

LOCAL GOVERNMENT AND  
ABORIGINAL TREATY NEGOTIATIONS

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## LOCAL GOVERNMENT AND ABORIGINAL LAND CLAIMS

### EXECUTIVE SUMMARY

Native land claims continue to be a significant issue for local governments in British Columbia. The UBCM believes that local government participation in the treaty negotiation process is crucial to the success of those treaties.

The B.C. Treaty Commission is about to be established, and the Nisga'a negotiations are ongoing. The provincial government, in the mean time, has been making "joint stewardship agreements" with several first nations that are seen as "parallel or outside of" the treaty process. These agreements do not confer rights, but are for joint resource and environmental management in traditional tribal territories.

Pursuant to the UBCM policy "Local Government and Native Land Claims", passed in 1991, the UBCM has been seeking a memorandum of understanding with the provincial government that will establish the parameters of local government participation in the treaty process. The province has responded positively, recognizing that "local governments are not third parties in the usual sense".

The UBCM has continued to participate in the province's Third Party Advisory Committee, although events surrounding the joint stewardship agreements and the Nisga'a negotiations have left many participants questioning the efficacy of that process.

The UBCM wishes to reaffirm the principles and recommendations of the 1991 policy, and to pursue the recognition of local government as an order of government distinct from other "third party" interests through a memorandum of understanding with the province.

## **SUMMARY OF RECOMMENDATIONS**

### **RECOMMENDATION #1:**

**THE UBCM REAFFIRMS THE RECOMMENDATIONS OF THE "LOCAL GOVERNMENT AND NATIVE LAND CLAIMS" POLICY OF SEPTEMBER 1991.**

### **RECOMMENDATION #2:**

**THE UBCM REAFFIRMS AND EMPHASIZES THAT LOCAL GOVERNMENT IS ANOTHER ORDER OF GOVERNMENT AND DISTINCT FROM OTHER "THIRD PARTY" INTERESTS.**

### **RECOMMENDATION #3:**

**THE UBCM REAFFIRMS THAT A MEMORANDUM OF UNDERSTANDING WITH THE PROVINCE IS THE APPROPRIATE AND NECESSARY INSTRUMENT TO ESTABLISH THE PARAMETERS OF LOCAL GOVERNMENT PARTICIPATION IN TREATY NEGOTIATIONS.**

### **RECOMMENDATION #4**

**THAT UBCM ESTABLISH AN ABORIGINAL TREATY NEGOTIATIONS OFFICE AS SET OUT IN APPENDIX "A" AND BE AUTHORIZED TO FUND THE OFFICE THROUGH A SURCHARGE ON ANNUAL DUES OF UP TO 20%.**

## LOCAL GOVERNMENT AND ABORIGINAL LAND CLAIMS

### 1. INTRODUCTION

Native land claims continue to be a significant issue for regional and municipal governments in British Columbia. Local government has a significant stake in the process leading to treaties with the first nations of British Columbia.

The Union of B.C. Municipalities believes that the participation of local governments in land claims negotiations is essential to the success of new settlements or treaties. Local government is the government for most people in B.C. These communities have a vital interest in the settlement of native claims.

Following on the recommendations of the B.C. Claims Task Force, the British Columbia Treaty Commission is about to be established. Negotiations between the federal and provincial government and first nations have been continuing, and aside from the treaty process several agreements have been reached on joint stewardship of resources. The provincial government's "Third Party" consultation process has been underway.

The UBCM has been involved in the third party consultations and has, as well, been seeking a greater role in the negotiations in its own right, as another order of government with a special interest in the outcome.

At the 1991 convention the UBCM adopted a policy paper, "Local Government and Native Land Claims" (provided as part of the support material for the B.C. Communities agenda), which gave the background to the native claims process, outlined the positions of the various parties and set out nine recommendations that, in the view of the UBCM, would lead to success in the treaty negotiations.

Two key recommendations are that local governments observe the negotiations as part of the provincial negotiating team in order to ensure that the interests of their communities are adequately represented, and that the province and the UBCM sign a memorandum of understanding as to the UBCM's role in the treaty process. The UBCM has been negotiating these recommendations with the province over the last year.

This paper reviews the current situation, including the progress of the third party advisory committee, the new provincial-first nation joint stewardship agreements and the position of the UBCM.

## **2. RECENT DEVELOPMENTS**

### **(a) The Treaty Commission**

The B.C. Treaty Commission is to be formally established on September 21, 1992 by representatives of the First Nations, Prime Minister Mulroney and Premier Harcourt.

