EXECUTIVE SUMMARY

The broad objectives of this Workbook are to review the NFA in relation to approved UBCM policy and to provide conclusions on how the Agreement affects this policy. The purpose of the paper which will flow from this Workbook will be to provide direction to the provincial and federal governments on the NFA from a local government perspective.

The views of UBCM members have been sought in preparing this Workbook, which can be considered a rolling draft for the purpose of obtaining further input.

The Workbook is relatively lengthy and comprehensive. This was necessary in order to do justice to the lengthy and comprehensive nature of the NFA, which runs to over 250 pages with 450 pages of appendices and four side agreements. The NFA’s length, in turn, is dictated by the very ambitious objective of the negotiators; namely, to set out and exhaustively define Nisga’a aboriginal rights and entitlements. This is key to achieving certainty in the NFA. Any Nisga’a aboriginal rights not defined in the treaty are expressly released and should therefore be unenforceable in the future. The importance for UBCM of this aspect of the NFA is reflected in the fact that it is the first subject to be covered in this Workbook.

Our legal review, circulated to members in September 1998, concludes that the language for achieving certainty in the NFA substantially accords with UBCM policy on this subject. There is, however, a lack of finality in some key areas, such as overlaps, tax exemptions and additions to treaty settlement lands. These are dealt with in Part 1.

In an effort to make the Workbook more manageable, we have organized our analysis around previously identified general and specific UBCM interests. This is the same format used in UBCM’s review of the Nisga’a AIP circulated to members in 1996. Members may wish to go directly to the part or parts of the Workbook which address interests of most concern or significance for them.

General interests are dealt with at length in Parts 1 to 9. Again, Part 1 deals with certainty and finality. Parts 2 through 9 deal respectively with affordability, community stability, the Constitution and Charter of Rights, standards, fee simple and other interests, jurisdiction and management of resources, governance and jurisdiction, and, finally but certainly not least importantly, local and regional government relationships. Part 10 discusses local government specific interests in dispute resolution, communication and information, services and infrastructure, planning and taxation. All these subjects are closely inter-related. For example, certainty, community stability and ownership/management of natural resources are obviously connected.

We have attempted to take a practical interest-based approach to the NFA in this Workbook, as opposed to more legal, constitutional, philosophical or social science types of approaches. This is not to suggest that there are not important legal, constitutional, philosophic or academic issues raised in the NFA; only that there are other forums for addressing them, such as the courts, the legislature, the media, and academia. Some of these larger issues are discussed in this Workbook where they directly impact on UBCM interests. They are discussed in particular in Parts 4, 8 and 9.
A recurring theme throughout this Workbook relates to the relatively isolated and remote location of the Nass River Valley where the Nisga’a treaty settlement lands (TSL) are located. There are a whole host of issues in urban or semi-urban treaty negotiations which are not dealt with in the NFA. For example, the closest zoned land is about 150 kilometres away from Nisga’a TSL. Provisions ensuring that adequate tools are in place for local government/First Nation co-ordination, compatibility and harmonization will require greater attention in most other treaties.

Regarding local government and First Nation relationships post treaties, UBCM believes that it will be important to establish sufficient tools to allow relations to evolve and develop as circumstances and needs evolve and change. In many cases a protocol or agreement concerning the resolution of disputes between neighbouring local governments and First Nations will be required. It will also be important in many cases to establish mechanisms for communication and consultation and agreements respecting service delivery and infrastructure development. These protocols and agreements are being negotiated outside of treaties all across the province. However, UBCM would like to ensure that all necessary protocols and agreements are negotiated and finalized before treaties are signed, not as an after thought. These matters are discussed in Part 10.

Regardless of what happens with the NFA, it will remain an influential document in other treaty negotiations. It contains some provisions which will be, and should be, incorporated elsewhere. For example, the Charter of Rights and Freedoms will apply to Nisga’a Government and institutions and the Criminal Code of Canada will also apply. Also, all private fee simple properties have been excluded from Nisga’a Lands. These provisions should be included in every treaty. The general mechanism for achieving certainty in the NFA will also have application in other treaties. It has already been incorporated into the Sechelt Agreement-in-Principle, which was initialled by negotiators for Canada, B.C. and the Sechelt Band in January.

There are other provisions which should not be applied in other treaties. For example, the NFA says that the Nisga’a Government does not have the power to tax non-Nisga’a residents on Nisga’a Lands unless the power is specifically delegated in the future as a result of an agreement between the Nisga’a Nation and the provincial and/or federal government. The province has been emphatic that this will happen only if the Nisga’a establish adequate representation for non-Nisga’a. UBCM believes that future treaties should provide explicitly that non-First Nation citizens living on First Nations’ lands will not be subject to any First Nation government tax unless they also have the opportunity for meaningful participation in that government. This subject is dealt with in Part 9.

There has also been a lack of clear and comprehensive government policy for compensating third party and local government interests which are adversely impacted by the NFA. In our opinion this must be remedied. This subject is dealt with in Part 6.

In short, it is our belief that a critical understanding of the NFA in relation to local government interests is important, and we hope that this Workbook will be of some assistance in this regard.

A space has been provided at the end of each part for comments. We hope that members will take advantage of this opportunity to improve the document and to ensure that it accurately reflects their concerns.
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DRAFT BACKGROUND WORKBOOK
REVIEW OF NISGA’A FINAL AGREEMENT
March 26, 1999

INTRODUCTION

The Nisga’a Final Agreement (NFA) was initialled by the Government of Canada, British Columbia and the Nisga’a Nation on August 4, 1998. It was ratified by the Nisga’a on November 12, 1998, and Bill 51, the Nisga’a Final Agreement Act, is in second reading in the provincial legislature. If enacted, Bill 51 will give provincial approval and effect to the NFA. If ratified by all three parties, the NFA will become the first “modern-day” treaty in B.C.

Since the NFA was initialled, the UBCM Executive has set out to accomplish four objectives:

- provide information to our members on the NFA
- commission research and analysis
- facilitate informed discussion among members
- recommend positions on certain subjects

In accomplishing these objectives, UBCM has produced two other papers, the first an annotated summary of the Final Agreement and the second a legal review of certainty and finality in the NFA. This Workbook is an element of a comprehensive analysis of the NFA in relation to local government interests, paralleling the approach taken in our 1996 review of the Nisga’a Agreement-in-Principle (AIP).

Objectives & Approach. The broad objectives of this Workbook are to review the NFA in relation to approved UBCM policy1 and to provide conclusions on how the Agreement affects this policy. The paper which will flow from this Workbook is intended to provide direction to the provincial and federal governments on the NFA from a local government perspective.

In examining the NFA, it is important to consider not only its implications for the directly affected region, but also its precedent setting nature for the rest of British Columbia. The initialling of the NFA, as the first of its kind in B.C., gives rise to the question: “are their aspects of this Agreement that could be applied to negotiations with other First Nations in other areas?” Answering this question is a key focus and specific objective of this Workbook. The importance of this question lies in the fact that 36 of the 51 aboriginal groups that have commenced negotiations under the British Columbia Treaty Commission (BCTC) process2 are involved in substantive “Agreement-in-Principle” negotiations, or are ready to do so.

The views of UBCM members have been sought in preparing this Workbook. A workshop was held at a Joint-Treaty Advisory Committee (TAC) meeting in November 1998 to discuss the NFA in relation to UBCM interests and the possible application elsewhere of various parts of

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1 Policy reference documents are:
   - Defining the Municipal Interest in Treaty Negotiations, 1994
   - Achieving Certainty in Treaty Negotiations, 1995
   - UBCM’s Response to Provincial Government Mandates, 1997

2 The Nisga’a negotiations have been conducted outside the BCTC process since they pre-dated the establishment of this process (1993).
the Treaty. TAC representatives from around the province attended this meeting. **This Workbook can be considered as a rolling draft for the purpose of obtaining further input.**

The Workbook considers the following local government general and specific interests:

1. Certainty and Finality
2. Affordability
3. Community Stability
4. Constitution and Charter of Rights
5. Standards
6. Fee Simple and Other Interests
7. Jurisdiction and Management of Resources
8. Governance and Jurisdiction
9. The Local and Regional Government Relationship
10. Other Specific Interests of Local Government

Includes:
- Dispute Resolution
- Communication and Information
- Infrastructure and Services
- Planning
- Revenue and Taxation

These interests are high-lighted and expanded upon at the start of each Part of this Workbook. They are followed by a discussion of relevant NFA provisions and conclusions on the applicability elsewhere of those provisions. Finally, a space is provided for additional comments and suggestions.

**Scope.** The NFA is 252 pages long, has 22 chapters and about 450 pages of appendices. In addition, there is an Implementation Plan (approximately 250 pages) and side agreements on Taxation, Own Source Revenues, Fiscal Financing and Fisheries Harvest.

It is not the intention to exhaustively examine every section of the NFA. This Workbook focuses on those chapters and provisions of greatest importance to local governments.

**UBCM GENERAL INTERESTS**

1. **CERTAINTY AND FINALITY**

| 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 rights 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. |

**NFA.** Certainty is a primary UBCM interest. As such, UBCM obtained a full legal review of this issue in September 1998. The legal review examines all NFA provisions affecting certainty and finality in the context of established UBCM principles and policy. It should be referred to for a complete examination of this topic.
The NFA provides that it is a full and final settlement of Nisga’a aboriginal rights, including aboriginal title (20/22). A concept of “modification” is introduced (2/24-25). Simply put, modification means that aboriginal rights are changed to treaty rights, and aboriginal title is changed to fee simple title. Put another way, the NFA exhaustively sets out and defines Nisga’a aboriginal rights, and any aboriginal rights not set out are “released”. This is a new technique that has not been previously used in treaties. According to the above-noted legal review, the NFA terms for modification, release, indemnity and amendment, combined with the dispute resolution procedure provide a comprehensive set of defined arrangements between the parties.

The NFA stipulates that Nisga’a Lands will be owned in fee simple (31/3). This resolves the uncertainty concerning the nature and scope of aboriginal title. In addition, the NFA specifies and limits the federal and provincial governments’ obligations to consult with the Nisga’a (21/28). This addresses some of the uncertainties on this matter raised by the Supreme Court of Canada in the Delgamuukw decision.

**Conclusion and Applicability Elsewhere.** The UBCM legal review concludes that the language for achieving certainty in the NFA substantially accords with UBCM policy on this subject. It provides a relatively high degree of certainty while, at the same time, providing mechanisms to allow for response to changing circumstances. However, the legal review notes that the NFA is not certain and final in the sense that the rights and responsibilities of the parties are forever fixed. The Agreement contemplates the possibility of amendments, “re-openers”, additions to treaty settlement lands, compensation for future overlapping aboriginal title claims, and uncertainties inherent in settling all jurisdictional questions arising out of aboriginal self-government.

Government negotiators have made it clear that the basic legal mechanism for achieving certainty in the NFA will be incorporated into other treaties in B.C. Thus, it is not surprising that the same language appears in the Sechelt Agreement-in-Principle - the only other AIP initialled to date, and the first to reach this stage in the BCTC process. From a UBCM perspective, it would not be wise nor useful to advocate a different basic legal model relating to certainty in the other 50 or so treaties being negotiated in B.C.

