
**LOCAL GOVERNMENT TREATY-RELATED INTERESTS IN
GOVERNANCE
UBCM Policy Digest Paper #3 - January 2004**

INTRODUCTION

This paper is one in a series of papers produced by UBCM that consolidates existing UBCM policy on the named issue. It is intended for use primarily by UBCM members and their local government Treaty Advisory Committees (TACs) in the process of identifying and representing local government interests at treaty tables in their area, as part of the provincial negotiating team.

The goal is to make this information more readily available and easier to use for TACs and others interested in the collective views of BC local governments on treaty issues. It is important to note that:

- UBCM policy is based on the development and articulation of interests, rather than positions (a decision made by the membership); and
- UBCM policies describe the common interests of local governments applicable to all treaty tables. UBCM policy does not define specific local government interests relating to individual treaty tables and circumstances. These interests are defined and represented by TACs and local governments in the area.

GOVERNANCE RELATED INTERESTS: A SYNOPSIS

There are a wide range of topic areas relating to First Nations governance and jurisdiction that are being negotiated at treaty tables. UBCM's existing policies related to governance relate primarily to the following three areas:

1. The Local Government – First Nation relationship

- Structuring the relationship
- Servicing
- Dispute resolution
- (*Land use planning and development - see Policy Digest Paper #2 – Land Interests*)

2. First Nation Authority on and off Treaty Settlement Land (TSL)

- Application of standards and Relationship of laws (e.g. environmental protection)
- Jurisdiction and management of resources

3. Representation of Non-First Nation members living on Treaty Settlement Lands

Existing UBCM policies generally do not touch on First Nations law making in relation to their culture nor internal operation of First Nations governments.

UBCM policy work related to governance issues in treaties is found in the following papers (note that those identified as “policy papers” have been endorsed by the UBCM membership):

LOCAL GOVERNMENT AND ABORIGINAL TREATY NEGOTIATIONS: DEFINING THE MUNICIPAL INTEREST (1994)

This policy paper provides the first statement on local government interests in governance issues in relation to treaties.

UBCM RESPONSE TO PROVINCIAL TREATY MANDATES: “BC’S APPROACH TO TREATY SETTLEMENTS” (1997)

This policy paper responded to the provincial government’s 1996 treaty mandate (i.e. policy statements) on self government for First Nations.

REVIEW OF NISGA’A FINAL AGREEMENT: DRAFT WORKBOOK (1999)

This Workbook is an element of a comprehensive analysis of the NFA in relation to local government interests. The broad objectives of this Workbook are to review the NFA in relation to approved UBCM policy on the general and specific interests of local government in treaty negotiations and to provide conclusions on how the Agreement affects these interests.

APPROACHES AND OPTIONS FOR TREATIES IN URBAN AREAS (1999)

This discussion paper examines some of the issues of concern to local government about the roles and responsibilities of First Nation governments and their relationship to local governments in treaties.

LAND USE COORDINATION, SERVICING AND DISPUTE RESOLUTION: TOWARD CERTAINTY FOR LOCAL GOVERNMENTS THROUGH TREATY NEGOTIATIONS (2000)

This policy paper establishes principles and make recommendations on how through the treaty process, successful negotiation of land use coordination and the related issues of servicing and dispute resolution can occur between local governments and First Nations.

UBCM POLICY AND PRINCIPLES ON TREATY-RELATED GOVERNANCE INTERESTS: POLICY EXCERPTS

Local Government and Aboriginal Treaty Negotiations: Defining the Municipal Interest (1994)

The Local Government – First Nation Relationship

Treaty settlements will, in most cases, include certain rights of aboriginal governance as well as jurisdiction over some lands and resources. It is assumed that self-government, although it may vary from settlement to settlement, will be involve an amalgam of federal, provincial and municipal type powers, exercised within the unique economic, social, demographic, historical and cultural context of each First Nation.

Local governments are uncertain as to their relationship to this new form of government and the powers, jurisdiction and lines of communication that can be

anticipated. Critical to ensuring the development of harmonious relationships between local and aboriginal governments will be a clear understanding of lines of authority and the separation of powers, possible areas of overlapping jurisdiction and concurrent or co-jurisdiction, and well defined mechanisms for cooperation, consultation and joint decision-making (e.g., joint council meetings, joint operating committees, issue-specific joint committees) and clear dispute-resolution processes.

Local governments are interested that, where appropriate, there be a harmonization of laws and standards between the two governments. This will promote efficiency, clarity and effectiveness, and public health and safety, particularly in situations where the communities are adjacent to each other.