The First Nations have named their representatives to the Commission; Peter Kelly and Carol Corcoran. The federal and provincial governments are expected to name theirs soon.

The most important remaining issue between the federal and provincial governments is funding. Until this issue is resolved, it is unlikely that any new treaty negotiations will begin.

In the meantime the Nisga'a negotiations are continuing and an Interim Agreement is expected soon.

The Treaty Commission is to be composed of four commissioners and a Chief Commissioner. Two commissioners will be nominated by the First Nations Summit, one each by B.C. and Canada and the Chief Commissioner will be nominated jointly. All parties must agree to the nominees.

The basic role of the commission is to "facilitate negotiation of treaties". In carrying out this role the commission will:

- (i) receive statements of intent to negotiate and funding requests from First Nations, and notify Canada and B.C.;
- (ii) assess the readiness of parties to begin a framework agreement. In the case of Canada and B.C., this includes ensuring they have obtained background information on the communities, people and interests likely to be affected and established mechanisms for consultation with non-aboriginal interests;
- (iii) encourage negotiations following the six steps outlined in the Report of the Task Force, which are:
  1. submission of statement of intent to negotiate a treaty
  2. preparation for negotiations
  3. negotiation of framework agreement
  4. negotiation of Agreement in Principle
  5. negotiation to finalize a treaty
  6. implementation of the treaty.
- (iv) assist in obtaining dispute resolution
- (v) maintain a public report of the status of negotiations.

## **2(b) The Provincial Government**

The new government has committed itself to the creation of the Treaty Commission. The province has also committed itself to the recognition of aboriginal title and the inherent right to self government, and stated its interest in negotiating modern day treaties with all of the first nations of British Columbia.

The government has also undertaken a major initiative in the signing of "joint stewardship agreements" with several first nations.

According to the provincial government, joint stewardship provides...

"... A framework for British Columbia's government-to-government relations with First Nations on all aspects of land and resource management within traditional territories, including cultural resources such as archaeological sites and ethnographic sites. Joint stewardship will operate outside or parallel to formal treaty negotiations."

The Joint Stewardship statement sets out certain principles which "will inform ongoing government operations concerning lands and resources". These principles are:

1. British Columbia has recognized that First Nations have a... unique legal interest in land. Within the context of the Province's aboriginal policy framework, a fundamental shift in management processes will take place to give effect to that interest.
2. Joint stewardship is an essential component of effective land and resource management.
3. First Nations will play an integral part in developing and implementing policy on joint stewardship of land and resources in British Columbia.
4. Joint stewardship will recognize the contribution of both traditional and technical aspects of resource management. It will bring together two different methods of decision-making: government agency approaches and traditional aboriginal processes focused on building consensus.
5. Joint stewardship will respect the existing legal rights of non-aboriginal British Columbians.
6. Joint stewardship arrangements will preserve the government's ability to exercise its powers under statute.
7. The measures undertaken through joint stewardship will vary according to the nature of the particular aboriginal interests concerned.

8. Joint stewardships will facilitate participation by First Nations in land and resource management. It will not involve vetoes or moratoria, unless the parties agree that a particular, limited action is necessary to protect certain defined aboriginal interests. Where interests of third parties are involved, they will be consulted.
9. Joint stewardship arrangements will provide the means for First Nations participation within the financial and human resource constraints of British Columbia. The provincial government will seek appropriate federal participation.
10. Joint stewardship will be without prejudice to arrangements concluded in treaties.

To date agreements have been signed with the Xax'lip in the Fountain Valley, the Cowichan Band and the Haida in the Queen Charlotte Islands or Haida Gwaii.

In signing the Xax'lip agreements, Minister Petter said;

"The joint stewardship agreements follow the province's commitment to establish a new relationship with aboriginal people based on the recognition of aboriginal title and the inherent right to self-government."

The Xax'lip agreements relate to land and resources, "joint natural resource initiatives" and the Fountain Valley Road. The agreements do not transfer jurisdiction or powers to the Xax'lip. Rather, they set up a joint resource management advisory committee and provide for arrangements whereby the Xax'lip and the province will seek consensus on decisions respecting land and resources in the Xax'lip traditional territory.

The agreement applies to any license, permit or other disposition and the use of land, water and resources in the traditional territory. The Xax'lip will be notified and consulted about such disposition proposals, and a dispute resolution mechanism is provided for.

