CERTAINTY AND FINALITY IN THE NISGA’A FINAL AGREEMENT

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A. INTRODUCTION

UBCM has been active in representing the general interests of local government in the negotiation of the Nisga’a Final Agreement (“NFA”) and other B.C. First Nations treaties. One of the primary concerns of local government is that treaty negotiations lead to agreements which are certain and final.

The Nisga’a First Nation and the Federal and Provincial Governments initialed the NFA on August 4, 1998. This paper discusses whether the NFA meets the UBCM objective of certainty and finality. We review the background of the NFA, the UBCM policies and principles with respect to certainty and finality, and comment on whether the NFA is in accord with those policies and principles.

B. 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 as a submission to the federally-appointed Fact Finder, the Hon. A.C. Hamilton, in 1995 and endorsed by the UBCM membership. It emphasized local governments’ over-arching interest in “certainty and finality” in treaty negotiations:

“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 Both of Singleton Urquhart Scott, Barristers & Solicitors, Vancouver, B.C.
“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. UBCM reviewed this report and recommended that the federal Minister not accept the report recommendations (particularly in view of on-going treaty negotiations in B.C.) until such time as their implications were fully resolved.

In July 1996, UBCM completed the paper entitled “UBCM Review of Nisga’a Agreement in Principle”. In it, UBCM restated its concern that an ultimate Treaty provide certainty and finality. It concluded that the Agreement in Principle did not provide satisfactory assurances as to how those objectives would be realized. The Agreement in Principle contemplated the possibility of re-opening a Final Agreement in certain circumstances and was silent with respect to uncertainty arising out of overlapping aboriginal claims to Treaty lands.

C. **OPTIONAL MODELS FOR ACHIEVING CERTAINTY**

A typical dictionary definition of “certain” is: “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 authority or authorities could regulate activities, a determination
of which laws apply to a given area, and an assurance that negotiated and agreed upon matters would not re-emerge for further agreement at a later date.

Traditional treaty models sought to obtain certainty by providing for a “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 enshrined in Section 35 of the Constitution Act, 1982.

Options other than “extinguishment” were considered and rejected by the Federal Fact Finder in his 1995 report to the Federal Minister of Indian Affairs and Northern Development, entitled Canada and Aboriginal People: A New Partnership. 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 on Achieving Certainty in Treaty Negotiations and it was concluded that the surrender and partial surrender models were preferable for obtaining the necessary degree of certainty and finality.

The NFA does not employ the traditional extinguishment and surrender model. Instead, it employs a hybrid involving the recognition of continuing Nisga’a Section 35 aboriginal rights as “modified” in the NFA, and a corresponding release by the Nisga’a of all other 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 recommended by UBCM. What follows is a brief overview of those parts of the NFA which were drafted with a view to achieving certainty and finality.

D. NISGA’A FINAL AGREEMENT - PROVISIONS REGARDING CERTAINTY

The NFA contains sections intended to achieve certainty and finality. It does so by describing matters of substance and of process. The NFA is intended as a “living
document” and, to that extent, does not purport to crystallize the positions of the Parties, once and for all. It contains provisions for amendments and modifications, as well as a comprehensive dispute resolution protocol.

The following pages (pp. 4 - 7) provide summaries of the NFA provisions pertaining to, or affecting, certainty and finality.

(1) **Preamble and Definitions, Chapter 1**

The NFA sets out Nisga’a section 35 rights inside and outside of Nisga’a Lands. The parties intend their relationship to be based on a new approach to mutual recognition and sharing and to achieve this by agreeing on an exhaustive list of rights, rather than extinguishment of rights.

The parties intend that the Agreement will provide certainty with respect to Nisga’a ownership and use of lands and resources and the relationship of federal, provincial and Nisga’a laws within the Nass Area.

“Nisga’a Lands” means those lands identified in paragraphs 1 and 2 of the Lands Chapter. “Nisga’a Nation” means the collectivity of those aboriginal people who share the language, culture, and laws of the Nisga’a Indians of the Nass Area, and their descendants.

