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LMTAC Discussion Paper: Local Government Issues and Interests on the Federal Additions-to-Reserve Process

Introduction

The Additions-to-Reserve (ATR) process of *Indian and Northern Affairs Canada* (INAC), and the implications for local governments, has gained increased profile among member jurisdictions of the *Lower Mainland Treaty Advisory Committee* (LMTAC).

Reasons include:

- LMTAC participation in a June 2010 INAC evaluation of the ATR process;
- recent experiences of LMTAC member jurisdictions in ATR applications; and
- the emergence of federal legislations (e.g. the *First Nations Commercial and Industrial Development Act* and the *First Nations Certainty of Land Title Act*) intended to facilitate and attract on-reserve development, and the potential that such legislations may lead to increased ATR applications.

This paper summarizes the role of local government in the current ATR process, identifies potential issues for local governments, and presents local government interests and recommendations to be considered and promoted within INAC's ATR policy.

Additions to Reserve Process

An Indian Reserve can be described as the area of land that is held in trust by the Federal Crown for the use and benefit of an Indian Band (First Nation). As Federal land held under section 91(24) of the *Constitution Act, 1867*, local government bylaws and Provincial land use legislation are of no effect on Indian Reserves.

First Nation communities, like many other communities in Canada, may from time to time encounter the need or opportunity to expand their land base. Under INAC's ATR policy of 2001, lands can be considered for addition to existing Indian Reserves if the application falls within the following three policy categories¹:

¹ Federation of Canadian Municipalities (FCM), Land Management Project Toolkit, Book 3, *Additions to Reserve Policy* (2007).

1. Legal Obligations, including;
 - Specific Claim;
 - Court Order; or
 - Legal Reversion.
2. Community Additions, including;
 - Community growth (member housing, community centres, schools, churches, and other community uses);
 - Geographic enhancements (accretions, rights-of-way); or
 - Return of Unsold Surrendered Land.
3. New Reserves, with possible reasons including;
 - Social or commercial needs. The ATR policy requires a First Nation to demonstrate that the benefits of the proposal cannot be achieved through other forms of land tenure;
 - Provincial Land Offerings or Unsold Surrendered Land. The benefits of the proposal are weighed against the federal cost implications and other site-specific criteria; or
 - Landless First Nations.

ATR applications are addressed through a step-by-step process and are dealt with on a case-by-case basis. INAC and the applicant First Nation must consider local government interests, including the following:

- land use planning / by-law harmonization;
- tax considerations;
- service provision; and
- dispute resolution.

While First Nations and local governments are expected to negotiate and communicate on ATR applications on a “good faith” basis, local governments do not have a general or unilateral veto over the granting of Indian Reserve status.²

INAC does not have statutory authority to approve an ATR application.³ All successful ATR applications must receive approval through the Governor General in Council. While INAC regional staff can make recommendations to the Minister respecting the strength and/or weakness of an ATR application, the ultimate decision to approve the ATR rests with Federal Cabinet.

Identification of Local Government Issues

Based on a review of the INAC ATR policy, and feedback received from several LMTAC member jurisdictions that have recent and ongoing experience with ATR applications, the following issues of concern for local government have been identified:

² INAC, Additions to Reserves/New Reserves Policy: Directive 10-1, 6.8 (October 2003)

³ INAC Presentation, Expanding the Reserve Land Base (December 2007)

Communication

- Improved communication between local government and the applicant First Nation is imperative. In a recent ATR application considered by two LMTAC member jurisdictions, INAC was responsible for communicating with local government; however, in another ATR application, it was the applicant First Nation that managed communications. Direct communication with the First Nation, even if facilitated by INAC, increases the ability of local government to understand and communicate with the First Nation any issues that may arise with respect to the application.