The Cowichan Indian Band Agreement is similar. A joint Environmental Management Committee is formed, and the Agreement is meant to;

"... provide a framework and process that ensures the opportunity for continuing communication, consultation and cooperation by the parties in environmental management activities"; and,

"... develop a framework for joint recommendations leading to action oriented strategies for resolving environmental issues."

Again, no new rights or interests are created.

The agreement between the province and the Haida is;

"To provide more effective management of the recreational fishing industry on Haida Gwaii through:

- (a) implementation of the Council of the Haida Nation 1992 Management plan for the Commercial Recreational Fishery...; and
- (b) development of a framework and process to address management issues and agreements beyond the 1992 season."

The agreement commits the parties to establishing a joint working group and working towards long-term management of the recreational fishery.

A discussion paper on joint stewardship is expected to be released by the provincial government this fall.

### **(c) The Federal Position**

The federal government takes the same position as it did a year ago. Of course, the inherent right to self government has now been recognized in the proposed federal constitution.

The federal side has neither been involved in the third party advisory process, except as an observer, nor has it participated in any provincial initiatives, such as the joint stewardship agreements.

The federal government will not involve itself unless issues arise that are clearly within its jurisdiction - e.g., fish, migratory birds, some environmental issues, and is currently only active in the Nisga'a negotiations and preparations for the establishment of the Treaty Commission.

The federal government has been active in discussions about how to implement a third party consultation process.

### **3. THE UBCM-PROVINCIAL MEMORANDUM OF UNDERSTANDING**

Recommendation #9 of the 1991 UBCM policy called for the establishment of a UBCM-provincial memorandum of understanding that would provide for; cooperation in establishing joint programs for public information and education; processes for public consultation and issue identification and negotiation; mechanisms for dispute resolution and the agreement of the federal and provincial governments that neither would negotiate an item affecting a local government without fully consulting that local government.

The UBCM has been negotiating with the provincial government for the development of such a memorandum of understanding.

In July, Andrew Petter, the Minister of Aboriginal Affairs for the province, in a letter to the UBCM President, said:

"The province is sensitive to the concerns of local government about the treaty-making process and recognizes the legitimate and special interest local governments have in policy development and implementation of certain aspects of negotiated agreements."

"We also recognize the expertise and knowledge of local issues that municipalities can bring to the process and want to ensure that we take advantage of that expertise."; and,

"It was for that reason the provincial government included the UBCM in its existing third party consultation process, even though local governments are not a "third party" in the usual sense in which many of the other organizations are"; and,

"There is no question that there are a number of aspects of treaty negotiations that will have a major impact on local governments and on which they should be fully consulted.

I am prepared to make a commitment to you now, on behalf of the province, that consultation will take place both within the existing third party consultation process and at the local level, using as a guide the issues raised by the UBCM in its proposed memorandum of understanding."

Given this encouragement, UBCM and provincial officials have been working towards finalizing an agreement.

#### **4. THE THIRD PARTY ADVISORY COMMITTEE**

The provincial Third Party Advisory Committee, established in January, 1991, has been meeting regularly in an attempt to devise a mechanism and process to;

"... assist the Government of B.C. in developing a provincial negotiating position which represents the interests of all British Columbians."

Much of the work of the Advisory Committee has been taken up with trying to find agreement on the process, roles and responsibilities of the Committee itself. The purpose of the Committee, as stated in the most recent discussion paper, is to;

"... provide a consultation process whereby representatives of major sectoral groups directly impacted by treaty negotiations are consulted jointly and sectorally by both federal and provincial governments on policy and negotiations related to B.C. treaty negotiations."

Although the provincial government has stated that the Joint Stewardship Agreements are "outside or parallel to formal treaty negotiations" and "will not prejudice arrangements reached in treaties", the process is clearly related to the assumption of new powers and roles by the aboriginal people of B.C. It is hard to

imagine that these agreements will be rolled back and not become part of any future treaty negotiations or arrangements.

Similarly, the Nisga'a negotiations are at present explicitly outside the proposed Treaty Commission process and not formally subject to a third party advisory process.

The UBCM is of the view that despite those admitted limitations, both cases raise questions as to the effectiveness of the present consultation mechanisms. Questions are raised as to the timeliness and openness of the current process.

There was a lack of consultation on the stewardship agreements, taking the Third Party Advisory Committee participants by surprise. There was little, if any notice, and no attempt to solicit third party views.

In the Nisga'a case, the local government has had very little input into the land claim negotiations.

The UBCM believes that **any** provincial-first nation negotiations that have implications for third parties should be subject to the same requirements as set out in the Third Party Advisory Committee process.