There are, however, specific provisions in the NFA mentioned by members and cited in the UBCM legal review where lack of certainty and finality remain a concern, particularly with respect to application elsewhere. These are:

- **Rights of Other Aboriginal People** - There is a paragraph in the General Provisions chapter (23/35) which 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 that there may be future amendments to the NFA possibly 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 (22-23/33-35). This as a fundamental impediment to finality. UBCM strongly believes that overlaps must be dealt with prior to any future provincial agreement on other land settlement packages, as established in the Provincial Mandates for Treaty Negotiations.

- **Tax Exemptions** - Provisions in the Taxation Chapter allow the Nisga’a to re-negotiate the parts of the NFA dealing with Nisga’a tax exemptions if, within 20 years after the

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3 The convention used for referencing the Final Agreement complete text will be the page number followed by the paragraph section number.
effective date of the treaty, Canada or B.C. enacts legislation giving effect to another Northwest B.C. land claims agreement containing a more advantageous First Nations tax exemption. This “re-opener” means that there is a lack of finality on this topic.

- **Additions to Treaty Settlement Lands** - The NFA provides for the addition to Nisga’a Lands of contiguous lands owned in fee simple by Nisga’a entities and citizens (33/11). This provision requires the consent of the landowner and the Federal and Provincial Governments. There appears to be a lack of finality on this topic. This provision would probably not have any significant impact on local government in the Nass Region, but if the provision were incorporated in treaties in more developed areas there would be a local government concern. In urban or semi-urban areas the possibility of additions to treaty settlement lands could raise uncertainty as to identification and status of those lands, particularly with respect to impacts on property taxation and land use regulation in regions of the province where there are neighbouring local governments. These potential impacts are discussed in Part 10. The Sechelt AIP proposes that these concerns be dealt with by way of a municipal veto regarding additions to Sechelt treaty settlement lands that are within municipal boundaries.

CERTAINTY AND FINALITY
Comments and Suggestions on Conclusions and Applicability Elsewhere.
2. **AFFORDABILITY**

Local governments have an interest in settlements being affordable, meaning that they will not impose any extraordinary financial burden on the people of B.C. In this regard, the treaty can be broken-down into four components: lands and resources, cash, third party compensation, and other costs.

**Lands and Resources.** About 1,930 square kilometres of Crown land in the Nass Valley will be transferred to the Nisga’a. This land will be added to the 62 square kilometres of land comprising the former Nisga’a Indian reserves (collectively referred to in the NFA as the “Nisga’a Lands”. See 31/2). All 1,992 square kilometres will form a single contiguous land mass, but there will be pockets of land within the Nisga’a Lands which will not be included.\(^4\)

There is an additional 27.5 square kilometres of fee simple land outside Nisga’a Lands which will be transferred to the Nisga’a. These additional lands comprise 25 sq.km. of existing Indian reserves and 2.5 sq.km. of Crown Land (collectively referred to in the NFA as the “Nisga’a Fee Simple Lands”. See 39-43/45-72). All of the lands referred to above will be collectively referred to as Treaty Settlement Land in this Workbook, or “TSL”.

The Crown lands included in the NFA are rural and isolated. Thus, the cost associated with their transfer to the Nisga’a is primarily in the nature of lost opportunities for future resource development. After the effective date of the treaty, the Nisga’a Nation, not the Province, would own:

- all subsurface rights on Nisga’a Lands, which means all mineral resources including geothermal resources, and any associated fees, rents, royalties, or other charges (34/19 -20)
- all timber and non-timber forest resources on Nisga’a Lands, and any associated fees, rents, royalties, or other charges (66/3-4).

Local governments have an interest in adequate quantification and disclosure of the opportunity costs associated with removal of TSL from Crown control. UBCM has urged the province “to indicate the process by which it will designate economic value to parcels of land being considered for treaty settlements.” UBCM believes that, in the context of the B.C.T.C. process (of which the NFA is not a part), it is appropriate to apply real market values to land and resources, and that the process of land assessment should be dealt with in a transparent manner.\(^5\) The B.C. government has estimated an NFA land value of $106 million\(^6\) and foregone forest revenue of $36 million, but it is impossible to tell how these figures were arrived at and whether real market values were used.

**Cash.** The cash component of the NFA is summarized in Appendix 2. The Agreement calls for one-time transfers totalling $311 million, of which $246 million will be paid by Canada and $65 million by B.C. This includes a capital transfer of 190 million which will be paid over a 15 year period. Other included items are discussed below under “Other Costs”. The cash component represents about $57,000 per capita using a population of 5,500. B.C. will also upgrade the Nisga’a highway at an estimated cost of about $41 million.

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\(^4\) These primarily relate to private interests in fee simple, private agriculture leases, and private woodlot licences, and to access roads associated with the fee simple interests. The Nisga’a Highway is also not part of the Nisga’a Lands. These are discussed in Part 6.


\(^6\) This is a notional value derived from the Memorandum of Understanding between B.C. and Canada, June 1993, and used in the determination of federal and provincial shares of the financial components of the NFA. An actual market value for the land cannot be accurately derived due to the size of the parcel and the remoteness of its location. There are no comparables.
Canada’s ongoing program funding obligation is approximately $30.9 million per year, and B.C.’s obligation is about $1.2 million per year (1997 dollars). These amounts are broken down in Schedules A and B to the Fiscal Financing Agreement. According to the Department of Indian Affairs, over 90% of these ongoing funding obligations come from the existing funding base, reflecting funding that is already flowing annually to the Nisga’a communities.

Third Party Compensation. British Columbia and Canada are obligated to indemnify the Nisga’a Nation for liability to any person who immediately before the effective date of the NFA had an interest in Nisga’a Lands (72/42 and 43). The Provincial government has estimated the costs of compensating known third party claims at between $23 and $30 million. This cost will be shared equally by Canada and B.C..

Again, the Nass River Valley is relatively isolated and undeveloped. Greater third party costs can be anticipated in more economically developed regions. Third party compensation will be discussed in greater detail under Part 6 below, which deals with fee simple and other interests.

Other Costs. In addition to the land and cash components of the treaty settlement, there are a number of other costs to provincial and federal government. These are listed in Appendix 3.

Conclusion and Applicability Elsewhere. The province has indicated that the land and capital components of the NFA will not be “templated”. UBCM agrees with this position. Obviously these components will be individually negotiated at each table. Nevertheless, some First Nations will undoubtedly attempt to set up the NFA as a bench-mark for their minimum acceptable settlement. For this reason it is important to know the specific factors that influenced the final size of the land and capital components of the NFA. To our knowledge, this information is currently unavailable. This may be due to the confidentiality requirements normally associated with any negotiation. Issues relating to communication and confidentiality are briefly discussed in Part 10.2 below.

UBCM believes that adequate and timely financial assessments, impact studies, and cost/benefit analysis of any treaty settlement proposal must be conducted prior to provincial acceptance. In the absence of such studies it is difficult to draw a conclusion regarding affordability.

Regarding on-going program funding obligations to the Nisga’a Government, local governments want clarity, compatibility and equivalency. The NFA attempts to ensure these things in three ways. First, recognition of legislative authority in the NFA does not create or imply any funding or financial obligation for Canada or British Columbia (212/5). Funding will be negotiated every five years in a separate agreement. Second, funding will be provided only for services at levels reasonably comparable to those generally prevailing in north-west British Columbia (212/3). Third, by the 13th year of the NFA 100% of the Nisga’a Nation’s own source revenue capacity, which includes property tax capacity and resource revenue capacity, will be deducted from annual fiscal transfers (section 20, Own Source Revenue Agreement).

UBCM also seeks reassurance that the approach taken in the NFA does not create excessive administrative burdens for local governments if it is proposed in other parts of the province. Considerations such as land use consultation off-TSL, governmental relations between First Nations and adjacent local governments, and impacts on local government infrastructure, service, fiscal and financial arrangements may require different solutions in areas less isolated than the Nass River Valley. The impact on these arrangements must be taken into account when

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7 The capital, fiscal, taxation and own source revenue aspects of the NFA are discussed in more detail in the UBCM summary of the NFA Side Agreements dated October 8, 1998.
assessing the affordability of other proposed treaty settlements. They are discussed in various parts of this Workbook.

As a general rule, local governments want the Province to focus on cash instead of land as the major component of treaty negotiations. In this regard, the land and resource provisions in the NFA may have some application in rural treaty negotiations in the north, but they will not be relevant in other negotiations, particularly in urban or semi-urban areas. The mix between land and cash will vary depending on factors such as the availability and value of Crown land, the proximity of neighbouring communities, and the differing requirements of First Nations to achieve self-sufficiency. The large land component in the NFA may make sense in the Nass Valley. In an urban or semi-urban context it would not be affordable. It is worth noting in this regard that the Sechelt AIP involves only about 1,964 hectares, or about 1.0 percent of Nisga’a TSL.

To conclude, issues such as third party compensation, compensation of local governments, the cost associated with new administrative burdens, the quantum of royalties lost as a result of the transfer of lands to First Nations, and the value of land being considered for treaty settlements will be important to local governments in assessing the affordability of other proposed treaty settlements.

**AFFORDABILITY**

Comments and Suggestions on Conclusions and Applicability Elsewhere.
3. COMMUNITY STABILITY

Local governments are vitally concerned for the future of their communities and want treaty settlements that will not derogate from the social and economic stability of those communities, particularly those which are currently resource-dependent.

NFA. Community stability is not directly addressed as such in the NFA. However, to the extent that the NFA affects jobs and industry in the Nass region, it will affect community stability. The forestry and fisheries provisions in the NFA are most significant in this regard. They are discussed in Part 7 below.

On the positive side, the NFA does contain some provisions which are designed to minimize potentially disruptive influences and events. For example, specific consultation requirements and procedures are set out in detail in various chapters of the NFA, most notably in the Fisheries, Forestry and Wildlife Chapters. Canada and B.C. will have no obligations beyond these specific requirements and procedures to consult the Nisga’a in respect of any activity on Crown land, including a resource development or extraction activity (21/28). These provisions in the NFA will be binding on all three parties. As a result, they should help to lessen the destabilizing influence resulting from cases such as Delgamuukw and the threat that these cases pose to the underlying validity of resource extraction tenures and other development rights on Crown land. This issue relates very closely to the question of certainty discussed in Part 1.

Regional Socio-Economic Assessment of the Nisga’a AIP. A Regional Socio-Economic Assessment of the Nisga’a Agreement-in-Principle was released by the province in December 1996. This assessment was prepared by an inter-ministerial team of economists and analysts and was based on information taken from stakeholder consultations, from statistical reports and from previous studies.

The main conclusion in the assessment was that a treaty based on the Nisga’a AIP would provide economic benefits and have positive impacts on economic activity in the region. The study concluded that “an expenditure of the capital transfer will generate jobs and spin-off activity in the region” (p. 63). The Assessment also found that the extent to which non-Nisga’a residents of the region will benefit from increased infusion of capital depends on the ability of regional businesses and workers to "take advantage of opportunities created by the increased spending potential of Nisga’a people" (p. 62).

