
*Summary of LMTAC Interests
Regarding Common Table Negotiations*

**Endorsed by the LMTAC Board
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MAINLAND
TREATY
ADVISORY
COMMITTEE

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EXECUTIVE SUMMARY

A *Common Table* approach to treaty negotiations was established in spring 2008 as a response to concerns raised by First Nation members of the *Unity Protocol* that provincial and federal government mandates on the following issues were creating barriers to successful treaty negotiations:

- Recognition / Certainty
- Constitutional Status of Treaty Lands
- Governance
- Co-Management
- Fiscal Relations and Taxation;
- Fisheries; and
- Shared Territories.

Any change to treaty negotiation mandates by federal or provincial governments on the above issues could have significant implications for local government. The outcome of the *Common Table* discussions will direct the future of negotiations under the *BC Treaty Process*; therefore, it is important for LMTAC to undertake a thorough review of each of the mandate issues in order to assess whether local government interests would be adversely impacted. This document is intended to provide a summary of LMTAC interests with respect to the key issues listed above.

As a member of the Provincial negotiation teams, **LMTAC supports the current negotiation mandates and principles of the provincial government on each of the seven *Common Table* topics**, and provide the comments herein for the consideration of the Province in preparation of a response to the *BC Treaty Commission* (BCTC) on the *Common Table* discussions.

1. CONTEXT

The First Nations' *Unity Protocol Agreement* was signed by approximately 60 First Nations between October 2006 and spring 2007, in response to frustrations encountered during negotiations with British Columbia and Canada in the *BC Treaty Process*. Current *Unity Protocol* membership includes approximately 52 First Nations; as 8 previous supporters have since left the Treaty Process.

Unity Protocol First Nations identified challenges with respect to federal and provincial mandates on the following six issues and seek to jointly engage with them on the negotiation of principles or options that all Parties can rely upon when negotiating individual treaties:

- Recognition / Certainty
- Constitutional Status of Treaty Lands
- Governance
- Co-Management
- Fiscal Relations and Taxation;
- Fisheries; and
- Shared Territories.

The *BC Treaty Commission's* (BCTC) 2007 Annual Report discussed the option of establishing a 'Common Table' to facilitate negotiations between British Columbia, Canada and First Nations on the key issues identified by the *Unity Protocol*. During the provincial *Throne Speech* of February 12th, 2008, British Columbia announced it would support the *Common Table* proposal.

Following, the *Common Table* was officially established in May 2008 with a series of fourteen, full-day meetings scheduled over a three-month period. Discussions were organized and moderated by the *BC Treaty Commission* (BCTC), to address each of the seven topics identified above

2. COMMON TABLE DISCUSSIONS

During the July 23rd, 2008, LMTAC Board meeting, *Ministry of Aboriginal Relations and Reconciliation* (MARR) representatives briefed LMTAC members on the *Common Table* discussion forums held between representatives of Canada, British Columbia, and the *First Nations Summit* (FNS).

LMTAC has since been advised by MARR representatives that the Province will be providing a response and analysis of the seven discussed with the FNS to the BCTC for further consideration. In order for local government interests to be considered as part of the Province's submission to the BCTC, the LMTAC Executive met on October 8th, 2008, and endorsed the drafting of a summary of LMTAC interests with respect to *Common Table* negotiations, as a new LMTAC workplan item, and directed staff to prepare a final document for submission to the Province by the end of November 2008.

3. SUMMARY OF LMTAC INTERESTS

Any change to the treaty negotiation mandates of federal or provincial governments on the seven key issues identified at the *Common Table* could have significant implications for local government.

This summary of LMTAC interests for each of the *Common Table* issues is intended to identify potential implications for local government, considering each issue in the context of the following:

- Statements and/or policy proposals on the key issues from the FNS.
- Existing treaty negotiation mandates or principles of the provincial government; and
- LMTAC First Principles and interest statements; including related LMTAC policy work on a *Common Table* topic (i.e. cooperative management, fisheries).

Following each of the above considerations, a comment summarizing LMTAC interests with respect to the *Common Table* negotiations, and any potential change in the provincial mandate, is provided.

As a member of the Provincial negotiation teams, LMTAC provides the comments herein for consideration by the Province, as it prepares a response to the *Common Table* discussions. LMTAC comments are submitted with the understanding that any significant changes in the provincial negotiating mandate would require further analysis by LMTAC.

RECOGNITION / CERTAINTY

Unity Protocol statement:

We need to find a way to achieve certainty for all Parties without requiring extinguishment of aboriginal rights, title and identity. The objective is to find certainty through recognition and reconciliation rather than by the governments imposing extinguishment and assimilation.

