

GOOD PUBLIC WORKS MANAGEMENT IN FIRST NATIONS COMMUNITIES

Public Works and Self-Government

An Introduction for Negotiators



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PUBLIC WORKS AND SELF-GOVERNMENT: AN INTRODUCTION FOR NEGOTIATORS

I. INTRODUCTION

A good public works infrastructure is essential to the health, safety and well-being of any community. Unless, a community has a solid basis of well-maintained roads, a good water supply, sound sewage and solid waste disposal and a workable planning system, among other things, improved social well-being and economic expansion will be difficult, if not impossible, to achieve and sustain.

For these reasons, those negotiating self-government - from the federal, provincial and First Nations governments - need to ensure their agreements treat the public works function in a comprehensive and effective manner.

The purpose of this introductory document is to assist them in accomplishing this task. It is organized around the following four questions:

- What is public works?
- What constitutes sound public works?
- Why is regulation central to public works?
- What are the implications for negotiators?

This document also provides related references (see Annex A) and contacts for further information (see Annex B).

II. WHAT IS PUBLIC WORKS?

Scope of Public Works

Public works covers the broad spectrum of activities essential to the smooth running of any community. These activities tend to be controversial only if they are not functioning properly. In that sense, they are often 'taken for granted'.

Included in the term public works are very visible community assets such as government buildings and schools, including their upkeep and maintenance. Further, the term encompasses the roads, bridges and related infrastructure such as street lighting as well as the ability to keep these in good repair and to clear snow in the winter. Providing fire protection, critical in remote communities for house fires and for bush and forest fires, and ensuring energy supplies for heating and electricity in an efficient and environmentally friendly manner are also part of public works, as is work site safety.

Other elements include systems for collecting, treating and disposing of sewage and solid waste, for providing potable water, for developing and maintaining parks and recreation facilities, for wharves, harbours and airstrips, for land management and expropriation and for the development of community plans and zoning by-laws.

Finally, public works might also entail, in some communities, regulating the construction of private buildings through such means as building and fire codes.

Governing and Managing Tasks

Governing is the primary responsibility of political leaders in a community. Managing and operational responsibilities, on the other hand, tend to be the responsibility of First Nations staff. In practice, there is often considerable overlap between these tasks.

Governing responsibilities for public works are many and varied. Among other things, Chief and Council establish the overall direction of the public works function, adopt by-laws and policies to guide staff and members, approve long term capital plans, set yearly budgets, establish the public works organization, ensure clarity in the roles and responsibilities of the principal actors, and ensure that the rest of the First Nations staff provide the necessary financial and administrative support.

Within the parameters established by Council and by other governments, managing responsibilities include:

- *Planning* - because of the long lead times required to build community assets;
- *Designing* - public works facilities are complex and in many cases highly technical;
- *Financing* - community assets are expensive to build and maintain;
- *Constructing* - these challenges vary from play structures in parks to multi-million dollar schools;
- *Maintaining* - all of the physical assets of a community from roads to buildings to potable water systems require constant upkeep and regular maintenance;
- *Regulating* - because many of the public works functions affects health and safety of the community or have the potential for harming the environment, they are often inspected to ensure that the facilities themselves and in some cases their operators are meeting certain standards often set out in a law;
- *Responding to Emergencies* – such emergencies could be spawned by poor water quality, environmental spills, fire, floods etc.

The scope and complexity of public works suggest that negotiators would be wise to develop a separate chapter dedicated to this function.

III. WHAT CONSTITUTES SOUND PUBLIC WORKS?

Governments want their public works function to accomplish several objectives. Principal among these is the delivery of high quality services - such as the provision of potable water and the treatment of sewage, the collection of garbage - at reasonable cost. Other objectives include:

- preserving the health and safety of citizens;
- ensuring fiscal prudence;
- achieving environmental sustainability;
- providing economic development opportunities;

- enhancing cultural expression and pride; and
- strengthening communities through recreation and voluntary communities.

All of these objectives are central to sound governance. Because the goods and services generated as a result of public works activities are tangible - they can frequently be seen, measured and touched - they become an expression of the permanence, competence and vitality of the community.

That said, common to the interests of all negotiators dealing with self-government are four aspects of sound public works: 1) achieving and sustaining high quality services; 2) ensuring health and safety of citizens; 3) achieving environmental sustainability; and 4) ensuring sound fiscal arrangements.

IV. WHY IS REGULATION SO CENTRAL TO SOUND PUBLIC WORKS?

The recent tragedy at Walkerton, a small town in southwestern Ontario, illustrates what can happen if a critical public works function goes badly wrong. In May 2000, a deadly form of E.coli entered the town's drinking water. The contamination was confirmed on May 15. It was six more days before residents were alerted. Six people died and 2300 others became ill. It is hard to imagine any other locally delivered government service having such a catastrophic impact on a community.