(2) **General Provisions, Chapter 2**

Judicial Determinations in Respect of Validity. If a superior court finally determines that any provision of the Agreement is invalid or unenforceable, the parties will make best efforts to amend the Agreement to remedy or replace the provision and the provision will be severable from the Agreement (para. 19).

Full and Final Settlement. The Agreement constitutes the full and final settlement in respect of the aboriginal rights, including aboriginal title, in Canada of the Nisga’a Nation (para. 22).

Nisga’a Section 35 Rights. The Agreement exhaustively sets out Nisga’a section 35 rights, the geographic extent of those rights and the limitations to those rights. Those rights are: (a) the aboriginal rights, as modified by the Agreement, of the Nisga’a Nation to Nisga’a Lands and other lands and resources in Canada; (b) the jurisdiction, authorities and rights of Nisga’a Government; and (c) the other Nisga’a section 35 rights (para. 23).

Modification. The aboriginal rights of the Nisga’a Nation, anywhere in Canada before the effective date, are modified and continue as modified as set out in the Agreement (Para. 24). The aboriginal title of the Nisga’a is modified and continues as the estate in fee simple to areas identified in the Agreement as Nisga’a Lands or Nisga’a Fee Simple Lands (para. 25).
Release. If the Nisga’a Nation has an aboriginal right other than or different in attributes or geographic extent from the Nisga’a section 35 rights as set out in the Agreement, the Nisga’a Nation releases that aboriginal right to Canada to the extent of the difference (para. 26). The Nisga’a Nation releases Canada, British Columbia and all other persons from all claims known or unknown relating to any act before the effective date that may have affected or infringed any aboriginal rights in Canada of the Nisga’a Nation (para. 27).

Indemnities. The Nisga’a Nation will indemnify Canada or British Columbia from costs suffered in connection with any claim relating to any act before the effective date that may have affected or infringed any aboriginal rights in Canada of the Nisga’a Nation (para. 30). The Nisga’a Nation will indemnify the other parties from costs suffered in connection with any claims relating to the existence of an aboriginal right in Canada of the Nisga’a Nation other than the Nisga’a section 35 rights set out in the Agreement (para. 31).

Other Aboriginal People. Nothing in the Agreement affects any rights under section 35 for any aboriginal people other than the Nisga’a Nation (para. 33). If a superior court finally determines that any other aboriginal people has section 35 rights that are adversely affected by a provision of the Agreement, (a) the provision will operate to the extent that it does not adversely affect those rights, and (b) if the provision cannot so operate, the parties will make best efforts to amend the Agreement to remedy or replace the provision (para. 34).

If Canada or British Columbia enters into a treaty with another aboriginal people and that treaty adversely affects Nisga’a section 35 rights in the Agreement, (a) the other parties will provide the Nisga’a with additional or replacement rights or other appropriate remedies, (b) at the request of the Nisga’a, the parties will negotiate and attempt to reach agreement on the additional or replacement rights, and (c) if the parties cannot reach agreement, the matter will be determined in accordance with the dispute resolution process in Chapter 19 of the Agreement (para. 35).

Amendment Provisions. Generally speaking, all amendments to the Agreement require the consent of all parties (para. 36). When the Agreement provides that the parties will negotiate and attempt to reach agreement relating to an amendment and that if no agreement, then the matter will go to final arbitration, and the parties have negotiated an agreement or the matter is determined by arbitration, the amendment date will be the date of the agreement or the effective date of the arbitrator’s decision (para. 43).

Obligation to Negotiate. Whenever the parties are obliged to negotiate and attempt to reach agreement, all parties will participate (para. 49).

Interpretation. There is no presumption that doubtful expressions in the Agreement are to be resolved in favour of any particular party (para. 57).
(3) Lands, Chapter 3

General. Nisga’a Lands consist of all lands within boundaries in Appendix A and Appendix B (para. 1).

Additions to Nisga’a Lands. If the Nisga’a Nation, a Nisga’a Village, a Nisga’a corporation or a Nisga’a citizen owns land that is contiguous with Nisga’a Lands, with the consent of the owner, and Canada and British Columbia, this land may be included as part of Nisga’a Lands (para. 11).

