arrangements for the provision of and payment for municipal services;
- By-law application and enforcement on the newly created reserve; and,
- The process for resolving matters of mutual concern.

The expectation is that the First Nation and local government will reach agreement on issues of concern to local government. However, the actual agreements can be as simple or comprehensive as the parties feel is necessary.

Clearly, federal policy recognises that there could be a negative fiscal impact on local government from additions to reserve (ATR) and provides for two methods of mitigation of that impact: tax loss compensation and servicing agreements. Federal policy does not

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<sup>9</sup> In BC, leaseholders occupying reserve land are taxable by local government unless the First Nation has introduced its own property taxation regime under the Indian Self-Government Enabling Act.

<sup>10</sup> Similar but not identical. TSL will be under FN jurisdiction; it will not be federally owned land.

<sup>11</sup> The policy refers to municipal governments as a short-hand for local governments.

lay out specific formulas for compensation or a required framework for servicing agreements; it lets the parties decide on the most appropriate approach in each circumstance. Nor does federal policy require the First Nation to pay compensation in all circumstances; the municipality may not seek compensation or the tax loss may not be considered significant.

Moreover, the federal government may allow the addition to proceed even though the First Nation and the municipality fail to agree on tax loss compensation. Canada retains the discretion to approve the addition where it considers the First Nation has made reasonable efforts to respond to the issues raised by local government. It does not give local government a veto over land transfers.

The federal government considers the following factors in determining whether a compensation offer made by a First Nation is reasonable:

- The amount of municipal taxes currently assessed on the property in question.
- Any savings the municipality may experience as a result of reduced delivery of services if the addition is approved;
- Any increased municipal revenues resulting from a service agreements negotiated with the First Nation;
- The relative size of the property tax loss in relation to the total tax revenues of the municipality; and,
- Whether the municipal tax base was receding or expanding at the time of the proposed addition to reserve.

Where compensation is paid, it is intended as a one time obligation not a commitment to assist the municipality for an unlimited period of time. The following sections provide some examples of the application of the ATR policy.

### **3.3 SASKATCHEWAN TREATY LAND ENTITLEMENT AGREEMENT**

In 1992, Saskatchewan, Canada and 25 First Nations entered into a Treaty Land Entitlement Agreement (TLE) that resolved outstanding land claims by these First Nations. Subsequently, four more First Nations entered into similar agreements. Under these Agreements, the First Nations will receive approximately \$539 million to buy just over 2 million acres (800,000 ha) of land to add to their reserve lands. The land purchased may be Crown land or private land that is acquired on a “willing seller – willing buyer” basis. To date, more than 596,000 acres have attained reserve status; most of this land has been in northern and rural communities but almost 400 acres (160 ha) have been added from urban areas.

#### **Urban Municipalities**

Where the affected land is within an urban municipality, the TLE requires the First Nation to enter into an agreement with the affected municipality concerning:

- Compensation for the loss of taxes, levies or grant-in-lieu, which, but for the setting aside of the reserve, could reasonably have been expected to have been received by the urban municipality for its own purposes. Compensation is to be achieved by one or both of the following:
  - o A servicing agreement whereby the municipality provides municipal services in return for a fee.
  - o A one time lump sum payment, or periodic payments, or some other formula negotiated between the parties.
- To the extent possible, compatible municipal and band by-laws.
- An appropriate dispute resolution mechanism.

Any compensation payments are the responsibility of the First Nation.

The TLE does not give local government a veto over the transfer of land. Canada may transfer the land to reserve status where an agreement has not been reached within 5 months of the request by the First Nation to enter into an agreement with the affected municipality and the municipality has not responded to the request reasonably and in good faith.

The TLE provides a dispute resolution process (an Arbitration Board) to determine whether the municipality is acting in good faith and/or whether the First Nation is proposing a reasonable and adequate agreement. Canada agrees not to transfer land until the matter has been disposed of by the Arbitration Board.

### **Urban Reserves in the City of Saskatoon**

In recent years, a number of urban reserves have been created in the City of Saskatoon and with each one the City has entered into an agreement concerning land use and servicing. The first agreement was signed in 1988 between the City and the Muskeg Lake Cree Nation that led to the first commercial reserve in the City intended to be used by the First Nation for economic development purposes. Creation of the reserve has transformed the 33 acre (13 ha) site from vacant federal Crown land to a significant commercial centre. Since then, the City has entered into a number of agreements with other First Nations under the framework of the TLE.

These urban reserve agreements between the City and First Nations include the following elements:

- A specification that at all times the land use and development on Urban Reserves within the City will be essentially the same as if the site were not reserve land.
- The City agrees to provide all normal City services at the same level as that provided to similarly zoned land in a comparable state of development. The City also agrees to provide water, sewer and electricity service to each individual customer on urban reserve land.
- First Nations do not pay municipal taxes but they pay an annual fee equivalent to the municipal taxation that would have been paid had the land been under

municipal jurisdiction – this is the mechanism of municipal compensation for tax loss.

- The First Nation has exclusive taxing jurisdiction on the urban reserve but the First Nation agrees to levy taxes equivalent to the amount that the City would have collected if it were the taxing authority – there is no tax haven.
- The agreements are in force for as long as the land remains reserve land. In the event of a dispute, the issues can be referred to binding arbitration.

