

**PRACTICAL INTERESTS OF LOCAL GOVERNMENT IN
NEGOTIATION OF FIRST NATIONS GOVERNANCE AUTHORITIES IN TREATIES:
DISCUSSION PAPER OF THE UBCM GOVERNANCE TECHNICAL TEAM
UBCM - September 2004**

EXECUTIVE SUMMARY

The Governance Technical Team (GTT) was established by UBCM to assist in defining in more detail local governments' practical interests in the negotiation of First Nation governance authorities. The goal is to convey these interests to the provincial and federal governments and their negotiators at treaty tables. Members of the team included staff from local governments and Treaty Advisory Committees involved in treaty tables that have produced an Agreement in Principle (AIP) and in most cases, at which Final Agreement negotiations are currently underway. Provincial government representatives were also members of the GTT, providing an important opportunity to share information and build understanding.

Governance Technical Team (GTT) members examined the AIP in their region and identified areas of future First Nation legislative and regulatory authority in which local governments had a practical interest and those that were priorities for detailed examination. These priority areas of practical interest are:

- 1) Buildings and Structures
- 2) Business (licensing, regulation and operation)
- 3) Emergency preparedness/services
- 4) Environmental Management (e.g. assessment and protection)
- 5) Peace, Order and Safety
- 6) Land Use Planning and Management
- 7) Public Works
- 8) Taxation
- 9) Transportation - Roads and Rights-of-Way

The interests and concerns in relation to each of the nine areas are described in this report. In summary, based on their research and examination of the 2003 AIPs, the common concerns raised by local government GTT members relate to the potential for:

- Final Agreements that fail to address the full extent of issues relating to post-treaty First Nation powers and authorities which could have an impact on neighbouring jurisdictions;
- lack of effective mechanisms to deal with dispute resolution, cost-sharing, and cost recovery;
- lack of a process to facilitate consultation and communication between First Nation parties and neighbouring municipalities;
- economic advantage for First Nation governments through adoption of different standards and/or taxation regimes;
- lack of compatibility and coordination between First Nation government and local government standards and regulations within the same areas (e.g. environmental management, emergency preparedness; and infrastructure); and
- lack of coordinated land use planning with long term perspective.

In answering the question, "How could our concerns about the nature and scope of First Nations powers and authorities in these areas be addressed?", GTT members are suggesting a range of approaches, depending on the issue:

- Ensuring First Nations meet or beat the same provincial and federal standards local governments are required to follow;
- Ensuring provincial and federal laws prevail in the event of a conflict with a First Nation law (this may mean ensuring the scope of First Nation government jurisdiction is comparable to municipal jurisdiction in the same area of authority);
- Ensuring that First Nation and local governments have the ability to provide the same standard of services on and off Treaty Settlement Lands;
- Considering formalizing the local government-First Nation relationship, e.g., through First Nation membership in Regional Districts or other means;
- Providing a process through which neighbouring First Nation and local governments can come to agreement on key issues (e.g. servicing); and
- Creating dispute resolution mechanisms for First Nation and local governments.

GTT members also agreed that negotiating these First Nation governance powers in a non-constitutionally protected Governance Agreement separate from the treaty itself, will allow First Nations governments to continue to evolve and adapt to meet future needs and challenges.

Finally, the importance of addressing key issues pre-treaty and not post-treaty is underscored in this report. From a local government perspective, AIPs leave a lot of questions unanswered with respect to the nature and scope of First Nations future law-making authority. In negotiating First Nation governance, it is imperative that the impacts of having different powers and authorities from the neighbouring jurisdiction are well understood and any potentially negative impacts mitigated.

The solution is to ensure that early and adequate consultation occurs with local governments (both individually and collectively) prior to the completion of Final Agreements. Local governments at treaty tables have a key role to play in identifying issues directly with First Nations pre-treaty and working together on resolution of local government concerns, to allow and encourage cooperation post-treaty.

1. BACKGROUND

To date, five Agreements in Principle (AIPs) have been negotiated with First Nations through the BC treaty process: Lheidli T'enneh, Maa-Nulth, Sliammon, Snuneymuxw and Tsawwassen. These AIPs deal primarily with lands, resources and fiscal issues. While each AIP has a chapter on governance which lists areas of future First Nations law-making powers, details on the nature and scope of future First Nation government powers and authorities post-treaty have not yet been negotiated. A Governance AIP was negotiated at only one of the tables (Snuneymuxw) and the First Nation has not ratified it. The other four AIPs have been ratified by the three Principals in the negotiations: the federal and provincial governments and the First Nation.

In UBCM's January 2004 *Comparative Analysis of the 2003 AIPs and Local Government Interests*, UBCM registered its concern about the lack of negotiations on the nature and scope of First Nations governance, since it is only through these negotiations that many local government concerns and interests can be addressed. The three Principals have put a priority on negotiating First Nations' governance at Final Agreement treaty tables. As indicated in AIPs, the intent is to produce Governance Agreements outside the treaty (and therefore are not constitutionally protected), subject to review after 10 years. In addition, some First Nations governance powers and authorities will be contained in the treaty itself.¹

2. PURPOSE AND PROCESS

In early 2004, UBCM set itself the following goals:

1. To continue to advocate for and actively support the participation of affected local governments in governance negotiations at individual treaty tables; and
2. To define in more detail local government's practical interests in the negotiation of First Nations governance and to convey these interests to the provincial and federal governments so that they may be considered in negotiations with First Nations at treaty tables.

