A Serpentine Path: The Impact of Legal Decisions on Aboriginal Rights and Title on the Conduct of Treaty Negotiations in British Columbia

by

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B.A., University of Guelph, 1998

A Thesis Submitted in Partial Fulfillment of the

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in Dispute Resolution

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Legal decisions on Aboriginal rights and title and treaty negotiations with First Nations in British Columbia (BC) are inextricably linked. While much has been written on the impacts of a small number of such legal decisions, there has been very little research that critically examines how legal decisions on Aboriginal rights and title, in general, influence the way the parties to the BC treaty process conduct treaty negotiations. In-depth interviews with ten First Nations, provincial, and federal chief negotiators/advisers, together with British Columbia Treaty Commission (BCTC) commissioners and senior-level program staff, suggest that legal decisions on Aboriginal rights and title influence the conduct of treaty negotiations in an indirect and serpentine manner. Further to this, the results suggest that legal decisions on Aboriginal rights and title may act to simultaneously facilitate and constrain the conduct of negotiations.

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Chapter 1: Introduction

> For years the courts have been making the obvious point that judges cannot write treaties, and the Supreme Court of Canada added its voice to this chorus in *Delgamuukw* by urging negotiated solutions. Since then, however, decisions have been handed down that go beyond mere cheerleading. Most of these decisions are clearly intended to facilitate and protect negotiated settlements. Whether they all actually do so is a matter for debate.
>
> —Hamar Foster, *Litigation and the BC Treaty Process*, 2002, 67.

This thesis contributes to the debate Foster has identified. The intent is to not to do this in an adversarial way as this would require arguing that legal decisions either do or do not facilitate negotiated agreements. Rather, this thesis will contribute to a deeper understanding of the relationship between legal decisions on Aboriginal rights and title and treaty negotiations in British Columbia and the myriad ways in which those decisions have an effect on the conduct of treaty negotiations.

It is in the spirit of creating new understanding that this study seeks to understand how legal decisions concerning Aboriginal rights and title affect the conduct of treaty negotiations that are part of the BC Treaty Process. The study involved conducting in-depth, qualitative interviews with corresponding First

Nations, provincial and federal chief and/or senior-level treaty negotiators and BC Treaty Commission commissioners and program staff.

This study will contribute to the body of knowledge regarding effective, cross-cultural negotiations between settler and colonized peoples in Canada. Research results will be shared with participating First Nations, the BC Treaty Commission, and participating government (provincial and federal) treaty negotiation offices.

Rationale: The BC Treaty Process

In 1992, on the recommendation of *The Report of the British Columbia Claims Task Force* (British Columbia Claims Task Force 1991), the Governments of Canada and British Columbia, together with the First Nations Summit (FNS)[1], signed the British Columbia Treaty Commission Agreement (1992) and hence the BC Treaty Commission (BCTC) was born.

The BCTC started operations in 1993, two years after the Governments of Canada and British Columbia, and First Nations in BC (represented by the FNS), agreed to a negotiation process to settle land title issues in the province (British

---

[1] The First Nations Summit (FNS) is one of the principals to the BC treaty process. The organization represents those First Nations that are participating in the BC treaty process, which is currently 51 First Nations (approximately 70% of BC's First Nations population). According to their website, the FNS "provides a forum for First Nations in British Columbia to address issues related to Treaty negotiations as well as other issues of common concern. As one of the principals of the treaty negotiation process along with Canada and BC, the First Nations Summit plays an important and ongoing role in ensuring that the process for conducting Treaty negotiations is accessible to all First Nations" (First Nations Summit 2007). The Union of BC Indian Chiefs (UBCIC) supports the remaining non-treaty First Nations through their efforts to establish and protect Aboriginal title in the province without using the treaty process, which the UBCIC alleges extinguishes their rights and title (Union of BC Indian Chiefs 2007).

Columbia Treaty Commission 2001). According to the BCTC website (British Columbia Treaty Commission 2007a), the Commission's goal is to act as the "independent and neutral body responsible for facilitating treaty negotiations among the governments of Canada, BC and First Nations in BC. The Treaty Commission does not negotiate treaties—that is done by the three parties at each negotiation table." Further to this, the BCTC has the task of overseeing treaty negotiations and ensuring "that the parties are being effective and making progress in negotiations." Ultimately, the BCTC is responsible for facilitating "fair and durable treaties."

The negotiation process has been slow in coming to fruition. As of this writing, the provincial and federal Crowns have signed only three final agreements with First Nations in BC. Of those three final agreements, one failed its community ratification vote and the other two have passed ratification by their First Nation communities. According to the BCTC website, there are currently 8 First Nations in Stage 5 (Negotiation to Finalize a Treaty), 39 First Nations in Stage 4 (Negotiation of an Agreement-in-Principle), and 4 First Nations in Stage 3 (Negotiation of a Framework Agreement) and 7 First Nations in Stage 2 (Readiness to Negotiate) (British Columbia Treaty Commission 2006b). Approximately two-thirds of all Aboriginal people in BC are part of the treaty process. For an explanation of the stages in the BC Treaty Process, please see Appendix I.

Given the length of the treaty process thus far, one can argue that the time is ripe to add to our collective knowledge of treaty negotiations in British Columbia. The researcher aims to assist those communities, individuals and governments involved in treaty negotiations to be able improve their negotiations, their treaties, and, ultimately, their communities.

Aims of the Investigation

This study originally set out to look at how legal decisions concerning Aboriginal rights and title shape negotiator behaviour and decision-making in the negotiation process. The research originally focused on the experience of negotiators at three different Final Agreement tables. As will be outlined further on, the researcher modified this research topic after conducting several interviews.

Chief negotiators were the target group of interest because of their unique position in the treaty process: they are the point of contact between the process set up to negotiate settlements with BC's First Nations and the legal decisions on Aboriginal rights and title issued by the courts that are relevant to the matter at hand. The rights-based courts and the non-rights-based treaty negotiations are not two processes that meld together easily. Negotiators are the ones who must manage the day-to-day reality of treaty negotiations and then find a way to work with the legal decisions on Aboriginal rights and title that affect the negotiations of which they are part.

The original research questions were:

1. How do relevant legal decisions regarding Aboriginal rights and title shape negotiators' behaviour and decision-making at the treaty tables?
   i. How do legal decisions constrain the way negotiators negotiate at the treaty tables?
   ii. How do legal decisions facilitate the way negotiators negotiate at the treaty tables?

Given that the BC Treaty Process is now in its fourteenth year, with only three final agreements (Lheidli T'enneh, Maa-nulth and Tsawwassen) initialled (and one of these recently voted down as it did not reach the required majority in its community referendum[2]), this study will contribute to the body of knowledge regarding effective, cross-cultural negotiations between settler and colonized peoples in Canada. Research results will be shared with participating First Nations, the BC Treaty Commission, and participating government (provincial and federal) treaty negotiation offices.

After the author conducted the first few research interviews, it became clear that the research question needed modification. This will be outlined in detail in the Research Methods chapter. In the meantime, it is sufficient to restate what became the final research question: how do legal decisions on Aboriginal

[2] The Lheildi T'enneh Final Agreement was voted down with 111 votes for the treaty (approximately 47%) and 123 against (approximately 53%) (British Columbia Treaty Commission 2007b). The community had set 70% as the required threshold to ratify the treaty.

rights and title affect the conduct of negotiations in the BC treaty process? How do legal decisions constrain treaty negotiations? How do legal decisions facilitate treaty negotiations?

The key underlying assumption in this research project is that legal decisions on Aboriginal rights and title have an impact on the conduct of negotiations. The questions that lead from this, then, are:

- At what level of conduct do legal decisions have an impact?
- What are those impacts?
- How do legal decisions lead to those impacts?

Further to this, was an initial assumption (carried through into the research design and implementation) that chief negotiators and BCTC treaty commissioners are the appropriate target group to interview in order to be able to best answer the research question. As discussed further on, the study would have benefited from a larger target group.

Thesis Organization

There are five sections in this thesis: Introduction, Context of the Investigation, Research Methods, Analysis and Conclusion. Following this Introduction, Chapter 2 will set the context for the study through a brief summary of treaty making in British Columbia and a brief introduction to legal decisions on

Aboriginal rights and title. Following these discussions is a more in-depth review of the relevant literature, including an examination of some relevant negotiation and conflict theory, the relationship between legal decisions and negotiations, and finally the relationship between the Courts and treaty negotiations.

Chapter 3 outlines the methods used for data collection, including a discussion on research implementation and some of the challenges the researcher faced.

The bulk of the thesis is devoted to an analysis of the data in Chapter 4. In this section, the researcher examines in more detail the legal decisions on Aboriginal rights and title discussed in the interviews. The researcher uses excerpts from the interviews to illustrate the main themes that emerged from the research. These themes include how legal decisions on Aboriginal rights and title:

- Set the stage and context for treaty negotiations;
- Establish the Crown obligation to consult and accommodate, with its inherent impacts on treaty negotiations;
- Play a role in the Crown process of developing negotiation mandates;

- Illustrate the tension between the rights-based narrative of legal decisions and the non-rights-based, voluntary, and political nature of treaty negotiations in BC, and;
- Do not always influence the conduct of treaty negotiations.

Finally, this work concludes that the research suggests that legal decisions on Aboriginal rights and title influence the conduct of treaty negotiations in an indirect and serpentine manner. Further to this, the results suggest that legal decisions on Aboriginal rights and title may act to simultaneously facilitate and constrain the conduct of negotiations. This final chapter contains a review of the meaning and significance of the analysis, an examination of the conclusions, consideration of the implications for practice, a critical review of the strengths and weaknesses of the study (design and implementation), and future lines of inquiry and research.

