
BRIEFING NOTE

To: LMTAC Board
From: Steven Shovar, LMTAC Policy Analyst
Report Date: March 18th, 2011.
Subject: Aboriginal Self-Government (Non-Treaty) Agreements

ISSUE

Musqueam Indian Band's Aspirations for a Non-Treaty Self-Government Agreement

- The *BC Treaty Commission's (BCTC) 2010 Annual Report*, released in the fall of 2010, states that "Musqueam is exploring the potential for a stand-alone self-government agreement." Based on this reference, LMTAC made an enquiry through the Department of *Indian and Northern Affairs Canada (INAC)* regarding the possibility of non-treaty self-government negotiations taking place with the *Musqueam Indian Band*.
- INAC responded to LMTAC with a letter dated December 9th, 2010, from Anita Boscarior, Director General, Negotiations West, Treaties and Aboriginal Government, INAC, which confirmed that "Musqueam has proposed to negotiate a self-government agreement, outside the scope of the *BC Treaty Process*."
- At the January 12th, 2011, LMTAC Executive Committee Meeting, Executive members requested that staff research non-treaty self-government agreements and their potential implications for local government.
- On January 21st, 2011, LMTAC replied to Ms. Boscarior's letter requesting a continued dialogue and updates on developments regarding the *Musqueam Indian Band's* self-government negotiations as well as the opportunity to provide input on issues that may directly affect Lower Mainland local government.
- In her response letter of February 9th, 2011, Ms. Boscarior provided assurances that, should the Federal government enter into self-government negotiations with Musqueam or any First Nation located in the Lower Mainland, local governments will be provided the opportunity for meaningful consultation.

BACKGROUND

Musqueam Indian Band and Treaty Negotiations

- The *Musqueam Indian Band* has a population of approximately 1,243 members, with 635, or 51% of those members living on three Reserves. An additional 718 non-aboriginal members also live on the Reserves.
- The *Musqueam Indian Band* originally entered the *BC Treaty Process* in 1993 when it submitted its *Statement of Intent (SOI)*.
- The Band is in *Stage 4 Agreement-in-Principle (AIP)* of the *BC Treaty Process* but negotiations have been inactive since 2005.

Historical Context

- The Aboriginal right to self-government was recognized as early as 1763 with the *Royal Proclamation Act*.
- The inherent right of Aboriginal self-government has been subject to great debate throughout recent Canadian history, including attempts by the federal government to incorporate it into the Constitution.
- In 1993, the ***Royal Commission on Aboriginal Peoples*** concluded that legally, and as a matter of policy, the inherent right of Aboriginal self-governance was already protected under the Constitution and that self-government negotiations should start immediately. In response, the federal government released its ***Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government***, in 1995.
- Self-government agreements can be treaty or non-treaty. Most self-government negotiations in British Columbia have been towards treaty agreements, either under the *BC Treaty Process* or outside of the treaty process (e.g. Nisga'a). However, to-date, there have been two non-treaty self-government agreements completed in British Columbia, including the *Sechelt Indian Band Self-Government Agreement* and the *Westbank First Nation Self-Government Agreement*.

BC Non-Treaty Self-Government Agreement Examples:

Sechelt Indian Band Self-Government Agreement

- The *Sechelt Indian Band Self-Government Agreement* stemmed from efforts of the Band to establish enabling legislation that would remove most provisions of the *Indian Act*, in order to give them greater control over their own affairs, while maintaining a constitutional relationship with the federal government. Maintaining such a relationship was crucial to deal with future potential land claims put forward by the Band or any amendments that might need to be made to the resulting legislation.
- The resulting agreement consisted of two separate bilateral agreements. One between the *Sechelt Indian Band* and Canada, and the other between the *Sechelt Indian Band* and BC.
- The federal government passed the enabling legislation, in 1986, which delegated self-governing authority to the Indian Band as agreed upon. For its part, the provincial government passed legislation that created the *Sunshine Coast Regional District*, which included both non-Aboriginal communities and the Indian Band.
- As part of the agreement with the federal government, Sechelt's Reserve land was transferred to the Indian Band under fee-simple ownership.¹
- The Sechelt agreement is unique because it was negotiated nearly a decade before the establishment of the *BC Treaty Process*, during a time when the provincial government was not agreeable to negotiating treaties.
- As such, it is likely that the Sechelt Agreement included provisions, such as a transfer of Reserve lands as fee-simple ownership to the Band that would not be offered in non-treaty self-governing agreements, as First Nations have the option to negotiate treaties to achieve such provisions.
- Given the unique context of the Agreement, the *Sechelt Indian Band Self-Government Agreement* is probably not a pertinent example for future non-treaty self-government agreements. The *Westbank First Nation Self-Government Agreement* is a more relevant BC non-treaty self-government agreement to examine as it was signed after the creation of the *BC Treaty Process* and, in contrast to the Sechelt Agreement, it does not include a transfer of ownership over Reserve land.

