

**CERTAINTY AND FINALITY IN RECENT FIRST NATIONS
AGREEMENTS-IN-PRINCIPLE**

Prepared for UBCM by
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September 2003

EXECUTIVE SUMMARY

The five recent Draft Agreements-in-Principle (AIPs) with First Nations are significant milestones in the B.C. treaty process. They represent a “work in progress” towards a final agreements. This report examines the question of whether the recent AIPs contemplate final agreements which will satisfy local governments’ concerns that treaty settlements be certain and final.

The recent AIPs diverge from the 1998 Nisga’a Final Agreement (“NFA”) model in two major respects: (1) the absence of a release of Aboriginal rights not otherwise modified into the Nisga’a Treaty, and (2) provision for a separate Governance Agreement which is not a Treaty or land claims agreement and which does not recognize or affirm any Aboriginal or Treaty rights. There are also provisions for the addition of future Aboriginal rights to the Final Agreement, amendment of the Final Agreement, dealing with overlapping claims and review of fiscal arrangements.

It is UBCM’s policy that treaties with First Nations seek to achieve optimal certainty and finality. UBCM’s 1998 policy paper reviewed the NFA and concluded that while retaining flexible arrangements designed for durability and adaptability in treaty implementation, it yielded a substantial degree of certainty. The recent AIPs contemplate a treaty and other agreements which provide less certainty and finality than the NFA. The legal mechanism for optimizing certainty contained in the recent AIPs is incomplete, insofar as an agreement on a back-up legal technique for releasing or otherwise foreclosing “residual” aboriginal rights has yet to be decided upon. Further, in the AIPs the parties agree to negotiate amendments to the Governance and Final Agreements with a view to incorporating undefined additional rights. These provisions allowing additions of future Aboriginal rights is a significant “re-opener” not found in the NFA.

It is recommended that the Federal and Provincial governments strive to achieve certainty and finality through inclusion of appropriate back-up techniques to the modification provisions in any Final Agreements. Specifically, all future AIPs and Final Agreements should include a technique for effectively circumscribing aboriginal rights embedded in the Final Agreements and the jurisdictions and powers set out in the Governance Agreements.

It is further recommended that UBCM seek assurances from both governments that future Agreements-in-Principle and Final Agreements entered into will include provisions reflecting, to the greatest extent possible, those characteristics of certainty and finality sought by B.C. local governments and reflected in existing UBCM policies.

1. INTRODUCTION

Draft Agreements-in-Principle have been reached in 2003 with the Snuneymuxw (February 19), Maa-Nulth (May 26), Sliammon (June 10), Tsawwassen First Nations (July 9) and Lheidli T'enneh (July 26). These Agreements-in-Principle are significant milestones in the six-stage B.C. Treaty Commission treaty process. Negotiators for the three parties have initialled these Agreements-in-Principle, and at least one has been ratified (Lheidli T'enneh). The certainty and finality provisions in the five Agreements-in-Principle are generally similar and, at the same time, are markedly different than the approaches contained in the NFA.

This report discusses whether the Agreements-in-Principle meet the UBCM objective of certainty and finality. It reviews the UBCM policies and principles with respect to certainty and finality and the background of the Agreements-in-Principle, and comments on whether the Agreements-in-Principle are in accord with these policies and principles.

2. UBCM POLICY AND PRINCIPLES ON ACHIEVING CERTAINTY

In October 1995, UBCM prepared a policy paper entitled "Achieving Certainty in Treaty Negotiations". This paper was prepared in 1995 as a submission to the federally-appointed fact finder, the Hon. A.C. Hamilton, and was endorsed by the UBCM membership. It emphasized local governments' over-arching interest in "certainty and finality" in treaty making.

"Local governments want treaty settlements to be certain and final, meaning that the final outcome of treaty negotiations will be a completion of the process of addressing outstanding First Nations claims and that, in relation to the question of aboriginal right and title, the treaties will bring finality and certainty to the greatest extent possible, recognizing that 'self-government' for aboriginals may be a dynamic, evolving form of government as it is for local governments. This will enable all citizens of British Columbia to move toward economic, social and community sustainability."

