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GUIDE TO A FACILITATED SERVICE AGREEMENT BETWEEN FIRST NATIONS AND LOCAL GOVERNMENTS
FIRST EDITION
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FIRST EDITION



First Nations Tax Commission



The First Nation Guide to a Facilitated Service Agreement between First Nations and local Governments, First Edition is published under the authority of the First Nations Tax Commission, 2013.

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FOREWORD FROM THE CHIEF COMMISSIONER



The First Nations Tax Commission (FNTC) is committed to help build regional economic partnerships between First Nations and local governments. The FNTC advocates for First Nations and local governments to work together on the provision of regional services, infrastructure development and economic development. Integrating First Nations into regional economies is an important step to overcoming First Nation disparities and receiving maximum value from resource development.

First Nations, local governments and regional districts or counties are all part of the regional economy that competes for investment with other regional economies. Fundamental building blocks of competitive regional economies are service agreements. Service agreements define the service delivery arrangements between local governments and First Nations in a region. Service agreements work when they are based on one essential understanding: the quality of life and the standard of living in a region depend on the success of the region as a whole.

The FNTC has helped facilitate the negotiation of more than twenty-five service agreements between First Nations and local governments in the past twenty years. These service agreements have provided quality services and infrastructure to First Nations at an affordable price. They have also provided a platform for deeper regional integration on issues such as region-wide capital planning, land use planning, and economic development planning as well as sharing in the costs and benefits of investment.



This experience has given us a refined understanding of fiscal arrangements and governance issues at a local level. However, the FNTC has always recognized that we only facilitate these agreements. Ultimately, local people have the local knowledge to resolve local issues.

Canada needs competitive economies. Strong regional economies are better able to reach agreements on land and resource management, better able to attract investment and better able to reduce the costs of government. Just as important, First Nations are the fastest growing component of Canada's aging work force. To meet the challenges of rising dependency ratios, First Nations must be included in the benefits of investment.

This guide to service agreements provides an overview of service agreements and the services offered by the FNTC to facilitate them.

Best regards,

C.T. (Manny) Jules

Chief Commissioner

First Nations Tax Commission



INTRODUCTION

What is a First Nation – Local Government Service Agreement

A First Nation – Local Government service agreement is a contractual relationship between two governments for the provision of services.

A service agreement provides the answer to four key questions:

1. Which services are being purchased?
2. For whom are these services being purchased (taxpayers, members, others)?
3. What is the method for pricing these services?
4. What are the terms of the agreement?

Service provision is an important part of the property tax system. Each government decides what local services and infrastructure to provide for the community, and how those services and infrastructure will be provided. It is often efficient for smaller governments, such as First Nations, to purchase services from nearby larger governments. This results in reduced duplication of service, reduced costs to taxpayers, reduced capital requirements and improved relationships. There are instances where it is cost effective for a local government to purchase services from a First Nation. Some of the most common services purchased are water, sewer, and fire protection. The contract to provide these services is a First Nation – Local Government service agreement.

FNTC Facilitation

Facilitation contributes structure and process to negotiations so that parties can work effectively toward a positive outcome. Successful meetings consist of talking, listening and deciding. Sometimes because of unfamiliarity or disagreements, two parties can have difficulty talking and listening, which makes deciding impossible. This is sometimes the case between local governments and First Nations negotiating a service agreement. There may be insufficient familiarity with each other's legislative and administrative frameworks and this unfamiliarity can lead to disagreements. In such cases, an independent facilitator can assist in managing the discussion.



A skilled facilitator can help the service agreement negotiators formulate proposals, recognize opportunities for mutual gains, and identify when elements of an agreement have been concluded. They can also help develop and implement negotiation processes and rules.

The FNTC and its predecessor the Indian Taxation Advisory Board (ITAB) have a 20 year history in facilitating service agreements between First Nations and other governments. Here are a few examples:

Tk'emlúps te Secwépemc (TteS, formerly Kamloops Indian Band) and City of Kamloops (BC) – The TteS and the City of Kamloops both benefit from economic development within the region. The ITAB utilized this mutual interest to facilitate a political protocol where the two councils meet twice a year to address mutual concerns. It has also formed the basis for a sewer agreement that includes revenues to work on joint projects. This agreement continues to facilitate significant growth in the region.

Adams Lake Indian Band and District of Salmon Arm (BC) – Wal-Mart wanted to build on an Adams Lake reserve and wanted certainty in the water and sewer agreement between Adams Lake and the District. Salmon Arm wanted to add transportation services to the existing agreement. The ITAB facilitated an amendment to the existing agreement to include transportation services and greater certainty over water and sewer.

Campbell River Indian Band and District of Campbell River (BC) – The Campbell River Indian Band wanted to implement its tax system and develop its economy in cooperation with the district. The District of Campbell River wanted to minimize the loss of revenues it collected previously and work on joint economic projects with the Campbell River Indian Band. The FNTC helped to facilitate an economic protocol arrangement and an interim service agreement between the parties.

Uashat Mak Uti Man First Nation and City of Sept Iles (QC) – The circumstances for First Nation taxation in Quebec are similar to those in BC. As in BC, the ITAB worked with the government of Quebec to create provincial legislation to facilitate First Nation taxation. It was only after this provincial legislation was passed that a fair service agreement could be negotiated between the First Nation and the local government to provide local services to a commercial development on First Nation lands.



Tzeachten First Nation and City of Chilliwack (BC) - In 1991, Tzeachten First Nation signed a service agreement with the City of Chilliwack. The negotiations were acrimonious and neither party was particularly satisfied with the agreement. The First Nation felt they were paying too much for the services and the local government felt uncertainty about future development on Tzeachten lands. In 2006, the parties renegotiated their service agreement using FNTC facilitation services. The agreement included a comprehensive land use planning process, an agreement about development cost charges and a new pricing approach for services provided on First Nation lands. This second generation service agreement has been used as a model by other First Nations in the Chilliwack area and Fraser Valley. It demonstrates how both parties can realize mutual benefits when they focus on their common interest – regional economic growth.