A Note on Terminology

In this thesis, the author uses the term First Nation(s) to refer to the Aboriginal peoples of British Columbia. This is distinct from the general definition of aboriginal, as per the Constitution Act, 1982, which states, "'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada."

Aboriginal refers to those who were "present when modern history began or when colonizers arrived. Indians were and are the aboriginal peoples of British Columbia. 'Indian' and 'aboriginal' and 'native,' … are thus synonymous within

British Columbia; each is commonly used by Indians and others; none has any pejorative connotation" (Tennant 1990, xi). Regardless of the term used by the researcher or the research participants, they will always refer to the aboriginal peoples of British Columbia. Any reference to non-First Nations aboriginals outside of British Columbia will identify them as either Métis or Inuit peoples.

Chapter 2: Context of the Investigation/Literature Review

First Nations and Treaty Making in British Columbia

Like other parts of Canada (such as the Atlantic provinces and Quebec), the Province of British Columbia never signed treaties with the majority of its First Nations. Treaty making that started in 1850 largely concluded by 1854. It would not be until the negotiation of the Nisga'a treaty, well over one hundred years later, that BC would re-enter treaty negotiations with its original inhabitants.

British Columbia's first foray into treaty making happened under the control of James Douglas in the mid-1800s. As a representative of the Hudson's Bay Company, Douglas began to arrange for the purchase of land from Vancouver Island First Nations. He began these purchases in 1850 and continued them after his appointment as Governor of the Colony of Vancouver Island in 1851 (Harris 2002). Unlike modern treaties, the Douglas Treaties, as they came to be known, were essentially purchase agreements whereby the Colony of Vancouver Island purchased land from 14 First Nations on Vancouver Island covering approximately 3 per cent of Vancouver Island (roughly 573 sq. km) (Tennant 1990).

With the exception of Treaty 8 (signed in 1899 and covering north-eastern British Columbia, the Colony had largely concluded its pursuit of new treaties by 1854. Harris (2002) outlines some of the debate surrounding the stoppage of the Douglas Treaties: there are some who suggest that Douglas did not have the funds to continue with negotiations while other have argued that Douglas did; what changed was his idea of an appropriate policy for dealing with First Nations. Regardless of the cause, the result is the same: by 1854 land purchases and treaty negotiations on Vancouver Island had stopped and British Columbia would see no new treaty negotiations until the start of Nisga'a negotiations in 1976 (Molloy 2000).

The Nisga'a negotiations were a direct response to the *Calder* case, which will be discussed in a later section of this thesis. The negotiations initially involved Canada and the Nisga'a. British Columbia did not join the treaty negotiations until 1990 when it became clear that their participation was key to resolving some land and resource issues under negotiation (Indian and Northern Affairs Canada 2004). After 136 years, British Columbia had finally re-entered treaty negotiations with its First Nations.

As mentioned briefly in the introduction, the BC Treaty Commission started operations in 1993, two years after the Governments of Canada and British Columbia, and First Nations Summit First Nations in BC, agreed to a negotiation process to settle land title issues in the province (British Columbia

Treaty Commission 2001). The impetus to finally resolve the Land Question and the issue of Aboriginal rights in BC came largely from the desire for "Certainty" in the province. The focus on Certainty is because "[c]ontinued uncertainty about how and where Aboriginal rights apply discourages investment and economic development in BC. Through the give and take of negotiations, treaties will define Aboriginal rights and title, thereby resolving ownership of BC's land and resources" (British Columbia Treaty Commission 2006a). While some have taken issue with focusing on undefined Aboriginal rights as the cause of economic uncertainty (Blackburn 2005), and others with the entire process itself (Alfred 2000), it is beyond the scope and intent of this thesis to address these issues.

Legal Decisions on Aboriginal Rights and Title

In this thesis, when the author refers to "legal decisions on Aboriginal rights and title" he refers to decisions issued by either the Supreme Court of Canada or a BC Superior Court. These decisions form part of a growing jurisprudence on Aboriginal rights and title that influence how Canada, British Columbia, and First Nations approach treaty negotiations.

Aboriginal rights are protected under section 35 of the Constitution Act, 1982, which states "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" (Government of Canada 1982). The Constitution Act recognizes the existence of Aboriginal and treaty rights, but it does not define them—defining these undefined rights is the work of the Courts and treaty negotiations.

The following is a chronological list of the legal decisions on Aboriginal rights and title referenced in this thesis. The decisions are:

- *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; (*Calder*)
- *R. v. Sparrow*, [1990] 1 S.C.R. 1075; (*Sparrow*)
- *R. v. Gladstone*, [1996] 2 S.C.R. 723; (*Gladstone*)
- *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; (*Delgamuukw*)
- *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Marshall*, [1999] 3 S.C.R. 533; (*Marshall*)
- *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; (*Haida*)
- *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74; (*Taku*)
- *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69; (*Mikisew Cree*)
- *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43; (*Marshall/Bernard*)
- *Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al.*, 2005 BCSC 697; (*Huu-ay-aht*)
- *R. v. Morris*, [2006] 2 S.C.R. 915, 2006 SCC 59; (*Morris*)
- *R. v. Douglas et al*, 2007 BCCA 265; (*Douglas*)

Two forthcoming legal decisions that also appeared in the interviews include the Xeni Gwet'in Aboriginal title case in the Nemiah Valley/Brittany Triangle and the Nuu-chah-nulth case on Aboriginal fishing rights.

Note that only one interviewee made extremely brief mention of *R. v. Morris* and *R. v. Douglas* and did so without providing much interpretation or analysis as to their effects. As a result, the researcher has decided to exclude those decisions from the larger analysis of this thesis. They appear here solely to reflect the accuracy and content of the interview transcripts.

Please see Appendix V for a summary of all legal decisions on Aboriginal rights and title the research participants discussed during their interviews.

Literature Review

Relevant Negotiation and Conflict Theory

In order to situate the research results, it is necessary to have a basic understanding of some of the negotiation and conflict literature and how it relates to the impact of legal decisions on Aboriginal rights and title on the conduct of treaty negotiations in British Columbia.

In *The Dynamics of Conflict Resolution*, Bernard Mayer (2000, 142) defines a negotiation as

> an interaction in which people try to meet their needs or accomplish their goals by reaching an agreement with others who are trying to get their own needs met. Whether we call it problem solving, bargaining, cooperative decision making, or communicating, when two or more people try to reach a voluntary agreement about something, they are negotiating. They may be friendly, hostile, positional, or open-minded; they may have good alternatives to negotiation or no acceptable choices. One of them may have a great deal of power and may not have to negotiate to meet his or her needs, or each may genuinely need the other in order to accomplish his or her goals.

Mayer (2000) goes on to identify several other key aspects of negotiations. He contrasts distributive negotiations, where the disputants focus on how to get the most of what they want for themselves, against integrative negotiations, where the disputants work together to first increase the potential benefits for all and to then share those benefits. Distributive negotiations can be thought of as a win-lose situation, where one more for me is one less for you. Integrative negotiations can be thought of as win-win situations where we are all better off in the end.

Another important distinction in the negotiation literature is the one between positional and interest-based negotiations, first popularized in *Getting to Yes* (Fisher, Ury, and Patton 1991). In positional negotiations, the disputants focus on their "proposed solutions (positions), which they defend or alter depending on the circumstances" (Mayer 2000, 155). Chicanot and Sloan (2003) define positions as the ideal outcome or solution from the disputant's point of view. Further to this, Chicanot and Sloan (2003, 16) state that "a position-based

negotiation becomes a competing discussion about potential outcomes." This is quite different from interest-based negotiations where the disputants "discuss their needs and concerns and look for options to address them" (Mayer 2000, 155). Chicanot and Sloan (2003) remind us that interests also include the disputants' hopes and desires.

In summary, the key difference between positional and interest-based is that positional negotiations are based on the disputants' pre-existing idea of the ideal solution to the dispute whereas an interest-based negotiation is a discussion where the parties create those solutions together, in a joint problem-solving exercise to meet all their needs, fears and desires. This particular distinction can be readily applied to treaty negotiations: the treaty process itself is ostensibly interest-based although, according to some of the interviewees, negotiations tend to be largely positional in nature. One interviewee went so far as to state that of all the tables he was involved with, he only considered one to be a "true" negotiation that looked at the parties interests and had some real give-and-take on all sides. The rest, he said, were positional negotiations.

The author refers later in this thesis to the BC Treaty Process not being a right-based process. Therefore, it is necessary to outline what is a rights-based approach to engaging in conflict. According to Mayer (2000, 35-36), a rights-based framework is one

> through which disputants can attempt to get their needs met by asserting their privilege or claim under some established structure of law, policy, regulation, or procedure…. In a rights-based struggle, the message is, “The law requires you to do what I want.” The structure of rights-based conflicts tends to focus us less on what we need and more on what we have the right to get.

Mayer goes on to outline how a rights-based approach (of which the use of courts and, subsequently, legal decisions on Aboriginal rights and title, is a prime example) can be useful for setting parameters around the process for dealing with a conflict as well as setting parameters around what the outcome may be.

Fisher, Ury, and Patton (1991) are well known for the negotiating method they advocate in *Getting to Yes*. They argue that one can easily solve conflicts simply by separating the people from the problem, focusing on interests instead of positions, inventing options for mutual gain and insisting on using objective criteria.