To accomplish the second goal, UBCM sought the assistance of staff representatives from local governments where AIPs have been recently tabled, (Snuneymuxw, Maa Nulth, Sliammon, Lheidli T'enneh and Tsawwassen) and provincial government staff (see [Appendix A](#) for a list of Governance Technical Team or "GTT" members).

The GTT met twice and conducted individual analyses to examine potential differences between local government and First Nation law-making authorities post-treaty, in order to better understand and address the implications of any differences for coordinated and cooperative intergovernmental relations.

The purpose of this paper is to report on the findings of the GTT as follows:

¹ While a Governance AIP has not yet been concluded at any of the other four tables, all of the AIPs indicate that one is to be negotiated. Existing UBCM policy acknowledges the evolving nature of governance and the need to allow for change over time, which would be facilitated by a separate Governance AIP outside the treaty. Therefore GTT members support the approach of a separate Governance Agreement containing many of the local governance authorities outside the treaty itself.

1. First Nations' governance authorities listed in AIPs, in which local governments have a practical interest;
2. Description of the nature of local governments' interests and concerns in these areas of authority; and
3. Advice on how these authorities could be negotiated in a way that would meet the general interests and address concerns of local governments.

3. EXISTING UBCM POLICY AND GTT GENERAL PRINCIPLES

UBCM has defined and represented local government general interests related to First Nations' governance matters in policy papers and through the Treaty Negotiations Advisory Committee (TNAC) since the mid-1990s. These interests have been consolidated in the UBCM Policy Digest Paper #3² and are focused primarily on the following three areas: the local government - First Nation relationship; First Nation authority on and off Treaty Settlement Lands (TSL); and representation of non-members living on TSL. The latter subject is discussed in UBCM Policy Digest Paper #3 but was beyond the scope of the GTT's work.

In developing this paper, GTT members agreed on the following principles and assumptions:

- *Parity without "Sameness"*

GTT members recognize that First Nations and local governments will not be the same post-treaty, given for instance that First Nations governments will have jurisdiction in areas that local governments do not. It is unlikely that First Nations will operate under provincial legislation such as the *Community Charter* and *Local Government Act*. At the same time, it is important to ensure that post-treaty, adjacent jurisdictions have compatible authorities and jurisdictions, which can be coordinated easily when necessary.

- *Same Standards in Intergovernmental Relationships*

First Nations governments should not be required to meet standards of conduct that local government are not required to when dealing with one another. However, new intergovernmental mechanisms might need to be created between First Nation and local governments where there are no mechanisms available, such as they would be between local governments. This is particularly true with respect to dispute resolution.

- *Support for Treaties and Prosperous First Nations Communities*

GTT members support First Nations gaining greater control over their own affairs and their own communities. They also support economic development leading to wealth and job creation on First Nations lands. Local governments desire for a level playing field between adjacent jurisdictions is not intended to impede these objectives in any way.

4. FIRST NATIONS GOVERNANCE AUTHORITIES IN WHICH LOCAL GOVERNMENTS HAVE A PRACTICAL INTEREST

A survey of AIP Governance chapters (and the Governance AIP in the Snuneymuxw case) shows a high degree of commonality among the areas listed in which First Nations will have law making powers. See [Appendix B](#) for a comparison of the four ratified AIPs. Noteworthy is the

² *Local Government Treaty Related Interests In Governance Issues*: UBCM Policy Digest Paper #3 - July 2003 is available through the UBCM Website at www.civicnet.bc.ca

Tsawwassen AIP, which contains many additional areas of authority not specifically listed in other AIPs, including the open-ended category of “other matters as negotiated”.

Governance Technical Team (GTT) members each examined the AIP in their region and identified areas of future First Nations’ legislative and regulatory authority in which local governments had a practical interest and those that were priorities for detailed examination³. The common areas of practical interest that GTT members identified are:

1. Buildings and Structures
2. Business (licensing, regulation and operation)
3. Emergency preparedness/services
4. Environmental Management (e.g. assessment and protection)
5. Peace, Order and Safety
6. Land Use Planning and Management
7. Public Works
8. Taxation
9. Transportation - Roads and Rights-of-Way⁴

It should be noted that there are many other areas of interest to local government related to First Nations’ law-making authorities in relation to natural resources, but they are outside the scope of this study, since it focuses primarily on law-making powers referenced in the governance chapter of AIPs. With that stated, two exceptions have been made: one is environmental protection and assessment and the other is taxation. Although they are dealt with outside of the governance chapter in AIPs, these areas were selected for further examination because of the close relationship they have to other areas of jurisdiction on the list, (i.e. taxation with business and environmental assessment and protection with land use planning and management). Other areas in which local governments have a practical interest but were not selected for detailed examination are:

- Administration of Justice
- Enforcement of laws (imposition of penalties, fines, restitution, imprisonment for violation of First Nation laws)
- Liquor/Intoxicants (prohibition and regulation)

The governments of BC and Canada propose that First Nation governments *not* have law making powers post-treaty in the following areas.

- | | |
|--|-------------------------------------|
| • Criminal law | • Workers compensation board |
| • Institutional correctional facilities | • Customs and excise |
| • Gaming and gambling | • Immigration and citizenship |
| • Regulation and insurance of motor vehicles | • National defense |
| • Employment standards and labour relations | • Broadcasting |
| | • Liquor distribution and licensing |

5. LOCAL GOVERNMENT INTERESTS AND CONCERNS

³ Treaty Negotiation Office (TNO) representatives on the GTT provided members with a confidential summary of proposed Final Agreement language, where available, in relation to negotiating governance powers with First Nations at Final Agreement treaty tables.

⁴ These nine areas are the focus of the next section of this paper.

