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# UBCM Discussion Paper on the Common Table

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UNION OF  
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## UBCM Discussion Paper on the Common Table

The following is a discussion paper on the Common Table facilitated by the BC Treaty Commission. This paper will examine the issues that were discussed at the Table in relation to general local government interests as defined in UBCM policy. It is based on public information available from various sources. The paper is intended to provide the provincial government with a local government perspective of the issues discussed at the Common Table. However, UBCM requests the opportunity to review and provide input into specific provincial mandate changes that are under consideration.

### 1. BACKGROUND

In January 2008 the BC Treaty Commission committed \$400,000 to a common treaty table approach.<sup>1</sup> This approach was in response to issues raised by 60 First Nations who were signatories to a Unity Protocol in late 2006/early 2007. The Protocol called for the creation of a common voice for First Nations to deal with six barriers to treaty ratification that it was felt could no longer be solved at individual treaty tables due to government mandates.

Aimed at removing these barriers and expediting negotiations, Unity Protocol members look to the Protocol for “unity and determination to achieve fair and honorable treaties.”<sup>2</sup> The six barriers are: (1) certainty, (2) constitutional status of treaty lands, (3) governance, (4) taxation, (5) resource and lands management, and (6) fisheries.

Unity Protocol participants call for open dialogue, where they feel strict federal and provincial policy is not adequate to facilitate agreement within stalled treaty negotiations. In 2006, independent audits of both the federal and provincial negotiating structures indicated that firm adherence to narrow mandates was hindering progress.<sup>3</sup> The provincial Throne Speech on February 12, 2008 included support for, “fast-tracked treaty negotiations at common tables as suggested by the BC Treaty Commission and First Nations themselves.”

### 2. CURRENT STATUS

Canada, BC and First Nation met during 2008 to discuss the identified six barriers. First Nations are essentially seeking a relaxation of government mandates on the above issues with a view to re-opening stalled negotiations. The outcome of these talks could have a significant impact on the pace and success of the BC Treaty Process.

Following the discussions the BC Treaty Commission prepared a confidential report identifying a number of opportunities for addressing the six issues. Canada and BC are currently considering the report and are trying to find ways to build on the opportunities identified in the Treaty Commission’s report.

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<sup>1</sup> “Common Table Established.” *BC Treaty Commission: Update*. March 2008. <http://www.bctreaty.net>.

<sup>2</sup> Robert Morales, “Chief Negotiator’s Report.” *Treaty Talk*. Vol.14, Issue 2. Summer 2007. p.1

<sup>3</sup> Report of the Auditor General of British Columbia. “Treaty Negotiations in British Columbia: An Assessment of the Effectiveness of British Columbia’s Management and Administrative Processes.” *Office of the Auditor General of British Columbia*. November 2006.

### 3. DISCUSSION

#### Recognition/Certainty (including shared territories)

##### Unity Protocol Interests

BC and federal governments have completed Final Agreements (FAs) that set out s.35 rights, modify aboriginal rights and title, and result in full and final settlement. The FAs also state that the First Nation will release and indemnify Canada and BC from any other claims relating to past infringements of Aboriginal rights.

First Nations involved in the Protocol seek a notion of certainty that does not require the extinguishment of Aboriginal rights, title and identity. They seek recognition of Crown and Aboriginal jurisdiction across their traditional territory, which is neither modified nor extinguished.

Members advocate incremental certainty whereby governance rights on traditional territories beyond treaty settlement lands (TSL) would be subject to shared decision-making.

##### UBCM Interests

Local government is interested in achieving treaties that provide the greatest certainty and finality possible with respect to Aboriginal rights and title. UBCM has previously stated that certainty, in its view, can be best reached by exchanging undefined aboriginal rights for constitutionally protected and clearly defined treaty rights on settlement lands.<sup>4</sup> Local government remains interested in provisions that address certainty on issues such as the rights of other Aboriginal people (e.g. overlaps), dispute resolution, consultation and amending the final agreement.