From the findings, it is clear that the NFA may result in reductions in activity in some economic sectors, which could result in job losses in non-Nisga’a communities. In this regard, the Assessment states “some individuals will lose their jobs or may have their incomes reduced...the transition periods included in the treaty will help to minimize the effects and allow most job displacements to be offset by naturally occurring vacancies" (p. 69).

There were criticisms of this Assessment from some sectors when it was released. Much of this criticism was generated by the Assessment’s lack of specificity. In the province’s defence, this lack of specificity may have been due to the fact that the AIP left many matters to be negotiated in the Final Agreement. A follow-up study, prepared by Grant Thornton management Consultants, was released on March 24, 1999 entitled Financial and Economic Analysis of Treaty Settlements in British Columbia. As at the date of this draft Workbook (March 26), UBCM has not had an opportunity to review this document.

Conclusion and Applicability Elsewhere. Measuring the impact on community stability of a treaty settlement of the NFA’s complexity is difficult due to the large number of factors involved. Nevertheless, the NFA contains some provisions which should help to preserve, and, in light of Delgamuukw, perhaps even enhance, community stability, at least to the extent that it creates certainty on the ground, as discussed in Part 1.
More generally, the role of socio-economic assessments, compensation to third parties, the duration and nature of transition measures, and spin-off benefits of treaty settlements all need to be taken into account in considering the impacts of any treaty on community social and economic stability. These factors will change from community to community, sector to sector, and treaty to treaty. For example, the NFA may affect local jobs, but it will not directly affect any local government tax base, since there is no significant local government tax base affected. The impact on the Kitimat-Stikine Regional District is discussed in Parts 9 and 10. For treaties where local governments are more directly affected, a broader spectrum of measures will be required in order to ensure that First Nations socio-economic sustainability, which UBCM supports, is not achieved at the expense of local governments and third parties.

COMMUNITY STABILITY

Comments and Suggestions on Conclusions and Applicability Elsewhere.
4. CONSTITUTION AND CHARTER OF RIGHTS

Local governments are interested that treaty settlements will be within the framework of the Canadian Constitution and that the Charter of Rights and Freedoms will apply to all citizens and residents of this province, and that equity and fairness to all will be a fundamental premise in these negotiations.

Application of Canadian Constitution. The NFA states that it is a treaty and land claims agreement within the meaning of sections 25 and 35 of the Constitution Act, 1982 (17/1). It also states that it does not alter the Constitution of Canada (17-18/8). However, the legal validity of these provisions has been challenged. In particular, self-government has not previously been part of any land claims treaty in Canada, and the effect of its inclusion is not clear.

According to one view, the NFA changes the constitution and creates a third order of government. The argument is that Nisga’a authority to make laws which prevail over federal or provincial laws (see Appendix 4) is inconsistent with the exclusive and exhaustive distribution of legislative authority between the Parliament of Canada and the Provincial Legislature under the Constitution Act, 1867. Also, it is argued by some that exclusion of non-Nisga’a citizens from the right to vote for Nisga’a Government is inconsistent with the Charter of Rights and Freedoms.

An opposing view is that the NFA involves valid delegation, not abrogation, of legislative authority. The argument is that the NFA does not create a new level of government. The NFA can only be brought into force by provincial and federal enactments. It confirms, and places a limit upon, an undefined aboriginal right of self-government which already exists and is protected by s. 35 of the Constitution Act, 1982. The areas where Nisga’a laws would prevail over conflicting provincial or federal laws are areas where infringement of the Nisga’a Nation’s constitutionally protected aboriginal rights and title would be difficult to justify (for example, laws relating to Nisga’a land). Those who hold this view argue that, if the justification test established by the Supreme Court of Canada can be met, the federal government can still infringe Nisga’a self-government rights, as defined in the NFA, and the province can still expropriate Nisga’a Fee Simple Lands.

Application of Charter of Rights and Freedoms. With regard to democratic representation and the protection of individual rights, the NFA stipulates that the Charter of Rights and Freedoms will apply to Nisga’a Government (18/9). However, there are provisions in the NFA which have the effect of excluding non-Nisga’a residents on Nisga’a Lands from the right to vote for, and to be qualified for membership in, Nisga’a Government (161/9(k)). Relations with non-Nisga’a individuals ordinarily resident on Nisga’a Lands are dealt with in the Nisga’a Government chapter (163/19-23). Non-Nisga’a citizens are given some representation in Nisga’a Government structures short of the right to vote (the one exception is the right to vote for a Nisga’a public institution such as a school board that directly and significantly affects them. See Part 8 below.)

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8 Two recent law suits have been commenced seeking, among other things, court declarations that the NFA changes the constitution: BC Fisheries Survival Coalition and others v. Her majesty the Queen in Right of Canada and others, October 16, 1998; Gordon M. Campbell and others v. A.G. of B.C. and A.G. of Canada, October 19, 1998.

9 The two court challenges mentioned above primarily focus on the constitutionality of the self-government provisions.

10 The test for infringement and justification is laid down by the Supreme Court in Sparrow v. R. and R. v. Vanderpeet.
Nisga’a Government jurisdiction will not include authority in respect of criminal law (171/61), and the NFA will not affect federal and provincial jurisdiction in respect of industrial relations, employment standards, and occupational health and safety (172/67).

**Conclusion and Applicability Elsewhere.** The provincial government has made a commitment to negotiate treaties that do not change the Canadian constitution. UBCM has endorsed this commitment noting that equity and fairness must apply in a reciprocal fashion to aboriginal and non-aboriginal peoples both on and off settlement lands. The questions are: Does the NFA meet this principle, and does it fit within the Constitution, particularly with respect to Nisga’a Government? We have noted above that there are currently arguments being made on both sides of this debate, and the issue is before the courts in two separate legal proceedings.

The NFA contains a number of broad provisions relating to Nisga’a law-making which UBCM would expect to find in other treaties. These include the continued application of the Criminal Code and Charter of Rights and Freedoms. Specific law-making provisions are dealt with in the next part of this Review. They will vary from treaty to treaty depending on factors such as the size and sophistication of the First Nation involved, and the need to ensure compatibility and harmonization with neighbouring communities.

**CONSTITUTION AND CHARTER OF RIGHTS**

| Comments and Suggestions on Conclusions and Applicability Elsewhere. |

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11 Provincial Government Mandate
5. STANDARDS

Local governments are interested that general provincial and federal standards (e.g., environmental protection, land and resource planning, consumer protection, employment standards, workers compensation, health and safety, etc.) will apply on settlement lands within or adjacent to local government boundaries. Local governments are interested that there be compatibility and harmonization between the standards determined by First Nations and those of local governments (e.g., land-use, sub-division development, etc.).

NFA. All Nisga’a Government law-making powers are concurrent with federal or provincial powers. Appendix 4 lists those areas of Nisga’a law-making authority where Nisga’a laws will prevail over conflicting provincial and federal laws to the extent of the conflict (e.g., the Nisga’a law is “paramount”). These areas of jurisdiction can be broken down into three basic categories:

1. laws relating to internal Nisga’a concerns; for example, the administration of Nisga’a government (166-167/34-38), culture and language (167/41-43) including the teaching of Nisga’a language and culture (176/100(c)), and Nisga’a citizenship (167/39-40);

2. laws relating to assets which will belong to the Nisga’a under the NFA; for example, laws respecting the administration and management of Nisga’a Lands, including laws regulating the use, management, planning, zoning and development of those Lands (169/47(a)), and laws regulating, licensing, or prohibiting the operation on Nisga’a lands of businesses, professions, and trades (169/47(b)); and

3. laws where paramountcy is not seen as a problem by federal and provincial officials because the NFA imposes sufficient conditions, restrictions and standards on Nisga’a exercise of the law-making authority. Nisga’a laws in relation to pre-school to grade 12 education, for example, take precedence over conflicting federal or provincial laws, but, as in all cases, only to the extent of the conflict, and only on the condition that teacher certification and curriculum content is in accordance with comparable standards in B.C. public schools (176-177/100-102). Nisga’a laws in relation to family and child services are also paramount but subject to laws of general application relating to the reporting of child abuse, and only on the condition that standards comparable to provincial standards are included (174-175/89-93). Other examples can be found in Appendix 4. If the prescribed standards and requirements are not met in any of these examples then the subject Nisga’a law would be invalid.

There are also important areas of Nisga’a Government law-making authority where provincial and federal laws will prevail over conflicting or inconsistent Nisga’a laws. These areas include laws in relation to buildings, structures and public works (172/69-71), the regulation of traffic and transportation (172-173/72-74), public order, peace and safety (171/59-62), environmental assessment (155/1-3), environmental protection (157/11), the provision of social services (173/78-79), and the provision of health services (except with respect to a Nisga’a law relating to the structure of health care delivery). In each of these areas federal or provincial laws will prevail over a Nisga’a law to the extent of any conflict.

There are also many areas of law-making jurisdiction where the NFA is silent. For example, the NFA does not mention consumer protection or workers compensation. In these areas the Nisga’a Government will have no law-making jurisdiction, and federal and provincial laws of general application will continue to apply (13/18). Nisga’a Government will only have law-making authority to the extent specifically set out in the NFA. Furthermore, as previously stated, Nisga’a Government jurisdiction will not include authority in respect of criminal law (61/171), and the NFA will not affect federal and provincial jurisdiction in respect of industrial relations, employment standards, and occupational health and safety (67/172). Further, the
provincial Residential Tenancy Act will apply on Nisga’a Lands. This is not the case on Indian Reserves.

More generally, Nisga’a Lands will be within the constitutional realm of the province. Much of the Province’s laws of general application will apply. Lands currently within Indian Reserves, on the other hand, are largely beyond reach of Provincial regulation.

Other specific NFA provisions which relate to the question of standards include the following:

- all environmental assessment processes referred to in the NFA will, in addition to the requirements of applicable environmental assessment legislation, meet the 10 criteria set out in the agreement (10/8);
- no party shall relax its environmental standards in the Nass Area for the purpose of providing an encouragement to the establishment, acquisition, expansion, or retention of an investment (10/18);
- the Nisga’a Government will have the rights and obligations of a local government with respect to emergency preparedness and emergency measures (180/122);
- with respect to forest practices, the Nisga’a have the option to establish rules and standards to govern forest practices on Nisga’a Lands which must meet or exceed provincial standards. (67/8);
- the Nisga’a may establish a police service (185/1) and court services (191/30), but in both cases must meet specified provincial standards;
- funding for agreed-upon public programs and services is to be provided at levels reasonably comparable to those prevailing in north-west B.C. (15/3);
- the NFA allows the Nisga’a Government to adopt federal or provincial laws in respect of matters within Nisga’a Government jurisdiction as set out in the NFA (11/129).