Specific Interests Identified by Unity Protocol Members	Current Negotiation Mandates / Principles of British Columbia	LMTAC First Principles and Interest Statements; Including Related Policy Work
<ul style="list-style-type: none"> ➤ Dispute the Crown strategy of modifying aboriginal rights and title into treaty rights and fee-simple title. (<i>Statement from the First Nations Summit, October 15, 2007</i>) ➤ Concerns regarding extinguishment of aboriginal rights and title post-treaty. (<i>Ha-Shilth-Sa newsletter, November 2, 2006; Hupacasath newsletter, February 2008</i>) 	<ul style="list-style-type: none"> ➤ A fundamental goal of a treaty is to achieve certainty. This means that the ownership and use of lands and resources will be clear and will result in predictability for continued development and growth in the Province. (TFN Final Agreement – Certainty Fact Sheet) 	<ul style="list-style-type: none"> ➤ First Principle 7: Need for Certainty – Local governments strongly support the need for final treaty settlements to provide certainty with respect to Aboriginal rights and title. ➤ Interest Statements: 4.2.1 Certainty For local governments, “certainty” means a desire to settle all First Nation claims without constantly seeking remedies through the courts. A specific deadline should be established for the filing of all Aboriginal claims under the <i>BC Treaty Process</i> to ensure the timely resolution of outstanding Aboriginal rights and title issues.

LMTAC Comments:

LMTAC supports current BC mandates and principles, as stated above. Through treaty negotiations, local governments seek certainty to the greatest extent possible with respect to the jurisdiction of local, provincial, federal and treaty First Nation governments. Uncertainty surrounding aboriginal rights and title negatively impacts local government land use planning decisions, land acquisitions, and investment in local communities. To address certainty, LMTAC supports the ‘modification’ model used in the *Tsawwassen* and *Maa-nulth Final Agreements*.

CONSTITUTIONAL STATUS OF TREATY LANDS

Unity Protocol statement:

First Nation Reserves and lands have always been protected against provincial and local jurisdiction through a direct relationship with the British Crown and then the federal government. B.C. and Canada are now trying to impose removal of Reserve status and of this protection. It is a further example of the history of denial. First Nations should be able to explore options to meet legitimate federal and provincial interests without being forced to give up Reserve status and constitutional land protections if they do not wish to do so.

Specific Interests identified by Unity Protocol Members	Current Negotiation Mandates / Principles of British Columbia	LMTAC First Principles and Interest Statements; Including Related Policy Work
<ul style="list-style-type: none"> ➤ First Nations desire flexibility with respect to the post-treaty constitutional status of <i>Treaty Settlement Land (TSL)</i> (<i>Ha-Shilth-Sa newsletter</i>). For example, some First Nations have proposed that TSL be granted protections under section 35 of the <i>Constitution Act</i>. ➤ The designation of First Nation TSL as ‘fee-simple’ serves to eliminate Indigenous rights (<i>R. Morales, 2008</i>). 	<ul style="list-style-type: none"> ➤ Pre-treaty, Indian Reserves are considered federal jurisdiction under section 91(24) of the <i>Constitution Act</i>. Post-treaty, provincial negotiators have articulated a strong mandate for First Nation TSL to be considered under provincial jurisdiction, subject to specific First Nation law – making authority as prescribed in the <i>Final Agreement</i>, under section 92 of the <i>Constitution Act</i>. 	<ul style="list-style-type: none"> ➤ First Principle 13: Clarity and Consistency in Regulatory Jurisdiction over Lands – Lands received by a First Nation, as part of a treaty settlement and under the jurisdiction of a First Nation government, should be subject to the same provincial and federal legislation that is applicable to local government. ➤ Interest Statement: 4.1 General – Local governments strongly believe that treaties should help facilitate the deconstruction of the Federal <i>Indian Act</i>.

LMTAC Comments:

LMTAC supports current BC mandates and principles, as stated above.

Local governments are interested that, post-treaty, First Nation TSL be subject to the same federal and provincial legislation as applies to lands located within local government boundaries, avoiding a jurisdictional “patchwork”. LMTAC supports the Province’s existing mandate whereby the *Indian Act* will no longer apply to a treaty First Nation, its lands or members and will be replaced by a concurrent law model whereby Federal, Provincial and some regional governance authorities apply to TSL and, in matters where a First Nation Government has law-making authority, the treaty sets out which law prevails in the event of a conflict.

GOVERNANCE

Unity Protocol statement:

British Columbia has already made movements to remove one of the key barriers in the area of governance. It appears Cabinet will agree to include First Nation governance authorities in Treaty rather than requiring a separate Governance Agreement with no constitutional protection. First Nations must be confident that in the future their laws will not be relegated into a mirror image of Canada and BC laws.

