

APPENDIX C

TO: UBCM Members
FROM: Councillor Joanne Monaghan, President
DATE: September 8, 1995
RE: **RECOGNITION OF LOCAL GOVERNMENT AS
AN ORDER OF GOVERNMENT**

ITEM #3(a)
October 4, 1995
B.C. COMMUNITIES AGENDA

1. DECISION REQUEST

For the UBCM membership to review past positions, recent events and reiterate the UBCM position on recognizing local government as an order of government.

2. BACKGROUND

The subordinate legal or constitutional status of local government has been a long-standing concern of local government in British Columbia.

In the early 1980s the UBCM adopted General Policies that expressed the desire of local government to be recognized as an equal partner in the system of Canadian governments. Most recently the drive for legal recognition was expressed in the policy paper "Local Government and the Constitutions" adopted at the 1991 Convention (Appendix A). This policy position was reconfirmed in 1992, 1993 and 1994.

3. RECENT EVENTS

Recognition can come in many forms: it can be of limited or general application; it can come from many groups (provincial, federal, other government bodies or the public); and it can be expressed in many different forms - from constitutional recognition to statements of policy.

In BC, local government has made some progress recently in terms of special recognition in provincial legislation and in bilateral agreements with Ministries that are important to review.

LEGISLATIVE OR STATUTORY FORMS OF RECOGNITION

One of the main elements of the UBCM position has been a requirement that the provincial government consult before taking any action that affects local government. Two recent statutes featured such provisions:

Local Government Grants Act, 1994

This Act, which replaced the *Revenue Sharing Act*, contained two new requirements for consultation:

- *At least annually, the minister must consult with representatives of the Union of British Columbia Municipalities regarding the administration of the grants under this Act. [s. 6 (1)]*
- *At least once every 5 years, the consultations under subsection (1) must include a review of unconditional grants under section 2. [s. 6 (2)]*

Growth Strategies Amendment Act, 1995

This Act, which sets out a legislative framework for regional districts to prepare growth strategies, also includes the ability for the provincial government to establish policies and procedures; however:

- *Guidelines under subsection (1) or (2) may only be established after consultation by the minister with representatives of the Union of British Columbia Municipalities. [s. 942.32 (3)]*

It also contained a further consultative feature for establishing lists of arbitrators:

- *Lists of persons who may act on a panel under section 942.23 (1), as an arbitrator under section 942.23 (2) or as an arbitrator under section 942.23 (3) are to be prepared by the minister in consultation with representatives of the Union of British Columbia Municipalities. [s. 942.24 (1)]*

Both of these statutes do require consultation before the provincial government can act and in that way they recognize a basic element of the local government position. They do, however, apply to UBCM as a representative organization. They also rely on a mutual understanding of the various dimensions of what constitutes good consultation (including timeliness of notice, timeframe to review, etc.). None of these new provisions remove the provincial government's prerogative to act, despite the outcome of the consultation.

Also, there has been some other recent legislation that explicitly recognized the special status of local government and its representative body, the UBCM:

- the 1994 legislation that establishes the **Public Sector Employers Council** provides that *"A representative of the Union of British Columbia Municipalities may attend meetings of the council as an observer."* [s. 3 (7)]
- amendments in 1994 to the Municipal Superannuation Act provided for a new **Municipal Pension Board** that includes *"one person nominated by the Union of British Columbia Municipalities."* [s. 23 (1)(c)]

However, **Bill 55** (1995) which deals with limiting railway assessment and utility taxation illustrates the importance of defining the appropriate time for consultation. The Act provides that Cabinet may limit railway assessment but:

The Lieutenant Governor in Council may only make a regulation under this section after the minister has consulted with representatives of the Union of British Columbia Municipalities respecting the proposed regulation. [Assessment Act s. 27.1 (3)]

A similar requirement was introduced with respect to a regulation to limit municipal tax rates:

The Lieutenant Governor in Council may only make a regulation referred to in subsection (1) (a), (b), (c) or (d) after the minister has consulted with representatives of the Union of British Columbia Municipalities respecting the proposed regulation. [Municipal Act s. 274 (4)]

One of the problems surrounding Bill 55 is that even though it provides for consultation there was no overarching requirement for the province to consult before introducing the Bill itself. In the case of Bill 55 the consultation was not related to the legislation but about how it was to be implemented - basically it addressed how the negative implications for local government might be minimized.

The *Modernizing the Municipal Act* process of removing unneeded provincial approvals, etc. from the *Municipal Act* that began in 1991, as a result of UBCM recommendations can be seen as a complement to the process of recognizing the competence of local government. At the same time as efforts were being made to simplify the Act, new sections were being added with the result that the *Municipal Act* has grown in size; from 998 sections (321 pages) in 1991 to 1036 sections (597 pages) in 1995.