Conclusion and Applicability Elsewhere. In many areas where consistent standards are of greatest importance - environmental protection and assessment, public order, building regulation, consumer protection, employment standards, workers compensation, Criminal Code matters, health and safety, social services, transportation - Nisga’a Government either does not have any law-making power or federal and provincial legislation will over-ride their law-making ability in the event of a conflict. Further, in many important instances the Nisga’a Government must meet or exceed general provincial and federal standards. These NFA provisions are designed to maintain consistency. They are in line with UBCM interests and may have some application, from a UBCM perspective, in other treaty negotiations. They appear to provide a reasonable level of assurance that the NFA will maintain a “level playing field”.

Potential difficulties arise in those areas where Nisga’a Government laws would over-ride federal and provincial laws to the extent of a conflict. Again, Appendix 4 lists these areas. They include Nisga’a culture, adoption, child custody and family services, elections, education, local roads and land use planning. Many either directly concern Nisga’a citizens and governments, or directly concern Nisga’a Lands or the regulation of businesses located on Nisga’a Lands. Nisga’a law-making powers in these areas are broad. In particular, lack of limitations on Nisga’a Government authority in the areas of land use management, planning, zoning and development control, if duplicated in other parts of the province, might in some cases make it difficult to maintain a level playing field, and would create the possibility of negative cross-border impacts.
The NFA provides little guidance with respect to local government concern for compatibility and harmonization between the standards determined by First Nations and those of local government relating to land use, subdivision, development, and like matters. This may make sense in the NFA given that the closest zoned land is about 150 kilometres away from Nisga’a TSL. However, provisions ensuring that adequate tools are in place for local government/First Nation co-ordination compatibility and harmonization will require greater attention in most other treaties. This subject is dealt with in greater detail in Part 9 below.

### STANDARDS

**Comments and Suggestions on Conclusions and Applicability Elsewhere.**

6. **FEE SIMPLE AND OTHER INTERESTS**

Local governments are interested that those lands owned in fee simple not be “on the table” for negotiation (e.g. not subject to expropriation) and that all other forms of interest in land and resources will be adequately compensated for if they are part of a treaty settlement.

**Interests.** As agreed in the Nisga’a AIP, no parcels of privately owned fee simple lands have been included in Nisga’a TSL.

There are, however, a number of existing interests, short of fee simple, which are attached to parcels to be included in the Nisga’a Lands. These are primarily leases, licences to occupy, easements, and rights of way. Most of these are in favour of governments, government agencies and crown corporations, although there are a number of such interests in favour of individuals and private corporations. These private interests relate to private roads, waterworks,
telecommunication sites, logging camps, and sorting yards. The NFA stipulates that the Nisga’a Nation must grant to each owner of these existing interests a replacement interest in the applicable form set out in the Appendices to the NFA. Only modifications which are mutually agreed upon in writing by the Nisga’a and the owner of the interest are permitted (36/30-32).

There is an existing woodlot licence within the Nisga’a Lands which will be impacted by the Nisga’a forest entitlements in the NFA. Should the NFA be ratified, all existing provincial forest licencees within Nisga’a Lands will be phased out over a five year transition period commencing on the effective date of the treaty. This will obviously have an economic impact on existing licence holders. The value of some existing fishing licences will also be adversely affected by Nisga’a fish allocations in the NFA.

Compensation. As mentioned in Part 2 above, fair compensation will be paid relating to recognized third party interests as they are phased out. In the case of fisheries licence holders the cost will be about $5 million, and in the case woodlot licencees the cost will be between $18 and $25 million, according to provincial estimates.

There may be other existing interests in lands which have not been identified but which come to light after the lands are transferred to the Nisga’a. Canada and B.C. have agreed to share the potential costs of compensating these unidentified interests.

Finally, in addition to the woodlot licence mentioned above, there are 63 fee simple parcels and two agriculture leases which will be surrounded by Nisga’a Lands, but which will not be transferred to the Nisga’a on the effective date of the NFA. There are also existing angling guide licences and trap-lines located on the Nisga’a Lands which will be continued under provincial laws. Access issues relating to these interests are discussed below.

Access. The NFA provides for a right of access to those fee simple parcels within Nisga’a Lands which are currently reached by unregistered “historic and travelled trails.” The NFA states that if an owner of one of these fee simple parcels reasonably requires a right of access to that parcel, Nisga’a Government may not unreasonably withhold consent to that right of access (82/25). The owner of the parcel and the Nisga’a Government must mutually agree on the terms of access, and the owner must offer fair compensation.

There are also four registered private access roads on Nisga’a Lands. The Nisga’a Nation will grant private rights of way for these roads (98/65).

More generally, in relation to the free movement of people throughout the province, the Nisga’a highway corridor is not part of Nisga’a Lands. It will remain under provincial ownership and the Nisga’a will have no jurisdiction over it. The Nisga’a Nation will also grant to British Columbia rights of way, in perpetuity, for secondary provincial roads on Nisga’a Lands. These Crown roads may be used as roads open to the public, or as roads open to industrial and resource users, or as public utility corridors, or for all three purposes.

Relating to hunting, fishing and recreation, the NFA appears to strike a balance between temporary public access to Nisga’a Lands and the Nisga’a interest in protecting their property. The Nisga’a must allow public access, but such access does not include harvesting or extracting resources, causing damage, mischief or nuisance, or interfering with authorized Nisga’a land uses (79/2).

Relating to future utility and transportation requirements, the Nisga’a will be obligated to grant to British Columbia new rights of way when required for public purposes subject to the payment of fair compensation and certain other conditions stipulated in Section 2 of the Roads and Rights of Way Chapter (85/2). In the event of a dispute either party may refer the matter to binding arbitration in accordance with the NFA.
The NFA authorizes agents, employees, and contractors of Canada or British Columbia, police officers, and members of the Canadian Armed Forces to enter, cross, and stay temporarily on Nisga’a Lands (81/15). The entry must be in accordance with federal and provincial laws of general application for the purpose of delivering programs and services, carrying out inspections under law, enforcing orders, carrying out the terms of the NFA, or responding to emergencies. Reasonable notice of entry will be required.

**Conclusion and Applicability Elsewhere.** No private fee simple lands have been included in the NFA settlement. However, local governments are concerned that potential impacts to resource interests, and other third party interests which rely on access to lands be minimized.

The resource sector is of crucial importance to the stability of many local governments in British Columbia, and to the economic viability of communities across the province. For this reason, UBCM has recommended that the provincial government develop a transparent policy, rather than guidelines, for compensation to local communities and third parties affected by treaties. No such policy has been developed to date. Those affected by the NFA are being compensated on an ad hoc basis. In our view, this approach should not be applied elsewhere.

UBCM believes that existing interests short of fee simple must be protected and, if loss of all or part of such interests cannot be prevented, the loss must be compensated. This includes the protection of local government interests in services, infrastructure, planning and taxation, and it includes local government compensation in the event that a treaty adversely impacts on these interests. Specific local government interests are briefly discussed in Part 10 below.

UBCM also believes that compensation must extend to displaced individuals and employees, not just companies. There should be provision for retraining and employment opportunities for those displaced by phased out activities.

Finally, the NFA appears to reflect UBCM’s interest in ensuring the free movement of people throughout the province, as well as reasonable access to land and resources for hunting fishing and recreational opportunities. The NFA also contains provisions enabling the Province to acquire new rights of way on or through Nisga’a Lands for public purposes.

**FEE SIMPLE AND OTHER INTERESTS**

| Comments and Suggestions on Conclusions and Applicability Elsewhere. |
UBCM’s interest in the jurisdiction and management of natural resources is connected to the importance of forest, fish, water, mineral and agricultural resources for community stability. We have concentrated in this Workbook on forests, water and minerals, but the same types of considerations would apply to fish, wildlife and migratory birds. The NFA deals with these resources in Chapters 8 and 9. Agriculture is not a significant factor in the Nass River Valley and is not covered in this Review (although there are two existing agricultural leases within Nisga’a TSL).

**FOREST RESOURCES**

Many non-aboriginal communities are totally or significantly dependent upon resource industries, particularly the forest sector, for their existence. Some municipalities hold Tree Farm Licenses while others have developed plans for Community Forests. Control and use of the province’s natural resources is a significant interest and there is concern that treaty settlements will threaten the survival or well being of many resource dependent communities.

NFA. On the treaty effective date, the Nisga’a Nation will own all forest resources on Nisga’a Lands (66/3). After an initial five year transition period, the Nisga’a Government will have the exclusive authority to determine, collect and administer fees, rents, royalties or other charges in respect of all timber and non-timber forest resources on Nisga’a Lands (66/4).

There are no municipally held Tree Farm Licences and no Community Forests affected by the NFA.

There are a number of forestry provisions in the NFA that contribute to community stability. For instance, existing licensees will continue to harvest timber on Nisga’a Lands during the five year transition period. Also, B.C. will continue to have a role in jointly managing the resource with the Nisga’a Nation (66/5). Also during the transition period:

- the annual allowable cut (AAC) will remain at 165,000 metres\(^3\). The portion available to licensees will be 155,000 metres\(^3\) in year one and will drop to 125,000 metres\(^3\) by year five. Correspondingly, the Nisga’a Nation may authorize the harvest of 10,000 metres\(^3\) in year one increasing to 40,000 metres\(^3\) by year five.
- forest licensees are required to use Nisga’a contractors to harvest an increasing proportion of their total harvest (50 percent in year 1; 70 percent in years 2-5);
- provincial laws in respect of timber scaling will apply to timber harvested on Nisga’a Lands.

The Nisga’a also make a ten year commitment to maintain wood fibre supplies to local mills (69/22) and to avoid disruption of existing forest operations. After the five year transition period the Nisga’a must authorize the harvest of 135,000 to 130,000 metres\(^3\) of timber for a further 5 years. The Nisga’a have also agreed not to establish a primary timber processing facility for 10 years after the effective date of the treaty (76/70).

The Nisga’a have the option to establish rules to govern forest practices on Nisga’a Lands, but, as stated in Part 5 above, the rules must meet or exceed provincial standards (67/8). As well, Nisga’a laws in respect of timber scaling made after the transition period must be compatible with provincial timber scaling laws. Similarly, the Nisga’a Government may make laws in respect of non-timber forest resources on Nisga’a Lands, including establishing standards to regulate harvesting and conservation of non-timber forest resources, provided that the standards meet or exceed any federal or provincial standards (67/11).
Conclusions & Applicability Elsewhere. Nisga’a Government will have broader resource management powers within Nisga’a Lands than do local governments within municipal boundaries. This is consistent with the fact that the Nisga’a Government will own the land. The NFA provides some assurances that Nisga’a forestry management standards will be consistent with what is required elsewhere in the province.

Further, the transition provisions in the NFA appear to mitigate some of the negative impacts on the forestry sector which may otherwise have adversely affected community stability and well-being. For the first ten years there will be at least 130,000 metres\(^3\) of timber on Nisga’a lands available for harvesting. After 10 years, however, the Nisga’a, as owners of the timber resource on their lands, will be under no obligation to harvest at any particular rate, or at all. Nothing is said in the NFA about the potential long term impact of this on fibre supply at a reasonable price, nor about measures to compensate for this potential impact, such as the creation of retraining programs for displaced forestry workers. In other more developed parts of the province community impact issues such as these will be more significant.