Land Use Planning and Development

The planning interests of local government relate to land use within and adjacent to local government boundaries. Official Community Plans are developed for local areas while Regional Growth Strategies articulate regional planning objectives. Local governments are interested that land uses on settlement lands are compatible or harmonized with those of the local government beside or around the settlement lands.

Dispute Avoidance and Resolution

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

First Nation Authority On and Off Treaty Settlement Land

Jurisdiction and Standards on TSL - Local governments are interested that general provincial and federal standards (e.g. environmental protection, land and resource planning, consumer protection, employment standards, workers compensation, health and safety, etc.) will apply on settlement lands within or adjacent to local government boundaries. Local governments are interested that there be compatibility and harmonization between the standards determined by First Nations and those of local governments (e.g., land-use, sub-division development, etc.). The preservation of agricultural lands and the status of the Agricultural Land Reserve; access and easements for servicing; and enforcement of quality control standards are all issues of concern to local government.

Jurisdiction and Management of Resources - Many non-aboriginal communities are totally or significantly dependent upon resource industries, particularly the forest sector, for their existence. Some municipalities hold Tree Farm Licenses while others have developed plans for Community Forests. Local governments' water interests are substantial and numerous and agricultural land is also of great importance to many local governments and communities. Control and use of the province's natural resources is a significant interest and there is concern about the impacts of treaty settlements on the survival or well-being of many resource dependent communities.

UBCM Response to Provincial Treaty Mandates: “BC’s Approach To Treaty Settlement” (1997)

The Local Government – First Nation Relationship

UBCM agrees with provincial policy stating that treaties will clarify structures and processes that will serve as efficient forums for intergovernmental consultation and decision-making. In many cases, linkages will be necessary between aboriginal and local governments for coordination in the areas listed below:

- regional planning, zoning and growth management initiatives;
- planning and construction of infrastructure;
- local service delivery;
- property taxation; and
- standards with respect to health and safety.

UBCM urges the province to begin a concerted effort to explore, with representatives of local governments and their Treaty Advisory Committees, how these objectives can be achieved. This needs to be done well before any Agreements in Principle (AIPs) are finalized.

For local governments, aboriginal self-government raises a number of important and complex issues in terms of defining jurisdictions, fiscal arrangements, powers and communications as they relate to planning, infrastructure, local service delivery, property taxation and standards. While UBCM supports the province’s objective of ensuring clearly defined relationships and mechanisms between local governments and First Nations, these objectives are achievable only if both First Nations and local governments have compatible jurisdiction and authority. UBCM therefore recommends that the province, in concert with local governments and First Nations, explore mechanisms to provide them with opportunities to develop equivalent and compatible functions.

Service Delivery

Local governments believe in the importance of ensuring the health, safety and well-being of all residents, ensuring comparable levels of services and providing all parties with a clear understanding of their rights, responsibilities and accountabilities. Servicing agreements between First Nation governments and local governments must ensure adequate and predictable compensation for the services provided.

Dispute Resolution

Local governments’ interests are to achieve mutual understanding and certainty for all parties through cooperation, consultation and access to dispute resolution mechanisms with First Nations governments. In terms of governance, local governments also recognize that aboriginal peoples may have different priorities as compared to local governments.

First Nation Authority On and Off Treaty Settlement Land

Nature of Aboriginal Government Authority

UBCM favours the use of either the delegated authority model or limited authority subject to clearly defined conditions.

UBCM recognizes that “self-government” for aboriginal people may be a dynamic, evolving form of government as it is for local governments. We suggest therefore that careful consideration be given to which aspects of self-government should be contained in treaties and which should be contained in parallel agreements and accords. For example, the broad principles and goals related to aboriginal self-government could be entrenched in treaties, while details on particular aspects of self-government, such as policing powers, may be better suited to separate agreements. This would avoid the need for full-scale treaty amendments as aboriginal self-government evolves, and as adjustments related to particular self-government powers are needed.

Land-Based Jurisdiction

The province describes the extent of aboriginal authority in terms of its relationship to land. UBCM is concerned that exercise of powers off Settlement Land not result in pockets of extraterritorial jurisdiction within local government boundaries, particularly in urban areas.

Standards

UBCM supports the province’s general approach to ensure the maintenance of basic provincial standards, such as environmental protection and assessment, throughout the province. For local governments, consistency is important to maximize efficiency, facilitate public safety, ensure environmental protection and protect public health.

Representation of Non-First Nation members living on Treaty Settlement Lands

A key issue relating to the structure of aboriginal government is how self-government will affect non-aboriginal people. The provincial mandate on Self-Government notes that aboriginal governments will develop structures which will allow them to deal effectively with residents of Settlement Lands to the extent of their jurisdiction. It also states that the provincial interest is to see a means of representation for all those who are affected by decisions of aboriginal governments.