While it is not the purpose of this section to debunk Fisher, Ury, and Patton, their method highlights a shortcoming of what Tidwell (1998) refers to as the “popular texts” on conflict resolution: the undervaluation of “the role that situation and context play in handling conflict” (Tidwell 1998, 25). In other words, the “popular texts” do not give due consideration to the structural and contextual factors that exert an influence on a conflict.

Consideration of the structural and contextual factors that influence a conflict goes back to 1969 when Johan Galtung originally coined the term structural violence (Galtung 1969; Galtung, Jacobsen, and Brand-Jacobsen 2002). Galtung, Jacobsen, and Brand-Jacobsen (2002) define structural violence as “when large sections of the human population are prevented from fulfilling their potential due to economic and social structures based on inequality and exploitation” (19). Essentially, structural violence (also known as structural conflict) refers to those larger, systemic forces that exert an influence on conflicts and disputes. These forces also exert an influence on the parties to a dispute. As such, in order for a conflict or dispute to be resolved in an effective and meaningful way, the structural aspects need to be addressed as well. Not to address the structural influences would be akin to continually bailing water out of a sinking rowboat without looking for the hole and trying to plug it. The boat may not sink while the bailing continues, but the bailing will never stop if the hole remains unplugged.

Systems, institutions and policies[3] are all part of the structures that exert an influence on our lives. These are particularly relevant structures with regards to disputes between Aboriginal groups and the government. Addressing

[3] Specific examples of structural sources of conflict include specific government policies, pieces of legislation, court decisions and common law, accountability to constituents, etc., as these all may constrain or facilitate the types of actions and interventions possible in a dispute situation. Equally important is the influence of economic policies and capitalist values. For example, one of the key reasons for negotiating treaties, from the perspective of the Government of British Columbia, is to create “certainty.” In this context, certainty refers to creating certainty with regards to land and resource title so that the province attracts outside investment. In other words, there is an economic incentive for the province to negotiate treaties and this will shape their actions and behaviour with regards to the treaty process. Other types of structures could include value systems (worldviews), cultural norms, etc.

structural influences on conflict “requires that individual disputes be understood as existing within a larger framework of social structures and social conflict, and recognising that many such disputes reflect the interplay of forces largely beyond the control of individual disputants” (Dukes 1999, 159). It is important to remember that while these forces may be economic, political, cultural or social systems, they may also include other types of systemic issues such as racism. Other systems may be rooted in culture, such as value systems.

While there are important differences between value systems vs. economic, political, cultural or social systems, they will not be discussed here. Focusing on the role of value systems in treaty negotiations could constitute a research project in and of itself and is far beyond the scope of the proposed thesis research. Also important but not discussed here is the power dynamic between First Nations in BC and the provincial and federal Crowns and how that dynamic is played out through economic, political, or social systems and in treaty negotiations[4].

Rubenstein (1999) reminds us that considering structural influences is important because “the structural causes of conflict *do* pose serious problems for conflict analysts and resolvers under two circumstances: where relevant structures are hidden or ignored; where, although recognised, these structures

[4] The self-governance provisions of treaties reveals one aspect of the power dynamic: provincial chief negotiator BC1 stated that the province would only grant self-government to a First Nation through treaty negotiations (and not through legal decisions or side agreements). Therefore, despite the BC Treaty Process being a “voluntary” process, if a First Nation wishes to have self-government, there is a *de facto* obligation for them to participate in treaty negotiations (and all that entails in addition to self-government). This is a clear example of the province exerting its power over First Nations by virtue of providing no other venues for First Nations to reach self-government.except through the courts.

are considered either unchangeable or unreachable" (174; *italics* in original). Further to this, he states that:

> [e]xamples of hidden sources are legion. They frequently involve an assumption by the analyst or observer that the conflict is purely personal when it is also sociopolitical, that it is purely political when it is also socioeconomic, or that it is driven solely by ideological differences when deeper psychological structures are also implicated. In general, the tendency to think about social conflict non-structurally seems related to conscious or unconscious desires to exculpate the broader 'System' and its principal representatives from responsibility for failed social relationships (175).

One of Rubenstein's key points, then, is that in order to meaningfully address structural conflicts, there must be an emphasis on restructuring those failed relationships.

While Rubenstein points out where structural influences pose problems for conflict resolvers, we must also remember that structural influences may play a facilitative role in conflict resolution. For example, specific legal decisions may in fact open up new possibilities or options for the resolution and management of a conflict. This may be the case with some of the more recent legal decisions in Canada such as *Delgamuukw* or the *Haida* and *Taku* decisions that established the obligation of the Crown to meaningfully consult with and, if appropriate, accommodate First Nations before going ahead with development and resource extraction on disputed land. It follows from this that it is also a possibility that a structural influence on a conflict may act to simultaneously constrain and facilitate its resolution.

A detailed analysis of the structural influences on the negotiation tables in the BC Treaty Process is beyond the scope of this thesis.[5] Its consideration here, though, is important because legal decisions on Aboriginal rights and title are one of many structural factors exerting an influence on treaty negotiations. As such, it is necessary to understand the importance of the effects of legal decisions on negotiations.

An understanding of how structural factors (and, in this case, legal decisions) affect the conduct of treaty negotiations is not about decreasing or increasing the number of possibilities for resolution. Rather, it is about understanding how legal decisions on Aboriginal rights and title may shape the possibilities for resolution and how they can bring about opportunities and possibilities that may not have been previously attainable.

The Relationship between Litigation and Negotiation

There is a large and ever growing body of literature regarding legal decisions on Aboriginal rights and title and their relationship to negotiations (Alcantara 2007; Alfred 2000; Asch 2001; Bell 1998; Borrows 1999, 2001; British Columbia Treaty Commission 1999; Christie 2003, 2004, 2005, 2006; Culhane

[5] In addition to the points mentioned here, other structural influences on negotiation tables in the BC treaty process may include: changes in the political climate (e.g., change of federal government); impact of the Indian Act on the composition of tribal councils of treaty First Nations, which may affect the negotiation mandates of those First Nations; and government policies (e.g., the so-called "litigate or negotiate" policy where the Crowns have, at times, suspended negotiations with a First Nation that has initiated litigation on their rights and/or title). The treaty process itself imposes some structural factors on negotiations, such as the way First Nations wishing to participate in the process are financed (e.g., large amounts of loans that must be repaid over years), which may affect how they conduct negotiations; and the list goes on.

1998; Dacks 2002, 2004; Foster 1999, 2002; Hudson 2005; Imai 2003b, 2003a; Isaac 2001, 2006; Krehbiel 2004; Lawrence and Macklem 2000; Llewellyn 2002; Macklem 2001; McNeil 2005, 2006; Molloy 2000; Napoleon 2005; Natcher 2001; Penikett 2006; Roth 2002; Rotman 2004; Schiveley 2000; Wilkins 2004; Woolford 2005; Yurkowski 2000). All of it, to some extent, is relevant to the consideration of treaty negotiations because Aboriginal rights, title, and treaties go hand in hand.

With regard to treaty negotiations, the literature is varied. Alcantara (2007) attempts to explain treaty negotiation outcomes in Canada by comparing the experience of the Inuit and the Innu in Labrador. He argues that several variables account for the Inuit completing a Final Agreement while the Innu were unable to do so. Among others, we can highlight here the variable of "tactics." In general, this refers to the choice between negotiations or one of the alternatives. Alcantara (2007, 196) argues that "governments are more likely to work towards an agreement with those First Nations that show a commitment to negotiations. Conversely, governments are less likely to work towards a Final Agreement with those First Nations that are confrontational."

While this is only one of several variables that Alcantara identified, its relevance here is that litigation (i.e., the process through which legal decisions on Aboriginal rights and title are created) is an adversarial, confrontational process.

If Alcantara's results hold, then one can expect any kind of litigation to inhibit, to some extent, treaty negotiations.

Turning now to a specific piece of litigation, much has been written on the impact of the *Delgamuukw* decision for treaty negotiations in British Columbia (Borrows 2001; Christie 2003; Dacks 2002, 2004; Foster 2002; Imai 2003a; Roth 2002). John Borrows (2001) examines whether treaties are the best way to deal with Aboriginal title in the post-*Delgamuukw* environment. He astutely concludes that *Delgamuukw* is both diminishing and strengthening treaty relationships between Aboriginal peoples and the Crown. He cites several modern treaty negotiations that are examples of adherence to some of the details in *Delgamuukw.* He also cites ways in which the decision is leading to an erosion of the Aboriginal land base. Taken together with some of his previous work on *Delgamuukw* (Borrows 1999), where he concludes that *Delgamuukw* has subordinated Aboriginal title to Crown sovereignty, he begins to paint a picture where legal decisions on Aboriginal rights and title do not just simply facilitate or constrain treaty negotiations but may, in fact, do both simultaneously.

Perhaps a more positive outlook is apparent in Foster's (2002) work *Litigation and the BC Treaty Process.* In this article, he summarizes the history of Aboriginal rights and title litigation in British Columbia and its relationship to treaty negotiations. His prognosis for the future is an optimistic one—after outlining the history of litigation and treaty negotiations he ends by suggesting

that the courts are purposely putting in place incentives for meaningful negotiations. He concludes by stating that treaty negotiations will only be possible “if the courts provide a framework that gives all the parties a better idea of where they stand, and if the parties—all the parties—are truly committed to making just and honourable settlements” (Foster 2002, 69).

UBC law professor Gordon Christie and the University of Alberta’s Gurston Dacks have a somewhat more pessimistic analysis of *Delgamuukw* and its impact on treaty negotiations (Christie 2003; Dacks 2002, 2004). Christie (Christie 2003, 39) states that *Delgamuukw*, first and foremost, sanctifies the BC treaty process so that the Crowns “can be seen as discharging their responsibilities as democratic and liberal institutions” while, at the same time, they are gaining economic certainty over large tracts of the traditional territories of First Nations peoples in BC.