The City of Saskatoon has been supportive of the creation of urban reserves. They are seen as an excellent way of offering First Nation people economic and social opportunities that are not available to them in a rural reserve setting. The commercial centre developed by the Muskeg Lake Cree Nation is seen as a success story that has attracted a number of Aboriginal businesses to Saskatoon and has created employment opportunities that benefit the City as a whole.

### **Rural Municipalities**

The process of compensation is different for rural municipalities. Much of the land acquired by the First Nations is expected to be farm land that is some distance from an urban centre and does not receive local services other than road access. In this situation, the rural municipality will be compensated for the transfer of taxable land on the basis of a fixed formula: 90% of 25 times the municipal taxes levied in the calendar year immediately prior to the transfer date. Compensation is paid by the government of Saskatchewan (cost-shared 70% by Canada) not the First Nation. This is a relatively simple way of ensuring the municipality is compensated for continued provision of road services.

### **3.4 MANITOBA TREATY LAND ENTITLEMENT AGREEMENT**

First Nations in Manitoba have entered into Treaty Land Entitlement Agreements with the provincial federal governments. The elements of these Agreements are similar to those discussed above for Saskatchewan with one notable exception. In Manitoba, a municipality can apply for compensation from the provincial government where it suffers a tax loss that has not been offset by the revenue earned through a service agreement. If approved, compensation is equal to five times the net tax loss defined as the difference between the revenue earned in the year before transfer less annual revenue to be earned through the servicing agreement.

### **3.5 GALLAGHER CANYON AGREEMENT IN BC**

The primary reserve lands of the Westbank First Nation are located on the west side of Okanagan Lake. In recent years, the First Nation purchased 662 ha of land on the east side of the Lake in an area known as Gallagher Canyon with the intention of adding this to their reserve land. The Gallagher Canyon land is located partially within the City of

Kelowna and partially inside Electoral Area I of the Regional District of Central Okanagan.

The First Nation approached the federal government to have the Gallagher Canyon land designated reserve land under the ATR policy. As required by federal policy, the First Nation entered into negotiations with the affected local governments: the City of Kelowna, the Regional District of Central Okanagan and two Irrigation (“Improvement”) Districts. These negotiations led to the Gallagher Canyon Master Agreement that was signed by all parties in July 2000.<sup>12</sup>

The Agreement addresses a number of different concerns of local government including; compatible land use; rights of way; and contributions to servicing costs. The agreement addresses the First Nation’s need to access services and its desire to protect the tax-free status of its members.

It lays the foundation for future servicing agreements between the First Nation and the City and/or District(s) and includes the principle that the City or District(s) will be paid for all services provided to the Lands in question or the occupiers thereof “as if the Lands were in local government jurisdiction”. The amount that Westbank will pay for those services could be equal to “the amount ordinarily payable” for such services calculated using the same tax rates and using the same assessment methods as those used on other City or District lands.

If the First Nation chooses to provide any local services itself, the service fee payable to local government will be reduced by “an amount that represents the fair and equitable estimate of the cost to a reasonably efficient municipality to provide such service”. If the Westbank First Nation and the City or District(s) cannot agree on the amount of the service fee reduction, the matter is to be resolved through the Agreement’s dispute resolution provisions which include the possibility of binding arbitration. Under the Master Agreement both Irrigation Districts, which are the water providers in the areas, agree to “consider any application by Westbank for water service in a fair and equitable manner similar to any other application for lands within or outside the boundary of the irrigation district”.

Therefore, the agreement allows for local government to be compensated for tax loss through servicing agreements. It also requires the First Nation to contribute to off-site road improvement costs in the same manner as other developments (with an exemption for the first 100 homes for Westbank members). Although detailed service agreements have not yet been concluded, it is reasonable for local government to expect revenue from these lands similar to the revenue that they would have received had the land remained under local government jurisdiction.

### **3.6 MCLEOD LAKE INDIAN BAND TREATY 8 ADHESION IN BC**

In 1999, the federal and provincial governments entered into a Final Settlement Agreement with the McLeod Lake Indian Band concerning the Band’s claim that it has not received the Treaty benefits provided to other First Nations living in the area covered

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<sup>12</sup> The Government of Canada is not a party to the agreement.

by Treaty 8. Under the Settlement Agreement, the Band will receive almost 19,000 hectares of provincial Crown land that will be converted to reserve land in the name of the Indian Band.

Most of the land to be transferred is located in rural areas. However, the Agreement identifies two parcels of land that are close to urban services and attaches special conditions to the transfer of these properties. The two parcels are:

- 26 hectares close to the community of Bear Lake north of Prince George in the Fraser Fort George Regional District.
- 8.1 hectares in the District Municipality of Mackenzie.

The Agreement required the Indian Band to enter into service agreements with local government with respect to these two parcels unless it chose to provide its own services. These parcels of land are not to be transferred from the provincial Crown until one of these two conditions has been met. Both service agreements have been established and the province is in the process of transferring the land.

### **The Bear Lake Property**

The Bear Lake property is undeveloped and is located close to the unincorporated community of Bear Lake, north of Prince George in Electoral Area G of the Fraser-Fort George Regional District. The Regional District currently provides a range of services to this unincorporated community including water, fire protection, recreation and street lighting. Residents of the community also contribute to services provided widely across the Regional District including regional parks, solid waste management and libraries.