SUB-SURFACE RESOURCES

UBCM’s Response to Provincial Government Mandates recommended that the province re-assess transfer of sub-surface ownership to First Nations, retaining Crown ownership of sub-surface resources on treaty settlement lands, consistent with other fee simple tenures. (Recommendation 10, pg. 11)

NFA. In B.C. all minerals, precious or base, other than coal have been reserved from Crown grants since at least 1891. Nisga’a’s fee simple ownership of Nisga’a Lands is not subject to this reservation, nor to any other condition, proviso, restriction, exception or reservation set out in the Land Act (31/3). As a result, the Nisga’a will, on the effective date of the NFA, own all the minerals on or under Nisga’a Lands (34/19). Along with ownership of mineral resources, the Nisga’a Government has exclusive authority to determine, collect, administer, any fees rents, royalties or other charges in respect of mineral resources on or under Nisga’a Lands (34/21).

Conclusion & Applicability Elsewhere. In the older “numbered” treaties, lands remained reserve lands post-treaty and therefore the sub-surface rights were retained by the federal Crown for the benefit of the subject Indian band. Thus the minerals were beyond the usual provincial jurisdiction over subsurface rights. In a number of more recent treaties in the Yukon and Northwest Territories, First Nations received ownership of sub-surface resources directly as part of treaty settlements. It is likely that this approach will be applied to future treaties in B.C. Besides this historical justification, some commentators justify First Nation ownership of minerals on the basis of the objective of providing First Nations with lands and resources to enable them to work towards greater self-sufficiency and improve the quality of life in their communities.

WATER RESOURCES

Water interests of local governments are also substantial and numerous. Many local governments hold water licenses to serve their communities. Clarity is needed on such issues as ownership of bodies of water under common law, (e.g., to the midpoint of a body of water adjacent to reserve lands), historic rights to water use, water licenses, rights of access to shorelines, status of water lots, access and easements for servicing and enforcement of quality control standards.

NFA. The Province will retain full ownership and regulatory authority over water. It will establish a water reservation in favour of the Nisga’a of 300,000 cubic decametres per year which is apparently about one per cent of the annual flow of the Nass River watershed, for the use of the Nisga’a for domestic, agricultural and industrial purposes (50/122). The Nisga’a will be required to apply for provincial water licences that meet all provincial requirements for
volumes of flow to be applied against the water reservation (51/124). There are restrictions on
the percentage of flow which may be licensed to the Nisga’a from specific streams which cross
Nisga’a Lands (51/125). People using water under existing provincial licences will not be
affected (51/123). Their licences will continue, and the Nisga’a will be required to provide
reasonable access across Nisga’a Lands when needed by existing or future licence holders. The
Nisga’a will, however, have priority over future water licence applicants to the extent of their
water reservation.

Conclusion & Applicability Elsewhere. The water resource provisions contained
within the NFA provide for overall provincial management, adequate water supplies to meet
the needs of the Nisga’a communities and protection of water licence holders. Such provisions
seem fair and reasonable, and similar provisions in other treaties would address most local
government interests.

HARVESTING RIGHTS OFF TREATY SETTLEMENT LANDS (TSL)

Nisga’a citizens may engage in specifically identified traditional wildlife harvesting activities off
Nisga’a TSL and on Crown land. The harvesting entitlements are held collectively by the
Nisga’a Nation, and the Nisga’a Government may pass laws to regulate these harvesting
activities. For example, the Nisga’a may make laws governing the distribution among Nisga’a
citizens of wildlife entitlements in the Nass Wildlife Area (112/69 and 138/35). These laws
apply off Nisga’a Lands to the extent that Nisga’a wildlife harvesting rights are exercised off
Nisga’a Lands. The harvesting rights are also limited to domestic purposes (133/5).

Similarly, the Nisga’a Government may make laws respecting the allocation of Nisga’a fishing
entitlements (112/69). These entitlements can be exercised by the Nisga’a Nation commercially,
but, as with wildlife harvesting, the rights are subject to total allowable catch limitations in the
NFA, and to conservation measures and legislation enacted for the purpose of public health
and safety. They are also subject to Nisga’a Fishing Plans which must be submitted to and
approved by the Minister each year.

As a consequence of these harvesting rights applying on Crown lands, governments will need to
consult with the Nisga’a concerning resource decisions (subject to defined limitations) on those
Crown lands.

Conclusion and Applicability Elsewhere. Generally speaking, Nisga’a Government
jurisdiction regarding natural resources is restricted to Nisga’a Lands. The exception relates to
law making authority off Nisga’a lands to regulate the allocation between Nisga’a citizens of
their of harvesting rights on Crown lands. This law-making authority is subject to strict
conditions and restrictions as outlined above. Certainty is achieved through specific
confirmation and codification of the harvesting rights in the NFA. This is an improvement over
the status quo because undefined Nisga’a aboriginal rights are now defined in the Treaty. But
in some more populated areas, where there may be more public activities on Crown lands, it
will be less tenable to extend aboriginal rights off TSL. This subject will require caution, with
careful consideration of the specific circumstances in each region and in each negotiation.

JURISDICTION AND MANAGEMENT OF RESOURCES

| Comments and Suggestions on Conclusions and Applicability Elsewhere. |  |  |  |
8. GOVERNANCE AND JURISDICTION

Governance and jurisdiction issues have been discussed in various parts of this Workbook. This Part looks specifically at the nature of Nisga’a self-government authority, the extent of that authority, and relations with non-Nisga’a people.

NATURE OF NISGA’A GOVERNMENT AUTHORITY

UBCM has recommended to the Province that they clearly define the authorities which will be considered to be part of aboriginal self-government and the model proposed for transferring the authority in each case. UBCM favours the use of either the delegated authority model or limited authority subject to clearly defined conditions. (UBCM Response to Provincial Mandates, p.6)

NFA. Section 1 in the Nisga’a Government chapter states that the Nisga’a Nation will have the right to self-government, and the authority to make laws as set out in the agreement (159/1). Nisga’a Government will be a separate and distinct legal entity, with the capacity, rights, power, and privileges of a natural person (159/5). There will be two levels of Nisga’a Government, the Nisga’a central (or Lisms) Government and Nisga’a Villages, of which there are five. The Nisga’a Lisms Government is defined in the NFA (162/14) as:

- officers of the Nisga’a Lisms Government (elected at large by the Nisga’a Nation);
- chair and councillors of each village (i.e. ex officio members); and
- representatives of the Urban Locals (at least one from each of the three designated areas - Terrace, Vancouver and Prince Rupert/Port Edward).

The Nisga’a Lisms is the senior government and has responsibility for intergovernmental relations except where otherwise specified in the NFA. The Nisga’a Lisms Government will own all the Nisga’a Land in fee simple and all the mineral and forest resources on those lands. The Lisms Government has authority over a blend of federal and provincial jurisdictions. Its authority goes beyond that of a local government in the areas of natural resource management, citizenship, culture and language, establishment and operation of a land title system, expropriation, human resource development, the solemnization of marriages, social services, aboriginal healers, child and family services, adoption, education, and the devolution of cultural property.

The only power that appears to be delegated exclusively to the Nisga’a Villages is the ability to regulate traffic and transportation on Nisga’a Roads within Nisga’a Village Lands, although the Villages have concurrent jurisdiction with the Lisms Government in many areas relating to the provision of local services.

Conclusion. The nature of Nisga’a Government authority is one of the most controversial aspects of the NFA (see Part 4 above on Constitution and Charter of Rights). There are legal views on both sides of the issue. One view is that the NFA would create a third order of government in addition to the provincial and federal levels, which would require a constitutional amendment. Other views are that aboriginal self-government is an existing aboriginal right protected by section 35 of the Constitution Act, 1982, and the NFA would merely define and recognize this right.

The NFA will enable the Nisga’a to move out from the constraints of the Indian Act insofar as self-government is concerned. Nisga’a Lands will no longer be “lands reserved for Indians” under Section 91(24) of the Constitution.

With respect to the model used, it would appear that for some areas of jurisdiction, the Nisga’a Government follows a limited authority model, in that provincial and federal laws prevail to the
extent there is a conflict with a Nisga’a law. However, as noted in Part 5 and in Appendix 4, there are areas of Nisga’a Government authority in which Nisga’a laws would prevail over federal and provincial laws. The Nisga’a will have a high degree of autonomy and independence in these areas of law-making authority, but, with a few very important exceptions (e.g. land use and business regulation), the authority remains subject to clearly defined conditions and must meet provincial and federal standards.

The form of Nisga’a self government appears to be an amalgam of federal, provincial and municipal type powers as anticipated in our 1994 policy paper, Defining the Municipal Interest. It differs from the Sechelt model of governance in that the Sechelt have a delegated form of local government created by provincial and federal legislation. The Sechelt Indian Government District is a member municipality of the Sunshine Coast Regional District and it appoints a representative to the Regional District Board. Nisga’a citizens, on the other hand, vote as residents of Electoral Area A for representation at the Kitimat-Stikine Regional District.

Conclusion and Applicability Elsewhere. UBCM favours either delegated aboriginal authority whereby the province would retain ultimate control over program areas within the provincial jurisdiction, or, alternatively, limited aboriginal authority subject to clearly defined conditions. The NFA does not fit neatly into either of these models, but it does provide a defined framework for Nisga’a self-government. It spells out exactly what legislative authority is included and what is not included, and it spells out the jurisdictional limits of that authority. However, UBCM believes that there are four important qualifications that should be made regarding this aspect of the NFA:

1. as mentioned above, there are differing opinions regarding the constitutional nature of Nisga’a Government. This matter is before the courts, and until the issue is resolved it is not possible to make definitive statements regarding the constitutionality of the NFA;
2. if First Nations are to govern themselves without the influence of the Department of Indian and Northern Affairs they must have people and systems in place that are capable of carrying out the business of government in a competent and professional manner;
3. the Nisga’a model could not be applied in the urban context without changes to reflect differing needs and realities. For example, the election of the electoral area director as means of “regional district participation” simply would not work in many other areas; and
4. recognition that a First Nation is a separate government with its own jurisdiction cannot be isolated from recognition that full payment by the First Nation for local government services in lieu of paying property taxes is non-negotiable. This will be an important issue in many urban and semi-urban treaties. Likewise, the current taxation of non-band members living on reserves in other regions of the province without representation will be an important governance issue in treaty negotiations in those regions. This issue is discussed below.

EXTENT OF NISGA’A GOVERNMENT AUTHORITY

UBCM has advised the province of our view that certainty can best be assured through an exchange of aboriginal rights for compensation and clearly defined treaty rights. Local governments believe the treaty rights should be limited to settlement lands (UBCM Response to Provincial Mandates, pages. 7, 11).

NFA. The NFA states that federal and provincial laws of general application apply to Nisga’a Government, Nisga’a citizens, and Nisga’a Lands (18/13). All of Nisga’a law-making powers are concurrent with federal and provincial powers. (As noted in Part 5, areas where Nisga’a laws will prevail over federal and provincial laws in the event of an inconsistency or
conflict, and areas where they will not prevail are listed Appendix 4.)  The NFA spells out in considerable detail the scope and the geographical extent of Nisga’a Government power in particular areas of legislative authority.