BI-LATERAL AGREEMENTS WITH MINISTRIES

The two bilateral agreements with provincial Ministries show that it is possible to achieve major elements of the "recognition package" within defined spheres of activity and by agreement rather

than legislation. There are shortcomings to this approach but it has allowed local government to move forward in two important areas.

Protocol on Sharing Environmental Responsibilities, 1993

This was a significant achievement for local government because it went beyond consultation. Important elements that reflected the basic interests of local government were included in the preamble:

“The Province recognizes local government as an independent, responsible and accountable level of government.”

The preamble also recognized the distinct legislative authority of local government:

“The Provincial and local governments, having distinct legislative authority enabling them to regulate matters relating to the environment, are committed to ensuring a consistent and high level of environmental quality;”

The body of the Protocol contains many relevant features:

3. FUNDING AND RESOURCES

Any party proposing a significant change in environmental legislation, standards, policies or programs that affects another party will ensure that a full evaluation is done of the costs and revenues associated with the proposed change.

New environmental responsibilities will not be assigned to another party until issues of funding and resources have been discussed among the parties.

With respect to environmental matters where local governments are responsible, they should have adequate authority and independence to fulfill their responsibilities.

4. LIABILITY PROTECTION

Any devolution of authority or responsibility should provide local government with protection from any liability arising from the delivery of provincial programs or standards when acting in good faith and without negligence.

6. NOTIFICATION AND CONSULTATION

In the spirit of fairness, openness and equality any proposed significant change in environmental legislation, regulations, standards, policies or programs will be preceded by appropriate consultation among the affected parties, including timely notification of the proposed change.

Parties agree to use their best efforts to agree on a timetable for review and evaluation of the proposed change(s).

10. DISPUTE RESOLUTION

In the spirit of partnership and the efficient use of public resources, the parties agree to pursue alternate methods of dispute resolution wherever necessary, ensuring the rapid resolution of disagreements before negative impacts on the environment or economy occur.

This protocol continued the consultation requirements seen in other documents but added important new elements on dispute resolution and liability that have roots back to the UBCM General Policies of the early 1980s. It also dealt with the important subject of assigning new responsibilities with the requirement that the funding issue be considered before the province made a decision. It stopped short of barring the province from acting; recognizing that any bilateral agreement could not fetter the discretion of the legislature to act. Also of significance was that the Protocol was not left to languish. A mechanism to monitor its implementation and effectiveness was a special feature.

Protocol on Implementing the Memorandum of Understanding on Local Government Involvement in Treaty Negotiations, 1994

This Protocol was a follow up to the Memorandum of Understanding (MOU) signed in the spring of 1994 which said in the General Principles:

The Province recognizes that local government constitutes a unique and special government interest in the negotiation of modern day treaties.

The body of the MOU used mandatory (shall) language when it stated:

- b) *The provincial government shall consult on any item that may affect a local government and seek its advice, including but not limited to:*
- *any proposed changes to legislation that may directly or indirectly affect local government.*
 - *fiscal arrangements between the Province and local governments.*
 - *land selections in areas within or adjacent to municipalities.*
 - *the creation of new institutions of governance where local government interests are affected.*
 - *terms of settlement related to service production and delivery.*
 - *issues relating to the financing, construction and maintenance of municipal infrastructure.*
 - *issues related to land use planning, zoning, regulation, and standards and codes.*
 - *emergency services within local government service boundaries.*
 - *bylaw enforcement.*

#3(a) – Local Government as an Order of Government

The Protocol extended the commitment to local government involvement in treaty negotiations by agreeing that in each negotiation:

The TAC Representative shall be a member of the Province's Regional Caucus and present at the main table negotiations with the same privileges and responsibilities of other Regional Caucus members and at all times will follow the directions and instructions of the Province's Treaty Negotiator conducting the negotiations. This will include full access to the negotiation agenda and complete knowledge of the issues on the negotiating table.

Interestingly, both the Environment and Aboriginal agreements apply to all local governments (as opposed to UBCM as their "agent").

SUMMARY OF RECENT BC EXPERIENCE

Recent experience has shown that it is possible to implement elements of the policy positions on recognition of local government as an order of government particularly with respect to the basic principle and the requirements for consultation. Recent activities have shown that there are also good reasons for the specific legislation or agreements - these were not "window-dressing".

Experience also has shown that a selective approach to implementing the objectives of this UBCM policy can be very time-consuming compared to negotiating an overall accord on recognition. The Environment Protocol, which took significant time to conclude, has a expiry date (September 1996) and will require efforts to seek its extension. The recent experience however, provides a foundation on which to build a general approach to recognizing local government as an order of government.