Under the service agreement negotiated between the Regional District and the McLeod Lake Indian Band, the Regional District agrees to supply water and fire protection services to the reserve land. In addition, future occupants of the land would benefit from the broad suite of services provided by the Regional District. The First Nation agrees to pay for these services in two ways: by paying water user fees and an annual service fee in lieu of property taxes and parcel taxes. The intent is that the Regional District would recover the same revenue it could expect to receive if the land were lands in Electoral Area G and subject to Regional District taxation. As part of these negotiations, the Regional District wished to avoid the situation where service provision was unbundled; the Indian Band could not expect to receive services provided directly to the land without also contributing to those services provided off reserve land to which other residents of Electoral Area G contribute. The Agreement meets that expectation.

### **The Mackenzie Property**

The Mackenzie property is located outside the main commercial centre of the municipality but is next to the new City Hall. The property is undeveloped and is not serviced but is relatively close to municipal water and sewer services. Members of the McLeod Lake Indian Band have a commercial presence in the community: the Band owns land and a logging company based in the community.

In October, 2003 the District of Mackenzie entered into a Servicing Agreement with the McLeod Lake Indian Band with respect to the 8.1 hectare parcel. Under the Agreement the municipality agrees to provide water, sewer, garbage collection, fire protection and road maintenance services to the reserve lands. The Band agrees to pay the generally applicable user fees associated with these services and, in addition, a general service fee to cover the cost of direct services to the land and services generally available to residents of the community such as library, parks, airport and recreation. The general service payment is linked to municipal taxes that would have been levied on reserve had the occupants been subject to municipal taxes. The Agreement also spells out agreed uses of the land once Canada has accepted the land as reserve.

### **3.7 KWANLIN DUN FIRST NATION TREATY**

In February, 2005 the Kwanlin Dun First Nation signed Final and Self-Government Agreements with the Government of Canada and the Government of Yukon. Under these Agreements, the Kwanlin Dun will retain around 1,040 square kilometres of land as settlement lands including 35 square kilometres (3500 ha) within the City of Whitehorse.<sup>13</sup> The City based land includes a parcel of riverfront land in downtown Whitehorse. TSL that is currently in the City will remain within the City's boundaries.

The Self-Government Agreement gives the First Nation the ability to make laws over a wide range of matters including land use and taxation. Most of these law making authorities are not exclusive to the First Nation but concurrent with the powers of other governments. Therefore, Kwanlin Dun land within the City's boundary falls under the jurisdiction of the First Nation and the City of Whitehorse. The Agreement lays out the priority given to the different jurisdictions on different issues. For example, on the issue of land-use, Kwanlin Dun Land inside the City is divided into three categories. The Agreement spells out the extent to which City land use powers and First Nation land use authority applies on these different categories of land.<sup>14</sup>

City property taxes will apply on Kwanlin Dun land until such time as the First Nation exercises its taxing authority and assumes responsibility for the provision of local services. At that time, the Government of Yukon undertakes to ensure that the tax room is shared equitably and, in particular, that the municipality does "not incur any consequential loss". Also, the Kwanlin Dun First Nation and the Yukon agree to "enter into negotiations as necessary to provide for the efficient delivery of local services and programs".<sup>15</sup>

The Kwanlin Dun First Nation, Canada, the Yukon and the City of Whitehorse have also signed a side agreement which provides for the "orderly provision of municipal services to TSL located within the municipality".<sup>16</sup> Under this agreement the City agrees to provide municipal services "to the same extent and at the same quality of service as the

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<sup>13</sup> The total land area of the City is 415 sq. km.

<sup>14</sup> In addition, some parcels have shared jurisdiction with Yukon rather than the City.

<sup>15</sup> It would seem that Yukon, as party to the Self-Government Agreement, makes this commitment on behalf of local government.

<sup>16</sup> Municipal Services and Infrastructure Agreement.

City provides to other areas of comparable land use”. The First Nation agrees to pay utility charges and property taxes in accordance with the Final and Self Government Agreements.

### **3.8 WHAT CAN WE LEARN FROM THESE EXPERIENCES?**

There are some common threads running through the examples examined in this Chapter:

- The issue of tax loss in urban areas is addressed through a servicing agreement not through a compensation formula. Manitoba is an exception, where compensation may be paid. However, compensation is based on the known level of tax revenue earned in the year prior to land transfer; it is not based on an estimate of future tax revenue. Therefore, this limited form of compensation would not address the issues raised by local government in BC.
- Negotiations on a suitable servicing agreement are concluded prior to transfer of land and sometimes prior to the provision of services.
- Where it is too early to outline all the details of the servicing agreement, an agreement prior to land transfer can still usefully lay out the principles that would underpin the future servicing relationship.
- Servicing agreements cover the provision of off-site, community-based services (such as recreation facilities, parks and major roads) as well as on-site services (such as water and fire protection).
- First Nations receive access to the same range and quality of services as are available to comparable property owners in the community and are expected to pay an equivalent price.
- Local governments can expect to generate revenue through service agreements that will be the same or come close to the revenue they would have generated if the land had not become reserve land or TSL.

We will use these common features when considering alternative approaches in Chapter Five.

## ***CHAPTER FOUR: EXAMPLES FROM AREAS OF PROVINCIAL POLICY***

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### **4.1 INTRODUCTION**

This Chapter summarizes experience from areas of provincial jurisdiction that are relevant to the issues being examined in this paper:

- **First Nations Property Taxation** – the consequences of First Nations taxing leaseholders of reserve land in BC. Although this example does not involve a transfer of land, it does represent a change in taxing jurisdiction and has resulted in a tax loss for some local governments.
- **Local Government Restructure** – the service and taxation consequences flowing from the creation of a new municipality or a boundary extension of an existing municipality.
- **Incorporation of the City of White Rock** – a rare example where land on the fringe of an existing municipality has been removed to create a new municipality.
- **The Nisga’a Final Agreement Adjustment Project** – the first example of an adjustment assistance program in BC associated with Treaty implementation.