Local government is concerned with any lack of clarity in negotiated settlements that may complicate the management of resources and development in various communities. With a larger land base and wider self-governing authorities, the conclusion of treaties increases First Nation land activities, and increases the need for coordination with local government. Clearly defined treaty rights and authorities will allow First Nations and local governments to effectively respond to local circumstances.

##### *Shared Territories/Overlap*

The BC Treaty Commission's *2008 Annual Report* indicates that shared territories was discussed as part of the Common Table. UBCM is interested in treaty settlements that provide certainty around overlap disputes with other First Nations and address outstanding First Nation claims. UBCM supports the approach of the *BC Claims Task Force Report (1991)* that calls for First Nations to resolve overlap or shared territory issues between themselves. UBCM has stated in past policy papers its interest in the Province not agreeing to a treaty settlement that includes land subject to an overlap dispute unless an agreement has been reached among the First Nations concerned. However, UBCM has agreed to non-exclusive arrangements in the area of an overlap dispute, such as provisions for hunting or fishing.<sup>5</sup>

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<sup>4</sup> *Union of BC Municipalities*. "UBCM's Response to Provincial Government Mandates: BC's Approach to Treaty Settlements, 1997."

<sup>5</sup> *Ibid.*

## **Constitutional Status of Treaty Lands**

### Unity Protocol Interests

Current federal and provincial mandates seek to create TSL as private, fee-simple land owned collectively by a First Nation, subject to the Canadian Constitution.

Protocol members are interested in exploring alternative options to 'fee simple' interest. They are interested in maintaining reserve status and constitutional land protection (s.91(24) lands under the *Canadian Constitution Act, 1982*). Members of the Protocol seek to have their Aboriginal title remain as a continuing burden on Crown title.<sup>6</sup>

First Nations are interested in property rights differentiated from fee simple ownership because from their perspective fee simple ownership ignores the intrinsic nature of Aboriginal title (*sui generis*). In a Winter 2008 newsletter, Brian Thom (Senior Negotiation Support) of the Hul'qumi'num Treaty Group, advised First Nations of the Protocol to seek the implementation of property ownership with no underlying claim, akin to allodial title. This is established where a property holder has absolute inalienable ownership of land free and clear of any encumbrance (Crown or otherwise). This is different from fee simple title, which also represents absolute ownership but is limited by government powers.

### UBCM Interests

UBCM supports the provincial mandate that TSL be held communally by a First Nation, in a manner equivalent to fee-simple.<sup>7</sup>

UBCM's interests with respect to treaty land centers primarily on governance/law making authorities, coordination of land use planning and servicing arrangements. Local government is interested in having general provincial and federal standards apply on settlement lands within or adjacent to local government boundaries (e.g. environmental protection, land and resource planning, and infrastructure standards/codes). Local government is also interested in compatibility and harmonization between standards determined by First Nations and those of local governments (e.g. land use) as well as clear dispute resolution processes. Harmonization of laws and standards promotes efficiency, clarity and effectiveness, and public health and safety between neighbouring communities.

These interests are further considered under *Governance*.

## **Governance**

### Unity Protocol Interests

Recent treaties include provisions for concurrent law making where by First Nation, provincial and federal laws apply to TSL (priority of laws structure). The final agreements provide clarity for each law-making authority of the First Nation by stating which laws are paramount in the event of a conflict, ensuring harmonization between

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<sup>6</sup> Brian Thom. *Senior Negotiation Support*, Hul'qumi'num Treaty Group. "Closing the Treaty Gap: Six Topics, Six Solutions." *Treaty Talk*, Vol. 14, Issue 4, p.4 – 8

<sup>7</sup> *Union of BC Municipalities*. "UBCM's Response to Provincial Government Mandates: BC's Approach to Treaty Settlements, 1997."

federal, provincial, and Aboriginal laws. In matters of health, safety, the criminal code, human rights, and the environment, federal and provincial laws likely prevail.<sup>8</sup>

First Nations are concerned that the concurrent-law model will mean the scope and extent of their law-making powers will be significantly less than the self-determination they seek. They specifically see contention arising from the priority of laws provisions and see potential for conflict with cultural values. Protocol supporters are further concerned with the over-bureaucratization of Aboriginal lives when having to comply with multiple laws simultaneously, and the cost and efficiency consequences of doing business on lands that are double regulated.<sup>9</sup>

