
**LOCAL GOVERNMENT TREATY RELATED INTERESTS IN
ACHIEVING CERTAINTY AND FINALITY IN TREATIES
UBCM Policy Digest Paper #1 - May 2003**

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.

CERTAINTY AND FINALITY: A SYNOPSIS

Local governments are interested that treaty negotiations lead to agreements with First Nations that are certain and final. Certainty has been identified as a primary interest of local government in treaty negotiations. Lack of certainty with respect to the application of Aboriginal rights and title to land and resources in BC impedes a strong investment environment on which all BC communities rely.

UBCM interest development on the issues of certainty has focused on two areas:

Legal mechanism for providing certainty: UBCM has provided federal and provincial governments with advice in the development of a legal mechanism or technique for providing certainty in a treaty. Without a legal technique that provides clarity on Aboriginal rights, powers and jurisdiction to the greatest extent possible, the treaty has limited value. As in the Nisga'a Final Agreement, the "certainty" provisions will likely be included up-front, in the general provisions. Other treaty provisions important to the achievement of certainty relate to "overlaps" (or how rights of Aboriginal people are reconciled), consultation and dispute resolution.

Clarity of rights and responsibilities throughout the treaty: Another means of achieving certainty is to ensure that in relation to each subject area addressed in a treaty (e.g. chapters on lands, access, resources, governance, fiscal relations, taxation, dispute resolution), the language is clear and precise. The goal is to develop a final treaty that does not lead to further uncertainty on questions of First Nations title, rights and jurisdiction.

UBCM policy on achieving certainty and finality in treaties is found in the following papers, (note that those identified as policy papers have been endorsed by the full UBCM membership):

1. LOCAL GOVERNMENT AND ABORIGINAL TREATY NEGOTIATIONS: DEFINING THE MUNICIPAL INTEREST (1994)
This policy paper provides the first statement of the primary importance of certainty in treaties to local governments.
2. ACHIEVING CERTAINTY IN TREATY NEGOTIATIONS (1995)
This policy paper was prepared as a submission to the federally-appointed fact finder, the Hon. A.C. Hamilton. It set out six principles to guide certainty decisions in treaty negotiations.
3. UBCM RESPONSE TO PROVINCIAL TREATY MANDATES: "BC'S APPROACH TO TREATY SETTLEMENTS" (1997)
This policy paper responded to the provincial government's treaty mandate or policy statements with respect to the certainty issue.
4. UBCM REVIEW OF THE NISGA'A AGREEMENT IN PRINCIPLE (1996)
This review concluded that the Agreement in Principle did not provide satisfactory assurances as to how certainty objectives would be realized. The Agreement in Principle contemplated the possibility of re-opening a Final Agreement in certain circumstances and was silent with respect to uncertainty arising out of overlapping aboriginal claims to Treaty lands.
5. CERTAINTY AND FINALITY IN THE NISGA'A FINAL AGREEMENT (1998)
This paper analyzed the Nisga'a treaty's certainty provisions in light of UBCM policy and concluded that the six principles to guide certainty decisions in treaty negotiations set out in the 1995 UBCM policy paper, were substantially met.
6. LAND USE COORDINATION, SERVICING AND DISPUTE RESOLUTION: TOWARD CERTAINTY FOR LOCAL GOVERNMENTS THROUGH TREATY NEGOTIATIONS (2000)
This policy paper focuses on local governments need for clarity in jurisdictional arrangements with First Nations with respect to lands and provision of services.

**UBCM POLICY AND PRINCIPLES ON CERTAINTY AND FINALITY:
POLICY PAPER EXCERPTS**

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

Local governments want treaty settlements to be certain and final, meaning that the final outcome of treaty negotiations will be a completion of the process of addressing outstanding First Nations claims and that, in relation to the question of aboriginal right and title, the treaties will bring finality and certainty to the greatest extent possible, recognizing that "self-government" for aboriginal people may be a dynamic, evolving form of government as it is for local governments. This will enable all citizens of British Columbia to move toward economic, social and community sustainability.

Achieving Certainty in Treaty Negotiations (1995)

We look to treaties to formally recognize powers and jurisdiction without the need to resort to expensive and lengthy litigation over each aboriginal right (and without the risk, on both sides, of an adverse judicial decision). As part of a treaty settlement, it should not be necessary for First Nations to surrender other aboriginal rights respecting matters such as their culture and unique society. To the extent that jurisdictional powers are recognized in any treaties, there must be certainty of the scope of these powers within the current Canadian legal framework.

Six Principles to Guide Certainty Decisions

1. Treaties are intended to produce certainty, and should not be made where uncertainty remains. Where a First Nation is not prepared to bring certainty to the table, negotiators should consider other forms of agreement that are not constitutionally protected. Governments should not approach the negotiating table until there is a common understanding concerning the level of certainty that will be achieved when negotiations are concluded. Where certainty affects the legislative authority of local governments, local governments should participate in the process of establishing the level of certainty required. This process should occur prior to or during negotiations on a framework agreement.
2. For topics where certainty is not achievable or dynamic rights are evolving, governments should consider using accords that are not constitutionally protected.
3. Governments should be prepared to compensate First Nations for greater certainty and to offer less compensation where certainty is not obtained. This requires that the certainty provisions be negotiated prior to settlement of other issues, so that the total settlement reflects the degree of certainty provided by the treaty.
4. Treaty settlements should contemplate compensation for rights over an extended period of time, so that the parties can evaluate treaty implementation and how post-treaty relationships will develop before compensation is rendered and settlement lands are granted.
5. Clarity of language throughout the treaty is an excellent (and relatively inexpensive) means of obtaining certainty and should be pursued at every opportunity for the benefit of all parties.
6. Treaties must allow for dispute resolution provisions to address certainty issues that may arise after settlement legislation is enacted.

UBCM Response to Provincial Treaty Mandates: BC's Approach To Treaty Settlements (1997)

The province indicates that its primary objective in treaty negotiations is to resolve current legal uncertainties regarding rights to lands and resources. Specifically, the mandate indicates that treaties will replace the existing legal requirements set out in Sparrow and Delgamuukw with a more workable, efficient and effective system.

It is recommended that certainty of rights and obligations be an over-riding principle in treaty negotiations and that this be achieved by ensuring that the province's mandate

require the exchange of unspecified aboriginal rights as has been the case in other Canadian treaties.

Certainty and Finality in the Nisga'a Final Agreement (1998)

The Nisga'a Final Agreement (NFA) substantially accords with the UBCM policies and principles regarding certainty. Its provisions for amendment and modification are designed to respond to changing circumstances and, when combined with the dispute resolution provisions, provide a relatively high degree of certainty.

Although the language of “cede, release and surrender” and “extinguishment” are absent from the NFA, its express recognition of “modified” Section 35 aboriginal rights, and the release of others, does resemble the partial surrender model recommended by UBCM. The six principles to guide certainty decisions in treaty negotiations, set out in the 1995 UBCM policy paper, are substantially met.

Land Use Coordination, Servicing and Dispute Resolution: Toward Certainty for Local Governments through Treaty Negotiations (2000)

Achieving certainty with respect to land use, servicing and resolution of disputes can be the most useful role of the treaty for local governments. The conclusion of treaties in most cases will increase the level of activity by First Nations on their land, heightening the need for coordination with local governments. Without a common operating framework, such as is provided to local governments through the *Local Government Act*, uncertainty will persist.

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 from persisting long term.

It is recommended that a basic criteria for the success of treaty negotiations be greater certainty for local governments through the creation of land use planning systems that connect local governments and First Nation governments and that these systems be developed locally so that they respond to local circumstances.