SERVICE AGREEMENT FACILITATION PHILOSOPHY - THE MUTUAL GAINS APPROACH

The mutual gains approach to service agreements is collaborative rather than adversarial. It involves a consensus building search for a win-win solution rather than a win-lose approach. It involves a good faith effort to meet the interests of all stakeholders. Consensus has been reached when everyone agrees they can live with the current proposal. Participants in a consensus building process have both the right to uphold their interests and the responsibility to propose solutions that will meet everyone else's interests as well as their own.

The mutual gains approach leads to:

- creative solutions;
- widely supported solutions;
- increased understanding of other view points;
- increased mutual respect; and
- easier implementation.

Interests

Each participant in a negotiation process seeks to meet their interests. Interests are different from positions and demands. Interests are the underlying reasons, needs, or values that explain why participants take particular positions. Interests can change in light of new information or a deeper understanding of an issue. All successful long-term agreements recognize the interests of both parties and build upon mutual benefits.

Generally, local governments have the following three interests with respect to a long-term service agreement with First Nations:

1. Receive a fair price for the services they provide.
2. Maintain regulatory harmony by ensuring that rules similar to the local government are applied by the First Nation tax authority.
3. Ensure the regional investment climate is competitive to promote economic development.



Generally, First Nation governments have the following three interests with respect to long-term local service agreements:

1. Pay a fair price for the services provided by the local government and ensure that the services are of comparable quality.
2. Assert First Nation authority and deliver local services where there is a comparative advantage to do so.
3. Develop a competitive investment climate to promote economic development.
4. Interests (1) and (2) between First Nations and local governments are sometimes divergent and require negotiation to reach a long-term agreement. Interest (3) is clearly mutual between the parties. Focussing on mutual economic interests often supports successful negotiation of service agreement interests (1) and (2).

The best practice to achieve mutual interest (3) and provide a framework for resolving interests (1) and (2) are protocols, statements of principles and working relationships.

Local governments have a well-developed body of law governing land use. Generally, these local rules cannot be enforced on lands under First Nation authority. This is further complicated because few First Nations have an equivalent set of regulations governing land use. This perceived lack of regulation can create investor uncertainty until the First Nation begins to fill the possible regulatory vacuum with its own laws. To address concerns, provisions to provide greater regulatory certainty are built into some service agreements. In other circumstances, the First Nation works with the local government to harmonize their laws.

The service agreement should be a foundation for a long-term mutually beneficial relationship between First Nations and local governments. Certain elements of the negotiations may place a strain on short-term relations between First Nations and local governments. As much as possible, these disagreements during the negotiations should remain at the negotiation table. It is also important to ensure that a dispute resolution process is included in the service agreement.



SERVICE AGREEMENTS – CREATING COMPETITIVE REGIONS

Investment builds economies. When investment is strong, there are job opportunities, rising incomes, better quality education, health care and other services. Investment impacts quality of life.

Investment decisions are ultimately based on the region as a whole. Investors want to see quality and appropriate services throughout a region. They want to see affordable taxes throughout a region and they wish to see a high quality of life throughout a region.

Potential investors, including commercial and residential developers, homebuyers, and lenders have questions about local services:

- What local services will be provided? Water? Sewer Treatment? Road Maintenance? Parks? Garbage Collection? Snow Removal?
- What about the quality of those local services? Approximately the same as the adjacent jurisdiction? Better level of service? Not as good?
- What tax rates will I have to pay now, and in the future? Approximately the same as taxpayers in the adjacent jurisdiction? Will my tax bill rise faster than tax bills in the adjacent jurisdiction?
- How certain is the continued delivery of these local services? Will I have uninterrupted access to all local services the entire time I intend to be a property owner and taxpayer?

A lack of confidence in the answers can deter potential investors. Service agreements can provide answers to these questions and give confidence to investors regarding the quality, continuity, and pricing of local services within a region.

Mutual interest should lead to region wide cooperation. Unfortunately, mutual interest is sometimes forgotten particularly when negotiations begin. It is difficult to leave the mindset that one side wins and the other is excluded. It is also difficult to negotiate agreements when different governments derive their authorities from different sources.



Despite these difficulties, a region that is committed to mutually beneficial service agreements is a region that will prosper. When prosperity is available throughout the region, it is more attractive to investors, property values are maintained, and business is stronger for everyone.

A service agreement is the best tool for achieving responsive and cost effective region-wide government. It serves as the platform for developing broader agreements regarding region-wide capital planning, land use planning, economic development planning, protocols, and regulatory standards.

Benefits Arising from Service Agreements

Service agreements can provide direct benefits for both First Nations and local governments. For example, a First Nation that requires sewage treatment services can build its own sewage treatment services or it can purchase sewage treatment services from the adjacent municipality.





Purchasing services under a service agreement with the adjacent municipality is more efficient than the First Nation delivering the service if:

1. The adjacent municipality provides the same level of sewage treatment service at a lower price than the First Nation could provide;
2. The adjacent municipality provides a higher quality of sewer treatment service at the same price as the First Nation could provide the service; and
3. The adjacent municipality provides a higher level of sewage treatment service at a lower price than the First Nation could provide sewage treatment.

It should also be noted that in some instances the First Nation may have the excess capacity and the ability to provide services to under-serviced areas off reserve. This is the case with Shuswap First Nation whose unique service agreement is described below. This benefits the region as a whole, including the First Nation, by enabling investment, development, and economic growth that would not have otherwise occurred. Here is a short list of some of the benefits realized from service agreements.

Lower Average Costs of Services –The combined service populations of the First Nation and local government together will be larger than the First Nation or local government alone. Cost savings occur when the cost of servicing an additional taxpayer decreases as the number of taxpayers increases. This is usually true for any service with large fixed costs or initial costs such as sewer or water services. This benefits both parties as the service provider gains revenues and the service purchaser saves large initial costs. There are many examples of water and sewer agreements between First Nations and local governments listed available at the websites of Civic Info or the Federation of Canadian Municipalities.

Access to capital infrastructure: The local government will likely already have significant capital infrastructure in place and have acquired the necessary skills, people, and equipment to maintain that infrastructure. Traditionally, local governments have also had greater access to local infrastructure financing than First Nations.