Members of the GTT have contributed much of the text in this section. In the course of their respective analyses, GTT members examined local government powers and restrictions on those powers in priority areas of jurisdiction (numbered one to nine on page 4)⁵. Members then identified local government issues and concerns and contributed advice on ways these concerns could be addressed through treaty negotiations. As a result of their research, GTT members found overlapping interests and issues among the topic areas examined (e.g. in relation to regulation of business and taxation).

During their discussions, GTT members noted that areas of First Nations' government authority *not* mentioned in the AIPs posed a major concern. The AIPs leave many questions unanswered about how local governments and First Nations will coordinate necessary activities and functions at the local level. This points directly to the need for local government – First Nations discussions/negotiations during the treaty process; the outcome of which will be essential to the effective implementation of any treaty. This point is discussed in more detail in the conclusion of this paper.

5.1 Buildings and Structures

Issues and Concerns

At the national level, a model *National Building Code* is maintained and developed by the Canadian Commission on Building and Fire Codes (CCBFC). The BC government's *Building Code* (or BCBC, which includes *Plumbing Code*), provides minimum standards for public health, fire safety and structure sufficiency with respect to the public interest. Local governments can pass building bylaws but cannot vary the code without provincial government approval, and this can only occur in limited circumstances (e.g. to respond to unusual conditions within a municipality) assessed by the provincial government on a case by case basis. There are many checks and balances involved in building code development at the provincial level and there is a formal appeal process.

There is ample evidence that in both urbanized areas and their outskirts, development on First Nations lands is increasing. Local governments would be concerned if post-treaty, First Nation governments did not adhere to the standards and procedures in the *BC Building Code* due to the implications for:

- public safety;
- safety of individuals providing services on TSL (e.g. fire protection contracted from neighbouring municipality); and
- economic advantage – fewer building standards on TSL could mean lower building costs for developers and other builders.

Resolution of Concerns

Local government interests would be met if First Nations agreed to adhere to the *BC Building Code* and were involved with other governments and stakeholders in its on-going development.

5.2 Business (licensing, regulation and operation)

⁵ This information was compiled by the GTT for each of the areas of jurisdictions discussion in Section 5, but was not included in this paper due to length considerations. It can be provided by UBCM on request.

Issues and Concerns

a) Business Licensing

The *Community Charter* provides municipalities with the authority to regulate in relation to business. It also authorizes Council to provide for a system of licenses. This includes:

- establishing terms and conditions that must be met for obtaining, continuing to hold or renewing a license, including the nature and terms of those conditions and who may impose them;
- providing for the suspension or cancellation of licenses for failing to comply with a term or condition or failing to comply with the business licensing bylaw; and
- providing for reconsideration or appeals of decisions made with respect to the granting, refusal, suspension or cancellation of business licenses.

Additionally, the legislation permits two or more municipalities, by bylaw, to adopt in each participating municipality an inter-municipal scheme in relation to business.

Local government interests in regulating businesses relate primarily to ensuring that public health and safety, and fairness -- in the terms and conditions followed by business operators in the community -- are preserved. Regulation of pawnbrokers and second hand goods dealers is particularly important in this regard and provincial legislation recognizes the need for special powers and authorities for these types of businesses. Also, the regulation of the sale of goods such as firecrackers, fireworks, cigarettes, alcohol and similar substances where there are public health implications are of concern to local governments if the rules on TSL are significantly different than those applying off TSL.

b) Providing Assistance to Business

The *Community Charter* contains a general prohibition against municipalities providing assistance to businesses in the form of a grant, benefit, advantage or other form of assistance, including an exemption from a tax or fee. Exceptions are possible for heritage conservation purposes. Also, municipalities can enter into partnering agreements (for public-private partnerships to provide a service on behalf of a municipality) and in this limited circumstance, assistance to business *can* be provided under a partnering agreement, which can include a tax exemption under prescribed conditions.

Local governments would also have concerns if businesses on future First Nation lands will receive incentives or procurements from senior governments in order to stimulate economic activity that may not be available to businesses located off TSL. Such incentives would lead to an economic advantage for those businesses that are to locate on TSL. Moreover, local governments are unsure whether First Nation governments would have broader authority for operating a "government" business than local governments have. Again, this can lead to inconsistencies and potentially economic advantages for First Nations governments relative to local governments.

Resolution of Concerns

In relation to licensing of businesses, the Governance Agreement should provide more detail on the scope of First Nations authority with respect to the regulation and licensing of businesses. The treaty negotiation process needs to ensure that the business regulation regimes on and off TSL are compatible, in order to avoid any negative cross-boundary impacts at the local level.

In relation to resolving concerns regarding offering tax incentives to business, see the section on taxation in section 5.8.

5.3 Emergency Preparedness and Emergency Services

5.3.1 Fire Protection

Issues and Concerns

The main issues relating to First Nation fire protection powers and service delivery are:

- Uncertainty about whether *Workers Compensation Board* regulations will apply to First Nations firefighters;
- Varying standards of training, equipment and service delivery;
- Varying building construction standards.

These issues lead to concerns in the following areas:

- a) Potential demands on local government fire fighting financial and personnel resources.
- b) Potential fire hazards in boundary/fringe areas where First Nation lands are adjacent to local government lands.
- c) Safety of local government firefighters where local governments enter into mutual aid agreements with First Nation fire departments.