Specific Interests Identified by Unity Protocol Members	Current Negotiation Mandates / Principles of British Columbia	LMTAC First Principles and Interest Statements; Including Related Policy Work
<ul style="list-style-type: none"> ➤ Frustrations with the complexity of the concurrent law-model proposed by Canada and British Columbia, and the potential for conflict between First Nation, federal and provincial laws. (<i>Ha-Shilth-Sa newsletter; Hupacasath newsletter</i>). ➤ Desire to retain aspects of traditional governance models. 	<ul style="list-style-type: none"> ➤ Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia. (<i>Treaty Negotiation Principles, Ministry of Aboriginal Relations and Reconciliation</i>). 	<ul style="list-style-type: none"> ➤ First Principle 24: Respect Government Authorities – Treaties must recognize and respect the authority and jurisdiction of Federal, Provincial and local governments. ➤ First Principle 25: Application of Criminal / Civil Laws – Canadian Criminal Law should continue to apply as well as existing precedents set out in Civil Law in British Columbia. ➤ First Principle 26: Democracy and Accountability – Treaties should contain provisions for accountable, democratically elected governing entities. ➤ First Principle 27: Rights of Representation – Treaties must uphold the principle of “no taxation without representation” for all persons residing on TSL. Mechanisms need to be developed to ensure that all persons who are living on treaty settlement lands and who are paying taxes or levies to the First Nation have access and a voice in First Nation governance systems.

		<p>➤ <u>Interest Statements:</u> 4.4.2 Structure and Scope of Aboriginal Government</p> <p><i>Simplify Government</i> In complex urban regions like the Lower Mainland, there is the potential for multiple overlapping local government and Aboriginal authorities. Aboriginal self-government should strive to simplify this structure, not add to its complexity.</p> <p><i>Democratic Accountability</i> While the precise structure of Aboriginal self-government is likely to vary by each community, local governments believe strongly that self-governing First Nations should uphold the principles of democracy and accountability.</p> <p>➤ <u>LMTAC Policy Work:</u></p> <p><i>Background Discussion Paper to LMTAC First Principle #27– Rights of Representation, March 2003.</i></p>
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LMTAC Comments:

LMTAC supports current BC mandates and principles, as stated above.

Local governments recognize that First Nations’ governance structures will need to accommodate the unique history of each community. However, any provincial negotiation mandate with respect to First Nation’s governance should ensure that First Nation governance authorities are compatible with those of regional and municipal governments in matters relating to land use planning and mandatory regional services.

Further, that First Nation governments also be subject to the same standards for democracy and financial accountability as local governments, and that non-members residing on First Nation TSL are consulted on matters that directly and significantly affect their interests.

CO-MANAGEMENT

Unity Protocol statement:

The current model pursued by the governments is for First Nations to give up title to most of our Territory in exchange for fee simple ownership of a small percentage of their lands and limited hunting and fishing rights outside the Treaty lands. The current government mandates extinguish First Nation governance authority and decision-making roles outside of small areas of Treaty lands. We will be proposing tools and options to meet government interests while still enabling First Nations to maintain our relationship to our whole Territory and to have a meaningful role in making decisions in our Territories.

Specific Interests Identified by Unity Protocol Members	Current Negotiation Mandates / Principles of British Columbia	LMTAC First Principles and Interest Statements; Including Related Policy Work
<ul style="list-style-type: none"> ➤ Greater role for First Nations in decision making processes related to land and resource management within their traditional territories. ➤ Proposed creation of provincial, regional, and local cooperative management bodies. (<i>A Call to Action: Shared Decision Making, A New Model for Reconciliation of First Nations Natural Resource Jurisdictions, Hul'qumi'num Treaty Group, 2008</i>). 	<ul style="list-style-type: none"> ➤ Hunting, fishing and recreational opportunities on Crown land should be ensured for all British Columbians. ➤ Parks and protected areas should be maintained for the use and benefit of all British Columbians. ➤ Province-wide standards of resource management and environmental protection should continue to apply. (<i>Treaty Negotiation Principles</i>) 	<ul style="list-style-type: none"> ➤ <u>LMTAC Policy Work:</u> <i>Developing a Local Government Perspective on Cooperative Management Agreements with First Nations, July 2008.</i> The following local government interests were identified: <ul style="list-style-type: none"> ➤ Protection of local government assets; ➤ Land use planning; ➤ Equitable sharing of liability and responsibilities; ➤ Sustainability as a priority; ➤ Costs for local governments; ➤ Public health and safety; ➤ Dispute resolution; ➤ Inclusion of local government in cooperative management discussions at the very outset.