In its policy paper, UBCM listed six principles for guidance in ensuring certainty in treaties:

- 1. Treaties are intended to produce certainty, and should not be made where uncertainty remains.*
- 2. For topics where certainty is not achievable or dynamic rights are evolving, governments should consider using accords that are not constitutionally protected.*
- 3. Governments should be prepared to compensate First Nations for greater certainty and to offer less compensation where certainty is not obtained. This requires that the certainty provisions be negotiated prior to*

- settlement of other issues, so that the total settlement reflects the degree of certainty provided by the treaty.*
4. *Treaty settlements should contemplate compensation for rights over an extended period of time, so that the parties can evaluate treaty implementation and how post-treaty relationships will develop before compensation is rendered and settlement lands are granted.*
 5. *Clarity of language throughout the treaty is an excellent (and relatively inexpensive) means of obtaining certainty and should be pursued at every opportunity for the benefit of all parties.*
 6. *Treaties must allow for dispute resolution provisions to address certainty issues that may arise after settlement legislation is enacted.”*

The Hon. A.C. Hamilton’s report, *Canada and Aboriginal People: A New Partnership*, was released in September 1995 and it contained recommendations to the federal Minister to the effect that treaties should no longer require a surrender or extinguishment of aboriginal rights.

3. OPTIONAL MODELS FOR ACHIEVING CERTAINTY

“Certain” is defined as “determined, fixed, not variable, definite, exact, sure, (and) reliable”. In the Federal Government Comprehensive Land Claims Policy (1986) the word “certainty” is used to mean an end to land title questions, a final determination of which governmental authority or authorities can regulate activities, a determination of which laws apply to a given area and an assurance that negotiated and agreed upon matters will not re-emerge for further agreement at a later date.

Traditional treaty models sought to obtain certainty by requiring the “cede, release and surrender” of undefined aboriginal interests in exchange for defined treaty “benefits”. These reflected the previous federal policy of “extinguishment” of aboriginal rights and interests through treaties. The use of the traditional model was called increasingly into question when it was recognized that the extinguishment of aboriginal rights was inconsistent with their recognition and protection in Section 35 of the *Constitution Act, 1982*.

Options other than “extinguishment” were considered and rejected by the Hon. A.C. Hamilton in his report to the Federal Minister of Indian Affairs and Northern Development. These included:

- (1) The exhaustive definition of aboriginal land and resource rights under Section 35 of the *Constitution Act, 1992*,
- (2) A recognition of aboriginal rights and an agreement not to exercise them,
- (3) A progressive or “rolling” surrender, and
- (4) A partial surrender.

These and other models were discussed in the 1995 UBCM policy paper, "Achieving Certainty in Treaty Negotiations", in which it was concluded that the surrender and partial surrender models were preferable for optimal certainty and finality.

The NFA does not employ the traditional extinguishment and surrender model. Instead, it utilizes a hybrid approach involving the recognition of continuing Nisga'a Section 35 aboriginal rights as "modified" and incorporated in the NFA, and a "back up" release by the Nisga'a of all other "residual" Section 35 aboriginal rights. Although the language of "cede, release and surrender" and "extinguishment" is absent from the NFA, its express recognition of "modified" Section 35 aboriginal rights, and the release of others, does resemble the partial surrender model. The modification of aboriginal rights relating to matters set out in the Final Agreement in exchange for Treaty benefits approach, is also provided for in the recent Agreements-in-Principle.

The 1998 UBCM policy paper, "Certainty and Finality in the Nisga'a Final Agreement" analysed those parts of the NFA which were aimed at achieving certainty and finality. The policy paper concluded that the NFA terms for modification, releases, indemnities and amendments, combined with the dispute resolution process, provided a comprehensive set of defined arrangements between the Parties and yielded a substantial, although incomplete, degree of certainty and finality.