If there are significant differences in the way that their members are trained and equipped or a general lack of capacity in comparison with other fire departments, First Nation fire departments will have limited capability to provide mutual aid to local government departments. They then may have to rely excessively on aid from other departments, placing undue demands on the financial and personnel resources of those departments. This is particularly onerous for members of the numerous volunteer departments, who are generally employed elsewhere. They also may be unable to suppress fires close to their boundaries, creating a potential fire threat to adjacent jurisdictions.

If there are buildings on First Nations lands which are not constructed to BC Building Code standards, these could pose a safety hazard to local government firefighters assisting with fire suppression under a mutual aid agreement.

It is important to note that these same issues and concerns presently exist in relation to local government fire protection services, where standards vary significantly throughout the province., Some jurisdictions with highly trained and well-equipped fire departments adjoin areas that have minimal or no fire protection services.

Resolution of Concerns

The following options would help to resolve the concerns identified above:

- Require First Nations to operate fire departments in accordance with *Occupational Health & Safety Regulations*.
- Require First Nations to 'meet or beat' *BC Building Code*
- Encourage First Nations and local governments to reach agreement on specific standards of training, equipment and service delivery to be maintained as part of mutual aid arrangements.

- Encourage the Province (Fire Commissioner's Office) to develop guidelines for basic fire service delivery by all departments.

5.3.2 Emergency Preparedness

Issues and Concerns

While the provincial negotiating position is that First Nations' laws must 'meet or beat' provincial laws in most instances, there is no certainty that Final Agreements will reflect this. Potential inconsistency between First Nation and local government authority, and requirements for emergency preparedness, raises the following concerns:

- **Lack of Coordinated Response:** Emergencies do not recognize jurisdictional boundaries. Coordination among adjacent jurisdictions is critical to an effective emergency response.
- **Resource Allocation:** Unless basic emergency planning and response requirements are specified, First Nations may allocate insufficient resources to handle emergency situations that may arise on their lands or in a broader geographic area.⁶ This could place excessive demands on local governments' emergency response resources (financial, personnel, equipment, etc.) and compromise the ability of any jurisdiction to respond effectively.

Requirements for emergency preparedness will vary among local governments and among First Nations, depending on factors such as the relative risk of various emergencies and population density. Also, each jurisdiction will have some discretion in determining the scope of its emergency response program based on available resources, public opinion and political viewpoint. Varying levels of emergency response services can be accommodated provided all jurisdictions meet standard, basic service levels.

Resolution of Concerns

The following options would help to resolve the concerns identified above:

- Require First Nations to adopt legislation identical to – or at the very least equivalent to – the provincial *Emergency Program Act* and Regulations.
- Have First Nation representation on the Regional District Board with the First Nation as a participant in the Regional District emergency preparedness service. Presumably, emergency preparedness for all participants would then be carried out in accordance with the *Emergency Program Act* and Regulations.
- Encourage First Nations and local governments to enter into agreements to develop coordinated emergency plans and response procedures.

5.4 **Environmental Management**

Issues and Concerns

⁶ This situation already exists between municipalities, which have long been mandated to prepare emergency response plans, and some regional districts where such planning has been optional. Bill 54 will rectify this situation.

Local governments are subject to a wide range of provincial and federal legislation, regulations and guidelines aimed at environmental management, including the Federal *Fisheries Act*, provincial *Water Act*, *Fish Protection Act*, *Wildlife Act*, Contaminated Sites regulation, and *Waste Management Act*. Local governments seek consistency in environmental standards and regulations applicable on and off Treaty Settlement Lands. There may be cross-boundary public health impacts if First Nations and local governments have different law-making authorities and restrictions on those authorities.

The various legislation and regulations that local governments must adhere to are restrictive and driven by the will of the federal and provincial governments through dedicated legislation. The clauses as contained in the AIP are permissive, seemingly allowing First Nations greater flexibility in adopting legislation, regulations and standards based on the will of the First Nations' people within their respective communities and only address concerns where there are conflicts of law. The First Nations' laws are delegated by the respective First Nation communities whereas, for the most part, environmental laws that directly impact municipal governments are delegated to a large extent by the provincial government and also by the federal government. Moreover, AIPs state that in some areas of jurisdiction, the First Nation law will prevail over a provincial or federal law if there is a conflict between the two laws. For local government, provincial and federal laws always prevail in the event of a conflict.

Language in some AIPs raises several questions about the application of federal and provincial environmental assessment and protection processes and laws on Treaty Settlement Lands and the scope of First Nations' lawmaking authority. For example, in the Tsawwassen First Nation (TFN) AIP, TFN jurisdiction is unclear in terms of the full extent of its territory. The TFN AIP states (Clause 2, Chapter 12): *"Before the Final Agreement, the Parties will discuss expanded boundary options for which Tsawwassen First Nation will receive referrals beyond those areas set out in clause 1a through 1d."*

Also, the Sliammon, Tsawwassen and Lheidli T'enneh First Nations have adopted Land Codes under the *First Nations Land Management Act*. This legislation provides First Nations with the power to make laws dealing with environmental assessment and protection but does not appear to require that they meet the requirements of provincial environmental legislation. The AIPs are not clear as to whether a First Nation law or provincial or federal law would prevail in the event of a conflict. As well, it is not clear if the Land Code would continue to apply post-treaty.

Finally, some regional districts have their own environmental standards or requirements pertaining to cross-boundary issues, such as air quality and liquid waste management. Particularly in the urban context, preservation of the environment depends on the sum of the actions of individual local governments. Therefore, local governments would like to see First Nation governments following the same regional environmental standards and strategies as local governments in the same region.

Resolution of Concerns

Harmonization of environmental management procedures and processes on and off Treaty Settlement Lands should be the stated intent in all AIPs and the results of all treaties.