LMTAC Comments:

LMTAC supports current BC mandates and principles, as stated above. Cooperative management with First Nations can have significant impacts on local government interests, as articulated in the LMTAC discussion paper *Developing a Local Government Perspective on Cooperative Management Agreements with First Nations*. Treaties must not impose cooperative management schemes with First Nations upon local government. Any cooperative management negotiations regarding Crown lands located within or adjacent to local government boundaries must involve early and ongoing involvement of the affected local government.

FISCAL RELATIONS AND TAXATION

Unity Protocol statement:

The governments have many “bottom line” positions in this area that need to be opened up for negotiations. These include requiring First Nations to give up tax exemptions, refusing to improve funding for programs and services delivered by First Nations, refusing to include tax-sharing agreements with First Nations in Treaty, and requiring First Nations to accept federal claw-backs of at least 50 cents on every dollar generated by First Nations post-Treaty (with a few exempted areas of revenue). These fixed mandates leave no room for negotiations and impose a model that is more likely to condemn First Nations to poverty than it is to close the gap between aboriginals and non-aboriginals and create healthy and prosperous First Nation communities.

Specific Interests Identified by Unity Protocol Members	Current Negotiation Mandates / Principles of British Columbia	LMTAC First Principles and Interest Statements; Including Related Policy Work
<ul style="list-style-type: none"> ➤ Opposition to the timeline to phase out of section 87 <i>Indian Act</i> tax exemptions. ➤ Concerns regarding <i>Federal Own Source Revenue</i> mandates. ➤ Taxation of First Nation government owned corporations. ➤ Insufficient funding for First Nation services or treaty implementation. (<i>First Nations Unity Protocol New Release, March 16, 2007</i>). 	<ul style="list-style-type: none"> ➤ The existing tax exemptions for Aboriginal people should be phased-out. (<i>Treaty Negotiation Principles</i>). 	<ul style="list-style-type: none"> ➤ First Principle 34: Recognize Fiscal Capacities – Treaties must recognize the limited fiscal capacity of all levels of government and not impose any cost to Lower Mainland taxpayers, other than their contribution to treaty settlements through the cost-sharing <i>Memorandum of Understanding</i> between the Provincial and Federal Governments. Local government involvement in the B.C. treaty process should be financed by the <i>Province of British Columbia</i>. ➤ First Principle 38: Flexible Cost Recovery Post-Treaty – The Provincial <i>Local Government Act, Community Charter</i> and <i>Vancouver Charter</i> must enable local governments to develop flexible taxation and cost-recovery mechanisms when dealing with Aboriginal governments in the post-treaty environment. ➤ First Principle 43: Assessment and Taxation Between Local Government Bodies – First Nation governments participating in intergovernmental and/or regional

		<p>governance structures, pre- or post-treaty, must comply with existing practice whereby member jurisdictions will not assess each other property taxes on utilities and related infrastructure, nor on the lands or rights-of-way on which they are located. Treaty negotiations must work to uphold this important inter-governmental policy.</p> <p>➤ Interest Statement:</p> <p>4.1 General – Local governments strongly believe that treaties should help facilitate the deconstruction of the Federal <i>Indian Act</i>.</p> <p>4.1.1 Shared Values – The equality of Canadians is a commonly held value. Regardless of age, gender, race, place of origin or residency, it is commonly held that all Canadians should be afforded equal rights, privileges, and opportunities. Treaties should seek to uphold these values while recognizing the unique social, cultural and constitutional place of First Nations in Canada.</p>
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LMTAC Comments:

LMTAC supports current BC mandates and principles, as stated above.

Taxation: As the relationship between First Nations and government is redefined post-treaty, LMTAC supports the principle that there should be an eventual phase-out of *Indian Act* tax exemptions, resulting in equal tax treatment for all Canadians. LMTAC believes that the existing tax exemptions for aboriginal people should be phased out, consistent with the principle that all Canadians are equal with respect to rights, privileges and opportunities, as well as equal obligations to broader society.

Fiscal Relations: Any tax or fiscal arrangements proposed in treaty negotiations must not impose financial costs upon local government. In the event of service agreements, treaties must provide local governments with flexible cost-recovery options when dealing with First Nations.

FISHERIES

Unity Protocol statement:

Fisheries are vital to the health and cultural and economic survival of many First Nations. Current government mandates need to be opened up to create more flexibility. First Nations must have a meaningful role in managing and protecting fisheries for future generations. Treaties should not force First Nations to give up key aspects of their aboriginal fishing rights. We will develop tools and options to enable First Nations to support our economies and fish management and habitat enhancement from the sale of fish as we have always done. We hope to develop cooperative management processes that meet the legitimate interests of governments and other parties who have an interest in maintaining sustainable fisheries.