The Walkerton tragedy illustrates the central importance of a well functioning regulatory system to achieve the objectives noted above of sound public works. Testimony at the Walkerton inquiry and media reports reveal a long list of problems with the regulatory system: the lack of a legislative base for water standards in Ontario; poorly defined roles and responsibilities; lack of accreditation for testing laboratories; no ongoing accreditation of water plants; water operators who were not certified; equipment breakdowns that were not reported; political leaders who may not have understood their responsibilities; and poor communication with the public. There is no reason to believe that First Nations communities are immune to a similar list of problems and accompanying liabilities.

In addition to the provision of potable water, the treatment of sewage and solid waste, construction and safety-related issues, zoning, fire protection are other examples of where regulation plays a critical role. There are a number of characteristics that are important for a sound regulatory system, including:

- Clear, concise, consistent and measurable regulatory objectives;
- A legislative base;
- Clear roles and responsibilities among the key players, including what to do in an emergency;
- An appropriate balance of promotion, monitoring and enforcement activities;
- A regulator that is set up and organized in a way that limits the ability of other stakeholders from unduly influencing monitoring and enforcement;

- An understanding of the regulated group, including who they are and how they behave. This knowledge will assist in developing effective promotion, monitoring and compliance;
- Regular evaluation for effectiveness, and adjustment from time to time due to intervening factors.

The question is what does all this mean for self-government negotiators?

V. WHAT ARE THE IMPLICATIONS FOR NEGOTIATORS?

Filling the regulatory void

How would First Nations communities under the *Indian Act* fare relative to these characteristics of a sound regulatory system, especially the need for a legislative base? The short answer is not well. Federal law pertaining to public works is sparse and relates mainly to environmental management - for example, the *Fisheries Act* and the *Canadian Environmental Protection Act*. On the other hand, some relevant provincial law may not apply to Indian lands for constitutional reasons. Further, even if some provincial laws do apply, provincial governments have shown reluctance in the past to enforce such laws. Finally, by-law making powers for First Nations under the *Indian Act* are inadequate to deal with the regulatory aspects of public works.

In sum, there is a regulatory void pertaining to many elements of public works on First Nations communities, a void that self-government negotiations can help fill. Here are some questions they may wish to address in thinking about this task:

- For each of the principal components making up public works, what is the nature of the regulatory system now in play for the First Nations communities?
- How do such systems stack up to the characteristics listed above?
- How can the self-government regime under negotiation 'fix' current problems?
- In particular, what roles will each of the governments to the agreement assume?
- Does the First Nations party have the capacity to assume its role and, if not, how can it gain the required capacity and what will happen in the meantime?

The question of roles is especially important. Regulatory systems in Canada, where government itself is an 'operator', generally involve two levels of government: 1) the provincial and sometimes the federal government as the regulator; and 2) the municipal government or some other public body as the operator. In short, long experience, buttressed by the Walkerton tragedy, suggests that governments, like other organizations, have difficulties regulating themselves. If self-government negotiators accept this premise, they appear to have two options in situations where 'operations' will be in the public sector: apply provincial and federal regulatory systems to the First Nations government; or develop a two-tier First Nations government with regulatory and operating roles clearly defined.

To sum up, dealing effectively with the regulatory side of public works could have a major impact on how the self-government regime is structured.

Other Concerns

Getting the regulatory system 'right' for public works will be a significant challenge for negotiators. But there will be other concerns including the following:

- What are appropriate funding principles for public works around which to structure fiscal arrangements between the federal and First Nations governments?
- How will legitimate one-time costs related to implementing the public works function be identified?
- How will O&M funding levels be determined?
- In what condition will public works assets be transferred?
- Who will be responsible for insuring these assets?
- How will major capital funding be determined?
- What are the implications for public works in the Own Source Revenue Agreement?
- What redress mechanisms are required and how will they be structured?
- What ongoing mechanisms will be required to co-ordinate the public works function among governments?
- What aspects of public works need to play a central part of the capacity-building strategy for self-government?

The scope and complexity of public works suggest that negotiators would be wise to develop a separate chapter dedicated to this function.

VI. CONCLUSIONS

Public works is a complex, multi-faceted function essential to the health, safety and overall well-being of any community. Further, it is a challenging area to govern and manage. Aspects of it are highly technical. It affects everyone. Public works investments are costly to fund and maintain. Failures can result in sickness and even death. And because of this it has a complex legal and regulatory side demanding collaboration from players both from and external to the First Nations community.

For these reasons, self government negotiators face significant challenges in crafting agreements on public works, agreements that will be comprehensive, effective and sustainable.

VII. FURTHER INFORMATION

To help negotiators meet these challenges Annex A provides an annotated list of resources and documents. Annex B provides a list of regional RPS for INAC offices that negotiators may contact to receive advice on the public works function.