The UBCM policy paper further provided that, subject to amendments by future agreement and those specific instances where modifications and other "fine tuning" during the implementation of the NFA are contemplated, the NFA provides a substantial degree of certainty in the sense that that term is recognized in the 1986 Federal Land Claims Policy. The NFA is, of course, not "certain" in the narrow sense of being fixed and invariable, because it contains flexible arrangements designed for durability and adaptability as circumstances may require.

4. THE RECENT AGREEMENTS-IN-PRINCIPLE

As in the case of the 1996 Nisga'a Agreement-in-Principle, in the recent Agreements-in-Principle there are numerous provisions in which there is considerable scope remaining for negotiation and agreement. They are an important part of the "work in progress" of Treaty negotiations representing stage four of the six stage process. Of course, an Agreement-in-Principle is not a Final Agreement and is intended merely to contain a framework upon which a Final Agreement, Governance Agreement and other arrangements may be concluded. This statement applies particularly to the issues of paramount concern to local government and the focus of the present report on certainty and finality.

Since the NFA, Provincial government Aboriginal policy has evolved. The current Provincial government is committed to reaching Agreements with First Nations, by incremental steps if necessary through, for example, interim Agreements on resource management, education and social issues. A mandatory "once and for all"

comprehensive final Treaty making objective is no longer reflected in Provincial government policy. While the Provincial government continues to seek certainty and finality in land and resources matters, it is amenable to flexibility and elements of open-endedness with respect Aboriginal governance, fiscal and taxation issues.

Accordingly, the recent Agreements-in-Principle reflect an approach which differs from that employed in the NFA, in two major aspects:

- (1) the current lack of a back-up technique to the modification of rights model, which reflects the lack of Provincial government insistence upon a general release of non-treaty and future Aboriginal rights and title; and
- (2) the inclusion of an additional Governance Agreement which is not a Treaty, does not recognize or affirm any aboriginal or Treaty rights, and which recognizes that the scope of Aboriginal self government is not fixed and should be remain amenable to change outside of a constitutional framework.

The NFA modifies Nisga'a Aboriginal title and rights into those set out in the NFA and releases all other aboriginal rights outside the NFA to Canada. This legal release is the "back-up technique" to the modification of rights in the NFA. The defining and modification of Section 35 rights and the release to Canada of undefined Section 35 rights are the keystones for substantial certainty and finality in the NFA.

Unlike the NFA, which provides for that release, the recent Agreements-in-Principle contemplate the modification of aboriginal rights only with respect to matters contained in the Final Agreement and there is no "back-up" release of rights which are not so modified. To the contrary, the parties agree to negotiate amendments to the Governance and Final Agreements with a view to incorporating undefined additional rights. The parties agree to "work together" to identify an acceptable back-up legal technique to achieve the certainty which the Parties seek.

This "open ended" feature of the recent Agreements-in-Principle, is reflected in the Lheidli T'enneh Agreement-in Principle, General Provisions, paragraphs 36, 40 and 41 which provide:

"36. The Final Agreement will modify Lheidli T'enneh's aboriginal Land Rights, and other aboriginal rights that relate to matters set out in the Final Agreement, into the rights set out in the Final Agreement."

....

"40. If Lheidli T'enneh wish to exercise a right that is not addressed in the Lheidli T'enneh Governance Agreement or modified into a right set out in a Final Agreement, the Parties may discuss the matter and may agree to enter into negotiations on amending the Lheidli T'enneh Governance Agreement or the Final Agreement to incorporate the proposed right."

“41. Between this Agreement and the Final Agreement, the Parties will work together to identify an acceptable back-up legal technique to the modification techniques to achieve the certainty which the Parties seek.”

(See also Snuneymuxw, General Provisions, paragraphs 41, 47, 48; Maa-nulth, Chapter 2, paragraphs 35, 42, 43; Sliammon, Chapter 2, paragraphs 38, 44, 45; Tsawwassen, Chapter 2, paragraphs 43, 48, 49).