For many First Nations, the size of their tax base means that building their own infrastructure, such as water treatment plants or recreation facilities, would have high costs per taxpayer. In some cases, the costs per taxpayer would be so high that the project would not be feasible. For example, since signing the Squiala-Tzeachten-Chilliwack service agreement, Squiala First Nation has seen considerable land development. Squiala First Nation was able to build the necessary transportation infrastructure and provide the local services to support the new Eagle Landing Shopping Centre because of the coordination of services with the City of Chilliwack.

Less duplication: Service agreements allow governments to make more efficient use of existing services with less impact on the environment, rather than having duplicate services in the same local area. A good example of this is a recent decision by the Tk'emlúps te Secwépemc regarding their sanitary sewer system. They chose to build and operate a wastewater collection system that sends wastewater to the City of Kamloops treatment facility as opposed to developing their own complete wastewater treatment system, as the City of Kamloops already had the treatment infrastructure in place.



Utilization of excess capacity:

When a local government builds capital infrastructure or acquires the capacity to provide a service, it usually ends up with excess capacity, partly to accommodate future growth, and partly due to the indivisibility of some components. For example, a town with a population of 25,000 may build a water supply large enough to meet the needs of a population of 50,000. Another example is that a town may hire a full time animal control officer and build one pound facility when really it only needs animal control services 3 days a week, but the impounded animals still have to be cared for each day.



Selling these services to the First Nation would mean that the local government could make use of some of that excess capacity and receive some additional revenues in return.

The Shuswap First Nation provides an example of regional cooperation in the Kootenay region of British Columbia. Off reserve sewer service is provided by the Kinbasket Water & Sewer Company (KSWC), a company owned by the Shuswap First Nation. This service is crucial to economic development on the east side of Lake Windermere.

The Shuswap First Nation provided water service to residential taxpayers on reserve via the KSWC, however this utility company lacked sufficient capacity to provide water and sewer services to support expanded on reserve commercial development. As well, the viability of a commercial development on reserve would depend partly on continued growth within the region (especially on the east side of Lake Windermere directly below the reserve). Growth off reserve would be difficult because the regional district imposed growth restrictions on the east side of the lake due to poor sewage treatment facilities. The east side of the lake was serviced primarily by septic fields, many of which had begun to leach into the lake. The leaching septic fields presented a considerable health risk as many residents draw their drinking water directly from the lake.

As a solution, in 2005, the KWSC upgraded its capacity to provide water and sewer services to a new commercial centre as well as additional member housing on reserve. KWSC could also provide sewer service to off reserve residents on the east side of the lake, thereby reducing reliance on septic fields and allowing development restrictions to be lifted.

In this way, a service agreement between Shuswap and the regional district could provide employment, revenues, and environmental benefits to the whole regional economy.

Other Benefits

In addition to reducing the costs of service provision, service agreements can also provide benefits related to positive relationships, natural synergies, joint initiatives, regional economic development, increasing investor confidence, and meeting requirements for additions to reserves.



Positive Relationships: A service agreement is a major building block in developing and strengthening a positive relationship between a local government and a First Nation. A service agreement addresses many areas of common concern and future opportunity.

With an agreement, the parties form a larger community signaling that they want to work together well into the future in a spirit of cooperation. Most of the service agreements where negotiations were facilitated by the FNTC have a goodwill and cooperation statement jointly endorsed by the First Nation and local government.

Additions to Reserves: A service agreement may be a prerequisite for the addition to reserve process. This is true for Treaty Land Entitlement First Nations and for additions to reserves within local government boundaries. There are a great number of First Nations and local governments in Manitoba and Saskatchewan with treaty land entitlement opportunities that may be able to realize a number of these benefits from negotiating mutual gains service agreements.

Foundation for Joint Initiatives: An agreement could serve as a foundation for other joint initiatives between the local government and the First Nation such as: integrating emergency measures responses; joint infrastructure planning for future developments; and cooperative recreation projects including playing fields, arenas, and trails to help blend recreation services in the community.

Regional cooperation to support economic development: Service agreements between First Nations and local governments can expand infrastructure and make more land available for investment. Service agreements can create a standard of regional service quality and indicate regional economic cooperation between First Nations and local governments. A regional approach to local service provision can build the regional economy.



STEPS TO NEGOTIATING A SUCCESSFUL LONG TERM SERVICE AGREEMENT

1. Identify a Facilitator

In many cases, it is useful to have a neutral third party assist in the negotiation of a service agreement. A facilitator is trained to help parties negotiate productively. A facilitator uses a professional approach to help groups hold constructive meetings which can be especially useful with large groups, complex issues, or emotional conflicts.

The FNTC provides advice, support, and facilitation regarding various types of negotiation and dispute resolution processes, including service agreement negotiations. During facilitation, the FNTC can also aid the process by identifying appropriate training for the parties in mutual gains negotiations and dispute resolution offered through the Tulo Centre of Indigenous Economics. In the event of major breakdown in negotiations that cannot be resolved using facilitation, the FNTC maintains a roster of mediators that are experienced in mediating First Nation property tax and related issues.

2. Establishing a Principles Statement

First Nation and local government negotiating teams should consider basing negotiations on principles that support a positive long term business relationship. The initial approach to a service agreement negotiation should include the development of a principles statement that would be ratified by the respective parties or agreed to by the negotiating teams.

The principles included in the statement are jointly developed and do not diminish the responsibility each party has for achieving “the best deal” for their community. These statements provide a signal to explore mechanisms that enhance the overall advantages of having a service agreement.

Mandates built upon a principled foundation should be considered by the parties in a joint session held at the outset of the process. A list of principles and characteristics to consider is provided below to help facilitate discussion.



A principles statement should have provisions that will recognize the following:

- a) A service agreement will serve as a foundation for an ongoing positive relationship between the local government and the First Nation;
- b) The agreement must accurately reflect the will and broad direction provided by the respective councils and communities;
- c) A successful service agreement will take into account such characteristics as:
 - i) a commitment to interact with each other in a fair, honest and reasonable manner;
 - ii) timely and open communications;
 - iii) the integration of each party's interests and objectives;
 - iv) an understanding and recognition of each party's concerns and risks;
 - v) a non-adversarial approach to resolution of issues;
 - vi) sustainability over the long-term;
 - vii) shared sense of common purpose;
 - viii) a basis for cooperation and teamwork;
 - ix) trust and respect through operating as co-equals.