ANNEX A OTHER DOCUMENTS OF RELEVANCE TO NEGOTIATORS

THE PUBLIC WORKS FUNCTION

Institute on Governance, The Public Works Function in Canadian Jurisdictions, (RPS for INAC, October 1998)

This paper describes the legal and regulatory relationship between provincial governments and municipalities in Canada in the areas of land use planning, building codes, roads and bridges, parks and recreational facilities, water and sewage systems, and solid waste collection and disposal. Financing options available for selected functions are also examined. Available on the RPS for INAC website, http://pwgsc.gc.ca/rps/inac/content/docs_governance-e.html.

Institute on Governance, Self-Government Agreements and the Public Works Function, (RPS for INAC, October 1998)

An examination of how public works functions (public buildings, roads, potable water, etc.) are treated in four sets of aboriginal self-government agreements. It includes an analysis of self-government agreements with regard to (a) the similarities and differences with the tiered governance model developed by the Royal Commission On Aboriginal Peoples; and (b) the treatment of the public works function as it relates to the government's Inherent Right Policy. Available on the RPS for INAC website, http://pwgsc.gc.ca/rps/inac/content/docs_governance-e.html.

Institute on Governance, Backgrounder: Public Works Function in Self-Government, (RPS for INAC, March, 2000)

A look at public works in First Nations communities, including the existing legal and policy framework, roles and programs, and building capacity. It also explores the issue of public works in the context of self-government. Available on the RPS for INAC website, http://pwgsc.gc.ca/rps/inac/content/docs_governance-e.html.

Institute on Governance, Public Works in Small and Rural Municipalities, (RPS for INAC, March 1999)

A synopsis of how various public works are managed in small and rural municipalities across Canada. This paper illustrates various approaches to public works management (chiefly financing, administration, and training), and examines some of the public works trends and challenges faced by small, and often remote communities, including government downloading of responsibilities, growing use of public-private partnerships and user fees, problems of technology transfer, increased citizen expectations in service quality, and limited resources (time

and funding) for staff training. Available on the RPS for INAC website, http://pwgsc.gc.ca/rps/inac/content/docs_governance-e.html.

Institute on Governance, A Compendium of Provincial Public Works Statutes, (RPS for INAC, March 1999)

A 'road map' for federal negotiators and Aboriginal counterparts in addressing the scope of public works provisions in self-government agreements. The compendium provides a synopsis of provincial statutes relevant to the following six public works functions: (1) building and safety codes; (2) water and sewage; (3) solid waste; (4) roads and bridges; (5) parks and recreation; and (6) land use planning. Attention is paid to standards and regulations, inspection procedures, appeal or redress mechanisms, and offences and penalties. Available on the RPS for INAC website, http://pwgsc.gc.ca/rps/inac/content/docs_governance-e.html.

Profiles of Successful Public Works Delivery in First Nations Communities, a forthcoming publication of Real Property Services for INAC

CAPACITY BUILDING

Capacity Assessment and Development, Technical Advisory Paper No. 3. Bureau for Development Policy, United Nations Development Program, 1998.
Available on the UNDP website, <http://magnet.undp.org/Docs/cap/CAPTECH3.htm>.

Schacter, Mark, "Capacity Building": A New Way of Doing Business for Development Assistance Organizations, Policy Brief No. 6, Institute On Governance, 2000.
Available on the Institute On Governance website, <http://www.iog.ca/publications.html>.

REGULATORY SYSTEMS

A Strategic Approach to Developing Compliance Policies, Parts I and II, Treasury Board of Canada, 1992

Regulation of the Private Provision Public Water-Related Services, CEPIS/OPS-II and Malcolm Sparrow, "The Regulatory Craft", Brookings Institute, (Washington: 2000)

EMERGENCY RESPONSE SYSTEMS

SELF ASSESSMENT TOOL

Neegan-Burnside Ltd., Compendium of Information and Training Resources and Self-Assessment Tool, (RPS for INAC, May 2001)

Intended as a tool for First Nations, this compendium is intended to serve as a source of information for First Nations interested in finding out more about public works. It includes an overview of public works functions, Aboriginal and non-Aboriginal sources of information on related training and certification, and a self-assessment tool to enable First Nations to consider their interests and capacities in taking on a larger role in public works management and delivery.

FUTURE SEARCH CONFERENCE

Weisbord, Marvin and Janoff, Sandra, Future Search: An Action Guide to Finding Common Ground in Organizations and Communities, (Berrett-Koehler, 1995)

ANNEX B
PWGSC CLIENT SERVICE UNITS FOR INAC

Regional Director
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Fax.: (418) 648-4040

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Fax.: (306) 780-7242

Regional Director
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Fax.: (902) 667-0783

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