Final Agreement language around First Nations "meeting or beating" existing federal and provincial standards would provide local governments with assurances that province-wide standards for resource management and environmental protection will continue to apply.

Relationship-building between First Nations and local governments, including the role of voluntary measures, protocols and partnership agreements, could be seen as a viable alternative in Final Agreement language. Final Agreements should include provisions that encourage First Nations and local governments to coordinate planning and environmental management activities and procedures.

5.5 Land Use Planning and Management

Issues and Concerns

For local government, Official Community Plans (OCPs) and Regional Growth Strategies are developed as statements of objectives and policies to guide decisions on planning and land use management. They are developed with public input and in consultation with other jurisdictions and agencies, and work towards a broad range of economic, social and environmental goals. During the development or amendment of an OCP, provincial legislation requires that local government provide one or more opportunities it considers appropriate for consultation with affected persons, organization or authorities. The legislation specifically lists First Nations in this regard.

Currently, there are no requirements for First Nations to have an OCP or other planning regime, which involves input from the public and adjacent jurisdictions. Local government interests in First Nations law-making authorities in relation to land use planning and management relate to having access to a process that takes into account the interests of the adjacent community or communities adjacent to First Nations lands (TSL).

Local governments are concerned about the uncertainty with respect to future land use and development on TSL and their ability to respond to servicing requests from First Nation governments if they have no knowledge of the community's future plans.

With respect to land use disputes, if there is a land use planning regime in place on Treaty Settlement Land that allows and encourages communication with the public and the neighbouring jurisdiction in developing and implementing land use plans, then hopefully disputes will be avoided. If disputes do occur, the same informal and formal mechanisms used between local governments to resolve land use concerns could be used between local governments and First Nations.

As discussed above, local governments want a level playing field in terms of the federal and provincial environmental, building and other standards that must be met on and off Treaty Settlement Lands. Without these standards being upheld, public safety or the environment could be compromised. Moreover, First Nations could potentially have an economic advantage if development becomes less expensive on TSL than elsewhere, due to the need to comply with fewer standards in the land development process.

Resolution of Concerns

Provide capacity (e.g. through Treaty Related Measures) for First Nations to develop (with input from community and adjacent jurisdictions) long range Community Plans for future TSL as early as possible in the treaty process.

Include in AIPs, provisions that encourage local governments and First Nations to negotiate by final treaty, mechanisms to coordinate and communicate with one another on community planning, similar to those that are required through legislation among local governments. As part of this agreement, encourage local governments and First Nations to come to agreement around the process they will use to avoid and resolve any future disputes/land use conflicts.

5.6 Peace, Order and Safety

Municipalities have authority to regulate, prohibit and impose requirements on activities and things related to peace, order and safety. Regional district authority, though similar, is more narrow and specific in its application. Generally, this local government authority applies to: public places; public health; public safety; animals; buildings and structures; fire protection; fireworks; firearms; knives and other weapons; noise, emissions and other nuisances and disturbances. Local governments may also establish licensing for some of the items listed above, enter on or into property for public safety reasons, declare an emergency and exercise related powers, and seek further regulatory authorities from the Lieutenant Governor in Council.

There are several important restrictions on the above local government authorities, including: concurrency (bylaws must be in accordance with provincial regulations, agreements or Minister's approval where the bylaw deals with issues of public health, animals, and buildings and other structures); consistency (bylaws may not be inconsistent with a provincial law or enactment); accountability (e.g., municipalities must make available to the public, on request, council's reasons for adopting a regulatory bylaw); reasonableness; and due process.

The proposed general First Nations authority and how it would apply is substantially less clear than that of local governments. As proposed, First Nations governments would be able to make laws in order to regulate, control, or prohibit any actions, activities or undertakings on First Nation Lands, other than those authorized by the Crown that could constitute a nuisance, a trespass, a danger to public health, or a threat to public order, peace, or safety. This authority would also apply to fire protection. In the event of any conflict between a First Nation law and a federal or provincial law, the federal or provincial law would prevail to the extent of the conflict. Some AIPs note that the Parties will negotiate and specify the nature and scope of the First Nations authority in the Final Agreement.

Issues and Concerns

Most of the local government authority relating to peace, order and safety is discretionary, and differences currently exist between local governments. This would likely be the case with First Nations, whose authority would also be discretionary. The intention appears to be to enable First Nations to regulate and prohibit broadly in this area so long as First Nation laws do not conflict with provincial or federal laws. However, neither the proposed general scheme for First Nation authority nor the AIPs define terms such as "regulate" or "nuisance" (nor did the Nisga'a Final Agreement, the language of which is similar to that of the current AIPs), and how broad the authority actually extends is not clear.

There are two potential results arising from this: 1) First Nations would not have as broad authority as local governments, and 2) First Nations would have broader authority than local governments. The same potential implications exist with either result: where a First Nation does not have authority, or chooses not to exercise the authority it has, there could be significant public health and safety "overflow" issues (relating to noise, emissions, firearms, fireworks, etc.)

in adjoining communities (which would also affect those communities' resources). If a First Nation sought to establish a servicing arrangement with a neighbouring local government, but did not have the authority to regulate or chose not to regulate activities that could potentially impede the service, potential safety and resource issues might prevent a local government from agreeing to such an arrangement.

Resolution of Concerns

Clarity around the nature and scope of First Nations' authority in relation to peace, order and safety is needed to ensure that First Nations can adequately regulate and prohibit related activities. Opportunities for consultation, and dispute avoidance and resolution need to be included in Final and Governance Agreement negotiations to ensure processes can be developed between local governments and First Nations to assist their post-treaty relationships. Ongoing provincial assistance (financial and other) may also be needed to ensure adequate information and training exists to support the development of local government-First Nation service arrangements and joint community opportunities into the future.