UBCM recommends that treaties provide non-First Nation members living on TSL with mechanisms to participate in, not merely influence, decision making and elections on TSL.

Nisga’a Final Agreement (NFA): Draft Background Workbook (1999)

The Local Government – First Nation Relationship

The relationship between the Kitimat Stikine Regional District (KSRD) and the Nisga’a Nation has historically been a good one and relatively simple in nature. (The KSRD Electoral Area A director has usually been a Nisga’a citizen). Therefore, the NFA provisions dealing with ongoing intergovernmental relations at the local level are brief, and for the most part they are permissive rather than mandatory. The Skeena Treaty Advisory Committee (TAC) representing local governments in the area, had an active role in the negotiation of the local government provisions in the NFA.

The permissive language used in the NFA relating to the relationship between KSRD and the Nisga'a Nation allows for flexibility in the relationship and for arrangements to evolve as needed over time. The downside of this relatively flexible, unstructured and permissive approach is a lack of any agreed upon and binding principles in the NFA to guide the negotiation of any future agreements between the KSRD and the Nisga'a. For the Nisga'a and the KSRD this was not a concern because of their long-standing good working relationship, which currently involves relatively few formal agreements.

A detailed chapter on local government relations will be needed in treaties in more settled areas, and negotiations will be more involved and potentially more difficult. There may be a need for provisions relating to lines of authority, jurisdiction, mechanisms for co-operation, consultation and joint decision making, dispute resolution processes, and harmonization of local laws and standards.

The experience of the KSRD and Skeena TAC in Nisga'a treaty negotiations provides a number of useful lessons:

- The value of maintaining the *status quo* in terms of the structure of the local government – First Nations relationship should not be overlooked. Treaty provisions mandating change or stipulating new structures may not be necessary in every case.
- Even where local government - First Nations relations are left general and unstructured in a treaty, it is important at the very least to establish in the treaty a protocol for continuing communication.
- Treaties must be flexible enough to allow local government - First Nation relationships to evolve. The treaty must provide a framework under which separate agreements and accords can be achieved and revised from time to time as necessary. In some negotiations, it may be important to agree to principles which will be followed (or basic tools which will be applied) in the development of these separate accords and agreements.
- In many, if not most, treaty negotiations the specific interests of local government will have to be addressed in more detail than in the NFA. The way these interests are handled will be key to the development of good long term relations and to the success of treaties.

Dispute Resolution

The dispute resolution provisions of the NFA apply only to the three parties to the agreement. Since local government is not a party to the NFA, none of the provisions pertaining to dispute resolution apply. In treaty negotiations elsewhere, it will be important to establish:

- at a minimum a protocol concerning the resolution of disputes between the local government and First Nation, and preferably a binding agreement in this regard. The successful negotiation of this protocol or agreement should be a precondition to finalizing a treaty.
- Within the dispute resolution process applying to the three parties, a process for notifying a local government when their interests are affected by the dispute.

First Nation Authority On and Off Treaty Settlement Land

Jurisdiction and Management of Natural Resources

The NFA provides some assurances that Nisga'a forestry management standards will be consistent with what is required elsewhere in the province. The Nisga'a have the option to establish rules to govern forest practices on Nisga'a Lands, but, the rules must meet or exceed provincial standards. As well, Nisga'a laws in respect of timber scaling made after the transition period must be compatible with provincial timber scaling laws. Similarly, the Nisga'a Government may make laws in respect of non-timber forest resources on Nisga'a Lands, including establishing standards to regulate harvesting and conservation of non-timber forest resources, provided that the standards meet or exceed any federal or provincial standards.

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

Harvesting Rights

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

Nature and Extent of Nisga'a Government Authority

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

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

Representation of Non-First Nation members living on Treaty Settlement Lands (Relations With Non-Nisga'a People)

It is our view that in locations where the number of non-aboriginal residents number in the thousands and may well outnumber aboriginal residents, provisions like those applying to the relationship with non-aboriginal people in the NFA would be untenable. UBCM believes that future treaties should provide explicitly that non-First Nation citizens living on First Nation's lands will not be subject to any First Nation government tax unless they also have the opportunity for meaningful participation in that government.

Approaches and Options for Treaties in Urban Area (1999)

The Local Government – First Nation relationship

A structured political relationship between local governments and First Nations governments is a valuable way to achieve better understanding and a closer working relationship between neighbours. This could be achieved through:

Voluntary Arrangements: Agreements between governments to meet and discuss issues on a routine basis; and/or,

Joint Commissions: Governance structures created for the joint management of shared services.