Dacks (2002) outlines how *Delgamuukw* initially increased First Nations expectations of the value of Crown offers at the treaty negotiation table. However, as of the writing of Dack’s article, the BC and federal Crowns had not modified any of their negotiation mandates due to *Delgamuukw*. Dacks (2004) further argues that Crown offers did not increase because while *Delgamuukw* clarified the nature of Aboriginal title, it did not establish where Aboriginal title actually exists. He suggests this places BC First Nations in a bind—they have the support of a legal decision affirming the nature of Aboriginal title but *Delgamuukw*

also instructs that these issues are best dealt with through negotiations. The negotiations, however, require no proof of title as part of the process. The result, in Dack's view, has not been favourable for First Nations.

If one thing is clear, it is that there is a variety of views when it comes to the links between litigation and negotiation. In addition to those discussed above, others also argue various aspects of the relationship between litigation and negotiation. Lawrence and Macklem (2000) hypothesize that legal decisions relating to consultation and accommodation contribute to further litigation despite the call for the parties to negotiate. Aside from dismissing the treaty process entirely, Alfred (2000) argues that legal decisions, and *Delgamuukw* in particular, do not have an effect on treaty negotiations. As seen in the following discussion, still others argue that legal decisions have an important role to play in providing incentives for negotiations to take place. Some further argue that the courts can be directly linked to treaty negotiations to improve the process for all (particularly Imai 2003b, 2003a; Lanyon and Penikett 2003).

Perhaps when considering the literature at large, a picture emerges that is somewhat congruent with what is argued here: that legal decisions on Aboriginal rights and title have a complex and serpentine effect on treaty negotiations where they may simultaneously facilitate and constrain the process. In some cases, the effect may be quite noticeable and in other cases not. When there is a noticeable effect, legal decisions on Aboriginal rights and title may facilitate and/or constrain treaty negotiations to varying degrees. The literature in the field thus far is not, in

this regard, erroneous. Rather, in the view of the researcher, the literature contains individual pieces of a larger picture and, with respect to treaty negotiations in particular, the literature has come up short of painting a full picture of the dynamics and subtleties of the relationship between litigation and treaty negotiations.

The Interplay between the Courts and Treaty Negotiations

There is a small, but growing, body of literature that examines the role the courts could play if directly involved in treaty negotiations (Foster 1999; Imai 2003b, 2003a; Lanyon and Penikett 2003; Penikett 2006; Schiveley 2000). This is largely a theoretical literature—thus far, there have been no attempts to systematically use the courts in this way in a manner agreed to by all the parties to a treaty negotiation. However, it does merit examination due to the implications of such a practice.

The idea proposed, in general, is that treaty negotiators can use the courts to help break impasses at the negotiation table. When the negotiators are stuck, goes the idea, they would refer an issue to the courts for some kind of judgment to help them break their impasse.

At its most basic level, Foster (1999) suggests that since litigation has helped get treaty negotiations to where they are today, perhaps litigation can also help when there are impasses in negotiations. He highlights that "clarity with

respect to the legal rights involved generally makes for more effective negotiation" (Foster 1999, 173).

Law professor Shin Imai (Imai 2003b, 2003a) also argues for the integration of litigation and negotiations. Outlining the debate regarding the role of courts in negotiation, he tells us that there are two positions: one, that litigation and access to courts is necessary to deal with power imbalances at the negotiation table; two, that litigation is not appropriate due to its adversarial and non-collaborative dynamic. He states that there is now recognition in case law and dispute resolution literature of the need to integrate adjudication and negotiations. It is worth mentioning that Imai's introduction contains no citations of literature or case law that identifies this recognition, making it difficult to evaluate these assertions.

Despite this omission, he suggests that "there are three ways in which courts could enhance negotiation on Aboriginal rights to lands and resources: by establishing a negotiation framework and the parameters of Aboriginal rights…; by determining the relationship between negotiation and adjudication using principles of dispute resolution design…; and by ensuring the integrity of the negotiation process..." (Imai 2003b, 589-590).

In a related article (Imai 2003a), Imai outlines how the courts can provide incentives for negotiations to take place. He argues that "[t]he complex social,

political, economic and legal interests which are embedded in many sectors of the Canadian population are not best resolved in the context of legal proceedings" (Imai 2003a, 309). This is not necessarily contrary to his arguments in Imai (2003b) as the courts may contribute to the process without taking on the substantive role of reconciling the complex social, political, economic and legal interests of the parties. He further states that the courts should make decisions that provide incentives for effective negotiations. He cites *R. v. Sparrow*, *Delgamuukw v. British Columbia*, and *Marshall* as three cases that provide incentives to negotiate.

While it is entirely realistic to expect the courts to be able to provide incentives to negotiate through the decisions they issue, in the view of the researcher it is less realistic to expect the courts to set the negotiation framework. In a process intended to be interest-based and voluntary, how would the courts establish a negotiation framework exactly? What happens if one or more of the parties disagrees with the framework? By what authority do the courts establish the framework for a non-rights based, voluntary, negotiated settlement process? Why should the court set the negotiation framework and not the parties to the treaty negotiations? If the parties do not develop the negotiation framework themselves, what makes a court the most competent authority to do so? As mentioned elsewhere in this thesis, Imai's proposal reflects the prevalent assumption in the field that treaty negotiation problems and impasses are a result of insufficient legal clarity and, whether that is true or not, that the courts are the

most competent institution to resolve those problems. Until there is further research to support the assertion that the courts are the appropriate institution to resolve negotiation impasses and to set negotiation frameworks, it is premature to propose that they set the negotiation framework of an allegedly interest-based, voluntary treaty negotiation process.

Another shortcoming in Imai (2003a) is that it is difficult to establish that certain legal decisions provide only incentives to negotiate, as the effects of a decision are often serpentine and indirect. One part of a decision may provide an incentive to negotiate while another part does not. Another part of the same decision may, in fact, provide a disincentive to negotiate. Two examples of this are the *Sparrow* and *Delgamuukw* decisions. The first clarifies Aboriginal rights (right to fish) while the second further clarifies the nature of Aboriginal title. At first glance, these decisions provide an incentive to negotiate based on the legal clarification they provide of Aboriginal rights and title. However, at the same time, both decisions also outline under what conditions the Crown may infringe Aboriginal rights and title. By outlining what is, essentially, an alternative to negotiation, it is problematic to identify these two decisions as providing only incentives when their relationship to negotiations may actually be much more complex.

This is not to say that a legal decision cannot predominantly provide an incentive or disincentive. The *Calder* decision, for example, is widely cited (see

interviewees' comments in this thesis) as being *the* reason that both Crowns are engaged in treaty negotiations with First Nations. What is needed here is a careful analysis to determine whether a decision may provide only an incentive to negotiate (as Imai seems to suggest) or if it might also contain disincentives.

Lanyon and Penikett (2003) and Penikett (2006) also advocate for some kind of integration of courts and treaty negotiations. Like Imai (2003b), Lanyon and Penikett (2003) outline a process through which the courts and treaty negotiations would function in an integrated manner. Consistent with the literature, they propose that the parties would make use of the courts whenever they reach an impasse. They propose that "[w]hen negotiations reach an impasse there could be a reference of a single issue to the court for a determination. Once a decision has been rendered the matter would then be referred back to the parties to continue with treaty negotiations. Issues such as title and rights could be separated or severed and dealt with in turn" (Lanyon and Penikett 2003, 58).

In his book *Reconciliation* (Penikett 2006), treaty negotiator and former Yukon premier Tony Penikett also advocates for the direct involvement of courts in treaty negotiations. His voice stands out from Foster, Imai and Lanyon in that he is an experienced treaty negotiator. He argues that

> the politically constructed wall between negotiation and litigation should come down… When required, mediators—either court-appointed

> or appointees of the parties—could be assigned to assist in negotiations. In situations of impasse, one or more of the parties could refer issues to the courts, in order to get a decision on a particular point. Regardless of the court's involvement, all decisions would remain connected to the negotiations; instead of court actions being seen as a failure of the treaty process, they could constructively be incorporated into the overall design of "facilitation and dispute resolution," in which negotiation is the primary public-policy goal (Penikett 2006, 222).

Schiveley (2000) appears to be the lone voice of dissent against using the courts in this way. He argues that the "courts are not the proper fora for resolving centuries-old disputes between native populations and settler societies. Rather, a series of negotiations seems much more appropriate due to the complexity of the issues and differing worldviews of the parties involved" (Schiveley 2000, 427). While his work does not deal explicitly with treaties, the inextricable nature of Aboriginal rights, title, and treaties suggest his findings are important for any consideration of the ways in which the courts and treaty negotiations interact. For a more robust treatment of some of the issues that are part of intercultural dispute resolution in an Aboriginal context, see Bell and Kahane (2004).

Amongst those who advocate using the courts in conjunction with negotiations, it is possible to pull out some common threads. First, the focus on using the courts to clarify rights implies that there is a singular cause of negotiation impasses: unclear rights. As Schiveley (2000, 427) reminds us, however, "the complexity of the issues and differing worldviews" make these issues difficult to resolve. It is not that unclear rights do not exacerbate this

difficulty, but it is a logic gap to assume they are the principal cause of impasses in and of themselves.

Further to this, the inverse is an assumption that legal clarity will assist the parties to overcome a negotiation impasse. However, it seems somewhat presumptuous to make the assumption that legal clarity alone is the key to getting past all negotiation impasses.