5.7 Public Works – Infrastructure and Servicing

Issues and Challenges

Public works consists of the public facilities and infrastructure, as well as related services and support systems, required to meet community needs. These typically include:

- Roads, bridges and related infrastructure
- Systems for providing potable water
- Systems for collecting, treating and disposing of sewage
- Solid waste collection and disposal

Challenges, with respect to public works, include:

- the wide range of activities including some which are project-management oriented (e.g. the planning, construction and financing of a bridge); some which are regulatory in nature (e.g. the application of standards and regulations); and others which are operational (e.g. running and maintaining a sewage disposal system);
- the highly technical nature of the function, involving a number of professional disciplines;
- the potential for some activities to have “spillover” affects onto adjacent jurisdictions;
- the importance of having this function tied closely to other related activities of government (e.g. housing, environmental management, etc.);
- the fact that some activities bring specific benefits to individuals (e.g. the provision of potable water), thus lending themselves to user fee approaches while others have benefits that are more generalized (e.g. the provision of maintenance of public roads) and consequently need to be financed from general revenues;
- the high costs associated with financing public works facilities and the difficulty of smaller communities in obtaining sufficient and affordable debt financing;

- the likelihood that scale from an efficiency point of view matters and that the implications will not be uniform across the function (i.e. some activities can be done efficiently at the community level (e.g. solid waste collection), others may require a much larger scale (e.g. the development of regional standards and bylaws); and
- the impact that the function and financing of that function has on the daily lives of each individual or family in the jurisdiction, which means that local preferences will need to be tied to the function (e.g. public input).

Effective management and administration of public works ensures that all components are working together in a way that is practical and cost effective. The planning, regulation, design, construction, financing, operation and maintenance of capital works are central to the public works function.

Resolution of Concerns

The public works function is fundamental to effective self-government and is more complex than it appears. Thus, it likely deserves careful treatment in any self-government or Final agreement. The regulatory nature of many public works functions is one of the main reasons for this complexity. It is not clear how this regulatory aspect will work for self-governing First Nations, post-treaty. Moreover, building capacity for public works function may be a major challenge for some First Nations government, which may suggest a continuing relationship between First Nations and the federal government. Therefore, it is important to local governments that senior governments approach public works issues post-treaty with local and First Nations governments in a consistent and equitable manner -- whether through legislation, financing or partnerships.

With respect to the treaty negotiation process, servicing is a key area where discussions must take place between local government and First Nations governments well in advance of AIP and Final Agreement stages.

5.8 Taxation

Issues and Concerns

Local governments are required by law to balance their budgets annually. It is within this context that they set their property tax rates. The *Community Charter* contains a general prohibition against municipalities providing assistance to businesses in the form of a grant, benefit, advantage or other form of assistance, including an exemption in the form of a tax or fee. Exemptions are possible for heritage conservation purposes and partnering agreements (for public-private partnerships to provide a service on behalf of a municipality). The AIPs do not require that a taxation regime implemented by the First Nation be consistent with the taxation abilities of the neighbouring local governments.

Wording in the AIPs may provide First Nations the opportunity to create a taxation structure that could provide them an economic advantage over local government, creating an uneven playing field from an economic development perspective. A concern arises if First Nations governments are not operating under the same financial/budgeting constraints or they can rely on other governments to “top-up” any funding shortfalls. These circumstances could result in First

Nations governments having a built-in advantage over local government in terms of tax rates they can afford to set.

From a local government perspective, if First Nation governments are to be deemed a municipality for the purposes of certain legislation, e.g. *Income Tax Act*, then they should follow all aspects of the legislation and not just those aspects that accrue benefits to them.

Resolution of Concerns

Wording in Final Agreements should allow a First Nation sufficient opportunity to pursue economic development, while at the same time ensuring that such development would not be at the expense of neighbouring jurisdictions, (due to economic advantages based on a different taxation regime). This strategy may not be workable at all tables, however in all cases, the goal must be to create a post-treaty environment with a taxation relationship that benefits both parties and is economically sustainable.

5.9 Transportation - Roads and Rights-of-Way

Issues and Concerns

Ownership and costs are the two main areas of concern for local government with respect to roads and rights-of-way.

a) Ownership and Related Issues – In most cases, the AIPs identify provincial Crown roads. However, only two (Snuneymuxw and Tsawwassen) touch on the ownership of existing municipal roads post-treaty. In both cases, the AIPs provide that this issue will be dealt with in the Final Agreement. Three specific situations can be considered:

- (1) Roads which will be located within future Treaty Settlement Lands (TSL) and which will primarily serve to access TSL post-treaty.
- (2) Roads which are located within future TSL which provide access to lands beyond the TSL.
- (3) Roads located adjacent to both future TSL and municipal fee-simple properties.
- (4) Emergency access

In the first instance (i.e. lands located within TSL primarily servicing TSL) it seems self evident that ownership should transfer to the First Nation. If ownership of roads containing service infrastructure such as sewer lines and drainage systems (e.g. providing part of a drainage course) is to be transferred, there may be a need to provide protection for existing services and to allow for maintenance. This issue should be addressed as part of any consideration of the transfer of road rights-of-ways. Several AIPs make reference to the protection of existing registered rights-of-ways. However, they appear to be generally silent regarding unregistered rights or services located in roadways.

