UBCM’s Response to Canada’s New Approach to Supporting the BC Treaty Process

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Introduction

In March 2010, the federal government announced changes to its treaty negotiation mandates in a document titled Canada Takes Action to Support Progress in the BC Treaty Process. Mandates are instructions that provide federal treaty negotiators with general policy direction for negotiating treaties.

Canada acknowledges that while recent progress has been encouraging, all parties to the BC treaty process agree that the conclusion of more treaties is both possible and necessary. This is why Canada is taking action to facilitate progress and enhance its flexibility at negotiation tables. The mandate changes proposed by the federal government were informed by the work of the Common Table, which brought together Canada, BC and more than 50 BC First Nations in 2008, to discuss ways to reduce obstacles in the treaty process.

This paper examines the mandate changes from a local government perspective. Specifically, it takes into consideration local government interests as defined in UBCM policy. The paper is intended to inform the federal government of the issues and interests of BC local governments.

Below is a summary of each federal mandate change followed by local government interests.

Canada’s New Approach to Supporting the BC Treaty Process

Canada is committed to reconciling Aboriginal and Crown interests through the negotiation of treaties and is taking action to increase its flexibility at negotiation tables. The Common Table informed Canada’s action plan. Elements of the plan are:

Recognition/Certainty

Element 1: Allow the negotiation of language in treaties that recognizes that a First Nation has existing Aboriginal rights and acknowledges that these rights have not always been respected.

Canadian courts recognize that Aboriginal people have constitutionally protected rights based on their prior occupation of traditional territories. Section 35 of the Canadian Constitution recognizes and affirms Aboriginal and treaty rights but the nature of these rights are undefined. Canada negotiates modern treaties as a way to reconcile pre-existing Aboriginal rights. Canada has heard from Aboriginal groups that the BC Treaty Process does not adequately acknowledge existing rights and the realities of the past.

Federal negotiators will have the ability to include more respectful language related to recognition of Aboriginal rights as well as language that acknowledges the realities of
the past (also known as reconciliation language). This approach provides a more respectful basis for negotiations. These arrangements, to include more respectful language in treaties, fit into a broader theme of recognition and reconciliation adopted by the federal government.

UBCM Interests

Please see below, under Element 2, for UBCM’s interests in recognition and certainty.

Element 2: Introduce a method of achieving certainty in treaties that addresses First Nations’ concerns with the extinguishment of rights.

Treaties achieve certainty by ensuring all parties and stakeholders can rely on the terms of the treaty. Canada heard from First Nations at the Common Table that it is important that treaty settlement lands (TSL) and rights flowing from treaty be linked, somehow, to their Aboriginal rights.

Under the new approach, federal negotiators have additional tools to address recognition of Aboriginal rights and legal certainty matters. Canada has provided greater options for First Nations to meet their interests in maintaining the connection between the modern treaty and historic rights. At the same time, it ensures the negotiated settlements achieved through the BC Treaty Process meet Canada’s need for certainty.

UBCM Interests

According to the BC Treaty Commission, from the federal and provincial Crowns’ perspective, certainty is the term that has been given to the legal technique used in modern treaties to ensure that the land question is settled and aboriginal claims are full and final. From the First Nations’ perspective, recognition is about acknowledging the source of Aboriginal title and ensuring the survival of First Nations’ distinct cultures and societies, including their continued attachment to the land. The challenge is to achieve certainty without extinguishing aboriginal rights.

The federal and provincial governments have completed treaties in BC that set out s.35 rights, modify aboriginal rights and title, and result in full and final settlements. The final agreements 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 are concerned with the extinguishment of their rights.

Elsewhere in Canada, the federal government has negotiated a different certainty technique called the non-assertion model. Under this model the First Nation agrees not to exercise its aboriginal rights other than those articulated and defined in the treaty. Canada has also negotiated agreements that provide an orderly process for bringing additional rights into the treaty by agreement or as a result of a court decision. If this is the kind of model that Canada is exploring in BC, then local governments seek an

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1 BC Treaty Commission. “Common Table Report, 2008.”
understanding of how this achieves certainty.

UBCM encourages the federal government to clarify the language and tools to be used to recognize Aboriginal rights and to obtain certainty without extinguishing Aboriginal rights. UBCM also urges the federal government and First Nation groups to define what it means to, “recognize Aboriginal rights.” From a local government perspective, it seems contrary to recognize Aboriginal rights in a treaty and have certainty. By the very nature of this recognition, are we not creating uncertainty? Local governments are seeking an explanation, an understanding, of how these two opposing interests can be addressed to the satisfaction of all parties.

Local governments are 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.3

From UBCM’s perspective, certainty in treaties can be encouraged by clarifying terms, jurisdictions, and efficient procedures for resolving disputes concerning treaty interpretation. Local governments are 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.

Local governments also remain interested in other treaty provisions that address certainty. This includes provisions on issues such as dispute resolution, consultation and amending the final agreement. For example, UBCM’s interest in dispute resolution is that the treaty provides mechanisms for dispute avoidance and that there be a formalized process for dispute resolution following the final settlement.