Nisga’a Government authority, as a general rule, is limited to Nisga’a Lands (11/33). For example, laws relating to government structure, culture and language, planning, zoning, business licensing, health services, intoxicants, and public order, peace and safety will not extend to activities off Nisga’a Lands. As a result, Nisga’a Government will have no law-making authority in respect of activities on the Nisga’a Highway, existing private fee simple properties, submerged lands, or parks and ecological reserves. These lands are specifically excluded from Nisga’a law-making authority in the NFA. They are not Nisga’a Lands, even though they are situated within the land-mass defined by the Nisga’a TSL. By way of comparison, local government law-making authority can extend to lakes, rivers, streams and marine waters, as well as to provincial parks and highways within local government boundaries, notwithstanding that the Crown owns these things.

There are some areas of law-making authority which are not limited to Nisga’a Lands but will apply to all Nisga’a citizens wherever they reside in Canada. These include the solemnization of marriages in B.C., social services to Nisga’a citizens (other than licencing and regulation of facility based services), the adoption of Nisga’a children, including those on Nisga’a Lands if the parent(s) of guardian or a court waives the requirement for consent, and the devolution of the cultural property of a Nisga’a citizen who dies intestate.

Nisga’a Government will have no law-making jurisdiction on lands it owns, or subsequently acquires, outside the territory it governs as Nisga’a Lands.

In most cases Nisga’a laws will apply only to Nisga’a citizens. However, non-Nisga’a residents, and anyone who visits Nisga’a Lands, will be subject to some local Nisga’a laws, such as those pertaining to traffic, control of animals, local regulation of business, and the regulation of land use within Nisga’a communities. Local regulation of business and land use are discussed in Parts 5 and 10. The protections in the NFA for non-Nisga’a residents are discussed in the following section.

**Conclusion and Application Elsewhere.** The extent of aboriginal self-government in treaties, and its content and scope, will vary between First Nations depending on many circumstances. For instance, legislative authority relating to matters such as health and social services may make sense in the Nass River Valley, given a relatively large central core of Nisga’a population on Nisga’a Lands and very few non-Nisga’a residents. It would likely make less sense in an urban or semi-urban setting. Due to economies of scale and the need to avoid duplication and confusion, such authority would probably not be affordable, practical, nor desirable to any of the parties involved in urban treaty negotiations.

The powers Nisga’a Government will exercise off Nisga’a Lands are not powers normally within local government jurisdiction. UBCM believes that extreme caution is required in this area, and that law-making powers, generally speaking, should not be granted to First Nations off-treaty settlement lands in other treaties. While we understand that similar powers will likely be sought in most other treaties, it seems questionable, from a UBCM perspective, whether such provisions properly belong in a land claims treaty under Section 35 of the **Constitution Act, 1982**, but rather if they are to be addressed they should be contained in side agreements.
RELATIONS WITH NON-NISGA’A PEOPLE

In the section of the provincial mandate describing the land-based jurisdictional model for aboriginal self-government, the province stipulated that non-aboriginal residents will have the mechanisms available to them to be able to influence decisions that affect them. Clearly the ability to “influence” through means of an “advisory council” and the ability to vote in election are very different means of representation. UBCM recommends that the province replace “influence” with “participate”. UBCM supports effective representation of non-aboriginal people on Treaty Settlement Lands. (UBCM Response to Provincial Mandates, p. 5).

NFA. Non-Nisga’a people living on Nisga’a lands cannot vote for or hold office in Nisga’a Government. This is unchanged from the AIP. In general, Nisga’a law-making authority applies only to Nisga’a citizens on Nisga’a Lands, but the lack of representation for Non-Nisga’a is significant because non-Nisga’a residents may be affected in a number of Nisga’a law-making areas, most notably local business regulation and the regulation of land use within Nisga’a communities.

The protections for non-Nisga’a residents are as follows:

1. Non-Nisga’a residents may vote for or become members of, or will be given a reasonable opportunity to make representation to, a Nisga’a public institutions (e.g. school board) if the activities of that institution directly and significantly affect them (163/20-21);

2. Nisga’a Government will consult with non-Nisga’a residents who live on Nisga’a Lands about Nisga’a Government decisions that directly and significantly affect them (163/19), and may appoint non-Nisga’a to a Nisga’a public institution (164/23). Consultation is defined in the NFA (5/definitions); and

3. Non-Nisga’a residents may avail themselves of the appeal or review procedure in the NFA (163/22).

Non-Nisga’a residents are not subject to taxation by a Nisga’a Government (217/1). However, the NFA states that Canada or British Columbia may negotiate with the Nisga’a and attempt to reach agreement on Nisga’a Government direct taxation over non-Nisga’a citizens living on Nisga’a lands (217/3). We are advised that the province will not delegate this authority unless the Nisga’a Government establishes appropriate representational structures so that non-Nisga’a citizens who are taxed have a direct means of influencing how taxes are spent. According to the Ministry of Municipal Affairs, if a Nisga’a Government wanted to establish a general property taxation system to support local services (such as road maintenance, street lighting, water or sewer systems or recreational services), a Nisga’a Public Institution, in which non-Nisga’a could vote and run for office, would be the most attractive mechanism as the basis of provincial delegation of the authority to levy property tax on non-Nisga’a residents. Negotiations in this regard are not currently being considered.

Conclusion and Application Elsewhere. As it was in the Nisga’a AIP, this is one of the most contentious aspects of the NFA, and some critics have characterized Nisga’a Government as a “race-based” system.

Provincial government representatives have asserted that:

1. Since the Nisga’a cannot tax non-Nisga’a residents, violation of the democratic principle of “no taxation without representation” does not occur. Non-Nisga’a residents will continue to pay property taxes to the province (the tax collector for all rural areas) as residents of Electoral Area A.
2. Nisga’a Government jurisdiction does not apply to existing private lands held in fee simple that will in effect, surrounded by Nisga’a lands on the effective date of the treaty. Regional District jurisdiction would apply on these individual parcels.

The vote could be extended to non-aboriginal people in future. There is nothing in the NFA to prevent this evolution. According to the province, this step would be required should the Nisga’a wish to tax non-Nisga’a residents.

At the same time, it appears that the Nisga’a Government in this particular instance is not being viewed as a public government but instead similar to a private society. It is worth noting that Nisga’a citizens will continue to vote for all public government elections and referenda, including regional district elections.

It is our view that in locations where the number of non-aboriginal residents number in the thousands and may well outnumber aboriginal residents, provisions like those applying to the relationship with non-aboriginal people in the NFA would be untenable.

UBCM believes that future treaties should provide explicitly that non-First Nation citizens living on First Nation’s lands will not be subject to any First Nation government tax unless they also have the opportunity for meaningful participation in that government.

**GOVERNANCE AND JURISDICTION**

| Comments and Suggestions on Conclusions and Applicability Elsewhere. |

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9. **THE LOCAL AND REGIONAL GOVERNMENT RELATIONSHIP**

In order to ensure the development of harmonious relationships between local and aboriginal governments, treaties must provide for:

- a clear understanding of lines of authority and separation of powers
- possible areas of overlapping jurisdiction and concurrent or co-jurisdiction between aboriginal and local governments
- well defined mechanisms for cooperation, consultation and joint decision making
- clear dispute resolution processes
- Where appropriate, harmonization of laws and standards between the two governments

**Political Representation.** Under the NFA, political representation on the Kitimat-Stikine Regional District Board (KSRD) remains the same. As noted by Chairperson Joanne Monaghan in a speech on the NFA at the 1998 UBCM Convention:

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12 Appendix 4 contains Chapter 18 of the NFA, “Local and Regional Government Relationships” in its entirety. This text will be referred to throughout this section.

13 Dispute resolution is discussed in the following section of the paper
“Probably the most important aspect of the local government chapter is that all parties agreed the Nisga’a Lands would remain within the Regional District of Kitimat-Stikine. There has been no separation or abandonment of involvement in the Regional District government structure.”

Significant NFA provisions in this regard include the following:

- The Nisga’a Government will not become a municipal-type member of the KSRD but instead, Nisga’a residents continue to be represented as part of Electoral Area ‘A’ (231/1).
- Consultation with the Nisga’a is guaranteed prior to any amendments being made to the Electoral Area ‘A’ boundaries (231/3-4).
- The Electoral Area ‘A’ Director is elected at large by all voters within the Electoral Area and represents the entire area, not just the area encompassed by Nisga’a lands. Traditionally, the Electoral Area ‘A’ Director has been Nisga’a. Nisga’a residents will have the right to vote in KSRD elections and referenda in accordance with the Municipal Act.
- The NFA also specifies that the KSRD and the Nisga’a Lisims Government will meet at the request of either of them, to discuss matters of mutual interest.

**Intergovernmental Relations.** The NFA provisions dealing with ongoing intergovernmental relations at the local level are brief, and for the most part they are permissive rather than mandatory. The one mandatory provision relates to meeting with the KSRD to discuss matters of “mutual interest” if the KSRD request such a meeting (231/7). The Nisga’a Lisims Government or a Nisga’a Village may enter into agreements with the KSRD regarding the delivery of KSRD services on Nisga’a Lands or Nisga’a services to the KSRD (231/5). The Nisga’a Nation or Nisga’a Village may also enter into agreements with the KSRD to co-ordinate activities in areas of common responsibility such as planning, health services, and infrastructure development (231/6).

**Negotiation Process for Local Government Provisions.** The Skeena Treaty Advisory Committee (TAC), representing local governments in the area, had an active role in the negotiation of the local government provisions. In the words of Chairperson Joanne Monaghan of the KSRD:

“We found provincial and federal negotiations to be open, receptive and approachable. They often arranged to meet with the Skeena TAC, Regional District Board and members and municipal councillors for briefings and to discuss issues and concerns.

We even took matters into our own hands, and on occasion, met separately with Nisga’a representatives to discuss the wording of our chapter and were, in fact, involved in writing the local government chapter. Though many northwesterners, including local government representatives, are expressing misgivings about the overall agreement, the conclusion is still that we are satisfied with the wording of our particular chapter.

... With respect to the process of treaty negotiation and the need for effective local government involvement and discussions, I believe that the process worked. I would hope that other local governments and their TAC achieve a similar level of effective involvement and perhaps learn from our experience in this regard.”

**Conclusions & Applicability Elsewhere.** The NFA provisions relating to local and regional government relationships are brief and general. Due to the good and relatively simple nature of the relationship between KSRD and the Nisga’a Nation, it was not deemed necessary
to stipulate in detail the specific mechanisms and rules for ensuring that the interests identified in the UBCM interest statement highlighted above are protected.

The fact that the KSRD Electoral Area A director has usually been a Nisga’a citizen has played a helpful role in demonstrating to the Regional District and its member municipalities that their communities can work together.