In more succinct terms, the Maa-nulth Agreement-in-Principle, Chapter 2, paragraph 38, explicitly states:

“There is an outstanding issue among the Parties as to full and final settlement of Aboriginal Self-Government Land Rights that are not related to matters set out in the Final Agreement, which the Parties will resolve in the Final Agreement.”

(See also Sliammon, Chapter 2, paragraph 35 and Tsawwassen, Chapter 2, paragraph 40).

The legal mechanism for certainty negotiated in the recent Agreements-in-Principle is incomplete, insofar as an agreement on a back-up legal technique to supplement the modification of rights technique, is yet to be reached.

5. GOVERNANCE AGREEMENTS

Whereas the NFA incorporated the Nisga'a governance provisions, and accordingly those provisions become constitutionally entrenched by operation of s. 35 of the *Constitution Act*, the recent Agreements-in-Principle diverge from this approach by providing for a Governance Agreement outside of a constitutionally protected Final Agreement. The need for adaptability in response to the evolving recognition of aboriginal self government was considered to be best afforded by an extra-constitutional agreement which is not subject to onerous constitutional amending requirements.

Whereas the Final Agreement contemplated in the recent Agreement-in-Principle will be a treaty and land claims agreement within the meaning of sections 25 and 35 of the *Constitution Act, 1982*, the Governance Agreement will not become part of the Constitution. For example,

“The Snuneymuxw Governance Agreement will not be part of the Final Agreement, will not be a treaty or land claims agreement and will not recognize or affirm any aboriginal or treaty rights.” (Snuneymuxw, Governance, paragraph 7)

The resort to a constitutionally protected Final Agreement, which deals with the major issues of land and resources, juxtaposed with a Governance Agreement, reflects the

pragmatic recognition of the desirability of optimizing certainty, and the fact that a consensus on the nature and content of the Aboriginal right to self government has not been reached by all parties. As to the latter, it appears that the Governance Agreements will deal with local government-type responsibilities, such as education, child and family services, child adoption, culture, First Nation citizenship and zoning and land use planning. (Maa-nulth, Chapter 12, paragraph 29).

To date, there is only one draft Governance Agreement-in-Principle (Snuneymuxw). The other recent Agreements-in-Principle only refer in principle to a Governance Agreement or Self Government Agreement. Some provide for review of the Governance Agreement ten years after the Effective Date of the Final Agreement and subsequent reviews at the request of a Party. (Maa-nulth, Chapter 11, paragraphs 8, 9; Sliammon, Chapter 12, paragraphs 3, 4). Snuneymuxw provides:

“Snuneymuxw asserts that it has an inherent right to self-government, and the Government of Canada will negotiate self-government in the Final Agreement and the Governance Agreement based on its policy that the inherent right to self-government is an existing aboriginal right within section 35 of the *Constitution Act, 1982*.” (Preamble, Paragraph K; Governance Agreement, Preamble, paragraph F.)

(See also Sliammon, Preamble, page 4; Tsawwassen, Chapter 13, paragraph 1; Lheidli T'enneh, Preamble, paragraph L).

The Governance Agreement review provisions contemplated in several of the recent Agreements-in-Principle appear to be “re-openers”, that is, provisions that will permit future amendments to the Governance Agreements.

To the extent that the lack of finality in the non-constitutional Governance Agreements may be considered necessary to ensure flexibility and to permit local Aboriginal governments to evolve, the Governance Agreements are consistent with the UBCM principle, that “for topics where certainty is not achievable or dynamic rights are evolving, governments should consider using accords that are not constitutionally protected”.