Westbank First Nation Self-Government Agreement

- The *Westbank First Nation Self-Government Agreement* was a bilateral agreement between the *Westbank First Nation* and the federal government, signed on October 3rd, 2003. The federal government passed the enabling legislation the following year.
- The Agreement was the first non-treaty self-government agreement in BC negotiated under the federal government's 1995 *Inherent Right Policy*.

¹ Fee-simple ownership refers to absolute possession, in which case the owner is only bound by restrictions such as zoning laws and deeds. There is no duration limits to fee-simple ownership as is found with lease-holds.

- There was no transfer of ownership of Reserve land in the agreement and *Westbank First Nation* Reserve land continues to be held by the federal government for the benefit of the First Nation.
- The Agreement covered the following major items:
 - Jurisdiction;
 - Laws;
 - Canadian Charter of Rights and Freedoms;
 - Constitution;
 - Membership;
 - Taxation; and
 - Land and Land Management.
- Under the Agreement, financial transfer agreements are to be negotiated every 5 years. While the first financial transfer agreement does not take into account own-source revenue, subsequent agreements will be adjusted to reflect own-source revenue.
- In the Agreement, provisions of the *Indian Act* related to *Health, Fisheries, Property Taxation, and Financial Transfers* remained in force after the agreement.

OVERVIEW

What Is Aboriginal Self-Government?

- Since the mid-1980s, many considered self-government to be the main solution to achieving sound governance. Achieving self-government often involves lengthy negotiations leading to a significant transfer of jurisdiction to Aboriginal governments.
- Defining Aboriginal self-government is not an easy task, not even for First Nations. Self-government can involve administration of programs, but it is often not limited to just program delivery. Simply transferring jurisdiction over programs such as education, health care, housing and justice does not equate to self-government since many bands already exercise that right under the *Indian Act*.
- Generally speaking, First Nation self-government involves an extensive set of powers; making laws and policy, delivering programs, enforcing laws, and adjudicating disputes. The concept of self-government is closely related to political self-determination and the right to govern your own people.

What Does a Non-Treaty Self-Government Agreement Include?

- There is no specific list of what can or cannot be included in a non-treaty self-government agreement. However, there can be jurisdictional limitations on what is included in the agreement depending on the parties involved in negotiations (bilateral or tripartite).
- As with treaty agreements, under non-treaty agreements First Nations do not extinguish their right to future land claims.
- Under non-treaty agreements, certain aspects of the *Indian Act* remain in force.

Types of Non-Treaty Agreements

- There are three options for completing non-treaty self-government arrangements (Legislation, Contracts, and MOUs):
- **Legislation** can be used to:
 - Ratify and give affect to agreements;
 - Implement particular provisions of agreements; and
 - Act as a stand-alone mechanism when the parties concerned wish to implement self-government arrangements, but not through treaty.
 - Governance powers are delegated by an act of the Canadian Parliament or BC Legislature and have no constitutional protection.
- Legally enforceable **contracts** can be used to set out detailed, technical, or time-limited agreements respecting the implementation of self-government arrangements.
- **MOUs** can set out political commitments towards negotiating self-government agreements, but do not create legal obligations to follow through on such negotiations.
- Both non-treaty agreements in BC have been completed via enacting legislation.

The Bilateral Aspect of Agreements

- All bilateral self-government arrangements are non-treaty as tripartite agreements are required for constitutionally protected treaty agreements. Bilateral agreements limit the jurisdictional nature of what can be included in negotiations. For example, Federal-First Nation bilateral agreements are exclusive to issues of federal jurisdiction.
- Both Sechelt and Westbank non-treaty self-government agreements in BC have been bilateral, with the Sechelt Agreement involving separate, bilateral agreements with both the federal and provincial governments.
- Non-treaty self-government agreements do not have to be bilateral; however, it seems unlikely that both the federal and provincial governments would agree to sign a tripartite non-treaty agreement instead of a treaty agreement. The reason being that if all three parties are going to negotiate a self-governing agreement, covering issues of both federal and provincial jurisdiction, it would seem more prudent to negotiate a treaty agreement as part of the *BC Treaty Process*.