3. Setting Ground Rules

Ground rules are helpful for guiding the negotiation process, providing a framework for order, and ensuring there is a mechanism to deal with disputes. By establishing ground rules at the outset of negotiations, participants also provide rules of procedure and conduct for new members and advisors who may join the process.



The FNTC has developed ground rules that address the following elements:

- a. Without Prejudice – Negotiations should be without prejudice so the service agreement dialogue is not construed as a legal proceeding and will not be used in future legal proceedings.
- b. Negotiators – Participants should declare conflicts of interests and each party should identify a lead negotiator as well as technical and political support for the process.
- c. Responsibilities of Negotiators – This section covers attendance, preparation, information provision, behaviour and development of work plans and agendas.
- d. Communication among Negotiators and Meeting Attendees – To facilitate open and collaborative discussion participants should be respectful, stay on track, avoid digressions and not make personal attacks.
- e. Costs – Each party should pay for their costs of participation. Often the FNTC provides facilitation services at its own costs.





- f. Meeting Location – The hosting, chairing and location for meetings should be alternated.
- g. Meeting Summaries and Record of Decision – These should be prepared by the acting chairperson of each meeting.
- h. Binding the Agreement – Negotiators will be provided with specific mandates by their governments to guide their work during the negotiation process. However, each participant is there as an individual and binding the final agreement will require final approval and execution by the appropriate authorities for each government.
- i. Media Relations – Negotiations are not open to media or public and all statements to the media should be joint press releases.

4. Negotiations

The negotiation process is where the parties create their service agreement. Hopefully the process will lead to ongoing positive relationships that will extend, not only to the implementation and term of the agreement, but also to other regional cooperation and opportunities.

This section addresses five aspects of the negotiation process:

- Identifying objectives
- Creating a work plan and agendas
- Technical working groups
- Identifying services
- Service costs

a) Identifying objectives

There are many types of service agreements including comprehensive service agreements and agreements regarding specific services. It is important to understand the objectives of each party at the outset and to discuss opportunities for mutual gains. The facilitator may want to meet separately with the parties during this part of the discussion.



b) Creating a work plan and agendas

The facilitator should develop a work plan, timeline, and agenda for the parties that establish project milestones and achieve as many objectives as possible. The work plan should include topics or tasks, start dates and due dates, and identify the leader of each task. The parties and facilitator should agree to the work plan, meeting schedule and timelines.

c) Technical working groups

Technical working groups can be used to delegate certain tasks and make good use of expertise that can develop options and provide reports to the negotiation process. The role and objectives of a technical working group should be clearly articulated.

If parties agree to a working group's goals, they are more likely to accept the results. Both parties should participate, or have at least one representative participate in any established working group on their behalf. Possible examples of working groups for a service agreement negotiation might include: service selection, feasibility formula selection (finance), or contract development (legal).

d) Identifying services

Local government services are generally divided into nine general categories:

1. General Government Expenditures
2. Protection Services
3. Transportation
4. Recreational and Cultural Services
5. Community Development
6. Environmental Health Services
7. Fiscal Services
8. Other Services
9. Taxes collected for Other Governments.



There are some service categories that the municipal government cannot provide for the First Nation government, such as general government administration, tax collection for other governments, and many fiscal services. These types of services would therefore not be included in a service agreement.

The services selected will depend on the objectives of the parties and the users of the services. Considerations will include: Is this a comprehensive service agreement or an agreement for specific services? Are these services just for leaseholders or are they for all community members?

e) Calculating Service Costs

A number of service costing methods have been developed in First Nation–local government agreements.

The most common method depends on the answer to the following questions:

- Which services are First Nations or local governments buying?
- What proportion of the seller’s budget do those services comprise?

The simple method applies the proportion from the second answer to the buyer’s local government property tax revenues to determine the service price.

For example, a First Nation purchases fire protection, transportation service and water services from a local government. These services represent 35% of the local government’s budget. The First Nation would then apply the same local service tax rate as the local government to its tax base and pay 35% of its resultant revenues to the local government.

This calculation can be complicated by a number of factors such as variable tax rates, full cost pricing (as opposed to property tax pricing), services provided to First Nation members, buildings that are not assessed and requested contributions to local government infrastructure.

The FNTC has developed a spreadsheet application to assist in these negotiations and is utilized when the FNTC helps to facilitate the negotiation of service agreements.



The table below provides a sample of the service costs and agreements from a few FNTC facilitated agreements:

Participants	Services	Effective Date	Pricing
1. City of Campbell River / Campbell River First Nation	<ul style="list-style-type: none"> ▪ Municipal services 	<ul style="list-style-type: none"> ▪ January 1, 2005 – five year renewal cycle 	<ul style="list-style-type: none"> ▪ 72.5% of property taxes at municipal rates ▪ Fee equivalent to city Development Cost Charge (DCC)
2. City of Chilliwack / Tzeachten First Nation	<ul style="list-style-type: none"> ▪ Municipal services 	<ul style="list-style-type: none"> ▪ May 2006 – twenty five year term 	<ul style="list-style-type: none"> ▪ 75% of property taxes at municipal rates
3. City of Kamloops / Kamloops Indian Band	<ul style="list-style-type: none"> ▪ Fire protection 	<ul style="list-style-type: none"> ▪ 2008 – three year renewal cycle 	<ul style="list-style-type: none"> ▪ Fee times number of properties
4. City of Kamloops / Kamloops Indian Band	<ul style="list-style-type: none"> ▪ Sanitary sewer effluent 	<ul style="list-style-type: none"> ▪ November 1996 	<ul style="list-style-type: none"> ▪ Development cost charge ▪ Accelerated capital cost ▪ User fee of \$0.35 per cubic metre ▪ Service user fee of \$200 each year per dwelling unit – indexed to the Consumer Price Index (CPI)
5. Regional District of East Kootenay (RDEK) / Columbia Lake Indian Band	<ul style="list-style-type: none"> ▪ Building and plumbing inspection; ▪ Dog control; ▪ Eddie Mountain Memorial Arena; ▪ Fire protection; ▪ Grants In Aid; ▪ Libraries; ▪ Regional Hospital District; ▪ Regional Parks ▪ Solid waste disposal; ▪ Weed control. 	<ul style="list-style-type: none"> ▪ January 1, 2002 – December 31, 2006 	<ul style="list-style-type: none"> ▪ Sum of the levies made by RDEK for the services for that calendar year, times the assessment of all non-native interests in the Reserve as determined by the Band.