(4) Access, Chapter 6

Nisga’a Rights on Crown Lands. Nisga’a citizens will have reasonable access to Crown lands outside of Nisga’a Lands to allow for the exercise of Nisga’a interests set out in the Agreement, and for the normal use and enjoyment of Nisga’a interests set out in the Agreement, provided that this access does not interfere with other authorized uses or the ability of the Crown to authorize uses or dispose of Crown land (para. 23).

(5) Wildlife and Migratory Birds, Chapter 9

Nisga’a Wildlife Entitlements. The Nisga’a have a right to harvest wildlife throughout the Nass Wildlife Area which must be in a manner that does not interfere with other authorized uses of Crown Land (para 1 & 2). The Crown may authorize uses of or dispose of Crown land, provided that the Crown ensures that the authorized uses or dispositions do not deny the Nisga’a the reasonable opportunity to harvest wildlife under the Agreement or reduce the Nisga’a wildlife allocations (para. 3).

Nass Wildlife Area. British Columbia and the Nisga’a may agree to alter the boundaries of the Nass Wildlife Area from time to time. This reflects a recognition of the fact that wildlife populations move over time and that management approaches could evolve over time (para. 13).

Review of Nisga’a Wildlife Allocations. Within 15 years of the effective date of the treaty, British Columbia and the Nisga’a will review the Nisga’a wildlife allocation (para. 30). This makes it possible to negotiate entitlements to other species in the future.

(6) Administration of Justice, Chapter 12

Review. The parties will review this chapter no later than 10 years after the effective date and may amend this chapter if all parties agree (para. 50).
(7) **Fiscal Relations, Chapter 15**

**Fiscal Financing Agreements.** Every five years, or at other intervals, the parties will negotiate and attempt to reach agreement on a fiscal financing agreement. This agreement, which is not part of the NFA, provides details on funding that will be provided to the Nisga’a to enable the agreed-upon public programs and services to Nisga’a citizens and, where applicable, non-Nisga’a occupants of Nisga’a Lands, at levels reasonably comparable to those generally prevailing in northwest British Columbia (para. 3).

**Own Source Revenue Agreements.** Every 10 years the parties will negotiate and attempt to reach agreement on an own source revenue agreement. This agreement, also not part of the NFA, will determine the Nisga’a own source revenue capacity and the manner and extent to which that capacity will be taken into account under fiscal financing agreements (para. 14).

(8) **Taxation, Chapter 16**

**Other Taxation and Tax Administration Agreements.** From time to time, Canada or British Columbia may negotiate with the Nisga’a and attempt to reach agreement on the extent, if any, to which Nisga’a government will be provided with direct taxation authority over persons other than Nisga’a citizens on Nisga’a Lands and the coordination of Nisga’a government taxation, of any person, with existing federal or provincial tax systems (para. 3).

**Nisga’a Lands.** If, within 20 years after the effective date, Canada or British Columbia enact legislation providing tax exemptions in another land claims agreement, upon Nisga’a request, the other parties will negotiate and attempt to reach agreement to provide a similar tax exemption for the Nisga’a (para. 17).

(9) **Dispute Resolution, Chapter 19**

The NFA provides for a comprehensive and binding dispute resolution process to be resorted to only by the three parties to the NFA.

E. **HOW DOES THE NISGA’A FINAL AGREEMENT MEASURE UP TO UBCM POLICIES AND PRINCIPLES ON CERTAINTY?**

In our view, the NFA substantially accords with the UBCM policies and principles regarding certainty. Its provisions for amendment and modification are designed to respond to changing circumstances and, when combined with the dispute resolution provisions, provide a relatively high degree of certainty.
However, there is no doubt that in the implementation of a treaty arising out of the NFA, there may be changes to its terms by agreement or arising out of the dispute resolution processes set out in the NFA. This is, in our view, inevitable having regard to the evolutionary nature of aboriginal self-government, the potential for future overlapping aboriginal claims, fiscal implementation of inter-governmental arrangements in changing circumstances, and future unforeseen circumstances, the precise nature of which could not be fully and comprehensively articulated at the time of drafting.