Each section concludes with some lessons that can be learned from the example.

### **4.2 FIRST NATION PROPERTY TAXATION**

First Nations have the authority under s.83 of the *Indian Act* to impose property taxes on leaseholders occupying reserve land. The intent of federal policy is to give First Nations greater access to own-source revenue and the capacity to finance and provide local services. When this policy was introduced in 1988, it raised the prospect of ‘double taxation’ because local governments in BC also have the power to tax leaseholders occupying reserve land – a situation which, if it had been left unaddressed, would have been problematic for existing leaseholders and could have discouraged third parties from locating on reserve land.

In response to the prospect of ‘double taxation’, the provincial government introduced the *Indian Self-Government Enabling Act* in 1990 which allows a First Nation to select one of three methods of implementing property taxation of leaseholders. In practice, all First Nations have chosen the approach known as “independent taxation”. Under this option, the First Nation becomes the only taxing jurisdiction and the province vacates all property tax room in favour of the First Nation, including the tax room previously occupied by local government.

As part of the transfer of tax room, the First Nation and the affected local government may enter into a servicing arrangement whereby the First Nation pays for services provided by local government to leaseholders occupying reserve land. The provincial *Act* requires local governments to enter into negotiations with taxing First Nations in order to conclude a servicing arrangement but could place no similar obligation on the First

Nation. At the same time, the *Act* does not oblige local governments to provide services except for a transition period. In short, service arrangements are left to the First Nation and local government to work out between themselves.

Around 80 of the 196 First Nations in BC have implemented independent property taxation on reserve land and many of the taxing First Nations have entered into service agreements with local government.<sup>17</sup> In some situations, it has been possible for the First Nation to proceed without a service agreement because they can provide on-site services themselves or the taxable properties do not need access to on-site services (e.g., pipelines).

The process of negotiating the first service agreements was sometimes difficult and occasionally acrimonious.<sup>18</sup> The difficulties were attributable to a variety of factors including a lack of experience with servicing agreements, limited capacity to engage in the negotiations process and historical tensions between the neighbouring communities. Even so, many agreements have been successfully concluded.

Over time, some of the difficulties encountered with the first round of agreements have become less pronounced: parties coming to servicing agreements for the first time today have more experience on which to draw; those renewing agreements have more understanding of the other party. In many communities, the relationship between First Nation and local government have matured and improved, thereby creating a stronger foundation for future servicing agreements.

Nevertheless, some local governments remain dissatisfied with the service agreements in place and the dynamic created by the First Nation taking over the tax room previously occupied by local government. In particular, they point out that:

- The servicing agreement did not always fully compensate for the revenue loss e.g., it may have dealt with operating costs but not capital costs
- Local governments may have the legal authority to deny or cut off services where they cannot reach a suitable agreement with the First Nation, but it is very difficult in practice to take such action. Therefore, local government's bargaining leverage is limited.
- Transfer of tax room to the First Nation without conditions attached increases the bargaining leverage of First Nations and compromises local government's ability to negotiate full cost recovery.
- If a local government suffers a tax room loss in an initial agreement, it may be difficult to recover that loss in subsequent agreements.

This dissatisfaction has coloured the opinion of some local governments toward service agreements as a way of compensating local governments for the loss of tax room.

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<sup>17</sup> Some First Nations have taken the steps needed to implement property taxation but have not yet issued tax notices.

<sup>18</sup> A few resulted in Court action e.g., Salmon Arm/Adams Lake, Delta/Tsawwassen and Burns Lake/Burns Lake IB.

## What can we learn from this experience?

The following observations need to be considered when using this experience to assess the alternative approaches that will be presented in Chapter Five:

- Servicing agreements were the method available to local government to mitigate the effects of the change in jurisdiction. Where these agreements were concluded, they did moderate the tax loss of local government but the net fiscal impact on local government was uneven.
- The process of negotiating the first service agreements was time consuming and sometimes difficult. In some communities, the process of negotiating the service agreement accentuated tensions between the parties.
- Over time, however, local governments and First Nations have gained experience in negotiating and designing service agreements. This experience is useful to parties negotiating agreements for the first time.

### 4.3 LOCAL GOVERNMENT RESTRUCTURE

When new municipalities are created or existing municipalities extend their boundaries, the change in jurisdiction may have a negative fiscal impact on taxpayers living in the unincorporated areas of the affected regional district. Consider for example a municipal boundary extension where the land in question is currently in an Electoral Area and is part of a local service area that includes other parts of the regional district but does not include the municipality (e.g., community parks). Transfer of the land to municipal jurisdiction will reduce the tax base needed to support this service. The transfer may or may not reduce the cost of the service (e.g., depending if the land in question includes a community park). Overall, there could be a net negative fiscal impact on the service because revenue lost is greater than the reduction in service costs. As a result, property owners in the Electoral Area will have to increase the amount they contribute to the service in order to maintain the service level.