In the second instance (i.e. roadways within TSL which form part of a larger corridor), municipal interests would likely be best served by maintaining ownership and control over the right-of-way. Assuming this approach is agreed to by the three Principals to negotiations, there remains the issue of access to municipal roads from TSL and potential drainage issues. Although the AIPs consider the issue of access controls in relation to crown corridors, there is no reference to similar authority for municipalities.

In the third instance, (roads adjacent to TSL) the issues remain primarily the same (access, adjacent land use, drainage, etc.). However, there would be a further complication should the responsibility for the road be shared as is contemplated in Section 37 of the *Community Charter*. The AIPs do not address this possibility, nor is it clear if it will be addressed.

b) Costs - There is no direct recognition in any of the AIPs that development of TSLs could impact municipalities financially and this could in part be due to the different approach taken to funding roads under provincial jurisdiction.

Costs associated with the provision of roads stem from initial capital costs, maintenance costs and upgrading related to changing conditions, such as increases in traffic volumes and/or new access points. In the case of new capital and upgrading costs, many municipalities collect development cost charges (DCCs) as a means of ensuring that new development pays its share of road network improvements. Additionally, many also require owners of parcels under development to undertake improvements directly related to site access and traffic volume requirements. Typically, these might include acceleration/deceleration lanes, signalization, road widening, etc. Lastly, many municipalities require developers to upgrade the roadwork adjacent to a development to a set standard.

In the first two cases, the costs levied should bear some relationship with the upgrading cost of the road network and the demands arising from the development. In the third case (generally known as “works and services”), the relationship is not necessarily as strong.

Resolution of Concerns

The key issues are the determination of what criteria will be used to establish which roads will remain under municipal jurisdiction post-treaty and who will participate in the decision.

As a starting point, the process for dealing with ownership, as far as who makes the decision and on what criteria it would be based, needs to be clarified. Closely following is the question of whether or not municipalities will be provided with options that would allow them to effectively deal with public safety and long-term maintenance. Typically, these would include issues such as access location and design compatibility of adjacent uses, drainage paths, etc. In the absence of a commitment to include tools similar to those contemplated for corridors through Crown Lands, some municipalities may see the Crown taking over responsibility for major roads (which form a key part of the larger municipal road network) as the best solution for resolving their concerns.

The issue of cost recovery related to new development will likely have to be addressed as part of individual service agreements between local governments and First Nations. The use of similar mechanisms as are currently available for dealing with developments on fee simple lands may be key to establishing equitable cost-sharing agreements for infrastructure improvements. It is probably fair to assume that roads will continue to primarily be a provincial issue in those jurisdictions located outside of municipal boundaries; the largest challenges are likely to be faced in those municipalities where TSLs are in locations which may include urban development.

6. CONCLUSIONS

6.1 Common Concerns

The GTT identified nine areas of future First Nation governance authority in which local governments have a practical interest. The interests and concerns in relation to each of the nine areas have been described above. In summary, based on their research and examination of the 2003 AIPs, the common concerns raised by local government GTT members relate to the potential for:

- Final Agreements that fail to address the full extent of issues relating to post-treaty First Nation government powers and authorities which could have an impact on neighbouring jurisdictions, (see Section 6.3);
- lack of effective mechanisms to deal with dispute resolution, cost-sharing, and cost recovery;
- lack of a process to facilitate consultation and communication between First Nation parties and neighbouring municipalities;
- economic advantage for First Nation governments through adoption of different standards and/or taxation regimes;
- lack of compatibility and coordination between First Nation government and local government standards and regulations within the same areas (e.g. environmental management, emergency preparedness; and infrastructure); and
- lack of coordinated land use planning with long term perspective.

In negotiating First Nations governance, it is imperative that the impacts of having different powers and authorities from the neighbouring jurisdiction are well understood and any potentially negative impacts mitigated. This is important to ensure that public health and safety are not compromised and that the environment that supports cooperative First Nations and local government relationships is created.

6.2 Approaches to Resolving Concerns

In answering the question, “How could our concerns about the nature and scope of First Nations powers and authorities in these areas be addressed?”, GTT members are suggesting a range of approaches, depending on the issue:

- Ensuring First Nations meet or beat the same provincial and federal standards local governments are required to follow;
- Ensuring provincial and federal laws prevail in the event of a conflict with a First Nation law (this may mean ensuring the scope of First Nation government jurisdiction is comparable to municipal jurisdiction in the same area of authority);
- Considering formalizing the local government-First Nation relationship, e.g., through First Nation membership in Regional Districts or other means;
- Providing a process through which neighbouring First Nation and local governments can come to agreement on key issues (e.g. servicing); and
- Creating dispute resolution mechanisms for First Nation and local governments.

GTT members also agree that negotiating these First Nation governance powers in a non-constitutionally protected Governance Agreement separate from the treaty itself, will allow First Nations governments to continue to evolve and adapt to meet future needs and challenges.

6.3 Importance of Addressing Key Issues Pre-Treaty not Post-Treaty

From a local government perspective, AIPs leave a lot of questions unanswered with respect to the nature and scope of future First Nations law-making authority. There are many areas where specific powers and authorities are not listed in AIPs. Examples of this are business licensing and emergency services. This can mean one of two things. First Nation governments may not have the powers and authorities to deal with some important local issues or, the categories of law-making powers in a final treaty will be sufficiently broad to allow First Nations to fill any “gaps” needed. The first scenario could result in a vacuum on TSL; the second scenario could result in future problems because issues such as compatibility have not been adequately addressed in the negotiation process. Both scenarios are a cause for concern for local government.