The defining of Section 35 rights and the release to Canada of undefined Section 35 rights are the keystones for the certainty in the NFA. In our view, implementation uncertainties which are fully contemplated by the NFA are inherent and necessary to a flexible implementation of the terms and concepts underlying the NFA. It is in this sense that there remain some aspects of uncertainty and a lack of finality in the NFA. Having regard to the six principles contained in the 1995 UBCM paper entitled “Achieving Certainty in Treaty Negotiations”, the following specific observations can be made:

The NFA does not comply with the UBCM preferred model of surrender or partial surrender because the NFA does not purport to extinguish aboriginal rights. However, the Nisga’a do release to Canada undefined Section 35 rights not otherwise expressly set out in the NFA. The six principles to guide certainty decisions in treaty negotiations, set out in the 1995 UBCM policy paper, are substantially met.

(1) **No treaties where uncertainty remains.** As a legal instrument, the NFA provides a comprehensive set of defined arrangements between the Parties. In this sense it achieves a substantial degree of certainty. However, it contemplates the possibility of amendments and further agreement in defined circumstances. The NFA’s exhaustive dispute resolution protocol complements its goals in providing for a high degree of certainty as well as necessary implementational flexibility in the context of the evolving relationship between the Parties. To the extent that the terms and the results of the implementation of the NFA are not fixed and unalterable, there is inevitable uncertainty and a lack of finality inherent in the NFA.

(2) **For uncertain or evolving topics, use side accords.** The NFA does provide for non-treaty agreements, particularly in the fiscal relations, taxation and fisheries chapters.

(3) **Less compensation for less certainty.** It is not known whether this principle has been applied in the NFA.

(4) **Compensation over an extended period of time.** The cash settlement benefit of $190 million will be paid over a period of 15 years. (Chapter 14, para. 1). On the
other hand, settlement lands in fee simple are transferred to the Nisga’a Nation on the effective date of the NFA. (Chapter 3, paras. 1, 2 and 3).

(5) **Clarity of language.** The NFA is written in clear language.

(6) **Dispute resolution provisions.** Chapter 19 and Appendix M contain a comprehensive and graduated dispute resolution process from negotiation through mediation and arbitration to judicial determination.

F. **POSSIBLE AMENDMENTS, “RE-OPENERS” OR OTHER CHANGES**

Notwithstanding that the NFA generally accords with the UBCM principles to guide certainty decisions in treaty negotiations, nevertheless the NFA is not certain and final in the sense that the rights and responsibilities of the parties are forever fixed. The NFA contemplates the possibility of amendments, re-openers, the addition of contiguous lands owned by Nisga’a entities and citizens, compensation for future overlapping aboriginal land title claims, and inherent uncertainties in settling all interjurisdictional questions arising out of aboriginal self-government. UBCM forecasted uncertainties of this nature in its paper entitled “UBCM Review of Nisga’a Agreement in Principle”. The following are areas in which changes can occur:

(1) **Amendments**

Chapter 2, paras. 36 and 43 and several other provisions anticipate future amendments to the NFA as recommended by the Hon. A.C. Hamilton in his 1995 report. Some amendments could be significant, such as rights of access or boundary changes anticipated in the case of overlaps.

On one hand, this process contributes to certainty and durability of the Agreement, since there are bound to be future disputes and changing circumstances. On the other hand, the amendment provisions illustrate that there can be no absolute certainty or finality in any written agreement. On balance, in our view the amendment provisions are unobjectionable and do contribute to durability and ownership of the Agreement.

Interested local governments may wish to maintain a “watching brief” on the amendments to agreements affecting their areas of interest. Since they are not parties to the agreements, however, they will have little input into the amending process, other than through continuing Treaty Advisory Committees (“TAC”). Accordingly it may be prudent to continue the TAC structure after signing of the treaties in order to facilitate local government review of treaty implementation and post-treaty relations.
(2) **Re-openers**

The UBCM AIP paper referred to “Re-openers” such as the fiscal financing agreements in Chapter 15, para. 3 and the own source revenue agreements in Chapter 15, para. 14. The NFA stipulates that these agreements are not treaty or land claims agreements. In other words, these agreements appear to be side accords as recommended in the UBCM Principles.