UBCM has taken the position that a “provincial” third party committee may:

- assist local third party interests in understanding the treaty negotiation process and assist them in assessing the effects on their interests.
- monitor treaty negotiations with regard to consistency in the application of policy mandates between negotiations.
- share experiences of third parties in different negotiations.
- provide advice to Chief Negotiators on the application of policy;
- such other assistance as shall be requested by local third party sectoral interests.

However, a “provincial” third party committees do not represent local interests in a specific treaty negotiation. Local consultation processes should be established as each negotiation commences on framework agreements. The processes that are worked out should provide for practical two-way communications on local issues at the local level, that are appropriate for the area and matter under negotiation. It will be the role of the provincial advisory committees to advise on matters of consistency across negotiations and across sectors as set out above.

To overcome difficulties experienced by the Third Party process and to respond to the need to develop a process that allows consultation with the federal negotiations, a proposal to restructure clarify the Third Party Committee roles and responsibilities has recently been advanced by the members to the federal and provincial Ministers.

## **5. LOOKING AHEAD**

With the establishment of the Treaty Commission, B.C. moves to a stage when actual negotiations in many parts of the province may be underway at the same time.

Local government will need to be active in a variety of ways. Local government and UBCM must prepare to:

- support direct consultations with federal and provincial governments on basic policy positions and negotiating mandates.
- support local governments involved in consultations on specific treaty negotiations.
- facilitate local government involvement in public consultation, information and education programs.

A number of specific activities need to be considered including:

- support UBCM discussions with the Ministry of Aboriginal Affairs and the Department of Indian and Northern Affairs.
- support UBCM involvement in the Third Party Advisory Committee.
- conduct research on subjects such as self-government;
- assist local governments in specific treaty negotiations;
- ensure consistency between negotiations in provincial/federal mandates;
- be responsible for public considerations/education/information activities;
- provide regular updates to all UBCM members.
- report annually to the Convention;

This is a major task with major ramifications for local government and their communities. For that reason a recommendation is advanced to ensure local government can be effectively represented.

## **6. RECOMMENDATIONS**

Over the last year local government has seen some advances in relation to the issue of native claims.

Progress has been made in relation to the UBCM-provincial memorandum of understanding. Hopefully, that agreement will come to fruition shortly, which should provide local government with significant opportunities to participate in and influence the treaty negotiation process.

The proposed restructuring the Third Party Advisory Committee and the establishment of sectoral committee over the next year will strengthen the Committee. The role and level of activity will be greatly expanded.

The proposal to restructure the third party process should improve the effectiveness of that means of consultation.

Local government is not, and cannot be, simply a "third party" to treaty negotiations.

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## UBCM ABORIGINAL TREATY NEGOTIATION OFFICE

### 1. PREFACE

Aboriginal Treaty Negotiations in B.C. will be the most significant intergovernmental negotiations to affect local government in this decade; maybe this century. It is incumbent on local government to organize to play its part in the process. Part of that process is the creation of a central support organization.

### 2. PURPOSE

The UBCM Aboriginal Treaty Negotiations Office will serve three purposes:

- support direct consultations with federal and provincial governments on basic policy positions and negotiating mandates.
- support local governments involved in consultations on specific treaty negotiations.
- facilitate local government involvement in public consultation, information and education programs.

### 3. ACTIVITIES

As specific activities the Office shall:

- support UBCM discussions with the Ministry of Aboriginal Affairs and the Department of Indian and Northern Affairs.
- support UBCM involvement in the Third Party Advisory Committee.
- conduct research on subjects such as self-government;
- assist local governments in specific treaty negotiations;
- ensure consistency between negotiations in provincial/federal mandates;
- be responsible for public considerations/education/information activities;
- provide regular updates to all UBCM members.
- report annually to the Convention;

### 4. DURATION

The Office will be established by January 1, 1993 for a period of three years subject to continued funding. Recommendations on further continuance will be made to the 1995 UBCM Convention.

## **5. RESOURCES**

Subject to UBCM Executive approval the Office shall initially consist of a Senior Policy Advisor and necessary support services such as secretarial support and travel.

## **6. FUNDING**

Funding should be shared jointly by the federal, provincial and local governments.

Core funding for the Office will come from local government.

Funding for projects related to treaty negotiations participation, public education etc. will be sought from the federal and provincial governments.

A budget for core program work in 1993 is estimated to be in the order of \$120,000. This would be funded by a UBCM dues surcharge of 20%.