Service Agreement Best Practices

The FNTC has facilitated a number of service agreements between First Nations and local governments. The table below summarizes the best practices elements from this experience.

Service Agreement Element	Best Practices
<p>Facilitation</p>	<p>The FNTC recommends that local governments and First Nations use an experienced facilitator to support service agreement negotiations. At the request of both the local government and the First Nation, the FNTC will usually provide this service at its own cost.</p>
<p>Description of Services</p>	<p>Specific or comprehensive - Service agreements can be for one or more specific named services to be delivered to the First Nation. Or, service agreements can be comprehensive, setting out all local services offered by a local government and then listing significant exceptions not to be delivered. The agreement should ensure descriptions are as clear as possible indicating services included and what those services entail. This may include schedules with maps of serviced properties, lists of facilities and service schedules (e.g., schedules for solid waste pick-up or transit timetables).</p> <p>Hard services and soft services - A description of services to be provided can distinguish between hard services and soft services. Hard services tend to be delivered directly to the recipient. They include road maintenance, water supply, sewers, fire protection, and garbage collection. Soft services, on the other hand, are services that are available for the recipient to use, such as libraries, parks and recreation centres. Soft services are usually not available on the reserve lands, such as a recreation centre that may serve a population outside as well as inside a municipality's boundaries. Services can be described by including a schedule of hard services (e.g., water and wastewater) and a range of soft/other services such as animal control and parks and recreation.</p>



Service Agreement Element	Best Practices
Standard of Services	<p>The service agreement should state the standard of services to be delivered. This can be accomplished by simply acknowledging that the local government will supply services “at the same frequency and quality as those received by the rest of the area served” or “at a similar standard as that received by other areas serviced by the local government.”</p>
Exceptions for Non-Delivered Services	<p>In comprehensive service contracts, it may be necessary to recognize that not all municipal services can be provided to a reserve unless the First Nation enacts additional laws or by-laws providing the necessary framework and specific legal authority required. Services that cannot be provided without specific authority include planning, zoning, and by-law enforcement (noise, animal control, etc.). If a First Nation wishes to contract for these types of services, it will need to ensure it has taken the necessary steps to create the legal and administrative framework and enable local government officials to administer and enforce the regulations.</p>
Police Services	<p>On First Nation lands in BC, as in provincial rural areas and in municipalities with a population of less than 5,000, the provincial government provides the police services and assumes 70% of the policing costs with the federal government covering the remaining 30% under established agreements. Thus, it is not necessary for First Nations to enter into a contract and pay for police services from a local government. A First Nation may wish to create an alternative agreement for police services with a nearby municipal police department where service from the municipal department would be more practical than obtaining it from a distant RCMP detachment.</p>



Service Agreement Element	Best Practices
<p>Infrastructure Responsibilities</p>	<p>When establishing a major service such as a water supply, sewage collection system or road maintenance, each party must be aware of its respective responsibilities and clearly state them.</p> <p>Construction of infrastructure – If new infrastructure is required to provide the agreed-upon services to the First Nation, the parties must establish who will be responsible for constructing the new infrastructure. The clauses should also define the infrastructure construction standards. The agreement should identify and include the applicable laws and by-laws to be used for infrastructure construction and monitoring. To ensure consistency and minimize costs, the First Nation can adopt requisite standards “by reference” which ensures that future amendments will be included and the standard will always be current. At a minimum, the service provider’s health and safety standards should be stated.</p> <p>Ownership of infrastructure – The ownership of infrastructure provision specifies which party owns any new infrastructure required to implement the service agreement. Usually each party will fund capital within their jurisdiction or boundaries and will retain ownership of such infrastructure.</p> <p>Sharing of information – The parties should provide each other with plans, budgets and studies to support the infrastructure responsibility element.</p>



Service Agreement Element	Best Practices
Term	<p>Service agreements should provide for the long term stability of services to a specified area. Infrastructure is costly to construct and in many cases (such as sewer services) service connections and the grading of lines do not allow for alternatives. A best practice is to reflect that an agreement is intended to be long-term, and provide for review and renewal provisions to ensure the terms are current at least once every five years. Service agreements should contain provisions for: automatic renewal, notice for request to renegotiate and notice regarding discontinuance of a service. First Nations should be aware that local governments may have legal restrictions on the term of certain types of agreements. In such cases, provisions should be included to require good faith renegotiations with a view to renewing the agreement at the end of each fixed term.</p>





Service Agreement Element	Best Practices
<p>Cost of Services</p>	<p>The agreement should clearly set out the amount to be charged for the services or the formula to determine the costs. Sometimes there are different pricing approaches for different services.</p> <p>Generally, the easiest pricing approach is based on tax equivalence for general services or fee equivalence where the local government finances a service with a user charge. The advantage of these approaches is that they respond to changing conditions, without having to specify in advance a fixed total price for each year into the future. Rate structures that accommodate growth and development are a best practice.</p> <p>Simple tax equivalence involves the First Nation paying the local government “the amount that would otherwise have been collected with the local government’s property tax.” An additional benefit of this approach is that it is easy to adjust for non-delivered services such as planning or by-law enforcement. One simply subtracts from the full tax equivalent amount the percentage of the local governments expenditures devoted to non-delivered services. However, a tax equivalence approach, minus a proportion for services not delivered, does often include paying for the full range of local services that are available, including off-site facilities such as libraries and recreation centres. There are also other costing approaches. When facilitating a service agreement, the FNTC can provide a service agreement cost calculation application for the use of the parties that includes these other price calculation methods.</p>
<p>Pricing Services from Regional Districts</p>	<p>Under BC legislation, regional districts are required to allocate a share of each specific service’s costs among jurisdictions within the regional district (electoral areas, municipalities). Often the price of these services is based on the assessment base. Using the same approach for pricing services to a reserve is both practical and fair. First Nations should expect regional districts to want to use this approach for pricing services to First Nations.</p>