6. OTHER UNCERTAINTY AND RE-OPENERS

6.1 Overlaps and the Rights of Other Aboriginal People

As was the case with the 1996 Nisga'a Agreement-in-Principle and the NFA, there remains uncertainty on the issue of resolving overlapping claims by other First Nations. The overlap issue arises from the fact that several B.C. First Nations' traditional territories are subject to title and rights claims by other First Nations. Canada and B.C. continue to seek to ensure that the Final Agreement will finally settle Aboriginal title and rights claims to the treaty lands and that claims by other First Nations to the treaty lands will not emerge following the Final Agreement. Maa-nulth is the only recent Agreement-in-Principle which refers to resolution of overlapping claims:

“Overlapping claims with other First Nations with respect to Maa-nulth First Nation Lands referred to in paragraph 1 should be resolved prior to the Final Agreement.” (Chapter 3, paragraph 17).

Other Agreements-in-Principle refer to overlaps only tangentially in connection with the addition of lands to First Nation Lands. For example, Maa-nulth provides:

“Any addition of lands to Maa-nulth First Nation Lands will:

...

- c. be in areas free from overlap with another First Nation unless that First Nation consents;”

(See also Snuneymuxw, Lands, paragraph 14; Sliammon, Chapter 3, paragraph 25; Tsawwassen, Chapter 3, paragraph 25; Lheidli T'enneh, Lands, paragraph 17).

As in the NFA, the proposed Final Agreements and the Governance Agreements will not affect the Aboriginal or treaty rights of other Aboriginal people. If a court determines that a provision of the Final Agreement or Governance Agreement adversely affects the aboriginal or treaty rights of another Aboriginal people, that provision will not operate to the extent of the adverse effect and the Parties will use best efforts to remedy or replace the provision. Further, the Final Agreement will contain provisions for negotiating remedies where the current treaty rights are adversely affected by a future treaty with another Aboriginal people.

(Snuneymuxw, General Provisions, paragraphs 10 - 12; Maa-nulth, Chapter 2, paragraphs 44 - 46; Sliammon, Chapter 2, paragraphs 46 - 48; Tsawwassen, Chapter 2, paragraphs 51 - 53; Lheidli T'enneh, General Provisions, paragraphs 47 - 49).

6.2 Amendments

As is the case of the NFA, the recent Agreements-in-Principle also provide for future amendments to a completed Final Agreement. A Final Agreement may be amended with the agreement of the parties and any one or more of the parties may propose an amendment. Before proceeding with an amendment, the parties may attempt to find other means of satisfying the interests of the proposer. A Final Agreement will contain a process for ratifying amendments to the Final Agreement. By their nature amending provisions do not necessarily provide for certainty.

(Snuneymuxw, General Provisions, paragraphs 52 - 56; Maa-nulth, Chapter 2, paragraphs 47 - 51; Sliammon, Chapter 2, paragraphs 49 - 53; Tsawwassen, Chapter 19, paragraphs 1 - 5; Lheidli T'enneh, General Provisions, paragraphs 50 - 62).

6.3 Review of Other Agreements

6.3.1 Fiscal Agreements. The recent Agreements-in-Principle provide that every five years, or other period as agreed, the parties will negotiate and attempt to reach agreement on fiscal arrangements as to how funding will be provide to the First Nation. For Snuneymuxw, the fiscal Agreements will not be part of the Final Agreement and will not be a treaty or land claims agreement. In other cases, prior to the Final Agreement, the parties will determine the placement of the fiscal relations provisions in either the Final Agreement, the Self-Government Agreement or in related Agreements. Uncertainty and lack of finality is inherent in these flexible fiscal arrangements.

(Snuneymuxw Governance, Fiscal Relations, paragraphs 1, 11; Maa-nulth, Chapter 16, paragraphs 1, 17; Sliammon, Chapter 16, paragraphs 1, 2, 20; Tsawwassen, Chapter 15, paragraphs 3, 5, 6; Lheidli T'enneh, Fiscal Relations, paragraphs 1, 5).