The permissive language used in the NFA relating to the relationship between KSRD and the Nisga’a Nation allows for flexibility in the relationship and for arrangements to evolve as needed over time. It also recognizes that until implementation of the NFA, specific structures for Nisga’a Government functions will not be known, and therefore the exact nature of and needs for linkages between the KSRD and the Nisga’a Government cannot be anticipated. This point is made in UBCM’s legal review of certainty and finality in the NFA.

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, Nisga’a Constitution, consultation with non-Nisga’a residents, Nisga’a Laws and Urban Locals, 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 downside of this relatively flexible, unstructured and permissive approach is a lack of any agreed upon and binding principles in the NFA to guide the negotiation of any future agreements between the KSRD and the Nisga’a. For the Nisga’a and the KSRD this was not a concern because of their long-standing good working relationship, which currently involves relatively few formal agreements.

The KSRD relationship with the Nisga’a is not representative of many local government-First Nations relationships around the province. As mentioned above, in some areas of the Province, particularly those that are densely populated and developed, local government - First Nation relationships are complex, involving sophisticated local governments and well-developed service and political relationships. A detailed chapter on local government relations will be more important in treaties in these areas, and negotiations will be more involved and potentially more difficult. There may be a need for provisions relating to lines of authority, jurisdiction, mechanisms for co-operation, consultation and joint decision making, dispute resolution processes, and harmonization of local laws and standards. UBCM believes that the Municipal Act contains useful precedents in this regard. They should be used wherever appropriate.

The Nisga’a negotiation experience of the KSRD and Skeena TAC provides a number of useful lessons:

1. The value of maintaining the status quo should not be overlooked. Treaty provisions mandating change or stipulating new structures may not necessarily be required in every case and may not always assist in the development of sound working relationships with First Nations;

2. Even where local government - First Nations relations are left general and unstructured in a treaty, it is important, at the very least, to establish in the treaty a protocol for continuing communication.

3. Treaties must be flexible enough to allow local government - First Nation relationships to evolve. The treaty must provide a framework under which separate agreements and accords can be achieved and revised from time to time as necessary. In some negotiations, it may be important to agree to principles which will be followed (or basic tools which will be applied) in the development of these separate accords and agreements. In many, if not most, treaty negotiations the specific interests of local
government identified in Part 10 below will have to be addressed in more detail than in the NFA. The way these interests are handled will be key to the development of good long term relations and to the success of treaties.

LOCAL AND REGIONAL GOVERNMENT RELATIONSHIPS

Comments and Suggestions on Conclusions and Applicability Elsewhere.

10. LOCAL GOVERNMENT SPECIFIC INTERESTS

In this section, local government interests in the following areas will be discussed:

1. dispute resolution
2. communication and information
3. services and infrastructure
4. planning
5. taxation.

A. DISPUTE RESOLUTION

Local governments are concerned that treaty negotiations and settlements focus on mechanisms for dispute avoidance and that there be a formalized process for dispute resolution following the final settlement. The process should pay particular attention to issues related to "cross-border" impacts and the impacts of treaty rights which apply outside of settlement lands. Issues are bound to arise, as they do now between local governments, and a process for resolving differences should be an outcome of the treaty process.

Further, land use planning is one obvious area where there may be potential for disputes between local governments and aboriginal governments. This calls for a clearly defined and widely accepted dispute resolution procedure which is easily available to all parties.

NFA. The dispute resolution provisions of the NFA apply only to the three parties to the agreement. Since local government is not a party to the NFA, none of the provisions pertaining to dispute resolution apply.
Conclusions & Application Elsewhere. The Regional District of Central Okanagan’s comments on this issue (from their Report on the Westbank First Nation Treaty Negotiation, August 26, 1998) are a good representation of local governments’ views on this matter:

In areas where there are many linkages between a local government and neighbouring First Nation, including in the form of servicing agreements, a mechanism to resolve disputes is particularly important.

Local governments are interested that some form of dispute resolution process be created for local governments to access when their interests and residents are affected by the agreement provisions. Also, Final Agreements need to make provisions to inform local governments of any disputes that may affect their services, service agreements, facilities, lands, legislation and regulations.

Hence, in treaty negotiations elsewhere, it will be important to establish:

1. at a minimum a protocol concerning the resolution of disputes between the local government and First Nation, and preferably a binding agreement in this regard. The successful negotiation of this protocol or agreement should be a precondition to finalizing a treaty.

2. Within the dispute resolution process applying to the three parties, a process for notifying a local government when their interests are affected by the dispute.

DISPUTE RESOLUTION

Comments and Suggestions on Conclusions and Applicability Elsewhere.
Local governments are interested that the public should have opportunities to be well informed about the issues, the process and the expected outcomes and impacts of treaty negotiations. Post-settlement structures for communication and consultation (e.g., joint council meetings) should be established early in the process.

NFA. Assessment of how the first statement above has been addressed in the negotiation of the NFA, is beyond the scope of this analysis. There is a tension between the need for confidentiality and the need for openness. This tension is addressed in other negotiations, at least in part, through the 1994 Protocol Between the Province and UBCM for Implementing the Memorandum of Understanding on Local Government Participation in Aboriginal Treaty Negotiations, and through individual openness protocols acknowledging that B.C. will include a Treaty Advisory Committee (TAC) representative as a member of the provincial negotiating team and containing provisions for information sharing and confidentiality.

With respect to the second stated interest, the NFA provides that the Nisga’a Lisims Government and the KSRD will meet at the request of either of them to discuss matters of mutual interest (18/7).

Conclusions & Application Elsewhere. In treaty negotiations elsewhere, local governments and First Nations will in many cases require more detailed provisions and mechanisms for communication and consultation. Again, as with dispute resolution, these details will have to be negotiated in a separate agreement or accord because local governments are not direct parties to treaties. UBCM believes that such agreements, where required, must be in place prior to finalizing treaties.

Comments and Suggestions on Conclusions and Applicability Elsewhere.
C. SERVICES AND INFRASTRUCTURE

This category addresses one of the primary interests and functions of local government, the provision of services. Numerous local governments have negotiated service agreements directly with bands, as a pragmatic response to servicing the needs of aboriginal communities. Examples include water, waste management, fire protection, emergency services, transit, dog control, storm and sanitary sewers and roads.

NFA. The Nisga’a Lisms Government or a Nisga’a Village can enter into agreements with the KSRD regarding the payment for delivery of KSRD services on Nisga’a Lands or Nisga’a services to the KSRD (18/5). Payment and enforcement provisions for KSRD services are not included in the NFA. Discussions between the Nisga’a and the Regional District took place on this subject during negotiations, and an agreement was reached stipulating that:

- After an initial phase-in period, the Nisga’a would pay for regional district services like any other Electoral Area. In this case, services are limited to “general government”.
- During the initial phase-in period, the provincial government would cover the costs for the Nisga’a.

Conclusion & Application Elsewhere. Since there are currently few shared services between local government and the Nisga’a, many of local governments’ specific interests in infrastructure and services do not get addressed in this particular case. These interests include the retention of current infrastructure facilities and sites; maintenance of current services at existing levels and costs; equal fees and charges to residents for services on and off settlement lands; access to or through settlement lands for the purposes of infrastructure and service development; and compatible standards for infrastructure and services on and off settlement lands.

In addition to the types of local service powers familiar to local governments in B.C., Nisga’a Government also will have extensive powers in the social policy sphere: health, education and child and family services.

In other treaty negotiations, the following issues will be important, especially as First Nations develop, grow and prosper:

- mechanisms must be in place to ensure full recovery for regional district or neighbouring local government services;
- simple methods must be developed for co-ordinating functions between First Nations, municipalities and regional district;
- service contracts with First Nations must have legal and business efficacy; and
- integration of services between communities will be important in many areas, particularly in the urban or semi-urban context.

UBCM believes that these issues must be addressed during treaty negotiations because of the large impact that treaties will have on them. For example, there is a close relationship between the nature and extent of self-government and the nature and extent of service requirements.

SERVICES AND INFRASTRUCTURE

Comments and Suggestions on Conclusions and Applicability Elsewhere.
D. PLANNING

Local governments are interested that land uses on settlement lands are compatible or harmonized with those of the local government beside or around the settlement lands. First Nations should not be asked to undertake planning activities unless adjacent or surrounding local governments have done the same -- double standards should not apply.

NFA. Nisga’a Government land use regulation prevails over federal or provincial law in the event of a conflict or inconsistency (169/49). Given that the Nisga’a Nation will be the landowner, Nisga’a land use regulation is a function of self-management, rather than management of others, although non-Nisga’a residents (e.g. leaseholders) on Nisga’a Lands will be impacted. Nisga’a law-making power in this area is broad. There are only three reservations on the authority:

1. Nisga’a Land will be within the constitutional jurisdiction of the province and therefore subject to provincial laws of general application. This includes former reserve lands which are currently within federal jurisdiction.

2. until the Nisga’a enact land use regulations, current laws as they may exist will continue. When the Nisga’a “occupy the field,” provincial laws can be displaced; and

3. local-level dialogue is specifically encouraged and the need for compatibility and coordination in the area of land use planning is specifically mentioned. Nisga’a Lisms Government will meet with the KSRD at the KSRD’s request to discuss “matters of mutual interest.” (231/7) Nisga’a Government may enter into agreements to coordinate their activities with respect to common areas of responsibility such as planning, health services and infrastructure development (231/6).

The NFA does not erode the Regional District jurisdiction in areas such as land use planning or general government. Under the NFA, the Nisga’a will receive fee simple parcels (category A and B lands) outside the Nisga’a Lands and these will be treated like other rural private property. The KSRD’s jurisdiction will continue; their zoning bylaws, rules and regulations will apply.

Conclusions and Applicability Elsewhere. There are no regional district Official Community Plans, zoning by-laws or Regional Growth Strategies in the Nass area.

The NFA provides little guidance on many of local government’s specific interests in land use planning, including the co-ordination of local and regional plans, and zoning between local governments and neighbouring First Nations. By way of comparison, Part 25 (Regional Growth Strategies) and Part 26 (Management of Development) in the Municipal Act describe the regulation of parallel issues for local government in the area of land use regulation in about 100 sections over 65 pages. This compares to the few lines of text in the NFA. In more urban locales more detailed tools to enable effective local co-operation will be required.

PLANNING

Comments and Suggestions on Conclusions and Applicability Elsewhere.
E. TAXATION

A primary interest of local government is in budgetary stability. In regard to issues related to revenue and taxation, the principles of fairness and equity should apply to aboriginal and local governments equally.