Shared Territories/Overlap
UBCM is interested in treaty settlements that provide certainty around overlap disputes with other First Nations and address outstanding First Nations 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, it agrees with the approach that treaty settlements do not include land subject to an overlap dispute unless an agreement has been reached among the First Nations concerned. However, UBCM concurs with non-exclusive arrangements in areas of overlap dispute (e.g. provisions for hunting or fishing).

Treaty-Related Measures

Element 3: Strengthen and streamline Treaty-Related Measures (TRMs), which are government-funded projects, undertaken by First Nations, to help move treaties forward.

Treaty-Related Measures are tools that Canada, First Nations and the Province use to remove obstacles at treaty negotiation tables so that treaties can conclude more quickly. They are cost-shared by the federal and provincial governments. Treaty-Related Measures have assisted First Nations in completing a wide range of studies related to land, resources, economic development and governance activities, and has funded projects of importance to First Nations. TRMs have also been used to protect crown land and acquire land for treaty settlement purposes.

Canada is bringing forward changes that will streamline and strengthen these tools. These changes are a result of a federal evaluation report completed in 2009, which concluded that TRMs have a positive impact on the process but have not met their full potential due to ineffective cost-sharing arrangements. Cost-sharing provisions will be removed from some TRMs. Canada has increased the range of TRMs available and will increase First Nations involvement in the selection and design of TRM activities. These changes will better support the momentum at treaty tables.

UBCM Interests

Canada indicates that making changes to TRMs will better support the momentum at treaty tables. UBCM supports the idea of having an efficient negotiation process as described in its 1991 policy paper. In this context, efficient means a process where optimal decisions are reached in the least wasteful manner in regard to time and resources. Efficient also means the process is effective in meeting its original goals and that it can adapt to new conditions or unexpected developments. Local governments are encouraged by these changes to streamline TRMs as described by the new federal approach so far as they improve the efficiency of the process.

Tier 1 TRMs fund studies and planning processes early in the agreement in principle (AIP) stage. Tier 2 TRMs fund the acquisition and holding of potential TSL, at an advanced stage of AIP negotiations. While Canada no longer requires cost-sharing with BC for Tier 1 TRMs, it is crucial that local government interests be considered for both TRM tiers, not just for those TRMs where provincial funding is still required. For example, Tier 1 TRM funding could be provided to a First Nation to create a land inventory.

When TRMs are used to protect crown land and acquire land for treaty settlement purposes it is imperative that local government interests are understood and considered by Canada (with respect to federal crown land) and British Columbia. When and how local governments are involved is crucial to their interests being understood by negotiators and represented in the process. Early, on-going and full consultation with affected local government on land selection and access issues is necessary. Treaty Advisory Committees/local governments, and federal and provincial negotiation teams need to share specific information on this topic.
A primary interest for local governments is the coordination/harmonization of land and resource planning with regional and local 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, is of interest to local governments. UBCM advocates for local government involvement early on in the discussions to ensure compatibility of land use.

Communities, particularly resource dependent communities, rely on agriculture and natural resources for employment purposes. Municipalities and regional districts have strong interests in crown lands within and adjacent to their boundaries due to infrastructure sites and servicing uses, water resources, community expansion, taxation revenues, and parks and recreational uses. Local governments frequently lease or acquire interests in provincial and federal Crown lands within or adjacent to their boundaries for various public or community purposes such as watersheds, parks, airports, wharves/water lots, landfill/waste treatment sites. Other crown land that is of interest to local communities includes utility sites and major industrial lands.

Maintaining access to lands for these purposes is essential for local governments in order to provide essential services to their communities. These interests directly relate to local governments’ ability to provide services to residents and maintain community stability.

UBCM is interested in having fee simple lands not “on the table” for negotiation (e.g. not subject to expropriation). UBCM supports government policies regarding land selection and access where private or fee simple land can only be acquired for treaty settlement purposes on a willing-buyer, willing-seller basis. This applies to any municipal land held in fee simple.

The creation of treaty settlement land sparks the need for an expanded intergovernmental relationship between local governments and First Nations providing for the coordination of services, infrastructure and land use planning. Local governments are interested in opportunities early in the process where a local government and First Nation can discuss and reach agreement on their post-treaty relationship. Out of this may arise joint community opportunities such as the shared provision of services.

**Regulatory Standards**

**Element 4: Provide treaty First Nations in BC with the power to establish fines and administrative penalties on treaty settlement lands that are comparable to those that provincial and federal governments have in place for similar regulatory offences.**

Federal mandates provide for the negotiation of treaty provisions that allow First Nations to pass laws, create offences and establish penalties for violation. However, these instructions have not kept pace with changes to provincial and federal laws. For example, negotiation instructions limited maximum fines that could be established

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under First Nations law for environmental offences to $300,000 which is three times less
than fines (up to $1 million) that can be imposed under provincial law in BC.