6.3.2 Taxation Agreements. Some Agreements-in-Principle provide for a Taxation Treatment Agreement or Taxation Agreement which is expressly provided to be other than a treaty or land claims agreement. For example, in Lheidli T'enneh, the contemplated Taxation Agreement will not form part of the Final Agreement. In other Agreements-in Principle, the parties will negotiate the placement of taxation provisions in the Final Agreement, the Governance Agreement or a separate agreement. Prior to a Final Agreement, the parties may review other approaches to taxation or fiscal relations for general use in negotiations with First Nations in British Columbia to determine whether any of these approaches are appropriate for use in the Final Agreement or related Agreements.

(Snuneymuxw, Taxation, paragraphs 7, 8, 10; Maa-nulth, Chapter 17, paragraphs 1, 10 - 11; Sliammon, chapter 17, paragraphs 1, 17, 19; Tsawwassen, Chapter 16, paragraphs 10, 11; Lheidli T'enneh, Taxation, paragraphs 1, 17, 18).

There is no provision contemplated for review of the Taxation Agreement. If it is a non-constitutionally enshrined agreement, however, it would appear that it could be

amended by agreement of the parties according to common law contract principles.

6.4 Addition of Future Aboriginal Rights

The provision for adding future Aboriginal rights to the Final Agreement, following negotiation between the parties, is a major re-opener not found in the NFA. For example, Snuneymuxw provides:

“If Snuneymuxw wish to exercise a right that is not addressed in the Governance Agreement or modified into a right set out in the Final Agreement, the Parties may discuss the matter and may agree to enter into negotiations on amending the Governance Agreement or the Final Agreement to incorporate the proposed right.”

(Snuneymuxw, General Provisions, paragraph 47; Maa-nulth, Chapter 2, paragraph 42; Sliammon, Chapter 2, paragraph 44; Tsawwassen, Chapter 2, paragraph 48; Lheidli T'enneh, General Provisions, 40).

The above provision, however, is accompanied by the First Nation's promise not to assert or exercise any Aboriginal rights other than as set out in the Governance Agreement or modified into a right set out in the Final Agreement. In this context, the provision for addition of future Aboriginal rights following negotiations may be regarded as contributing to certainty and - apparently in B.C.'s view (but not in Canada's view) - obviating any requirement for a release of future Aboriginal rights. Snuneymuxw provides:

“The Governance Agreement will set out the agreement of Snuneymuxw not to assert or exercise any rights other than as set out in the Governance Agreement, for as long as the agreement is in force. This is not intended to affect the exercise of rights under the Final Agreement.”

(Snuneymuxw, General Provisions, paragraph 46; Maa-nulth, Chapter 2, paragraph 41; Sliammon, Chapter 2, paragraph 43; Tsawwassen, Chapter 2, paragraph 47; Lheidli T'enneh, General provisions, paragraph 39).

7. CONCLUSIONS

UBCM and local government interests in certainty and finality might yet be satisfied by the Final Agreements and related Governance Agreements, but the recent Agreements-in-Principle do not portend agreements and other arrangements which reflect a degree of finality and certainty that is fully responsive to UBCM's existing policies and guidelines.

The Governance Agreements in particular are a major potential source of uncertainty, because it is contemplated that they can be reviewed and amended without the formality of constitutional amendments.

The jurisdictional and operational interface between local and aboriginal governments, can only evolve within the framework of the Final Agreements and other arrangements contemplated in these recent Agreements-in-Principle, and accordingly optimal finality and certainty should remain a key objective.

8. RECOMMENDATIONS

It is recommended that the Federal and Provincial governments strive to achieve certainty and finality through inclusion of appropriate back-up techniques to the modification provisions in any Final Agreements. Specifically, all future AIPs and Final Agreements should include a technique for effectively circumscribing aboriginal rights embedded in the Final Agreements and the jurisdictions and powers set out in the Governance Agreements.

It is further recommended that UBCM seek assurances from both governments that future Agreements-in-Principle and Final Agreements entered into will include provisions reflecting, to the greatest extent possible, those characteristics of certainty and finality sought by B.C. local governments and reflected in existing UBCM policies.

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