The Tax Administration Agreements in Chapter 16, para. 3 and the Taxation Exemption Provision in Chapter 16, para. 17 do appear to anticipate amendments to the NFA relating to taxation. Paragraph 17 allows the Nisga’a to negotiate and attempt to reach agreement with the other Parties to provide a tax exemption for the Nisga’a if, within 20 years after the effective date of the treaty, Canada or B.C. enacts legislation giving effect to a northwest B.C. land claims agreement containing a First Nations tax exemption. This “re-opener” is of particular concern since the tax exemption phase-out has been negotiated as an integral part of the Final Agreement package. Moreover, if these provisions are used in other treaties, local government may wish to keep advised of such amendments. There appears to be a lack of finality on these topics.

Other topics providing for limited re-opening remain in the NFA, including the administration of justice review after ten years (Chapter 12, para. 50); the review of Nisga’a Wildlife Allocation (Chapter 9, para. 30); and the alteration of Nass Wildlife Area boundaries (Chapter 9, para. 13. There appears to be a lack of finality on these topics.

(3) **Land Quanta**

The Lands Chapter, para. 11, provides for the addition to Nisga’a Lands of contiguous lands owned in fee simple by Nisga’a entities and citizens. The provision requires the consent of the landowner and the Federal and Provincial Governments. There appears to be a lack of finality on this topic.

It is not known whether this provision would have any significant impact on local government in the Nass Region. If the provision were adapted in other treaties in urban areas, however, there could be a concern by local governments seeking certainty as to identification of treaty lands.

(4) **Jurisdictional Questions**

The NFA provides details of Nisga’a Government in Chapter 11. It remains to be seen what structures, such as Nisga’a Lisims (central) Government and Nisga’a Village Governments (para. 2), Nisga’a Constitution (paras. 9 - 11), consultation
with non-Nisga’a residents ( paras. 19 - 23), Nisga’a Laws ( paras. 34 - 129) and Urban Locals ( para. 13), will emerge in implementation. There will be requirements for extensive local legislation and administration of Nisga’a Laws. It remains undefined exactly how the government structures will operate and how they will relate with other local governments.

The NFA provisions relating to local and regional government relationships are left undetailed, due to the relatively simple nature of the Regional District - First Nation relationship in this case, (Chapter 18). In some areas of the Province where local government - First Nation relationships are more complex, there will probably be a need for more detailed provisions in this respect.

(5) Overlapping Claims

The AIP referred to overlapping claims. Recent court proceedings and press reports indicate that there are also overlap issues involving other First Nations’ claims to Nisga’a Lands.

The NFA deals with the overlap issue in Chapter 2, paras. 33, 34 and 35. Para. 33 states that the NFA does not affect the section 35 rights of other aboriginal peoples. Paragraphs 34 and 35 provide that if there are overlaps as a result of court decisions or other treaties, the applicable provisions of the NFA cannot adversely affect the lands of other aboriginal peoples. The parties to the NFA will negotiate to remedy or replace the ineffective provisions and amend the NFA using the dispute resolution process in Chapter 19 if necessary.

It appears therefore that there could be future amendments to the NFA altering the boundaries of Nisga’a Lands or alternatively permitting other aboriginal people access to Nisga’a Lands, to accommodate other First Nations’ claims. There is a lack of finality on this topic.

There are significant overlapping claims throughout the Province, particularly in the Lower Mainland. It appears that the NFA model may not work in these other areas since most land boundaries in most agreements would adversely affect other aboriginal peoples. The overlap issue may have to be resolved through some political process to reach agreement, other than through treaty negotiations.