Service Agreement Element	Best Practices
Payment	<p>The agreement should clearly set out how and when payments must be made by the service receiver. If the agreement includes a rate formula, the agreement may also include a process for the parties to determine what the payment will be in each year, or for each payment, as the case may be.</p>
First Nation Taxation of Local Government Properties	<p>While government properties on reserve are not generally taxed (and cannot be taxed if owned by the federal or provincial government), it is common that the owning government pay a “grant in lieu of taxes” to the government whose jurisdiction in which they are located if the facilities require any kind of local services. While First Nations can tax such local government facilities within their territory, better relations will be maintained with neighbouring jurisdictions if First Nations exempt such facilities from taxation in exchange for the local government providing all services for those properties, or a grant in lieu of taxes to cover any services that the First Nation must provide.</p>
Contemplating Future Changes	<p>An amendment clause outlines the manner in which future changes can be made to the agreement. The amendment clause will stipulate that all amendments are to be made in writing, agreed to by the appropriate authorities, and attached to the agreement. Following these requirements increases the certainty of the agreement and provides a process for future staff members to follow. It is more than likely that the reserve areas to be serviced by a local government will grow over time. Therefore, this should be contemplated by the agreement to avoid any future difficulties.</p>



Service Agreement Element	Best Practices
Regular Meetings	<p>The agreement should provide for the parties to meet at least once each year. This would be a technical meeting convened between First Nation and local government managers so that the parties can discuss and coordinate operational issues and future plans. The technical meeting should be held on an operational basis and a report from the meeting provided to the respective councils with recommendations on any action items required. In addition to the technical meeting, as a best practice, the respective councils should also maintain an open door policy and allow for at least one joint meeting of the councils each year.</p>
Point of Contact	<p>The agreement should include a provision setting out whom to notify if either party needs to contact the other respecting an operational issue, such as a service delivery problem.</p>
Access to the Reserve	<p>This provision ensures that staff and contractors will be allowed access to all areas of the service receiver's land, to the extent necessary to provide services and any required maintenance. Because a First Nation has a legal right to exclude others from a reserve, it is important that they extend specific permission to allow the supplier of services to enter. This provision may also enable entry to conduct inspections for service agreement compliance — particularly for agreements related to fire protection.</p>



Service Agreement Element	Best Practices
Indemnity Provisions	<p>Indemnity clauses limit liability by assigning it to another party. It is generally good policy to have each party accept liability for its own actions, and indemnify the other to the extent that its actions cause harm to the other. An indemnifying party should also take out insurance to cover their liability under the agreement. Note that local governments often have existing insurance coverage that will include liability they accept under agreements.</p> <p>Often local governments suggest an indemnity clause to ensure there will be no liability on the part of the service provider for failure to make a service available at a certain level, although the service provider will make its best efforts to ensure services are in their best working order. This may also include no liability in the case of a service receiver not adopting and/or abiding by by-laws or resolutions relating to service provision. It is recommended that the parties have all indemnity, release and insurance provisions specifically reviewed by their legal counsel and insurance advisors.</p>





Service Agreement Element	Best Practices
<p>Dispute Resolution Provisions</p>	<p>Dispute resolution clauses provide mechanisms by which disagreements may be settled. Such provisions can provide important safeguards that allow parties to work out their differences without having to enter a courtroom, saving time and litigation costs. Appropriate dispute resolution provisions must be negotiated for each agreement, and it is important that both parties “buy in” to the included processes in order to be effective.</p> <p>For First Nation-local government service agreements, a “stepped” approach to resolving disputes is recommended. This approach provides for a process with increasing levels of assistance where the dispute is not resolved at each stage. It may start with a face-to-face meeting between representatives to discuss a service concern. If this does not resolve the issue, the next step may be to involve others within each party, followed by third party facilitation, mediation and then arbitration. Arbitration is the last resort for resolving an impasse in an agreement.</p> <p>Dispute resolution processes tend to lead to a decision both parties can live with, as they have negotiated the result rather than having one imposed on them. FNTC facilitation or dispute resolution services are sometimes included in agreements.</p>



Service Agreement Element	Best Practices
Termination with Notice	<p>The agreement should set out how and in what circumstances the agreement can be terminated. Agreements are generally terminable “with notice” or “for cause.” For service agreements, it is only in some cases, such as where the parties anticipate that services are required only for a limited timeframe that the parties may want the ability to terminate with notice from one or either party before the specified termination date. The amount of notice that is appropriate will vary, depending on the circumstances and the type of service provided. Generally termination requirements for a major service would be a minimum of 12-24 months. Because local services are complex (and difficult to start and stop), and because local governments must balance their budgets on an annual basis, a lengthy notice period is necessary and should be clearly stated. For the recipient of the service, it may take significant time to find a replacement service provider, or to take the steps necessary to be able to provide the service directly.</p>



Service Agreement Element	Best Practices
<p>Termination for Cause</p>	<p>The agreement should set out in what circumstances the agreement can be terminated for cause. The most likely reason for termination for cause is where a service receiver fails to make payment as required, but it could also be for breach of another significant provision of the agreement. Any ability to terminate for cause should tie in to the dispute resolution provisions, to ensure that termination can only be an option after the dispute resolution processes are implemented but are not successful. It is in the interest of both parties to ensure that the agreement is maintained at all times, and that clear processes and remedies are in place to address defaults by either party without the need for termination of the agreement.</p> <p>Consequences for failure to make required payments should be given particular consideration in the agreement. First Nations and local governments must balance their budgets each year, and the service agreement payment is an important part of the annual expenditure plan for both governments.</p> <p>Provisions pertaining to payment defaults should be clear, detailing a specific time lapse before a missed payment becomes a default, and any interim interest and penalties. A service provider will want to include provisions that provide for effective recourse against a service recipient who does not pay for services, which provisions will put the recipient in breach of the terms of the agreement. Many actions that a local government may use against its own residents for non-payment are not suitable for a First Nation service agreement, as the reserve lands are held by the Government of Canada and a service agreement is a government to government relationship. Generally, provisions will be made for the suspension of services, penalties, interest charges and in extreme cases, termination of the service agreement. In many cases services cannot easily be discontinued (fire protection, water and sewer) and so parties should ensure that the agreement is maintained at all times.</p>