Provincial policy on boundary extensions recognises the possibility of a negative fiscal impact and calls for mitigation measures where the financial impact is ‘significant’.<sup>19</sup> The policy identifies two tests of significance:

- Property assessments (i.e., the tax base) in the boundary extension area must be (at least) in the range of 5 to 10 per cent of the tax base used to finance the service area.
- The actual amount of property taxation revenue involved (in relation to the requisition for the service) and the dollar impact on the remainder of the service area must be significant.

The first test identifies significance in terms of its proportional impact and the second test identifies significance in terms of its dollar impact. For example, the community parks service may lose 10% of its tax base, which is relatively high, but the net impact of

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<sup>19</sup> Regional district services that are financed by all electoral areas in a regional district are not subject to mitigation measures. A boundary extension would not usually have a significant impact on such services.

this loss may only be \$1 per year on an average home because the cost of the service is relatively low. The latter would not be considered significant.

If the need for impact mitigation is identified, the provincial government would work with the municipality and the regional district to identify the best course of action. Possible mitigation measures could include: continued participation in the service for a transition period; having the municipality join the regional service; and joint service delivery to maintain or achieve economies of scale.

The same types of issues can arise when residents and property owners in an unincorporated area choose to become incorporated. Although the province has not laid out a formal policy on mitigation with respect to incorporations, it is an issue that is considered and addressed as part of the restructure process.

### **What can we learn from this experience?**

The following observations need to be considered when using this experience to assess the alternative approaches that will be presented in Chapter Five:

- When local government jurisdiction changes, the provincial government recognises that there could be undesirable impacts on services and taxpayers.
- If the potential impacts are significant, mitigation measures are used to moderate the impact. Compensation is not paid.
- The indicators of significance are based on what is known at the time of transfer, not what may happen in the future. This is possible because boundary extensions and incorporations usually involve developed areas.
- The provincial government has considerable influence over service mitigation measures because it must approve any change in boundaries.

## **4.4 INCORPORATION OF THE CITY OF WHITE ROCK**

It is very unusual for land to be removed from a municipality. The only example that we have identified is that associated with creation of the municipality of White Rock from lands previously part of the municipality of Surrey. The change took place in 1957 following a referendum of citizens living in the White Rock area. The restructure process removed 500 ha of land from Surrey, a reduction of around 1.5% of its land base.<sup>20</sup>

The creation of White Rock transferred taxation authority and responsibility for service provision from Surrey to the new municipality. The *Act* creating the new City left it to the two parties to negotiate most of the transition arrangements and provided a dispute resolution process (a Board of Arbitration) to resolve any matters that could not be settled through negotiations. The *Act* also left it to the Board of Arbitration to decide how assets and liabilities should be apportioned between the two municipalities.

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<sup>20</sup> The total area of White Rock including water is 1,400 ha.

## What can we learn from this experience?

The following observations need to be considered when using this experience to assess the alternative approaches that will be presented in Chapter Five:

- The transfer process assumed that most of the responsibility for servicing would be transferred to White Rock along with the tax base. No compensation was paid to Surrey. The assumption of service transfer was probably reasonable in the context of land-use and land development patterns in 1957.
- Any difficulties that may arise were expected to be transitional and the parties were expected to work them out. The parties had the option of developing servicing agreements but there was no requirement that they do so.
- A clear and final dispute resolution process was established as part of the transfer. No guidelines were given to the Arbitration Board on what it should consider reasonable.
- Both jurisdictions remained subject to provincial jurisdiction. Ultimately, if problems had arisen, the province had the legislative authority to intervene to solve them.

### 4.5 NISGA'A FINAL AGREEMENT ADJUSTMENT PROJECT

Under the federal-provincial cost-sharing agreement on Treaty-related costs, Canada will provide \$40 million (in 1993\$) to BC for adjustment assistance at a rate of \$3 million (in 1993\$) on the Effective Date of each Treaty. Any amount not spent in connection with an individual treaty can be carried forward.

In the Nisga'a context, the provincial government used this allocation to finance the Nisga'a Final Agreement Adjustment Fund, which came into effect in 2001. Through this fund, workers, small business owners and communities could apply for financial assistance to help them adjust to the impact of the Nisga'a Treaty. To qualify for assistance, the applicants had to demonstrate that they experienced an adverse economic impact within a limited period following the Treaty coming into effect, that the impact was directly related to the Treaty, that the negative impact was not offset by a positive impact and that they had exhausted all other adjustment programs.<sup>21</sup> If an applicant was eligible for assistance, the fund could be used to help the applicant with job counselling, training, skills upgrading, business planning or similar expenses. Loans and capital expenses were not provided.

To date, very little has been paid out from the Adjustment Fund. This is attributable to the positive impact of the Treaty on economic activity in the region; the stringent conditions placed on applications to the Fund; and the amount of dislocation that was addressed through third party compensation and other payment programs.

None of the Nisga'a lands are located in urban areas and the two largest communities in the region, Terrace and Prince Rupert, did not suffer a tax loss. These two communities have both suffered economic difficulties over the past five years but these

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<sup>21</sup> For some impacts the deadline has been extended for two years because the effects were delayed.

difficulties were not directly attributable to the Nisga'a treaty and no adjustment payments have been paid to them. If anything, the investments in the region as a result of Treaty are considered to have had a positive impact.

### **What can we learn from this experience?**

The following observations need to be considered when using this experience to assess the alternative approaches that will be presented in Chapter Five:

- The approach taken is clearly one of mitigation through adjustment assistance, not compensation.
- Any adjustment process needs clear criteria to determine eligibility and to ensure equity among applicants. However, these criteria can be more or less stringent.
- The criteria need to be linked to something that is known and can be clearly demonstrated, not to something hypothetical that may occur some time in the future.
- The criteria can consider positive as well as negative impacts.