Process

- INAC regional staff make recommendations to the Minister respecting the strength and/or weakness of an ATR application. However, as the ultimate decision to approve the ATR rests with Federal Cabinet, politicians may support certain objectives and outcomes respecting the ATR application without the same understanding of potential implications for local government as INAC regional staff.
- Municipal and provincial government agencies are provided with 90 days to respond to a First Nation's ATR proposal.⁴ Once comments have been submitted, there appears to be no reciprocal obligation for INAC or the First Nation to respond to any issues or concerns raised by local government. Also, the 90 day response period may not be sufficient time for local governments to properly analyse an application that could significantly alter the regional landscape.

Local Government Engagement and Transparency

- In British Columbia, local government is recognized as an order of government and not simply a 'third party' interest; following, local government should be meaningfully consulted on ATR applications early in the process by the First Nation and, if necessary, INAC.
- Local governments must represent the interests of the community, and adhere to principles of transparency and accountability to the electorate. It is unclear if the ATR process is public or in-camera, which may place local government in the conflicting position of having private knowledge of proposals that are not in the community interest. The INAC ATR process needs to adhere to principles of transparency and accountability to the electorate affected by the ATR proposal.

Intergovernmental Coordination

- While municipalities are provided a role in the INAC ATR process, there is no mention of the other order of local government in British Columbia — regional districts. Long-term regional district planning, service delivery, and capital infrastructure plans can be impacted by ATR applications and the potential change of land jurisdiction to Indian Reserve. The impression is that any regional

⁴ FCM Toolkit (2007).

district involvement in the ATR process is a reflection of the goodwill of INAC staff, and not a matter of policy.

- Municipalities, regional districts, provincial agencies and other authorities may have interests in ATR applications. The experience of LMTAC local governments to-date reveals that there is insufficient intergovernmental coordination between agencies in the ATR process. Potential issues and conflicts are compounded by the uncertainty caused by the lack of stakeholder coordination. Early, meaningful and coordinated consultation can result in challenges being identified and resolved prior to becoming obstacles to the application.

Servicing and Land Use

- The obligation, if any, of local government to service ATR lands requires clarification; particularly if land use and servicing needs are unclear or inconsistent with long-term municipal and regional plans at the time of application.
- LMTAC member jurisdictions are concerned that ATR applications could result in a patchwork of jurisdictions across the region, particularly if the applicant First Nation proposes land use for the ATR lands that is incompatible with neighbouring municipal land use planning.

Financial Impacts

- First Nations and INAC must support the authority of local governments to determine the nature of the servicing agreements entered into for the ATR lands, before any endorsement is considered. For example, certain local governments prefer unique agreements for each service provided, while others prefer the 'global services' approach. LMTAC encourages its members to pursue global service arrangements that include both 'soft' and 'hard' services.
- Local governments rely on industrial and commercial taxation to contribute to a range of municipal and regional services. LMTAC is concerned that First Nations may use ATR to place local government tax rates at a competitive disadvantage, with no guarantee of the First Nation contributing to the full range of 'soft' and 'hard' municipal or regional services. Accordingly, ATR applications for market development should not be approved if alternative land tenure is available; for example, fee-simple ownership subject to municipal jurisdiction.
- Currently, there are no legal mechanisms to ensure that First Nations do not submit an ATR application for acceptable land constraint issues, such as band member housing, only to use it for development of residential market housing after the application is approved. This is particularly important due to the new opportunities for market development on reserve lands provided by the First Nations Commercial and Industrial Development Act (FNCIDA) and amendments passed under the First Nations Certainty of Land Title Act (FNCLTA).

Local Government Interests and Recommendations

LMTAC First Principle #12 – *Post Treaty Additions to Treaty Settlement Lands* states:

Lands to be added after the treaty is signed must remain subject to local government jurisdiction and taxation unless otherwise agreed to by local governments through a community consultation process.

Although the above First Principle was created to address scenarios in the *BC Treaty Process*, the same underlying interest applies in the ATR context; local governments demand that no transfer of jurisdiction occur for lands located within municipal boundaries unless agreed to by the affected local government.