In a review of the literature in the field, there appeared to be no literature that examined what causes impasses at treaty negotiation tables and what some solutions to those may be. In the opinion of the researcher, treating the “problem” (i.e., negotiation impasses) with “medicine” (i.e., increased legal clarity) is akin to prescribing an ill patient medication before conducting a full diagnosis of their condition.

Most of the research participants had valuable insights to share regarding the use of courts in conjunction with treaty negotiations and we shall return to this area in the analysis chapter.

Chapter 3: Methods and Data Collection

Research Design

Summary

The data for this study were collected through in-depth, qualitative interviews with ten senior- or chief-level treaty negotiators (from Canada, British Columbia, and First Nations); British Columbia Treaty Commission commissioners and staff; and treaty negotiation advisers from three different Stage Five treaty negotiation tables.

The researcher conducted the interviews over approximately six weeks, from June to July 2007. Six interviews took place in Victoria in private meeting rooms at the University of Victoria Law Library, University of Victoria Institute for Dispute Resolution, and at the offices of the Ministry of Aboriginal Relations and Reconciliation. Four interviews took place in Vancouver at the BC Treaty Commission, Indian and Northern Affairs Canada and Simon Fraser University.

Rationale for Selection of Study Participants

The BC government has made a decision to focus its resources on those negotiation tables that are closest to reaching a deal (British Columbia Treaty Commission 2006c). The researcher chose to focus on tables closest to reaching a deal precisely for that reason—the tables that have shown the most progress are the ones where the stakes are the highest. These are the tables that have

moved beyond an Agreement-in-Principle and are in substantive negotiations working towards a Final Agreement. By this criterion, the three tables examined in this study come from the eight tables in Stage 5, Negotiations to Finalize a Treaty, as of the time the researcher developed this research project (spring 2007).

The three tables must remain anonymous, as failure to provide anonymity would serve to identify the research participants. One could simply go to the BC Treaty Commission website, click on the link for updates for the negotiation table in question and then access the publicly available contact information for the study participants. The researcher selected the tables to ensure that First Nations with a variety of characteristics (e.g., based on geographical location) were part of the study. Unfortunately, in order to protect the anonymity of the tables it is not possible to elaborate the characteristics of the First Nations. The researcher recognizes that this may affect others' interpretation of this thesis but it is a necessary step.

After selecting the tables, the selection of the participants was a relatively straightforward process as each table has three chief negotiators along with one treaty commissioner assigned to it. Since this study aims to look at the experiences and perspectives of senior- or chief-level negotiators, these individuals are the natural study participants. Treaty commissioners were included for the general insights they could provide about the tables at which

they sit. Beyond these two broad categories of participants, others were included based on the recommendation of some initial interviewees.

It is worth mentioning that there are many negotiators involved in a negotiation beyond the three chief negotiators from BC, Canada, and the First Nation in question. In this study, the researcher chose to focus on senior- or chief-level negotiators because chief negotiators, specifically, are responsible for setting the overall direction and approach to negotiations. One could easily interview (non-senior-, non-chief-level) negotiators and assistant negotiators but these lower level negotiators act on instructions received from higher up. Therefore, when looking at how legal decisions on Aboriginal rights and title affect the conduct of negotiations, it is necessary to speak with those who carry the responsibility for the supervision and conduct of negotiations—senior- or chief-level negotiators.

Recruitment of Study Participants

The original target group was thirteen individuals—three negotiation tables with three chief negotiators and one treaty commissioner per table plus one treaty negotiation adviser. On the recommendation of some interviewees, the researcher mailed out three more invitations to a former chief negotiator from one of the tables as well as to two BC Treaty Commission programming staff.

Contact information for all participants is publicly available on the BC Treaty Commission website, www.bctreaty.net. The website contains the names,

positions, phone numbers, emails and mailing addresses of all chief negotiators and treaty commissioners. In some cases, the website listed incomplete contact information, but there was always a phone number. In those cases, the researcher called the potential research participant or their office (depending on the phone number listed) directly to request a mailing address. In the case of the treaty negotiation adviser, the researcher met him and received his business card at a public event earlier in the year.

The researcher mailed hard copy Letters of Invitation and Consent Forms to all potential study participants in late May 2007. He followed up the mailings with phone calls starting one week after the potential participant would have received their invitation. In some cases, the participants themselves contacted the researcher first to ask further questions and provide their full and informed consent to participate in the study. Email contact was necessary at times because some participants or their assistants requested the information be sent via email. Interview dates and times were usually set after a couple of exchanges by telephone or email.

The Letter of Invitation and Consent Form outlined the purpose of the study, how it was to be conducted, and addressed ethical procedures. The information also outlined whom to contact regarding any questions or concerns with the study. The invitation made it clear that the research would not be anonymous due to the interactive nature of interviewing. Additionally, given the

relatively small size of the target group and the criteria used to select them, despite the confidentiality of the interviews, the researcher informed the participants that it would be possible for others involved in the BC Treaty Process to deduce their identities based on the information and/or excerpts used in this study. Aside from that, the researcher made all efforts to ensure participant confidentiality. As such, only the author and his supervisor know the identities of the research participants, and the author has either changed or removed their names in this final write up (see Confidentiality and Anonymity, below).

Characteristics of the Study Participants

Table 1 summarizes the general characteristics of the study participants. Six chief negotiators participated in the study—three from British Columbia, two from Canada and one representing a First Nation (but not a member of that Nation). Two treaty commissioners, one treaty adviser for a First Nation and one BC Treaty Commission staff member also participated in the study.

Table 1: Characteristics of the Study Participants

Who	Position	Party	Gov't Exp.?	Industry/Business?	Lawyer?
BC1	Chief Negotiator	British Columbia	Yes	Yes	No
BC2	Chief Negotiator	British Columbia	Yes	No	No
BC3	Chief Negotiator	British Columbia	Yes	Yes	No
CA1	Chief Negotiator	Canada	No	No	Yes
CA2	Chief Negotiator	Canada	No	Yes	No
FN1	Adviser	First Nation	Yes	No	No
FN2	Chief Negotiator	First Nation	No	No	Yes
TC1	Commissioner	BCTC	Yes	Yes	No
TC2	Commissioner	BCTC	No	No	No
TC3	Senior staff	BCTC	No	No	No

Out of the ten participants, nine are men and one is a woman. Two of the ten are lawyers by training. Five of the ten have held previous positions in

government and four of the interviewees have backgrounds in business and/or industry. Involvement in the BC treaty process ranges from a few years to since its inception in 1993. Involvement in treaty making in general ranges from a few years to two decades. The above table does not include involvement in treaty making because, when combined with the other characteristics, that information may make it possible to identify some of the research participants. None of the research participants had formal negotiation training (e.g., a certificate from the Justice Institute of BC) but all generally had some instruction along with, in the words of one participant, "good, old-fashioned experience at the table."[6]

Confidentiality and Anonymity

In addition to the issues of confidentiality outlined above, the researcher has assigned codes to refer to the research participants. These can be seen in Table 1 where the first two letter of the code refer to which party the interviewee is affiliated with. The digit following the two-letter code merely reflects the order in which the researcher interviewed respondents from the same party and in no way signifies their rank or importance as sources of information. Further to this, when appropriate, the author has written with male pronouns. In this way, the one female participant will not be identifiable based on the identifier codes or pronouns.

[6] Interview with a BCTC treaty commissioner, 19 June 2007.

For full details on how the researcher ensured the confidentiality of the interviewees' responses, please see the Letter of Invitation and Consent Form in Appendices II and III, respectively.

One interviewee was comfortable with being named in this thesis. However, the author has chosen not to do so since that would potentially serve to identify the other negotiators involved at that same table. The decision not to use real names or to attribute quotations directly also allowed the participants to speak more frankly. In fact, two interviewees (TC2 and TC3) stated directly that the confidentiality of the interviews allowed them to be more frank with their responses.

Research Implementation

The Interviews

The researcher conducted all interviews in-person. Six interviews took place in Victoria and four in Vancouver. The interviews were qualitative, semi-structured and open-ended (Kvale 1996; Rubin and Rubin 2005). The researcher developed an interview guide with broad questions in order to provide a general structure (see Appendix IV). Within this structure, the discussion was free to move to concepts and themes that the research participants wished to emphasize. In all cases, the author started the interview with a general introduction and a review of the purpose and ethical considerations of the study. Study participants signed Consent Forms at this time and kept a copy of the form

for their records. Furthermore, the researcher presented each interviewee with a copy of *Toward an Understanding of Aboriginal Peacemaking* (Price and Dunnigan 1995) at the beginning of the interview as compensation for their time. The author recorded all interviews on a digital recorder and subsequently transcribed and coded them.

The interview transcripts varied in length with the shortest being approximately 22 minutes and the longest approximately 80 minutes. The average interview length was approximately 46 minutes. The researcher had originally envisioned interviews of one to two hours in length, though the interviewees clearly exhausted their contributions at a much earlier point. After transcription, the interview transcripts totalled 119 singled-spaced pages.

Roughly half the interviewees gave their consent to be contacted for follow-up questions if necessary and all requested a final copy of this thesis upon completion.

It was originally the researcher's intent to have each interviewee speak about their respective treaty tables. However, it quickly became apparent that due to the breadth of experience of the interviewees, they almost exclusively spoke to the research questions using all of their experience as the basis. As a result, it is not possible to say "in the case of Treaty Table One, we can see that…" The interviewees generally had direct and, often, concurrent, experience

at a number of tables and some had experience in treaty negotiations outside of BC. Therefore, in the analysis of the data, the tables with which the interviewees were initially connected ceased to become a meaningful variable.