Regional District Participation: Instead or in addition, First Nations could participate in regional districts. Two options exist for involving First Nations in regional districts are through full membership and stakeholder membership.

With respect to these options, no one model is likely to be appropriate for all circumstances. A variety of mechanisms will be needed. Also, while some options are labeled 'voluntary' and some are more structured, all will depend on good will between the parties to be successful.

The decision as to whether the appropriate relationship for a First Nation is with an individual municipality or with the regional district is one best considered on a case by case basis. One possibility is that the relationship with the region be mandatory on a limited number of issues that clearly have consequences beyond the boundaries of individual First Nations e.g. air quality monitoring and management.

Servicing

Transition language should deal with the transfer and continuation of existing agreements.

Some issues are unlikely to be dealt with through treaties and will be left to individual agreements including compatibility/consistency of services across local boundaries.

In the absence of mutually acceptable land-use planning arrangements, local governments may attempt to use servicing agreements to limit or condition land use on settlement land.

Dispute Resolution

Local governments are concerned that the complexity of the relationship will increase post-treaty and that formal mechanisms need to be put in place to resolve disputes should they arise. Most 'disputes' between First Nations and local government are expected in the areas of land use and servicing agreements. However, local governments wish to see mechanisms be in place to respond to other issues.

Local governments believe that prevention is the best approach, that is dealing with issues before they become disputes. This can best be achieved by forging relationships between local governments and First Nations now and should be based on 'empowering' the various parties; a solution shouldn't be imposed on them. All parties need to work together based on reciprocal respect for roles and authorities.

Representation of Non-Members

Local governments are concerned that non-members living on treaty settlement land will not have the right to vote in elections for First Nation governments but will be subject to the laws established by those governments. The law making powers of First Nations governments will include most of the powers currently exercised by local government. Today, non-members typically do not have voting rights or other forms of representation on First Nation governments. Many local governments view treaties as an opportunity to address a situation they considered inconsistent with democratic government.

How may treaties change the situation?

- Land development could lead to a larger number of non-members living on treaty settlement lands. It is possible, in some circumstances, that they will form the majority of residents living on treaty settlement lands.
- Non-members may not be able to vote for the First Nation government even though they may be paying taxes to that government for services received and even though they may be subject to regulations established by the First Nation government.
- Following treaties, non-members may become disenfranchised in the sense that they may not be able to vote for a First Nations government or for a local government representative.
- Members of First Nations may continue to be able to vote in local government elections as well as participate in First Nations' governments.
- Provincial laws, such as landlord-tenant laws, are expected to apply on settlement lands.

Local government representatives indicated that that non-members should be able to vote in some way on decisions that affect the services that they pay for.

Land Use Coordination, Servicing and Dispute Resolution: Towards Certainty For Local Government Through Treaty Negotiations (2000)

The Local Government – First Nation relationshipPrinciples

- Local governments and First Nations have their own negotiations to conclude through the treaty process. This will support a secure and stable framework for community relationships.
- The type of mechanisms or structures needed to achieve coordination will vary depending on local circumstances. For example, the more First Nations land involved and the closer it is to settled areas, the more need there is for formal coordination structures. In some areas, it will be essential that land use coordination and dispute resolution measures are agreed to prior to finalization of the treaty. Success of the current relationship is also a factor in how much structure is needed.

Recommendations

- That Provincial and Federal governments provide the opportunity during treaty negotiations for local governments to reach an agreement with First Nations *outside the treaty itself*, on land use coordination, servicing and dispute resolutions.
- That local governments and First Nations have the opportunity to design and sign-off on land use coordination mechanisms, servicing arrangements and dispute resolution before treaties are concluded, and that in certain cases, Provincial and Federal Governments be prepared to not conclude a treaty until the completion of a local government – First Nation agreement.

Servicing

Land use and servicing are inextricably linked. In order for local governments to plan and provide for servicing needs adequately, community land use objectives and future plans must be known. Provision of and payment for services is an important aspect of the local government – First Nation relationship. In future, agreements will often need to go beyond servicing and deal comprehensively with the range of intergovernmental issues. When local government and First Nations adhere to equivalent standards and regulations affecting land use and servicing, the many benefits that result include easier coordination and equal opportunity to attract development.

Dispute Resolution

An agreed to dispute resolution process is an essential part of coordination arrangements, since it provides closure should other attempts to coordinate land use and related activities fail. It also prevents unresolved conflicts persisting long term.

Regional Districts and municipalities in BC can have different needs with respect to how land use is coordinated and the formality of agreements and dispute resolution mechanisms.