## ***CHAPTER FIVE: ALTERNATIVE APPROACHES***

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### **5.1 INTRODUCTION**

Local government is not primarily a land owner but a regulator and a provider of local services to land owners and residents. It receives taxes and other forms of revenue in order to finance those activities. Therefore, the fiscal impacts associated with a transfer of jurisdiction are mostly about the servicing and revenue raising consequences of that transfer. Put more simply, is the government providing local services being fairly compensated by those benefiting from those services?

In most cases, the immediate fiscal effects of urban Crown land becoming TSL are likely to be very small because most of that land will be undeveloped. Over time, however, it is likely that conversion of land to TSL will reduce the net revenue local government would have received from that land. It is also possible that the First Nation will take over some local government costs. The net fiscal impact on local government will depend on whether there is an appropriate sharing of tax room and servicing costs between the local government and the First Nation. Therefore, the appropriate way to mitigate any adverse effect on local government is through the establishment of a suitable servicing agreement between the neighbouring jurisdictions.

This Chapter examines three alternative approaches to addressing local government concerns about the possibility of a negative fiscal impact. The alternatives vary in the manner and timing of the process used to conclude servicing agreements between the parties. It also considers the potential use of the Community Adjustment Fund as a way to mitigate any adverse impact on local government. We were not asked to select a preferred approach but the Chapter concludes with an examination of the applicability of the different approaches to different circumstances.

### **5.2 APPROACH #1: LET THE PARTIES RESOLVE IT THEMSELVES ON THEIR OWN TIMETABLE**

Given the variety of urban land parcels involved in treaties and the fact that development on TSL may be some years away, the simplest approach is to let the parties work out a servicing arrangement at the time one is needed. In most circumstances, First Nations will want to access local government services and expect to negotiate a service agreement that reflects the interests of all parties to the agreement. This approach postpones the negotiating process to a time when land development plans are better known and services are actually required; it allows negotiations to be based on the known circumstances of the day; and, it does not divert effort and capacity from more pressing issues at the time of Treaty.

This approach may be perfectly acceptable where there is already a good relationship between the local government and the First Nation and both sides expect to be able to negotiate a mutually acceptable arrangement when the time arrives. Even where the relationship is not as good, the local government may be content with this approach if it

believes that it has bargaining leverage when it comes to access to basic services such as water supply and sewage treatment.

However, this approach does not provide certainty for local governments or First Nations. It is possible that the First Nation will find other ways of accessing basic services, may never see the need for a servicing agreement, may not be willing to pay for the full range of local government services and may not be willing to pay a fee that matches the revenue lost. By not addressing the uncertainty issue, this approach does little to assist the relationship-building process between neighbouring communities.

It has been suggested this approach has close parallels in the context of local government relationships. For example, neighbouring municipalities may have servicing impacts on each other that are not fully offset by revenue payments between them; and, unincorporated fringe areas surrounding a municipality can have an impact on services paid for by residents and property owners in the municipality. Any concerns between the parties about the mismatch of services and revenues are worked out between the parties. This observation is correct but incomplete for the following reasons:

- Because matters of service delivery and payment have not been resolved in a manner that is acceptable to both sides, the end result is a poor relationship between neighbouring communities. This is not the desired outcome of Treaties.
- There are no recent examples of relationship problems being created by removal of land from a municipality i.e., there is no equivalent to the creation of TSL in urban areas.
- In the context of local governments, the provincial government has jurisdiction and influence over all the parties; both can be used to help mediate concerns between neighbours. This will not be the case with respect to TSL.

Therefore, although some parallels can be found in the context of local government relationships, those parallels are not ones that should be or could be emulated in the context of TSL.

Most of the examples discussed in this paper have not taken Approach #1; instead, they have expected the First Nation to work out the relationship issues with local government prior to land transfer, including the issues of tax loss and servicing. Even where local governments has been supportive of the transfer of urban land to First Nation jurisdiction and anticipates a positive spin-off benefits for the community as a whole (e.g., the City of Saskatoon), local government has insisted on concluding an agreement with the affected First Nations before the land is transferred. The next two Approaches illustrate how this could be done in the context of TSL.

### **5.3 APPROACH #2: SET THE FRAMEWORK AT THE TIME OF TREATY**

We have noted earlier in the paper that the time consuming work of negotiating servicing agreements may not be a high priority for First Nations. Moreover, some local governments may not be motivated to conclude such agreements. Therefore, it may be difficult to insist on the completion of full blown service agreements before Treaty. Nevertheless, we have seen in other circumstances (e.g., the recent Kwanlin Dun

Agreements in the Yukon; McLeod Lake Treaty 8 Adhesion in BC) that the service relationship issues can be addressed prior to land transfer where all the parties consider the matter critical to future intergovernmental relationships.

One way to simplify the process is to include in the Treaty-related documents<sup>22</sup> an agreed set of principles that would underpin any service agreements between local governments and First Nations. These principles would set the framework for any future agreement unless changed with the consent of all the parties to an agreement.