The Hul'qumi'num Treaty Group advocates a number of options as potential solutions. These include:

1. A negotiated displacement model, where federal and provincial laws only apply when explicitly brought in by a treaty.
2. Extensive delineation of areas where First Nations have law-making authority.<sup>10</sup>

### UBCM Interests

In the area of governance, local government is concerned with jurisdictional conflict between neighboring areas. Local government would like treaties to provide clear dispute resolution processes, the application of federal and provincial laws and standards, and the coordination of land use planning.<sup>11</sup> Specifically, local governments are interested in having provincial laws and standards apply to settlement lands within or adjacent to local government boundaries for issues like environmental assessment and protection, land and resource planning, water quality, etc. Also, there is an interest in First Nation law making authorities that result in the coordination and harmonization of land use planning, development and servicing with adjacent local government lands. Local government is interested in a land use planning regime on settlement lands that encourages communication with the neighbouring community and takes into consideration its interests. Sharing First Nation community plans also assists local government in responding to servicing requests.

Local governments are further interested in provisions that ensure environmental assessment requirements are consistent with provincial requirements and regional environmental standards or requirements are consistently applied across a region.

Some aspects of governance authorities could be contained in treaties while other evolving aspects could be contained in parallel agreements. UBCM supports negotiating separate agreements or accords that are not constitutionally protected for those aspects of governance that may evolve or require adjustments over time (e.g.

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<sup>8</sup> "What's On the Table." *BC Treaty Process: Department of Indian and North Affairs Canada*. [www.ainc-inac.gc.ca](http://www.ainc-inac.gc.ca).

<sup>9</sup> Brian Thom. *Senior Negotiation Support*, Hul'qumi'num Treaty Group. "Closing the Treaty Gap: Six Topics, Six Solutions." *Treaty Talk*, Vol. 14, Issue 4. p.4 – 8

<sup>10</sup> Ibid.

<sup>11</sup> *Union of BC Municipalities*. "Practical Interests of Local Government in Negotiation of First Nations Governance Authorities in Treaties: Discussion Paper of the UBCM Governance Technical Team, September 2004."

policing). This balances the need for legal certainty with the practicalities of ensuring durability.<sup>12</sup>

## Co-Management of Lands and Resources

### Unity Protocol Interests

The current land selection model advocated by governments requires First Nations to give up title to their traditional territories in exchange for fee simple ownership of treaty lands and limited hunting / fishing rights outside of treaty lands. While the provincial government has introduced the ability to 'revenue-share' at the treaty table, primarily government mandates seek the extinguishment of rights over all lands not allocated within a treaty settlement.

Supporters of the Unity Protocol are proposing tools and options to meet government interests while enabling First Nations to maintain a relationship to their whole territory. To provide the certainty required by governments, the Hul'qumi'num Treaty Group advocates a shared decision making model in its discussion paper titled *A Call to Action: Shared Decision Making, A New Model of Reconciliation of First Nations Natural Resource Jurisdiction*. The paper proposes a new approach to addressing First Nations co-management interests, advocating the creation of three shared decision-making bodies at the provincial, regional and local levels.<sup>13</sup>

### UBCM Interests

In previous policy papers, UBCM has stated that it is important that aboriginal rights of one First Nation outside TSL not interfere with the rights of another First Nation nor with the rights of non-aboriginal British Columbians. Therefore, treaty rights shall be limited to settlement land. With regard to First Nations' practice of traditional activities and participation in the management and planning of resources, this ought to take place within existing provincial processes and legislative frameworks.<sup>14</sup>

With the evolution of provincial policy on First Nations issues UBCM has been working to ensure local governments have a role in the New Relationship. UBCM recently signed an expanded MOU with the provincial government on this issue. The MOU captures the commitments in earlier agreements between UBCM and BC on local governments' role in the treaty process by extending the principles for consultation to include New Relationship activities that affect local government jurisdiction. In keeping with spirit of the MOU UBCM would expect local government to have input into any land and resource co-management model off TSL that the Province may be contemplating.