Professionalism

The researcher made every effort to be professional throughout the entire process, from mailing invitations to potential study participants up to the actual interviews. The invitations included a letter of invitation printed on résumé paper and the required Consent Form printed on regular copy paper. Additionally, the researcher attached a copy of his business card to each invitation letter, used oversized 5 ¾" by 9" envelopes and affixed laser printed return address and mailing labels to each envelope.

When it came time to conduct the interviews, the researcher ensured his appearance was professional and conducted all interviews dressed in a suit, tie and black leather dress shoes.

Inter-Participant Communication

An issue that arose during the course of the interviews and that merits mention is that the research participants talk amongst themselves. In some cases, the chief negotiators at a table will have been working together closely over the course of a number of years. As a result, it is common practice for chief negotiators to be in close communication on a variety of matters. In one interview, the interviewee asked the researcher if he would be interviewing

someone else. When the researcher responded that he could not answer that, the interviewee said, “Well, I know you’re talking to [him].”[7] That interviewee also knew of another scheduled interview. Those three interviewees are the chief negotiators from the same table.

In another case, after an interview had ended and the researcher and interviewee were leaving the UVic Law Library, the interviewee said, “Oh, by the way, you’ll be hearing from [name removed]. I spoke with him yesterday and he said he was going to contact you.” In this case, the two interviewees are chief negotiators from the same table (but a different table than the previous case).

It is important to highlight this inter-participant communication for two reasons: first, it reflects the importance of conducting research in a serious and professional manner. There is little doubt in the mind of the researcher that his professional conduct, coupled with inter-participant communication, helped to secure further interviews. Were he to have shown up for an interview wearing a t-shirt and shorts, word about that would have reached other interviewees. Second, there may be concerns about whether or not the participants influenced each other’s responses; while the researcher suspects this was not an issue, it was not possible to determine to what extent this may have happened. The researcher will address this further in the Results section of this thesis.

[7] Interview with a provincial chief negotiator, 4 July 2007.

Other Data Collection

As part of his studies, the researcher sat in on two days of a course offered this summer titled “Dispute Resolution and Indigenous Peoples” at the University of Victoria. The instructor of the course was Mark L. Stevenson, a Métis lawyer and chief negotiator on behalf of a number of First Nations. Mr. Stevenson allowed the researcher to sit in on the two days of class when he was covering treaty negotiations. As part of the classes, Mr. Stevenson had arranged for five treaty negotiators (from First Nations, British Columbia and Canada) to come in and give presentations to the class over the two days. Further, Mr. Stevenson gave his permission for the researcher to use anything said in class as a source of data for this thesis. However, as the researcher did not obtain permission from the guest speakers to use their information, the content of their presentations is not a source of data for this study.

Methods of Analysis

Upon completion of the interviews, the researcher transcribed them and wrote brief summaries for each. The summaries included a listing of the interviewees’ main arguments, any concepts and themes relevant to the research question, and the legal decisions on Aboriginal rights and title mentioned. The researcher then coded the interviews by applying coding categories, concepts and themes drawn from the literature review to the transcripts. The researcher then used the interview summaries to develop the further coding categories to apply to the transcripts. Once the coding structure was developed, the researcher physically coded the interview transcripts. The researcher developed

codes for the following broad categories: direct impacts of legal decisions; indirect impacts of legal decisions; no impact from legal decisions; other relevant themes, and; topical markers (such as specific legal decisions or events). The timeframe for coding was from March (start of the literature review) to August (end of analysis), with the bulk of the coding taking place in August.

When coding was complete, the researcher created a spreadsheet to cross-reference each interview code with the interviewees who discussed the code. He subsequently developed a ranking for the codes based on the number of interviews where the codes appear combined with the emphasis given by the interviewees when speaking to the concept. For this initial analysis, the researcher grouped the interviewees by party (i.e., British Columbia, Canada, First Nation, or BCTC) for comparison.

The researcher further sorted and compared the data according to the following interviewee characteristics: previous government experience (either as a public servant or in a political post) vs. no previous government experience; background in industry/business vs. no background in industry/business; and, legal background vs. no legal background.

After sorting and comparing the data, the researcher did a raw ranking of the legal decisions mentioned in the interviews as well as of the key interview codes. He also categorized the legal decisions based on why the interviewees

considered the decisions to be important/significant with regard to the conduct of treaty negotiations.

Using the interview codes and which interviews the codes appeared in, the researcher grouped codes together into related themes. These themes are the subject of the next chapter. In the discussion of the themes, the researcher has opted to use excerpts from the transcripts to illustrate his points and observations. A challenge with the approach is the danger of anecdotalism. This is what Silverman (2005, 211) refers as the danger of research that "depends on a few well-chosen 'examples'" instead of on critical investigation and analysis of the data.

In order to deal with this issue, the author has chosen excerpts on the following bases:

- Excerpts that represent the general theme, as evidenced by other passages in the data that illustrate the same point.
- Excerpts that illustrate differing perspectives or points of the same general theme (so-called negative, or deviant, cases).

Furthermore, at times text is highlighted when there are other sections of the data that support or refute a point illustrated in an interview excerpt. It will also be apparent where the researcher has used the data to refute his initial understandings and assumptions. For instance, this resulted in the modified research question. The data were also the basis for refuting some of the trends or theoretical constructs proposed in the literature.

Chapter 4: Analysis

This chapter critically examines the content of the interviews. It begins with a review of the legal decisions on Aboriginal rights and title discussed by the research participants. Following this, the chapter looks at the broad themes that emerged over the course of the interviews. The themes address the impact of legal decisions on Aboriginal rights and title with regard to:

- the role they play in setting the stage and context for treaty negotiations;
- their role in establishing the Crowns' obligation to consult and accommodate First Nations;
- how they influence Crown treaty negotiation mandates;
- the tension between the rights-based jurisprudence on Aboriginal rights and title and the political treaty negotiation process;
- the challenges of integrating litigation and treaty negotiations, and;
- some of the obstacles to legal decisions influencing the conduct of negotiations (so-called negative cases).

The analysis addresses the knowledge gap regarding *how* legal decisions on Aboriginal rights and title influence the conduct of negotiations. As discussed earlier, the literature in this area tends to concentrate on a handful of significant legal decisions (e.g., *Calder, Delgamuukw*) and tends to be largely theoretical in

nature; that is, the literature tends to be an analysis of a legal decision and what its influence should or will be. The literature that examines the impact of legal decisions from the perspective of those negotiating treaties first hand is virtually non-existent. In those cases where this area has been explored, it has been confined to the impact of either a single decision (Dacks 2002; Roth 2002) or a very small number of decisions (Imai 2003a), as if the parties to negotiations do not consider the wide ranging jurisprudence on Aboriginal rights and title in its entirety when deciding on their negotiation mandates and strategies.

This section examines how legal decisions act together and in concert to exert (in some cases), or not (in others), an influence on the conduct of treaty negotiations in British Columbia. The emphasis on the influence of a multitude of decisions was not a choice by the researcher, but rather emerged from the narratives of the interviewees. While all the research participants discussed specific decisions, they also referred extensively to processes influenced not by single decisions alone but by a variety of decisions acting together and often building upon each other. This chapter will pull together the respondents' narratives to provide a picture of how and under what conditions legal decisions on Aboriginal rights and title influence the conduct of treaty negotiations.

The researcher initially analyzed the data sorted by the party the respondent belongs to (British Columbia, Canada, First Nation, or BC Treaty

Commission). The data were subsequently assorted according to other participant characteristics such as whether the participants have:

- prior experience in government, either as a public servant or political post[8];
- prior experience in industry and business[9], and;
- a legal background[10].

It would be possible to write several chapters more on each of these ways of sorting the data. In the interest of keeping the research manageable, insights gleaned from the additional sorting will be incorporated into the analysis when it diverges from the main analysis based on party.

The Decisions

The interviewees mentioned 15 different legal decisions on Aboriginal rights and title. Their familiarity with the legal decisions ranged considerably. All could speak to some extent about at least four decisions. From there, familiarity ranged from declining to comment on any further decisions due to lack of knowledge over to the other extreme of intimate and detailed knowledge of

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[8] Given that, from a Crown perspective, the BC Treaty Process is largely about establishing economic certainty throughout the province, it is not out of the question to wonder if prior political experience (i.e., experience working for the Crown) affected respondents' views.

[9] Again, given that one of the goals of the BC Treaty Process is to establish economic certainty and attract business and investment to the province, it is logical to presume that prior business/industry experience *may* have affected respondents' views.

[10] First Nations treaty adviser FN1 stated that the author would find that lawyers would over emphasize the impact of legal decisions on Aboriginal rights and title and that non-lawyers would not. Legal background, therefore, became a meaningful characteristic by which to sort the data. Unfortunately, only two respondents had legal backgrounds making it impossible to make any meaningful conclusions based on this characteristic.

specific decisions and their effects. See Table 2 for the decisions mentioned and the number of interviewees who mentioned the decisions. The decisions have been ranked according to the number of respondents who discussed the decision during their interview. As stated previously, the *Morris* and *Douglas* decisions were mentioned briefly and with no interpretation or analysis as to their effects. For this reason, the researcher has excluded these two decisions from the larger analysis but presents them here to accurately reflect the content of the research interviews.