Local governments entering into contracts with First Nations will be well-advised to do due diligence to determine whether there are overlapping claims which may invalidate land and resource agreements relating to First Nations lands.
(6) “New” Aboriginal Rights

If the Courts recognize new aboriginal rights after the effective date, will the NFA apply to these new rights? Chapter 2, para. 23 provides that the NFA exhaustively sets out the Nisga’a aboriginal rights. In Chapter 2, para. 26, the Nisga’a release to Canada any aboriginal rights other than those set out in the NFA. This would appear to deal with new aboriginal rights arising after the effective date.

F. CONCLUSIONS

In this paper, we have reviewed the background of the NFA, the UBCM policies and principles with respect to certainty and finality, and commented on whether the NFA is in accord with those policies and principles. Our main conclusions with respect to the degree of certainty and finality provided in the NFA are as follows:

(1) Legal Mechanism for Achieving Certainty

The 1986 Federal Government Comprehensive Land Claims Policy defines “certainty” as: “an end to land title questions, a final determination of which authority or authorities could regulated activities, a determination of which laws apply to a given area, and an assurance that negotiated and agreed upon matters would not re-emerge for further agreement at a later date.” According to this definition, although the NFA does not employ the traditional extinguishment and surrender model, the NFA substantially accords with the UBCM policies and principles regarding certainty.

The NFA terms for modification, releases, indemnities and amendments, combined with the dispute resolution process, provide a comprehensive set of defined arrangements between the Parties. In this sense, the NFA achieves a substantial degree of certainty.

However, the NFA contemplates the possibility of amendments and further agreements in defined circumstances. To the extent that the terms and the results of the implementation of the NFA are not fixed and unalterable, there is inevitable uncertainty and lack of finality inherent in the NFA.

(2) Points that are not Certain and Final

Notwithstanding that the NFA substantially accords with the UBCM principles to guide certainty in treaty negotiations, nevertheless, the NFA is not certain and final in the sense that rights and responsibilities of the Parties are forever fixed and unalterable.
The NFA contemplates the possibility of: amendments; “re-openers” or side agreements; the addition of contiguous lands under limited circumstances; adjustment for future overlapping aboriginal land claims; and finally, inherent uncertainties in settling interjurisdictional questions arising out of aboriginal self government. The fact that in the implementation of a treaty arising out of the NFA there may be changes to its terms, through the any of these means or arising from the dispute resolution processes is, in our view, inevitable. Indeed, it is desirable in some cases, since such flexibility ensures durability of the treaty.

Areas where the lack of certainty and finality are of concern are:

Rights of Other Aboriginal People - This paragraph in the General Provisions chapter raises the possibility of additional or replacement rights being provided to the Nisga’a, in the event that Canada and B.C. sign a treaty with another aboriginal people that adversely affects Nisga’a rights.

Overlapping claims - It appears therefore that there may be future amendments to the NFA altering the boundaries of the Nisga’a Lands or alternatively permitting other aboriginal people access to Nisga’a Lands, to accommodate other First Nations’ claims. There is a lack of finality on this topic.

Tax Exemptions - Provisions in Taxation chapter allow the Nisga’a to negotiate and attempt to reach agreement with the other Parties to provide a tax exemption for the Nisga’a if, within 20 years after the effective date of the treaty, Canada or B.C. enacts legislation giving effect to another northwest B.C. land claims agreement containing a First Nations tax exemption.

(3) Final Assessment

In our view, in accordance with the general law of contract, there are four aspects of the NFA which the Courts may review in order to decide on the certainty of the treaty provisions: (1) legal enforcement mechanisms; (2) specificity of anticipated events and transactions; (3) amendment processes; and (4) finality of dispute resolution provisions.

We have touched on each of these aspects above to illustrate our opinion 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 term is defined in the 1986 Federal Land Claims Policy. The NFA is not certain however, in the sense of being “fixed and invariable”, because it contains flexible arrangements designed for durability.

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(3) Applicability to Other Areas

It has been suggested that the NFA may form a “template” for future treaties in British Columbia. Whether, and to what extent, the NFA will serve as an effective template for urban treaties and treaties elsewhere in the Province remains to be seen. Because there is potential for future negotiations and amendments in the implementation stage, the continuance of the TAC or a similar group to ensure local government input on implementation of the NFA will be important.