One possible set of principles would be based on the concept that local government is the default provider of service until such time as the First Nation takes over servicing responsibility, with wording similar to the following:

- The government that provides a service should fair compensation from all beneficiaries of that service.
- The local government agrees to provide services to the land in question on the same terms and conditions as comparable land within local government jurisdiction.
- The local government agrees not to change the manner of service provision in such a way as to exclude or reduce service to TSL.
- The First Nation agrees to make service payments to the local government equivalent to the payments that would be made to the local government by property owners and occupants if the property were fee simple land within local government jurisdiction. (The First Nation could recover these costs from occupiers of TSL.)
- Where the First Nation delivers a service to the land in question that would otherwise be provided by the local government, the First Nation is entitled to deduct an amount from its payment to the local government that is equivalent to the costs that could reasonably be incurred by the local government in providing that service.

While this is not the only set of principles that could be considered, the suggested listing should have appeal to local governments and should offer some comfort to the First Nation that it has an opportunity to receive services such as water and sewer on the same basis as residents within the local government's jurisdiction. The suggested list of principles reflects the content of many of the service agreements referenced in this paper.

The principles in the framework agreement would not answer all the detailed questions that need to be addressed in actual service agreements. The parties would still need to negotiate a more detailed agreement at the time services are required. It is possible that the parties will find it difficult to reach agreement on issues such as the cost of services delivered by First Nations or the appropriate payment for extending water services to TSL. Therefore, a definitive dispute resolution process would be included in the framework agreement signed at the time of Treaty.

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<sup>22</sup> We leave it to others to consider the best legal form for such an agreement.

First Nations may be cautious about Approach #2 for the following reasons:

- They may object to paying for services that have little value to residents of TSL and over which they have little control. They may prefer, therefore, to purchase only selected services. Any attempt to ‘unbundle’ services is unlikely to be easily accepted by local governments especially where it is possible that TSL will be occupied by non-First Nation members and businesses.<sup>23</sup> Where the First Nation insists on purchasing only a partial list of services, the local government would expect to charge a price for the selected services that is based on a different set of principles than those listed above. For example, it may expect the First Nation to pay a capital charge for access a sewer service that reflects the historic investment by local government taxpayers in that service. In such a situation, it is equally important that the principles be established at the time of Treaty.
- First Nations may not wish to pay more for services than the incremental cost incurred by local governments in providing those services. This is unlikely to find favour with local governments because it is not the method used to recover costs from residents and taxpayers. Taxes and charges are usually linked to average costs not incremental costs.
- First Nations may wish to retain the net revenue that a local government may generate on commercial developments. This is unlikely to sit well with local governments for two reasons. First, they may argue with the underlying premise and will point to the high servicing costs associated with commercial development. (e.g., for roads, policing and fire protection). Second, they would point out that any net revenue generated from commercial development is used to help reduce the cost of services to their residential taxpayers. Local governments would not agree that their residential taxpayers should be subsidizing development on TSL.
- First Nations may wish to retain revenue that would otherwise flow to local governments in order to help finance their land development costs. Local governments may be sympathetic to a First Nation’s need for development finance but are unlikely to support the view that these costs should be financed by local taxpayers. In most urban areas of the province, local governments expect these costs to be financed by the land developer.

It is possible, therefore, that the proposed set of principles would not be acceptable to the First Nation or indeed to all local governments. They may of course be able to negotiate a revised set of principles and, under this approach, should be given the opportunity to do so. The main objective behind Approach #2 is to set the principles in place before the transfer of land at the time of Treaty. Where agreement cannot be reached, Approach #1 would generally be the default. However, in some situations, the following Approach #3 may be considered more appropriate.

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<sup>23</sup> Some examples of service agreements that bundle services are provided in Chapters Three and Four.

#### **5.4 APPROACH #3: SHARE TAXING JURISDICTION UNTIL A SERVICING AGREEMENT IS IN PLACE<sup>24</sup>**

If it is not possible to negotiate a framework agreement before the Effective Date of Treaty, another approach is to convert the land to TSL but for provincial taxing authorities (including local governments) to continue to exercise taxing authority over the land in question until an acceptable servicing agreement is put in place.<sup>25</sup> The provincial government may be prepared to transfer the school property tax room to the First Nation prior to establishment of a servicing agreement in which case tax room really would be shared between local government and the First Nation.<sup>26</sup> Development on the land would be under First Nation jurisdiction but any development would be subject to shared taxing jurisdiction until such time as the parties put in place a service agreement. Once such an agreement was established, the provincial government would agree to vacate the tax room occupied by local government.

Under this arrangement, local government would be expected to provide services to TSL in the same manner as it provides services to comparable lands in the community. It would also be expected to actively negotiate a service agreement with the First Nation when the First Nation is ready and to do so in good faith. If the First Nation has difficulty concluding an acceptable agreement with local government, the provincial government would have the option of initiating a dispute resolution process. It could make the decision to vacate all or some tax room occupied by local government if it considered a service agreement offer made by the First Nation to be reasonable or if the local government refused to provide services in the manner expected. The province would also consider vacating some of the tax room where the First Nation could show that it is providing the services typically provided by local government.

This alternative puts the onus on the province to resolve any disagreement between the parties. The provincial government could establish a variety of dispute resolution processes (e.g., facilitation; mediation and arbitration) to assist them in making any decision on the sharing of tax room.

Approach #3 allows the matter of tax and servicing agreements to be settled when the parties are ready to work out a suitable service arrangement. It does not presume a particular outcome; nor does it give local government a veto. It doesn't give local government any guarantees that there will be no tax loss but it does allow them to argue their case with the provincial government in the future in the context of known circumstances rather argue their case today in the face of some unknown future.