Treaty vs. Non-Treaty Agreements

- The most important distinction between treaty and non-treaty agreements is that treaty agreements are constitutionally protected under Section 35 of the *Constitution Act*. There is no such constitutional protection provided for non-treaty agreements. Instead, in non-treaty self-government agreements, self-governing authority is delegated to the First Nation by the participating government through enacted legislation.
- Under treaty agreements, First Nations acquire *Treaty Settlement Land* (TSL), in addition to the land held as Indian Reserves. First Nations do not extinguish their right to future land claims under either treaty or non-treaty agreements.

Role of Municipalities in Aboriginal Self-Government Negotiations

- The *Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* states the following role for municipalities with regard to self-government negotiations:

*“the Government is committed to providing **municipalities** and third parties with meaningful opportunities to have input into negotiation processes that may directly affect their interests. To this end, the Government will work with provinces, territories, and Aboriginal groups to develop appropriate consultation mechanisms for municipalities and third parties that may be directly affected by self-government negotiations and agreements.”*

- The *Government of Canada* does not differentiate its commitment to local government involvement in self-government negotiations by type of agreement (treaty vs. non-treaty). Therefore, LMTAC has approached the federal government and asked to be kept informed of the *Musqueam Indian Band's* self-government negotiations.
- While the *Government of Canada* has made a commitment to consult with municipalities on relevant matters, it is unlikely that LMTAC, or any member local government, will be invited to sit at the table, unless the provincial government is involved in negotiations. In which case such a request would have to go through the Province.

IMPLICATIONS

Why Non-Treaty Agreements?

- The *BC Treaty Commission* (BCTC) states that non-treaty self government agreements, such as the *Westbank First Nation Self-Government Agreement*, represent an:

“interim or incremental approach to self government while treaty negotiations are continuing with the governments of Canada and BC. An interim or incremental approach allows a First Nation to gain some self government powers now in order to achieve community goals and build further capacity for self reliance.”

- According to this quote, non-treaty agreements are not supposed to replace the need for finalizing treaties. Rather, they should be means of developing capacity prior to pursuing treaty negotiations at a later date. However,
 - Neither the *Westbank First Nation* nor *Sechelt Indian Band* is currently active in treaty negotiations.
- Theoretically, the lack of land components, in non-treaty self-government agreements, should provide an incentive to First Nations to continue negotiating treaties. However, some First Nations may find that they can achieve their goals even if their land remains designated as Indian Reserves. New policies and legislation such as the *First Nations Land Management Act* (FNLMA), *First Nations Commercial and Industrial Development Act* (FNCIDA) and *First Nations Certainty of Land Title Act* (FNCLTA) provide improved options, previously not available to First Nations, to develop and manage their lands as Reserves. These options would be particularly attractive for those First Nations who hold high-valued Reserve lands.
- Furthermore, some First Nations may find there are greater benefits to increasing governance powers under non-treaty agreements while still maintaining certain provisions under the *Indian Act*. This may be especially true for smaller First Nation Bands that often lack the capacity to effectively manage themselves as fully independent treaty First Nations.
- As non-treaty self-governing agreements are implemented via legislation, rather than being constitutionally protected like treaties, they can also be subject to amendments should the signing parties agree. This could be used as a selling point for First Nations whose communities are hesitant to support treaties as some First Nation members often do not fully understand what they are achieving or what they may be giving up in a complicated treaty document. The ability to make amendments later, if needed, could provide some assurance to those concerned about finalizing a treaty agreement.

What are the Implications for Local Government?

- In comparison to the *Indian Act*, there are advantages for local governments interacting with non-treaty self-governing First Nations. For example, non-treaty self-governing First Nations can enter into service agreements with other levels of government as needed without special permission from INAC. Even though INAC encourages all First Nations to negotiate service agreements with neighbouring First Nations, the *Indian Act* does not explicitly allow such practice, and Ministerial permission is technically required.

Next Steps

- LMTAC will continue to dialogue with INAC regarding possible involvement and consultation opportunities related to the Musqueam non-treaty self-government negotiations.
- Furthermore, LMTAC will continue to monitor developments of Musqueam negotiations and other potential future non-treaty self-government negotiations in the province.