Local government interests in governance (see *Governance* section) similarly apply to the management of land and resources off TSL. A primary interest for local government is the coordination / harmonization of land and resource planning with regional and local

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<sup>12</sup> *Union of BC Municipalities*. "UBCM's Response to Provincial Government Mandates: BC's Approach to Treaty Settlements, 1997."

<sup>13</sup> Brian Olding, Jessica Rogers & Brian Thom. *A Call to Action: Shared Decision Making, A New Model of Reconciliation of First Nations Natural Resource Jurisdiction*. Hul'qumi'num Treaty Group: 2008.

<sup>14</sup> *Union of BC Municipalities*. "UBCM's Response to Provincial Government Mandates: BC's Approach to Treaty Settlements, 1997."

government planning and land use (e.g. OCP's and RGS's). These plans are adopted through extensive planning and public consultation. Respecting approved land use plans, where they exist, would be of interest to local government. UBCM advocates for local government involvement early on in the discussions to ensure compatibility of land use.

The interests of local governments in relation to natural resources vary, depending on their regional circumstances. Many communities are significantly dependent upon resource industries, particularly the forest sector. UBCM has stated in past policy papers that individual local governments are therefore in the best position to evaluate their interests with respect to resource allocation, its impact on community stability, and access to resources for present and future needs.<sup>15</sup>

## **Fiscal Relations and Taxation**

### Unity Protocol Interests

Protocol supporters are interested in maintaining s.87 *Indian Act* tax-exemption status. They also oppose provincial and federal refusal to include tax-sharing agreements with First Nations, and requiring acceptance of claw-backs of at least 50 cents on every dollar generated by First Nations post-treaty (with a few exempted areas of revenue). In the event of claw-back formulas, Protocol members wish to see them tied to indexed social and economic indicators.

Unity Protocol members are seeking the consideration of numerous options in solving the potential stalemate in treaty negotiations surrounding tax exemption:

- Including grandfather clauses that provide anyone alive on a specified date a s.87 tax exemption for life.
- Establishing benchmarks for social and economic indicators, and phasing out tax exemptions only in the event of a level playing field between Aboriginal and non-Aboriginals in the region.<sup>16</sup>

### UBCM Interests

In regard to issues related to revenue and taxation, the principles of fairness and equity shall apply to aboriginal and local governments equally. Local government is interested in equity and fairness in the property tax treatment of land and improvements under First Nations jurisdiction compared to similar property under local government jurisdiction. Schemes implemented by the federal and provincial government with relation to First Nations shall take into account the impact on neighboring districts, municipalities, and individuals involved.

Municipal and regional district revenues are derived from property taxes, grants-in-lieu of taxes, transfers from other governments, user fees and service charges. On average, 48 percent of the money needed each year to provide and maintain services is raised through property taxes. Capital financing and service provision commitments are based upon expectations of a relatively predictable population/assessment base.

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<sup>15</sup> *Union of BC Municipalities*. "UBCM Comparative Analysis of 2003 Agreements in Principle and Local Government Interests." January 2004.

<sup>16</sup> Brian Thom. *Senior Negotiation Support*, Hul'qumi'num Treaty Group. "Closing the Treaty Gap: Six Topics, Six Solutions." *Treaty Talk*, Vol. 14, Issue 4. p.4 – 8

Unanticipated changes to any of the above-noted revenue sources will result in revenue shortfalls and tax increases as local governments are required by legislation to balance their budget. When revenue streams change, local governments require time to adjust their revenue projections and plan their expenditures accordingly.