Service Agreement Element	Best Practices
Letters of Credit	<p>Often in the case of a new agreement there may be uncertainty about the timing and reliability of payments for services. As a preventative measure for the service provider and to protect against default, a letter of credit may be a useful device. A letter of credit may be provided to a service provider and can act as a form of insurance for a failure to pay for the services on time. Letters of credit are also a practical way to deal with breach of agreement issues that may arise. Service agreement templates often include a clause that stipulates a letter of credit is to be issued to the service provider and this should be considered a reasonable business term. In many cases the provision for a letter of credit is removed once a payment history is established.</p>
Definitions and Interpretation	<p>The Definition and Interpretation section of an agreement will provide any legal definitions, short forms and interpretive provisions used within the document. These provisions are important for consistency in the agreement and to ensure that the parties are able to reference these definitions at a later date, leaving little ambiguity in the interpretation of the agreement.</p>
Other Provisions	<p>Finally, there are a number of other minor conventional contract terms that should be included in any contract, such as no assignment without consent, time is of the essence, information sharing, confidentiality, notice, applicable laws, no waiver, enurement, and other elements that are usually addressed by the lawyers drafting the agreement.</p>



Other FNTC Initiatives Supporting First Nation Local Government Service Agreements

The FNTC supports three innovations that enhance the effectiveness and efficiency of First Nation-Local Government service agreements.

Accredited University Training – The FNTC, the Tulo Centre of Indigenous Economics (Tulo Centre) and Thompson Rivers University (TRU) offer a 2 credit course called *Service Agreements and Joint Agreements*. This course deals with the delivery of local services through the development of service agreements between First Nations and local governments or private sector contracts. The course is intended for First Nation and local government tax administrators and others involved with First Nation – Local Government service agreements. Students will complete a service agreement negotiation simulation and be introduced to the FNTC’s service agreement software application. This course is offered in a one week in class format on the Kamloops campus of TRU and in the online format. For more information about when this course and scheduling, visit www.tulo.ca

This course is part of the *Certificate of First Nation Tax Administration* program offered by the FNTC, the Tulo Centre and TRU. The Tulo Centre is a not-for-profit charitable institution dedicated to delivering certificate and diploma programs in First Nations Tax Administration, First Nations Economics and other areas of First Nation public administration. The Tulo Centre creates capacity to build the legal and administrative frameworks for markets to work on indigenous lands.

Service Agreement Software Application – The FNTC service agreement software application helps to expedite the completion of First Nation – Local Government service agreements. The purpose of the application is to allow the development of real time service cost estimates to facilitate service agreement negotiations. This tool has proved effective when both First Nations and local governments understand the data being entered and the meaning of the cost estimate formulas. It is a cost effective approach to a complex challenge and is used in conjunction with FNTC facilitated agreements.



The software application is updated on a regular basis. Features of the application include: (a) the ability to work with the assessment classes and adjustment factors in all provinces; (b) the ability to estimate detailed definitions of services; and (c) outputs to easily compare different service delivery options. The application can be used in most service agreement negotiations between First Nations and local, regional, and provincial governments.

Greater Regional Participation – The FNTC has begun to develop models to encourage greater participation by First Nation tax jurisdictions into regional governance structures. This could involve First Nations having seats on regional district boards or formally participating in regional planning and service delivery bodies. First Nation participation benefits regional economies because investors make decisions based on an assessment of a region as a whole. This creates a regional comparative advantage where quality services and infrastructure are provided throughout the region and there are region-wide protocols on issues such as environmental protection. A participating region will attract more investment which in turn will lead to rising property values, growing businesses, employment opportunities, and a better quality of life.

The inclusion of First Nation jurisdictions in regional governance also supports new economic strategies. It supports the recognition that when one part of a region attracts a significant investment project, this improves business throughout the entire region. It generates an understanding that local economies should work together as a region. Governments within a region should not compete against each other. A strategy to promote regional growth demonstrates that the governments within a region are best served by the development of region-wide capital planning, land use planning and investment facilitation. This ensures that a standard for the quality of services prevails throughout the region. An investor coming to a region should be able to access the same support and quality of information regarding any site within a region.



APPENDIX A - A VERY BRIEF HISTORY OF FIRST NATION TAXATION AND LOCAL GOVERNMENT SERVICE AGREEMENTS IN BC

Before First Nation property tax jurisdiction in 1988, municipal and regional governments had been collecting property tax from non-native leaseholders on reserves in British Columbia. Local governments levied property taxes on leaseholds held by non-Aboriginals and the provincial government levied taxes on reserves outside of municipal boundaries. These governments did not have any legal requirement to provide services to the lease-paying taxpayers.¹

The levying of taxes generated significant revenues for a few local governments, such as West Vancouver, Kamloops, and Duncan; however the total collected was less than 1 per cent of provincial revenues. Some of these municipalities provided full services. Some provided none. On average, only 25% of the on-site services provided to other municipal taxpayers were provided to leaseholders without additional payment.

The Provincial government collected property taxes in rural areas to help fund policing and roads. However, policing was always provided to reserves under the subsidized provincial contract with the RCMP. The Province maintained it had no obligation to provide roads or road maintenance to the tax-paying leaseholders on reserve.

These inconsistent arrangements created problems.

First Nations complained that taxation without services lowered the market value of their leaseholds. They also objected to their lack of political control over taxation levied on their territories.

Municipalities complained they could not enforce the collection of delinquent taxes. They also had to pass on amounts levied by other governments regardless of whether these were collected. Consequently, delinquency rates were very high. The Provincial Surveyor of Taxes reported that delinquencies on current and back taxes were 59.8% of the 1986 levy on reserve.

¹ In a technical sense these local governments were levying a tax on the non-Aboriginal occupier on First Nation lands with the amount calculated as if it were a property tax.



Further complicating matters was the uncertain status of legal contracts between First Nations and municipalities and also regional districts. The *BC Municipal Act* provided that municipalities had the authority to contract with First Nations. Court decisions concluded that First Nations had the power to contract without Indian and Northern Affairs Canada (INAC) involvement.