The solution is to ensure that early and adequate consultation occurs with local governments (both individually and collectively) prior to the completion of Final Agreements. Local governments at treaty tables have a key role to play in identifying issues directly with First Nations pre-treaty and working together on resolution of local government concerns, to allow and encourage cooperation post-treaty. As stated in a 2000 UBCM policy paper, “First Nations and local governments have their own negotiations to conclude through the treaty process. This will support a secure and stable framework for community relationships.”⁷

⁷ Land Use Coordination, Servicing and Dispute Resolution: Toward Certainty for Local Government through Treaty Negotiations, UBCM Policy Paper, October 2000.

List of Appendices

Appendix A – Governance Technical Team Members

Appendix B – First Nations Law Making Powers listed in AIPs – Comparison Chart

Appendix A

Governance Technical Team Members

Name	<i>Title and Organization</i>
Alison McNeil	Senior Policy Analyst Union of BC Municipalities
Marino Piombini	Senior Planner (Aboriginal Affairs) Greater Vancouver Regional District
Cheryl Hall	Planner Corporation of Delta
Regan Schlecker	Research Analyst Lower Mainland TAC
Kirstie Pirie	Manager Lower Mainland TAC
Finlay Sinclair	Senior Planner Regional District of Fraser-Fort George
Bob Harper	Chief Administrative Officer Alberni Clayoquot Regional District
Eydie Fraser	Executive Coordinator Assoc. of Vancouver Island and Coastal Communities/ Van. Island TAC Admin.
Brian Mehaffey	Senior Planner City of Nanaimo
Kelly Daniels	Chief Administrative Officer Regional District of Nanaimo
Frances Ladret	Chief Administrative Officer Powell River Regional District
Stan Westby	Chief Administrative Officer District of Powell River
Debbie Seto-Kitson*	Director, Policy Provincial Treaty Negotiation Office (TNO)
John Cowell*	Negotiator TNO
Martha Anslow	Manager, First Nations – Local Government Relations Ministry of Community, Aboriginal and Women's Services

***Note:** The role of TNO staff on the Governance Technical Team was focussed on information sharing and providing clarification on BC's approach to governance negotiations with Canada and First Nations. TNO staff did not participate in the analysis of First Nations authorities as identified in the AIPs, or in the preparation of this report.

Appendix B

GOVERNANCE CHAPTERS IN RATIFIED AIPs – LAW-MAKING POWERS

Lheidli T'enneh (LT)	Maa-Nulth (MN)	Sliammon (SL)	Tsawwassen (TFN)
Adoption of LT children	✓	✓ - include provisions to ensure the best interest of the child are paramount	✓
Child and family services	✓	Aspects of C&FS that include stds comparable to pro stds for the safety and well-being of C&F	✓ (same as LT/MA)
LT assets on LT lands	✓	✓	✓
LT citizenship	✓	✓	Membership in TFN
Mgmt, operation and financial admin. of LT gov	✓	✓	✓
Education – preK to grade 12	Aspects of preK to grade 12, provided MN meets prov. stds re curric, exams, cert. of teachers	✓	✓
Education – post-secondary	✓	✓	✓
Health services	✓	✓	✓ and Aboriginal healers
Justice – aspect of the admin. of	✓	✓	✓
Licensing, reg and operation of businesses	Zoning and land use planning of the MN lands including the management and operation of businesses related to lands and resources, with stds consistent with fed & prov laws	✓ includes licensing, reg and operation of businesses	✓ Land mgmt and use chapter
X	Regulation, administration and expropriation of MN lands	✓	X land mgmt and use chapter
Emergency preparedness	✓	✓	✓
Income assistance	✓	✓	X
Intoxicants –			✓

Lheidli T'enneh (LT)	Maa-Nulth (MN)	Sliammon (SL)	Tsawwassen (TFN)
prohibition and reg.			
Fire protection	✓	✓	✓
Solemnization of Marriage	✓	✓	✓
Public works, buildings & structures	✓	✓	✓
Peace, order and safety – regulation/prohib'n of actions or activities that may constitute a threat to	✓	✓ includes with respect to foreshore fronting SL lands and submerged lands	✓ includes things that may constitute a threat to public health
Social services and housing	Social services	✓	✓ (same as LT)
Enforcement of LT laws	✗	✗	✓
Traffic and Transportation	✓	✓	✓
Environmental Assessment – other than provincial projects on LT lands	May participate in established fed and prov EA processes	✗	✗
Environmental Protection chapter: - pollution - waste mgmt - local air quality - enviro ER resp. - fish and fish habitat May enter into agrmts with fed and prov gov'ts re performance of EP functions by LT	Environmental Assessment & Protection chapter: - may make EP laws, fed and prov laws prevail in event of a conflict - will be notified about emergencies	✓	Environmental Mgmt Chapter: - environment, including and not limited to management, protection or preservation, TFN to participate in provincial enviro processes on same basis as LGs
✗	MN culture and language	✓	✗
✗	✗	✗	Elections for TFN and TFN Constitution
✗	✗	✗	TFN standing in proceedings regarding divorce relating to child custody and interest in TFN lands
✗	✗	✗	Aspects of succession and estates
✗	✗	✗	Public games, sports, races, athletic contests and other amusements

Lheidli T'enneh (LT)	Maa-Nulth (MN)	Sliammon (SL)	Tsawwassen (TFN)
X	X	X	Firearms, weapons and dangerous substances
X	X	X	Animal control; keeping of wild and domestic animals and related activities
X	X	X	Agriculture
X	X	X	Employment services
X	X	X	Other matters as negotiated