Under the current property assessment system, property tax exemptions can be constitutional exemptions, assessment exemptions or tax exemptions. Tax exemptions that reduce the tax base of municipalities and regional districts will thereby diminish the local capacity to fund existing and future capital and operating expenditures. Therefore, a primary interest of local government is in budgetary stability.<sup>17</sup>

In the 2005 report titled *Treaty Settlement Land: The Fiscal Impacts on Local Government*, local governments identified specific fiscal concerns when crown land within an urban or semi-urban area is converted to TSL. A primary concern is the loss of revenue to finance services. Local governments receive revenue from crown land either by taxing occupiers of the land or by receiving grants-in-lieu of taxation from senior governments when the land is used for crown purposes. While there is a possibility that this loss of revenue can be recouped through a servicing agreement with the First Nation post-treaty, local governments are concerned that the revenue received would not match the cost of providing services. Local governments want to ensure that they receive adequate payment for the full range of hard (e.g. public works, utilities, water supply and sewage disposal) and soft services (e.g. recreation facilities, parks, library services, E911) provided to residents on TSL. For some local governments the recovery for soft services, which are also provided off TSL, is often overlooked in the development of servicing agreements. In urban areas, these services represent the largest portion of local government spending on services. Local governments would like to see servicing agreements reflect the costs of both hard and soft services.

Local governments are also concerned that development on TSL may decrease pace of development on other lands in the community and any future opportunities associated with development. For example, TSL may be developed as a commercial centre and, as such, would reduce the opportunity for commercial development on land under local government jurisdiction. With this loss of development, local governments may also lose development cost charges and other developer contributions such as voluntary amenity contributions to the community and the provision of affordable housing.

Given the fiscal impacts to local governments when land within a local government jurisdiction is converted to TSL, UBCM has advocated for early, on-going and full consultation with affected local government in the land selection process. The provincial government has made a commitment to involve local government in the process for selecting land for treaty settlements through a memorandum of understanding with UBCM. When and how local governments are involved is crucial to their interests being understood by negotiators and represented in the process.

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<sup>17</sup> *Union of BC Municipalities*. "Local Government and Aboriginal Treaty Negotiations: Defining the Municipal Interest, September 1994."

## Fisheries

### Unity Protocol Interests

Protocol signatories seek flexible government mandates that allow a meaningful role for First Nations in managing and protecting fisheries for future generations. They also would like treaties to recognize an Aboriginal right to fish for a moderate livelihood.

They hope to develop cooperative management processes that meet the legitimate interests of governments and other parties who have an interest in maintaining sustainable fisheries.

### UBCM Interests

With regard to natural resources, local government's primary interest is to maintain community stability (particularly in the case of resource dependent communities). These interests will vary depending on regional circumstances.

Local governments are subject to a wide range of provincial and federal legislation, regulations and guidelines aimed at environmental management. This includes the federal *Fisheries Act*. Local governments seek consistency in environmental standards and regulations applicable on and off TSL.<sup>18</sup>

UBCM members have adopted specific resolutions on a variety of fisheries matters. Local governments have consistently supported protecting Canada's sovereignty over the west coast salmon fishery with respect to Alaska-Canada boundary discussions. In response to the collapse of the 1999 Fraser River salmon run, members requested that the provincial and federal governments work together to develop a coordinated transition strategy that will assist individuals seeking new employment opportunities, job training, education or other programs. Communities have also consistently supported the Salmon Enhancement Program and other measures to protect and restore salmon habitat streams.

With respect to the pacific hake fishery, local governments have requested that the federal government establish a shore-first priority with respect to processing to ensure communities are able to maximize employment opportunities. And, more broadly speaking, local governments have continually requested that better consultation and communication occur between DFO and communities on fisheries policy. Specifically, coastal communities need to be made aware, and a party to discussions, related to the fisheries resource as it is an important economic driver for many local economies.

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<sup>18</sup> *Union of BC Municipalities*. "UBCM Comparative Analysis of 2003 Agreements in Principle and Local Government Interests." January 2004.

#### **4. CONCLUSION**

As this paper illustrates, important dialogue has taken place at the Common Table that has the potential to have an impact on local government. With the outcomes likely affecting the BC Treaty Process and government mandates, UBCM is putting forward this paper for provincial consideration.

As previously communicated to the Ministry of Aboriginal Relations and Reconciliation, UBCM would like the opportunity to review and provide input into specific mandate changes that are under consideration by the Province.