Table 2: Legal decisions on Aboriginal rights and title mentioned

LEGAL DECISIONS	No. Of Respondents	BC1	BC2	BC3	CA1	CA2	FN1	FN2	TC1	TC2	TC3
Delgamuukw	10	X	X	X	X	X	X	X	X	X	X
Haida	9	X	X	X	X	X	X		X	X	X
Taku	7	X	X	X	X	X				X	X
Calder	6		X		X		X	X	X		X
Sparrow	5		X			X	X		X		X
Huu-ay-aht	3			X				X			X
Mikisew Cree	3	X				X					X
Xeni Gwet'in (forthcoming)	3			X				X		X	
Gladstone	2		X					X			
Guerin	2					X					X
Nuu-chah-nulth (forthcoming)	2		X								X

Marshall/Bernard	1	X									
Marshall	1				X						
Morris	1	X									
Douglas	1	X									

LEGEND

	BC		First Nation
	Canada		BCTC

As one can see, *Delgamuukw* clearly comes out as the most-cited legal decision on Aboriginal rights and title. A crude ranking and indication of who discussed which decisions, such as presented here, however, tells us little about why the respondents mentioned the decisions they did and how they viewed the impact of those decisions on treaty negotiations.

Before delving into a deeper analysis, it is also useful to sort the legal decisions by type. The *type* of decision refers to the qualities of the decisions that the research participants, generally speaking, considered important with regard to the conduct of treaty negotiations. This categorization is not an attempt to put each legal decision into a hard and fast category—any given decision may have aspects that allow it to be classified as more than one type. What is important here is the *principal reason* for which the decision was mentioned. See Table 3 for this sorting.

Table 3: Legal Decisions Sorted by Type

Types of Decisions	**Court Cases**
Context/stage setting	*Calder, Delgamuukw, Marshall*

Consultation and accommodation	*Haida, Taku, Mikisew Cree, Huu-ay-aht*
Infringement	*Sparrow, Gladstone*
Good faith	*Guerin*
Title	*Xeni Gwet'in*
Forthcoming	*Xeni Gwet'in, Nuu-chah-nulth*
Un-important	*Douglas, Morris, Marshall/Bernard*

At this point, a brief definition of each category of legal decision is necessary. "Context/stage setting" refers to those decisions cited for causing one or both of the Crowns to get into and/or stay in treaty negotiations in British Columbia. "Consultation and accommodation" refers to those decisions cited due to their having established the Crown's legal duty to consult and, where appropriate, accommodate, a First Nation before infringing (usually through resource extraction) upon land to which the First Nation may have rights or title. "Infringement" refers to those decisions which lay out the conditions under which the Crown may infringe the Aboriginal rights or title of a First Nation. "Good faith" refers to decisions that encourage or dictate that the Crown negotiate in good faith with First Nations. "Title" refers to decisions that would actually determine a First Nation's Aboriginal title over specific tracts of land. This is different from *Delgamuukw*, for example, as that decision further clarified the nature of Aboriginal title but not identify the specific tracts of land to which First Nations have title. "Forthcoming" refers to those decisions that are exactly that. There are two decisions here that fall into this category: the Xeni Gwet'in court case, which seeks to establish their Aboriginal title within the Nemiah Valley; and the Nuu-

chah-nulth fisheries court case, which seeks to clarify their fishing rights. "Un-important" refers to those decisions that the researcher has deemed unimportant for the research question pursued in this thesis.

While there have been far more than 15 legal decisions on Aboriginal rights and title emanating from the courts in the past 30 years, not all of them may be relevant in the context of treaty negotiations in BC. It is also worth noting that some decisions will be relevant in some situations and not others. For example, a decision like *Gladstone*, which applies to a coastal spawn-on-kelp fishery, may have little to no value in the context of treaty negotiations with an interior First Nation. See the Analysis chapter for a brief discussion of applying a specific legal decision in a new situation.

One of the things that became apparent over the course of the interviews is that it is both impossible and unrealistic to point to any one legal decision on Aboriginal rights and title and categorically state that it has either helped or hindered treaty negotiations. Speaking about *Delgamuukw*, FN1 said,

> Many people have felt the *Delgamuukw* decision was a decision that really advanced things greatly with respect to First Nations and therefore advanced things with respect to the treaty process. I actually have a different view. I think, yes, the *Delgamuukw* decision was significant in that it clarified, pretty much in keeping with what common sense would say, about what Aboriginal title actually is. But it opened up infringement, the infringement capacity and powers of government by such a… it just threw open the barn door to infringement in such a way as to while clarifying the meaning of Aboriginal title, it discounted the value of Aboriginal title so much that it wasn't necessarily very helpful to

> negotiations. In fact, you're sitting across the table and you're realizing that government believes if it doesn't reach a settlement it can proceed with very broad-based infringement of your rights. And in fact, that's what the provincial government's now pursuing across the province with a lot more vigour than treaty negotiations. They're proceeding with all these other agreements, forest and range agreements and so on, to infringe Aboriginal rights.[11]

Even this can be complicated—while *Delgamuukw* outlines the conditions for infringement, it is important to remember that before decisions like *Delgamuukw*, the province did not need agreement to infringe rights or title, they just did it. This may open the debate up even further—do the infringement provisions of the judgment encourage or limit Crown infringement of Aboriginal title?

Other examples of this phenomenon are present throughout the interviews. Provincial chief negotiator BC2 highlighted the same dynamic in the *Sparrow* decision. He stated,

> I think maybe[…] the first important case that influenced an approach in treaty negotiations is the *Sparrow* case. I think the importance there was, one, it recognized that there is an Aboriginal right to fish… and we probably would have negotiated that without the *Sparrow* case, but it confirmed that and I think the important thing about the *Sparrow* case are the limitations around the right. The court was very clear that there are opportunities to limit the exercise of that right through legislation and the court talked about public purposes that go to conservation, public safety, that kind of thing.[12]

While BC2 pointed out different reasons for Crown infringement than FN1 did, their comments reveal that legal decisions may simultaneously act upon treaty negotiations in a number of different, and sometimes contradictory, ways.

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[11] Interview with a First Nations senior-level treaty advisor, 19 June 2007.
[12] Interview with a Chief Provincial Negotiator, 10 July 2007.

In the first example, the decision both clarifies the nature of Aboriginal title and details under what conditions the Crown may infringe upon that title. In the second example, the decision clarifies the Aboriginal right to fish and at the same time outlines how the Crown may infringe upon that right in a way congruent with the law.

Main Themes

The researcher initially sorted the interview results by party. The interview codes were ranked according to the number of interviews where they appeared. The codes were then cross-referenced in a table with the respondents organized by party in order to look for any further patterns.

What emerged initially were five broad themes: stage setting/context; consultation and accommodation; the courts say negotiate; the tension between the rights-based narrative of the jurisprudence on Aboriginal rights and title, and the non-rights-based, voluntary, and political nature of the treaty process; government negotiation mandates. What separates these broad themes from the others that arose during the interviews is that all the parties—British Columbia, Canada, First Nations, and BCTC—discussed them in their interviews.

SORTED BY PARTY

Sorting the data by party often reveals different perspectives on the concepts and themes, e.g., perspectives with regard to infringement of Aboriginal

rights or title as *per* FN1 and BC2—infringement if unable to reach agreement vs. infringement for conservation, public safety, etc.

SORTED BY GOVERNMENT EXPERIENCE

Half of the research participants have prior experience working within government. They are all provincial chief negotiators; First Nations treaty adviser FN1, and; BC Treaty Commission treaty commissioner TC1. In all cases, the experience ranges from management and leadership positions within government units up to and including cabinet positions.

SORTED BY INDUSTRY/BUSINESS EXPERIENCE

Four of the ten research participants have a background in business and industry. They are two of the provincial chief negotiators; one of the federal chief negotiators, and; one of the treaty commissioners.

SORTED BY LEGAL BACKGROUND

Two of the research participants have legal backgrounds. They are one chief federal negotiator and one First Nations chief negotiator. The small number of participants with legal backgrounds makes it difficult to make any rigorous and credible conclusions about the differences of opinion between them and the eight research participants who do not have legal backgrounds.

SETTING THE STAGE… BECAUSE WE TOLD YOU TO

All interview respondents referred to legal decisions on Aboriginal rights and title that have helped to "set the stage," and to set the context, for treaty negotiations in British Columbia. Almost all (seven of ten) interviewees specifically cited the courts' instructions, through legal decisions on Aboriginal rights and title, to negotiate Aboriginal rights and title issues and to *not* take them to court.

When referring to "setting the stage," the respondents meant the ways in which legal decisions were responsible for getting the parties to the table, making clear the general obligations of the Crowns' to negotiate, and for keeping the parties at the table. First Nations treaty adviser FN1 had this to say about the *Calder* decision:

> …the one thing one must say is that the *Calder* decision is ***the*** decision everyone must recognize as a turning point in British Columbia. The *Calder* decision, notwithstanding that it still took twenty years almost for the BC government to get the message, the *Calder* decision made it clear that "governments, if you are acting as if, and if you pursue certain policies based on the claim that there are no existing Aboriginal rights and title in British Columbia, then you are simply wrong and if you proceed on that basis you are acting outside the law…" Everything else after that has been refinement.... there is a huge legacy associated with the *Calder* decision and it's not so much that the *Calder* decision tells you ***what*** is to be done, what the outcome will be of these negotiations. The *Calder* decision very clearly says these negotiations must happen, this [Aboriginal rights and title] cannot be just treated as something to be ignored.[13]

[13] Interview with a First Nations senior-level treaty advisor, 19 June 2007.

Further to this, the respondents indicated that legal decisions helped set the stage not by just further defining the nature of Aboriginal rights and title, but by instructing the Crowns to resolve these issues through negotiations.