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<sup>24</sup> Post-treaty, the province and provincial authorities retain concurrent taxing jurisdiction over persons occupying TSL. However, the province has indicated a willingness to vacate the property tax field post-Treaty in favour of the First Nation's own property tax regime provided certain conditions are met.

<sup>25</sup> The land would remain within municipal boundaries for the purposes of taxation until such time as an agreement is established. In some earlier discussions with our Steering Committee we had considered the possibility of land remaining fee simple until a service agreement is in place. We think that Approach #3 is preferable because it would generate the same fiscal consequences without raising issues related to the exercise of First Nation land-use authority.

<sup>26</sup> The provincial government may put some conditions on the transfer of school tax room but those matters are not part of the issues being considered here.

This approach would not be easily accepted by First Nations: it would be seen as a loss of jurisdiction and would raise the prospect of its members being taxed by another government but lacking the capacity to pay those taxes. The approach may be easier for the First Nation to accept if local government taxation powers did not extend to First Nation Government lands or community facilities on that land, unoccupied land or residential properties occupied by First Nation members. Also, the First Nation will want to retain sole taxing authority over leaseholders occupying former reserve land where they have that power at the time of Treaty (i.e., where they have established independent taxing authority). The First Nation may also wish to have the recommendations of a third party arbitrator determine the tax sharing arrangement rather than leave it to the discretion of the provincial government. These modifications could enhance the usefulness of Approach #3 on selected parcels of Crown land currently under municipal jurisdiction.

## **5.5 THE ROLE FOR ADJUSTMENT ASSISTANCE**

As noted in Chapter Four, the provincial government will have funding available to help ease the adjustment process for individuals, businesses and communities post-Treaty. If this funding is to be used to mitigate the fiscal concerns raised by local government, three questions need to be answered: who would qualify; what type of assistance would be provided; and, when would it be provided?

### **Who would qualify?**

The Nisga'a adjustment program required applicants to demonstrate a negative impact in the first few years following Treaty. This approach is unlikely to be useful in the tax loss because it is unlikely that significant development will occur on TSL in that time frame. A more useful approach in the context of potential tax loss would be tie eligibility for adjustment assistance simply to the fact that jurisdiction over land has changed. Simply stated: if jurisdiction changes; you may apply for assistance.

### **What type of assistance would be provided?**

Since a satisfactory service arrangement is the best way to offset the potentially fiscal consequences of a change in jurisdiction, adjustment assistance funding could be available to help local governments develop servicing relationships with their First Nation neighbours.

As noted earlier in the paper, servicing agreements can take a long time to put into place. In some situations, there may be a need to begin by developing a closer and more respectful intergovernmental relationship (e.g., through a protocol agreement and regular meetings) before discussions can begin on more substantive issues. Therefore, any costs that are directly related to relationship building and the development of service agreements could be candidates for adjustment assistance funding.

In some situations, the provision of services to TSL may require up-front engineering work to clarify the cost of meeting the service needs of the First Nation or to show how neighbouring communities can work together to meet their joint servicing needs. These costs could also be eligible for adjustment assistance. The actual costs of service delivery would be recovered through a service agreement not through adjustment assistance.

### **When would assistance be provided?**

As a practical matter, it may be necessary to put a time frame around adjustment assistance program but the time horizon used in the Nisga'a program is more suitable to adjustment for individuals and businesses than it is for service agreements between neighbouring communities. A longer time horizon than five years is needed.

Also, if Alternative #2 above were adopted, local governments would incur costs in developing a framework agreement prior to Treaty not post Treaty. Local governments should still be eligible for assistance to offset the effort and resources invested in that process although it may be difficult to provide this help from a program targeted at helping defray post-Treaty adjustment costs.

## **5.6 CONCLUDING OBSERVATIONS**

Although we have not been asked to recommend a preferred approach, we have been asked to consider whether the different approaches are more suitable in some situations than in others. For example, where the amount of TSL is very small relative to the total taxable land base of local government, it may be possible to conclude that any negative impact (if there is such an impact after a service agreement has been concluded) will not result in significant additional costs for local government taxpayers. In this situation Approach #1 may be a reasonable way to proceed. Similarly, where the parcel of TSL is so small and so located that it is virtually impossible of the First Nation to service the land itself, local government may be satisfied that Approach #1 will lead to a reasonable outcome.

Unfortunately, however, we do not think it possible to develop a simple and unambiguous method of classifying urban TSL that could be used as a guide to when and where different approaches should be considered. All of the possible selection criteria (e.g., relative size; proximity to other developed land in the community; cost of providing basic services; intended use of the land; probability that the First Nation will deliver its own services) leave ample room for judgment, uncertainty and argument. Moreover, where the relationship between local government and a First Nation is good, any of the three approaches is likely to be successful. Where the relationship is poor, all could be difficult.

Therefore, we are not convinced that local government's concerns can be simply labeled 'reasonable' or 'unreasonable' at the time of Treaty based on the characteristics of the land in question or general beliefs about the benefits of Treaties. The choice between the three approaches must be made by weighing up the implications of using each approach in the context of individual Treaties: the degree of certainty it provides to

local government and First Nations; the extent to which it fosters relationship building between neighbours and its impact on the workload associated with Treaties. We would point out, however, that the majority of land transfer arrangements noted in Chapters Three and Four have dealt with servicing issues in advance of transfer not after.