EXPERIENCE ELSEWHERE

The desire for recognition is not something that uniquely interests BC local government officials. It is something that has long been a part of other government systems and it is something that is being successfully pursued elsewhere. It is something worth pursuing because it is the way government must be done in the future.

Recent Experience in Alberta

C. Richard Tindall, a leading authority on local government in Canada,¹ describes the current situation in Alberta as:

Alberta passed a new Municipal Government Act (Bill 31) in June 1994, which provides the closest thing to a power of general competence in Canadian legislation respecting municipal governments. In addition to the specific powers provided to municipalities in this and other statutes, Bill 31 states that municipalities have "natural person powers," except to the extent that they are limited by this or any other enactment. In addition, the new legislation introduces the concept of "spheres of jurisdiction." Instead of detailing specifically those matters on which a municipality is authorized to pass bylaws, Bill 31 provides broad authority within general subject areas. For example, section 7 contains a blanket power for municipalities to pass bylaws for the safety, health and welfare of people and the protection of people and property. Section 9 goes on to state that the power to pass bylaws under this division is stated in general terms to:

- (a) give broad authority to councils and to respect their right to govern municipalities in whatever way the councils consider appropriate, within the jurisdiction given to them under this or any other enactment, and*
- (b) enhance the ability of councils to respond to present and future issues in their municipalities.*

Both the concepts of "natural person powers" and "spheres of jurisdiction" were supported in the 1991 UBCM policy paper "Local Government and the Constitutions".

¹ Excerpts from C. Richard Tindall, "Ingredients in a Re-invented Municipal Government - Part 2", Municipal World, February 1995, pages 11 - 13.

Experience in Other Jurisdictions:

In relation to introducing these concepts into local government in Canada, Tindall made these observations :

How, specifically, can such a concept of municipal government be introduced for Canadian municipalities? A partial answer may lie in a different approach to provincial authorization for municipal actions. The standard approach in Canada has been for provinces to provide specific guidelines on what powers municipalities can exercise, and how they can be used. In contrast, most Western European countries give their local authorities the power of general competence – “the right to take any action on behalf of its local community, that is not specifically barred to it.”

No power of general competence can be unlimited, and the Western Europe arrangements include limits to prevent local authorities from infringing on individual rights or from carrying out functions given to other agencies of government. The real value of the power of general competence is not the specific provisions underlying it, but the concept of municipal government that it represents.

It bolsters the conception of the municipality as a general political authority which acts in its own right to foster the welfare of its inhabitants and confront whatever problem may arise in the local community. It encourages the citizen to see in the local authority not one agency among many for carrying out administrative tasks, but the corporate manifestation of the local community ... which is the first resort in the case of difficulty.

4. DISCUSSION

There are many means to achieve recognition of local government as an order of government and to define what being an order of government means in the BC context. The means of expression could be as a Preface to the Municipal Act or other provincial legislation; as a Charter or Bill of Rights enshrined in the BC Constitution Act; as additional bi-lateral Protocols with Ministries on key issues (e.g. local government's role in provincial land and resource use planning); or as an overall Protocol of Recognition – a protocol on protocols. The essential test is that the following formula be satisfied by any means of implementation:

Recognition = Respect + Rights

Recognition must include **respect** as an order of government. Respect can not be automatic, but it is time to recognize that the responsibilities of local government for public well-being are equal to those of other governments.

Recognition must also include legally defined **rights**. Local government and the citizens of the communities that make local government should have their rights to govern themselves clearly defined and, to the greatest extent possible, they should have the freedom to determine their individual community's priorities.

Recognition isn't just **respect**. You can't have recognition without also including the **rights**. And defined legal rights on their own are difficult to pursue without the mutual **respect** of other partners in the system of government.

Recognition of local government as an order of government is simply:

DEFINING THE THREE R'S: Recognition = Respect + Rights

Local governments in BC have described the key elements of the formula and are ready to make it happen.

5. RECOMMENDATIONS

- That the UBCM reiterate its fundamental objective to be formally recognized as an order of

government as set out in the policy paper "Local Governments and the Constitutions";

- That the membership reconfirm the basic elements that would constitute the legal recognition as including:
 - guaranteed access to provincial decision-making;
 - consultation on all matters affecting local government;
 - an amending formula for local government legislation;
 - joint decision-making in areas of shared responsibility;
 - negotiation of conflicts;
 - ensuring local government jurisdiction is respected by provincial ministries, Crown corporations and agencies; and
 - ensuring adequate financial resources are provide for any new delegated responsibilities.