LMTAC recommends that local government issues and concerns outlined above be addressed in the ATR process through consideration of the following interests:

Communication

- First Nation applicants and/or INAC must be obligated to confirm receipt of local government comments, and to address each of the local government concerns identified. In the event local government concerns cannot be accommodated, written reasons must be provided. LMTAC requests that ATR communication protocols be clearly delineated to the First Nation, INAC and local government.

Process

- LMTAC requests that local government receive assurance that criteria and processes described in the INAC ATR policy will not be overridden by the Governor General-in-Council. In circumstances where a Federal Cabinet decision differs from the recommendation of INAC regional staff, a process is needed for Federal politicians to communicate directly with affected local governments so that the potential implications for local communities are fully understood by the decision makers.
- LMTAC recommends that INAC allow requests from local government for extensions to the 90-day response period, and that INAC evaluate these requests on a case-by-case basis.

Local Government Engagement and Transparency

- For ATR applications where there are no legal obligations for INAC, municipal consent must be required for ATR within municipal boundaries.
- LMTAC recommends that the process become transparent to the public. The community must clearly understand ATR land use plans through open houses, workshops or public hearings.

Intergovernmental Coordination

- The status of regional district consultation within the ATR process remains uncertain. INAC ATR policy must reflect the importance of meaningful consultation with all forms of local government. INAC should consider adding a reference to regional districts, as applicable, within the consultation requirements contained within the ATR policy.
- LMTAC requests that proposed ATR land use be consistent with *Official Community Plans* and *Regional Growth Strategies*, as well as general local government zoning and bylaws.
- LMTAC recommends that INAC consider adding a new mechanism to the ATR policy that would improve stakeholder coordination during the ATR process.
- LMTAC requests clarification on whether the ATR process and its potential implications for local government is considered in bilateral agreements between the Canada and First Nations outside of the treaty process.

Servicing and Land Use

- LMTAC requests that service agreements be in place simultaneously with the approval of any ATR. Service agreements are encouraged to be comprehensive and include both 'hard' and 'soft' services. Local government must agree with the terms of the service provision. The ATR process must not result in any obligation for local government to service new Indian Reserve lands.
- To encourage First Nation land use that is consistent with that of the neighbouring local government, LMTAC supports INAC policy to not approve ATR applications for market development if alternative land tenure is available; for example, fee-simple ownership subject to municipal jurisdiction. Legal mechanisms are; therefore, required to ensure that First Nations do not submit an ATR application for band member housing, only to use it for development of residential market housing after the application is approved.

Financial Impacts

- Local governments must not be financially impacted by ATR. ATR proposals must address the harmonization of property taxes, including remittance of school and hospital district taxes, to the Province and regional district. In the *Metro Vancouver* region, the remittance of transit taxes for *TransLink* must be included.
- ATR applications must not be approved until the First Nation and the affected local government have agreed upon a harmonized property tax structure.

The Need for Local Government Consultation

This paper is intended to identify the general issues and interests of Lower Mainland local governments with respect to the ATR process. Individual local governments will have additional issues and interests that reflect the unique nature, needs, perspectives, and circumstances of their communities in relation to the specifics of an ATR application.

A survey of LMTAC member jurisdictions reveals a range of experiences and potential impacts when faced with ATR applications. As the effects of ATR applications may vary considerably for any particular municipality and/or regional district, it is essential that the INAC ATR policy reflect that consultation with local government be public and transparent, meaningfully undertaken early in the process, and with coordinated, consistent and continuing means for communication throughout the process.

Next Steps

LMTAC respectfully submits the discussion paper *Local Government Issues and Interests on the Federal Additions-to-Reserve Process* to the Minister of Indian and Northern Affairs Canada for consideration, and requests the opportunity to discuss these issues with an INAC representative at a future meeting of the LMTAC Board. Further to the ATR process evaluation conducted by INAC in June 2010, in which LMTAC was an invited participant, LMTAC requests a briefing on the findings and next steps contemplated by the federal government.