NFA. Key taxation provisions in the NFA include:

- Jurisdiction: The Nisga’a Lisims (central) Government has the power to levy direct taxes (e.g. property tax) on Nisga’a citizens on Nisga’a lands for Nisga’a purposes (217/1).
- Nisga’a Government taxation powers do not limit the power of Canada or British Columbia to impose or levy a tax or make laws in respect of taxation of Nisga’a citizens (217/2). The taxing powers are concurrent.
- Canada or British Columbia may negotiate with the Nisga’a and attempt to reach agreement on Nisga’a Government direct taxation over non-Nisga’a citizens on Nisga’a lands (217/3). At this point however, the Nisga’a Nation has no authority to direct tax non-Nisga’a citizens. For example, non-Nisga’a will continue to pay property taxes to the Province and not to the Nisga’a Government. Negotiations to change the status quo in this regard are not currently being considered. This was discussed in greater detail in Part 8.
- Taxation exemptions available to Nisga’a citizens under the Indian Act will be phased out after 8 years respecting transaction taxes such as the GST, and after 12 years respecting other taxes such as income tax (section 6).
- Sections 13 through 20 contain specific tax exemptions relating to settlement lands and capital. The general purpose of these sections seems to be to minimize the tax consequences for the Nisga’a associated with the implementation of the asset settlement contained in the NFA.\(^\text{14}\)
- there is a “re-opener” for tax exemptions - this is described in Part 1 of this review.

Nisga’a Government taxation exemptions are contained in the Nisga’a Nation Taxation Agreement, which is a side agreement to the NFA. The exemptions will be reviewed no later than seven years after the effective date of the NFA. This corresponds to the UBCM principle that governments should consider using accords that are not constitutionally protected for dynamic or evolving rights.

Conclusion and Application Elsewhere. The NFA should be revenue neutral for the KSRD: non-Nisga’a residents will continue to pay for regional district services through the regional district requisition. The province and thus the KSRD will continue to receive property tax revenue from non-aboriginal taxpayers within Nisga’a territory. Further, land owned by the Nisga’a outside the Nisga’a TSL core area will be treated like other rural private property in the regional district.

Local governments have many specific revenue and taxation interests. Treaty settlements will potentially impact upon taxation and downloading, property tax exemptions, grants-in-lieu, local government tax base and grants, Provincial grant programs, financing commitments, accessing new industrial base, future development on settlement lands, and the economic development of local communities. The cumulative impact could be very significant. However, in the particular context of the NFA, these specific interests are not affected. KSRD Chairperson Joanne Monaghan made this point in her speech at the 1998 UBCM Convention, which has been referred to earlier in this review.

\(^{14}\) For example, neither the Nisga’a Nation nor any Nisga’a village is subject to capital taxation in relation to their estate or interest in settlement lands, unless the land is used for commercial purposes (sections 13 and 14).
Local government revenue and taxation issues will be of central importance in other treaty negotiations.

**TAXATION**

| Comments and Suggestions on Conclusions and Applicability Elsewhere. |
GENERAL CONCLUSIONS

This Workbook has reviewed the NFA in relation to local government interests in treaties. It has analysed the affect of the NFA on those interests, and the applicability of NFA provisions elsewhere.

The NFA provides some answers as to how local government interests may be affected by a final treaty, but not all. Many more issues will have to be addressed in treaties in less remote areas than the Nass River Valley, particularly regarding inter-governmental relations at the local level.

It is clear that there are some NFA provisions which are acceptable from a UBCM perspective, and should be applied elsewhere. Within this category would fall the application of the Charter of Rights and Freedoms and the Criminal Code and the exclusion from Nisga’a Lands of fee simple property. The general mechanism for achieving certainty in the NFA would also fall within this category. It is equally clear that there are other provisions that will require a great deal more work in other negotiations. In other treaties, for example, provisions relating to adequate participation for non-First Nation residents on settlement lands, and provisions relating to clear and comprehensive government policies for compensation of third party and local government interests will be very important.

There are also provisions in the NFA that may have some application in rural areas, but would likely be unacceptable or incomplete in urban or semi-urban regions. For example, provisions dealing with local and regional government relations will require greater development concerning issues such as regional and local land-use planning, dispute resolution, and servicing and infrastructure.

Finally, there are many provisions that are specifically tailored to the unique circumstances in the Nass River Valley. These provisions may be acceptable in the NFA, but probably of little direct applicability anywhere else. Such provisions would include most of the asset side of the NFA (i.e. the actual land, cash and resource package).

A more detailed compilation of these various categories will be prepared by UBCM after Workbook comments and suggestions have been obtained.
APPENDIX 1

LIST OF NISGA’A FINAL AGREEMENT CHAPTERS

| Chapter 1 | Chapter 2 | Chapter 3 | Chapter 4 | Chapter 5 | Chapter 6 | Chapter 7 | Chapter 8 | Chapter 9 | Chapter 10 | Chapter 11 | Chapter 12 | Chapter 13 | Chapter 14 | Chapter 15 | Chapter 16 | Chapter 17 | Chapter 18 | Chapter 19 | Chapter 20 | Chapter 21 | Chapter 22 |
|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| PREAMBLE  | DEFINITIONS | GENERAL PROVISIONS | LANDS | LAND TITLE | FOREST RESOURCES | ACCESS | ROADS AND RIGHTS OF WAY | FISHERIES | WILDLIFE AND MIGRATORY BIRDS | ENVIRONMENTAL ASSESSMENT AND PROTECTION | NISGA’A GOVERNMENT | ADMINISTRATION OF JUSTICE | INDIAN ACT TRANSITION | CAPITAL TRANSFER AND NEGOTIATION LOAN REPAYMENT | FISCAL RELATIONS | TAXATION | CULTURAL ARTEFACTS AND HERITAGE | LOCAL AND REGIONAL GOVERNMENT RELATIONSHIPS | DISPUTE RESOLUTION | ELIGIBILITY AND ENROLMENT | IMPLEMENTATION | RATIFICATION |

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APPENDIX 3

MISCELLANEOUS COSTS OF NFA
(Excluding Land and Capital - See Part 2)

1. B.C. must pay remediation costs required under B.C. law should any of the sites listed in schedule B to chapter 3 be contaminated (section 44, chapter 3).

2. Canada and B.C. will pay $0.3 million and $2.8 million respectively for surveying the boundaries of Nisga’a Lands and Nisga’a Fee Simple Lands (sections 87-89, chapter 3). This survey cost is included in the $311 million one-time transfers referred to under the heading “Cash” above.

3. B.C. will issue a commercial recreation tenure to the Nisga’a for areas set out in Appendix E (sections 90-94, chapter 3).

4. the Nisga’a will be granted a provincial water licence, subject to regulatory requirements and existing water licences, reserving up to 300,000 cubic decametres, or one percent of the annual flow of the Nass River watershed for the use of the Nisga’a for domestic, agricultural and industrial purposes (sections 122-139, chapter 3).

5. the Nisga’a will have non-transferable fish and wildlife entitlements on Crown lands in the Nass wildlife area for domestic purposes. The entitlements will be expressed as percentages of the total allowable catch subject to conservation measures and legislation enacted for the purpose of public health or public safety (chapter 8 and 9 respectively). No federal or provincial licence will be required and no fees, charges, or royalties will be payable in respect of traditional or domestic harvests. This appears to be in recognition of the Nisga’a’s aboriginal rights in the area.

6. Canada will fund a Fisheries Conservation Trust in the amount of $10 million (sections 96-106, chapter 8). Canada and B.C. will each provide $5.8 million to enable the Nisga’a to increase its commercial fishing capacity, in the form of commercial licences and vessels (section 111, chapter 8). These amounts are included in the $311 million one-time transfers referred to under “Cash”.
LIST OF JURISDICTIONS WHERE NISGA’A LAW
WILL PREVAIL OVER FEDERAL OR PROVINCIAL LAW
(and Vice-Versa)

Areas where Nisga’a Laws will prevail over federal and provincial laws in the event of an inconsistency or conflict include:

1. laws in respect of the administration of Nisga’a fish allocations (112-113/68-71) subject to total allowable catch limitations in the NFA, and subject to conservation measures, legislation enacted for the purpose of public health and safety, the Harvest Agreement, and Nisga’a fishing plans (which must be approved by the minister);

2. laws as to the distribution of Nisga’a wildlife entitlements on Crown lands in the Nass Wildlife Area (138-139/35-38) subject to total allowable harvest objectives in the NFA, and subject to conservation measures and legislation enacted for the purpose of public health and safety, and that are not inconsistent with the annual management plans (which must be approved by the Minister);

3. administration, management and operation of Nisga’a Lands, including zoning and other regulation on land uses on Nisga’a lands, and regulation and licensing of businesses, professions and trades on Nisga’a Lands (167-170/44-52);

4. administration, operation and management of Nisga’a Government, including creation and continuation of Nisga’a Villages and Urban Locals (166-167/34-38);

5. Nisga’a citizenship, but without prejudice to issues relating to Canadian citizenship or rights under the Indian Act (167/39-40);

6. culture and language, but subject to laws in respect of intellectual property, the official languages of Canada, and the prohibition of activities outside of Nisga’a Lands (167/4-43);

7. family and child services provided that those laws include standards comparable to provincial standards and subject to laws of general application relating to the reporting of child abuse (174-175/89-93);

8. pre-school to grade 12 education provided that teacher certification and curriculum is in accordance with comparable standards in public or independent schools in B.C. (176-177/100-102);

9. post-secondary education within Nisga’a Lands, provided standards comparable to provincial standards are maintained (177/103-105);

10. laws in respect of assets, other than real property, on Nisga’a Lands owned by the Nisga’a Nation, Nisga’a Villages, or Nisga’a Corporations (170/53-54);

11. laws respecting the regulation of aboriginal healers on Nisga’a lands, not including the authority to regulate products or substances regulated under provincial or federal laws of general application, and subject to competence, ethics and quality of practice reasonably required to protect the public (174/86-88);
12. laws respecting the adoption of Nisga’a children (175/96,99);
13. laws in respect of the devolution of cultural property of a Nisga’a citizen who dies intestate (176/116);
14. laws relating to the organization and structure for the delivery of health care services (but see number 4 below).

Areas where federal and provincial laws will prevail over Nisga’a laws in the event of an inconsistency or conflict include:

1. laws in relation to buildings, structures, and public works (172/69-71);
2. the regulation of traffic and transportation (172-173/72-74);
3. the provision of social services (173/78-79);
4. health services except with respect to a Nisga’a law relating to the structure of health care delivery (174/82-85);
5. laws in relation to public order, peace and safety (171/59-62);
6. prohibition or regulation of intoxicants (178-179/110-114);
7. laws in respect of environmental assessment (155/1-3) and environmental protection (157/11) on Nisga’a Lands;
8. laws with respect to the sale of fish or aquatic plants harvested under the NFA (113/72-73);
9. laws with respect to the sale of wildlife, migratory birds, or the indelible by-products or down of migratory birds harvested under the NFA (139/39-40);
10. laws respecting the use, possession, and management of assets owned by a Nisga’a Government or Nisga’a Corporation located off Nisga’a Lands (170/56-58).

The Charter of Rights and Freedoms and the Criminal Code will continue to apply, as will all federal and provincial laws of general application where there is no conflict with the NFA or with valid Nisga’a laws made under the first list above. Further, Nisga’a Government jurisdiction will not affect federal and provincial jurisdiction in respect of industrial relations, employment standards, and occupational health and safety (172/67).
APPENDIX 5
LOCAL AND REGIONAL GOVERNMENT RELATIONSHIPS CHAPTER
(NFA CHAPTER 18)