Under the new approach, Canada can negotiate treaty provisions that provide First
Nations with jurisdiction to institute sanctions that are comparable to those that
provincial and federal governments have in place for similar regulatory offences. This
will provide First Nations with the same tools that the provincial and federal
government possess and will facilitate harmonization of enforcement regimes among
federal, provincial and First Nations jurisdictions in BC.

UBCM Interests

Local governments are interested in having general provincial and federal standards
(e.g. environmental protection, land and resource planning) apply on TSL within or
adjacent to local government boundaries. Local governments support compatibility and
harmonization between the standards determined by First Nations and those of local
governments (e.g., land-use, sub-division development, etc.).

Specifically, local governments seek consistency in environmental standards and
regulations applicable on and off TSL within or adjacent to local government boundaries. 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. 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. For local government, provincial
and federal laws always prevail in the event of a conflict. Consistent standards maximize
efficiency, facilitate public safety and environmental protection, and protect public
health.

Local governments are also interested in comparable law making authorities on TSL that
result in the coordination and harmonization of land use planning, development and
servicing with adjacent local government lands. Local governments are 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.

Financing Self-Governing First Nations

Element 5: Develop a new approach for financing self-governing First Nations that is
more transparent, fair and efficient. This approach will also take into account the
unique circumstances of self-governing groups.

Canada’s approach to financing of self-governing groups has been to commit to
individual fiscal negotiations with each group. These negotiations can be time
consuming and costly.

5 Ibid.
Canada is developing a new approach that will likely include:
• A transparent funding formula that takes into account the ability of the First Nation to generate own-source revenues;
• A formal mechanism for consulting with Aboriginal groups on matters relating to federal financial support for self-government;
• Accountability provisions; and
• New measures that take into account the unique circumstances of each self-governing group.

UBCM Interests

Regarding financing self-governing First Nations, local governments are interested in the principles of 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 ought take into account the impact on neighboring districts, municipalities, and individuals involved. Local governments do not want to increase tax burdens on property owners as a result of treaty settlements. Local governments are also interested in not having responsibilities and obligations of the federal and provincial governments downloaded to local governments without adequate resources to implement and manage such changes.7

Municipal and regional district revenues are derived from property taxes, federal and provincial government grants-in-lieu of taxes, transfers from other governments, user fees and service charges. Capital financing and service provision commitments are based upon expectations of a relatively predictable population/assessment base.

Under the current property assessment system, property tax exemptions can be constitutional exemptions, assessment exemptions or tax exemptions. If First Nations negotiate any tax exemptions, this will reduce the tax base of municipalities and regional districts thereby diminishing the local capacity to fund existing and future capital and operating expenditures.

Municipal councils and regional district boards must prepare a five-year financial plan, which includes operating and capital expenditures. The plan shows proposed sources of funds and their application for capital projects such as development and improvement of municipal facilities or land and equipment purchases. The plan is adopted annually by bylaw each year. The current year of the plan becomes the annual budget or operating plan for the year. It tells staff and the public what types and quality of services are to be provided. An expenditure not provided for in the plan or in an amended plan is unlawful.

Local governments cannot run a deficit in their current operating accounts. Each year they must balance their budget. Therefore, unanticipated changes to any of the above-noted revenue sources will result in revenue shortfalls and tax increases unless there is a

corresponding decrease in expenditures. When revenue streams change, local
governments require time to adjust their revenue projections and plan their expenditures
accordingly. A primary interest of local governments is budgetary stability.\footnote{Ibid.}

In the 2005 report titled \textit{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 governments in the land selection process. When and
how local governments are involved is crucial to their interests being understood by
negotiators and represented in the process.

\textbf{Fisheries}

\textbf{Element 6: BC Treaty Process Fish Negotiations and Cohen Inquiry}

Canada established the Cohen Inquiry to investigate the decline in sockeye salmon
stocks in the Fraser River. Canada has decided that it is necessary to defer the
negotiation of fisheries components at treaty tables that involve salmon, pending the
potential adoption of new policy approaches informed by the findings and
recommendations of the Cohen Inquiry. With the exception of Yale (now complete), In-
SHUCK-ch and Sliammon final agreement negotiations, Canada will defer discussions
on salmon fisheries.
Considerable progress can be made on many other topics that remain to be negotiated at most tables (e.g. AIP can be concluded without a fish chapter). Where a final agreement is close to completion before the fish deferral is lifted, Canada is prepared to consider other options to conclude treaties. For instance, if the parties are in agreement, a treaty could be concluded on all other matters.

**UBCM Interests**

With regard to natural resources, local governments’ 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.  

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.

**Conclusion**

In conclusion, UBCM would like to emphasize that it supports the treaty process and also supports the aspirations of First Nations people with respect to assuming control of their communities and affairs.

Local governments represent a unique interest in the BC Treaty Process and, as such, UBCM is putting forward this paper for federal consideration. As stated in the introduction, the paper is intended to inform the federal government of the issues and interests of local governments.

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