Specific Interests Identified by Unity Protocol Members	Current Negotiation Mandates / Principles of British Columbia	LMTAC First Principles and Interest Statements; Including Related Policy Work
<ul style="list-style-type: none"> ➤ First Nation interest in increased economic and management opportunities through treaty, and priority access. (<i>Ha-Shilth-Sa newsletter, Hupacasath newsletter</i>) 	<ul style="list-style-type: none"> ➤ The terms and conditions of leases and licenses should be respected; fair compensation for unavoidable disruption of commercial interests should be ensured. ➤ Hunting, fishing and recreational opportunities on Crown land should be ensured for all British Columbians. (<i>Treaty Negotiation Principles</i>) 	<ul style="list-style-type: none"> ➤ First Principle 23: Protect Fish Stocks – The protection of fish stocks is a primary concern, and the rights and responsibilities of all fishers engaged in native, commercial or recreational fishing should be given due consideration. ➤ <u>Interest Statement:</u> 4.3.3 Fisheries – Local governments wish to continue to work to restore and enhance fish bearing streams and waterways and protect stream habitat. ➤ <u>LMTAC Policy Work:</u> <i>Local Government Fisheries Backgrounder Paper – First Principle #23, October 2001.</i>

LMTAC Comments:

LMTAC supports current BC mandates and principles, as stated above, and reiterate that salmon allocations for the Fraser River fishery must be sustainable, ensuring the resource is available for future generations.

SHARED TERRITORIES

Provincial government and First Nation sources have suggested to LMTAC that the establishment of a process to resolve the issue of shared territories between First Nations will be addressed as a seventh *Common Table* item.

Specific Interests Identified by Unity Protocol Members	Current Negotiation Mandates / Principles of British Columbia	LMTAC First Principles and Interest Statements; Including Related Policy Work
<p>➤ Sources close to the FNS have conceded that establishment of a process to resolve shared territory issues should be added to the <i>Common Table</i> discussions as it is an important step for First Nations to reach resolution of their outstanding land claims.</p>	<p>➤ Provincial negotiators have supported the recommendation of the <i>British Columbia Claims Task Force</i> that “First Nations resolve issues related to overlapping traditional territories among themselves.” (June 28th, 1991).</p>	<p>➤ First Principle 6: Resolution of Overlaps/Shared Territory – <i>Final Agreements</i> shall not be completed until all conflicting land, water, and resource issues have been resolved. <i>Final Agreements</i> shall include the details of the overlap/shared territory resolution agreement.</p> <p>➤ Interest Statement: 4.2.1 Certainty – Consistent with the <i>BC Claims Task Force Report</i> (1991), Lower Mainland area local governments strongly support the recommendation that First Nations resolve issues related to overlapping traditional territories amongst themselves.</p> <p>Stage 4 <i>Agreements-in-Principle</i> should not be signed until overlap/shared territory issues are resolved. Early resolution would serve to eliminate uncertainties related to land selection and streamline the negotiation process.</p>

LMTAC Comments:

LMTAC supports the Province in that First Nations should work towards the resolution of shared territories amongst themselves.

Based on experience at the *Tsawwassen Treaty Table*, Lower Mainland local governments continue to support the early resolution of shared territories between First Nations in British Columbia, preferably prior to signing of an *Agreement-in-Principle*. As the independent ‘keeper’ of the *BC Treaty Process*, the *BC Treaty Commission* should consider a direct role in facilitating and moderating shared territory discussions amongst First Nations.

4. CONCLUSION

The mandate issues for discussion at the *Common Table* are of significant interest to local government, as the outcome of the *Common Table* discussions will direct the future of negotiations under the *BC Treaty Process*.

Following the identification of LMTAC interests in comparison to the key issues raised at *Common Table* negotiations, LMTAC supports existing provincial government negotiation mandates and principles for each of the key issues:

- Recognition / Certainty
- Constitutional Status of Treaty Lands
- Governance
- Co-Management
- Fiscal Relations and Taxation;
- Fisheries; and
- Shared Territories.

LMTAC provides this summary of interests with respect to *Common Table* negotiations for the consideration of the Province, in providing a response and analysis to the BCTC on the *Common Table* issues. LMTAC comments are submitted with the understanding that any significant changes in the provincial negotiating mandate would require further analysis by LMTAC. As a member of the provincial treaty negotiation team, LMTAC looks forward to continued dialogue with the Province as *Common Table* negotiations progress.