Bill C-115, the 1988 amendment to the *Indian Act*

In 1988, Kamloops Indian Band Chief CT. (Manny) Jules and INAC developed Bill C-115, an amendment to the *Indian Act*. This amendment clarified that conditionally surrendered reserve lands (land leased to non-Aboriginals and called “designated lands” in the legislation) remained under the jurisdiction of the First Nation and that all First Nations were authorized to levy property taxation. Bill C-115 did not exclude provincial and local government taxation. However, legal opinions held that if a First Nation introduced taxation that was specifically for the benefit of the First Nation, courts would rule to exclude provincially sponsored taxation. A result of the legislation was the creation of the Indian Taxation Advisory Board (ITAB) to advise the Minister on the regulation of First Nation taxation. The ITAB proceeded to sponsor information workshops, provide informative publications, conduct research, and provide training in implementing taxation to representatives of interested First Nations.

A very detailed analysis of Bill C-115 was published in 1991². It revealed an additional problem in the relationship between local property taxes and service provision. Average property tax revenues exceeded average service costs where leaseholds were primarily commercial or very high-value residential. However, leaseholds that were primarily low valued residential did not.³ Service delivery issues were generally resolved and agreements reached where average revenues exceeded average costs. The mismatch between property tax revenue and service costs continues to be a problem for some First Nations just as it is for small municipalities that lack a balanced tax base.

2 Robert L. Bish, Eric G. Clemens, and Hector G. Topham. Study of the Tax and Service Implications of Bill C-115 (Taxation amendments to the Indian Act). Center for Public Sector Studies, University of Victoria, October 1991. (134pp).

3 The most important reason for this result is that in BC it is common for property tax rates to be much higher on commercial and industrial property than on residential. Thus commercial and industrial property taxes tend to be much higher than the costs of services to those properties while residential property taxes do not cover the costs of servicing residential property.



The initial provincial government response to Bill C-115 was the *Indian Land Tax Co-operation Act* (Bill 77). It authorized the British Columbia Assessment Authority, the Surveyor of Taxes, and local governments to provide tax administration services to First Nations. It did not, however, end the taxation of First Nation lands without the permission of the First Nation and without the provision of services.

Bill 77 was replaced in 1990 by Bill 64, the *Indian Self Government Enabling Act*. This act provided three options for First Nations:

- **a) Concurrent tax jurisdiction:** This is an arrangement where both BC local governments and the First Nation would levy taxes on leasehold lands, with an agreement on tax sharing and service responsibility worked out between them.
- **b) Independent Taxation:** First Nations exclude all other taxing jurisdictions, levy their own property taxes, and make their own purchase of service agreements with other governments.
- **c) Indian Districts:** If the federal government granted corporate status (similar to Sechelt) the First Nation could use either taxation option and participate in provincial programs for municipalities including provincial revenue sharing, the Municipal Finance Authority, and other grant programs.

With all of the options, the First Nation could contract with the BC Assessment Authority, other BC government agencies, or local governments, for tax administration and services. Bill 64 clearly recognized that First Nation governments had both tax and service responsibility for reserve lands. However, the provincial and local governments would continue to tax the leaseholds of any First Nation that did not implement property taxation.

During subsequent years there was a variety of re-negotiations of contracts as well as mediations and arbitration. As a result, there are now many contracts which provide for the provision of on-site services to reserve lands (in some cases just leaseholds; in others the entire reserve). These contracts typically involve fire protection, water provision, sanitary sewage collection and disposal, and 911 emergency dispatches. In some cases, they can also include: building inspection, transit, storm water management, dog control, noxious weed control, parks and recreation, and libraries.



Payment approaches vary. The two most common approaches are a negotiated price for the service package or a payment equal to the municipal taxes that would have otherwise been collected for those services. Different approaches are taken because reserve lands vary considerably in their land use and they also have very different relationships between average tax revenues and average service costs. Some municipalities provide services at a tax-equivalent price, even where this generates a net loss, because they recognize that everyone in the district ultimately benefits from the maintenance of a high standard.

APPENDIX B – OTHER SERVICE AGREEMENT RESOURCES

Civicinfo BC - <http://www.civicinfo.bc.ca>

Civicinfo BC is primarily an internet based resource created to help with the free dissemination of local government information in BC. Civicinfo BC services range from bid and tender postings to professional development information.

The Civicinfo BC web site features a resource section of 91 local government agreements with First Nations. These agreements include memoranda of understanding, protocol agreements, and service agreements. Civicinfo BC's news releases also provide information on local government / First Nation agreements.

Federation of Canadian Municipalities - <http://www.fcm.ca>

The Federation of Canadian Municipalities (FCM) is an organization that advocates for local governments in Canada. The organization is over 75 years old and establishes their policies annually at a national convention of Canadian municipalities.

The **FCM First Nations-Municipal Community Infrastructure Partnership Program** (CIPP) is a national program which began in 2010 and runs through 2014. The CIPP is a partnership between Aboriginal Affairs and Northern Development Canada and the Assembly of First Nations. The objectives of the program are to “improve the ability of adjacent First Nation and municipal governments to form partnerships that lead to improved water and wastewater infrastructure and related services”.



The two main components of the CIPP are:

- Service Agreement Best Practice Toolkit – provides First Nations and local governments with information and resources on how to work towards effective service agreements. The toolkit also has a series of service agreement templates for the following services: water and sewer, fire protection, solid waste, animal control, recreation, transit and comprehensive service agreements.
- Community Partnership Training Workshops – workshops that are designed to bring municipalities and First Nations together and help build relationships and their capacity in conducting successful service agreement negotiations.

The CIPP resources are available on the FCM's website.

Manitoba Aboriginal and Northern Affairs – <http://www.gov.mb.ca/ana/index.html>

Manitoba Aboriginal and Northern Affairs created a **Reference Manual for Municipal Development & Services Agreements** for municipalities and Entitlement First Nations in Manitoba. The manual is a compilation of the issues that a Services Agreement pursuant to the Manitoba Treaty Land Entitlement Framework Agreement may potentially address. The guide may also be used as a reference for municipalities and First Nations not participating in the Framework Agreement.

This Reference Manual provides examples of provisions that maybe used in a service agreement such as general terms, services, by-laws, and dispute resolution. The Reference Manual also briefly outlines some ideas on how to conduct a successful negotiation.

This manual is available on the Manitoba Aboriginal and Northern Affairs' website



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