It also needs to be emphasized that the courts, in legal decisions such as *Delgamuukw*, have repeatedly stated that issues of Aboriginal rights and title need to be resolved through negotiations and not in courtrooms.

One interviewee highlighted that legal decisions on Aboriginal rights and title are the only reason the Crowns are currently in treaty negotiations with First Nations in BC. He said, "Why are we negotiating? *Calder* and *Delgamuukw*. That's the only reason. There's no other reason for it. Governments are not negotiating because they are good folks. They're negotiating strictly because of legal decisions."[14]

Another important impact of legal decisions with regard to context setting is in the role those decisions play in acting as a reminder to government of their obligations, as well as increasing government recognition and understanding of Aboriginal rights and title. Of particular interest is the fact that none of the provincial chief negotiators spoke directly to either of these impacts. In this respect, chief federal negotiator CA1 described the effects of legal decisions on Aboriginal rights and title as keeping

[14] Interview with a First Nations chief negotiator, 10 July 2007.

> people at the table by finding that rights exist and purporting more of a legal requirement…. [T]he…rights may not be specifically defined by the courts that would cause us to enter into a particular negotiation or to negotiate in a particular way. But they're constant reminders that Aboriginal rights and title exist and they have to… have to be dealt with…[15]

BCTC senior-level staff TC3 argued that, on a broad level, legal decisions on Aboriginal rights and title have made it clear to government that they have an obligation to deal with issues of Aboriginal rights and title. He stated,

> It's obvious that anything to do with the treaty process was profoundly [affected] by decisions, a whole string of decisions. *Calder*, *Sparrow*, those kinds of decisions that simply moved the… or increased the recognition for Aboriginal rights and title. Otherwise, this process wouldn't… you can argue this process wouldn't have come about unless there were a clearly defined issue in the jurisprudence that needed to be resolved.[16]

While all three parties to negotiations plus the BCTC recognized that legal decisions on Aboriginal rights and title have set the stage and context for negotiations, this does not mean that they all shared identical perspectives. There are some very clear differences when it comes to how legal decisions frame the alternatives to negotiation. This may seem to be a matter of differing opinions and perspectives, but these opinions and perspectives inform the actions of the parties at the table and therefore merit some consideration here.

According to First Nations treaty adviser FN1, "First Nations go into treaty negotiations with the backdrop of legal decisions, there's no question about that.

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[15] Interview with a federal chief negotiator, 4 July 2007.
[16] Interview with a BCTC senior-level staff, 12 July 2007.

Those legal decisions, in some important ways, frame the alternatives to negotiations. That is to say the legal decisions provide for some understanding of what the options might be to go to litigate instead of negotiation."[17]

On the other hand, provincial chief negotiator BC2 identified how some legal decisions serve to clarify how government can, if desired, infringe Aboriginal rights. See BC2's quote on p. 54 of this thesis.

The *Sparrow* decision outlined these broad criteria to establish if infringement has happened: "Is the limitation unreasonable? Does the regulation impose undue hardship? Does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation" (Supreme Court of Canada 1990, 5). The decision further outlined that government infringement of the Aboriginal right is justifiable if the government can "demonstrate that it was acting pursuant to a valid legislative objective" as well as "demonstrate that its actions are consistent with the fiduciary duty of the government towards aboriginal peoples" (Supreme Court of Canada 1996, 27).

While *Sparrow* outlined a set of criteria for determining whether infringement had taken place, the 1996 *Gladstone* decision took it one step further. Even though *Gladstone* did not determine if Crown infringement of the Heiltsuk right to a spawn-on-kelp fishery was justified, the decision did further

[17] Interview with a First Nations senior-level treaty advisor, 19 June 2007.

clarify the test to establish whether the Crown may infringe the Aboriginal right in question. According to Lamer C.J. and Sopinka, Gonthier, Cory, Iacobucci and Major JJ,

> Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation. With regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment (Supreme Court of Canada 1996, 6).

What is important here is how the different parties look at and use legal decisions when considering an alternative to negotiation. As *per* First Nations chief negotiator FN2, a First Nation may look to favourable legal decisions on Aboriginal rights and title (from their perspective) to see where they may have success with further litigation. The First Nation can then use the threat of litigation as an alternative to further negotiations in order to enhance their negotiating positions. At the same time, government may be looking at the same, or even a different, legal decision and realizing that infringement is always a possibility if they cannot settle with the First Nation with whom they are negotiating.

> Let us not think that rights alone are subject to infringement. The *Delgamuukw* decision clearly outlined the conditions under which the Crown is justified in infringing Aboriginal title. The Supreme Court determined that infringement may be justified for the "development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, and the building of infrastructure and the settlement of foreign populations" (Supreme Court of Canada 1997, 14). See First Nations treaty adviser FN1's comments on *Delgamuukw* on p. 53 of this thesis.

It is precisely when legal decisions on Aboriginal rights and title further clarify the nature of infringement and its justification that they present tangible alternatives to negotiating a treaty.

YOU BETTER CONSULT... AND THEN YOU BETTER ACCOMMODATE

Almost all (eight of ten) interview respondents discussed the Crown's obligation to consult and accommodate First Nations based on the emerging jurisprudence in this area. Several interviewees from all parties discussed consultation and accommodation in great depth, particularly with how it has been playing out in the treaty world and affecting negotiations.

Across all parties, there is a very clear understanding of the impact of those legal decisions on Aboriginal rights and title that deal with the Crown's obligation to consult and, where appropriate, accommodate a First Nation before proceeding with activities that may infringe upon land and resources subject to a potential treaty or land claim. The research participants largely cited the *Haida* and *Taku* decisions when discussing consultation and accommodation. Other decisions discussed are *Huu-ay-aht*, *Mikisew Cree*, and *Delgamuukw*.

Even when the data were sorted according to the respondent characteristics of government experience, business/industry background, or formal legal training, all groups recognized the importance of consultation and accommodation legal decisions on the conduct of negotiations.

Probably the most important impact of consultation and accommodation decisions is on how the Crowns deal with overlapping First Nations. Overlaps occur where the traditional territory of the treaty First Nation overlaps with the traditional territory of one, or more, other First Nation(s). Prior to the jurisprudence on consultation and accommodation, the requirement was for a First Nation filing a Statement of Intent to resolve any overlap issues that might affect treaty negotiations. However, the First Nation has not had to resolve territorial overlaps prior to initiating treaty negotiations (British Columbia Treaty Commission 2007c). The effect of this body of jurisprudence, therefore, has been to make the Crowns realize that they have an obligation to consult and accommodate any First Nations whose territory overlaps with the territory of a First Nation entering the BC treaty process.

Federal chief negotiator CA1 said that, prior to the *Haida* and *Taku* decisions, overlaps were “the responsibility of First Nations and that’s always been our [federal Crown] policy. We took a hands-off approach but now we see

that we have an obligation to actually consult with the overlapping groups."[18]

Federal chief negotiator CA2 agreed:

> I think it's fair to say that those three decisions [*Haida*, *Taku* and *Mikisew Cree*] have reminded us about the obligation of the Crown. That we can't subcontract or delegate the responsibility for consultation and accommodation in resource matters to the resource companies, for instance. Quite apart from whatever companies might want to do or have to do, there is an independent duty to consult and, where appropriate, accommodate, that's incumbent on both Crowns, provincial and federal… At any rate, *Taku* and *Haida* simply heightened the awareness that there is an obligation on the Crowns to consult and hopefully they're doing it.[19]

The interesting part of consultation and accommodation, however, is not in the obligation of the Crowns as found by Canadian courts. Rather, it is in the way that some First Nations have chosen to interpret, and apply, this jurisprudence. BCTC senior-level staff TC3 spoke at great length about this:

> [I]n the recent past, the decisions that have probably had the greatest impact have been *Haida* and *Taku*. It's in a very unexpected way…Because it's played into… overlap discussions among First Nations. What it's done, the treaty process is not based upon a proof of title process. The trade-off for that was to say, for the Crown, "OK, we don't expect you to prove title, but the trade-off is if there is an overlap, First Nations have to resolve it." But the two go hand-in-hand. So if you allow First Nations to define themselves for the purposes of treaty negotiations then the obverse of that has to be, "OK, any overlaps have to be addressed among yourselves."
>
> So that was the assumption upon which the whole treaty process was based. Then you have *Haida* and *Taku* saying, "OK, there is an obligation on the Crown, where there is an asserted right and a *prima facie* case for Aboriginal rights and title… there is an obligation from the Crown to consult and accommodate where an activity is undertaken that

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[18] Interview with a federal chief negotiator, 4 July 2007.
[19] Interview with a federal chief negotiator, 11 July 2007.

> may infringe upon Aboriginal rights and title." Well, what some First Nations are saying is treaties with other First Nations represent just such an infringement. Therefore it's not enough to say it's for First Nations to solve them out. You have to consult and accommodate. So, what you have, at sort of an operational level, is an intertwining of the Crown's obligation to consult prior to a treaty with First Nations obligation to resolve overlaps. In some instances, not all, the two have operated in such a way as… how can I put it? The two obligations have almost collided. The… there's almost an incentive arising from the *Haida*/*Taku* case for First Nations not to resolve overlaps with the First Nations, their neighbours, since if they do that it's hard to argue or sustain an argument that there has been an infringement that has to be accommodated. So, that has been perhaps an unintended or quite perverse playing out of the jurisprudence.[20]

In this instance, legal decisions with a very specific consequence (the Crown obligation to consult and accommodate) are starting to have very real impacts on treaty negotiations. The impact happens on several levels. First, the treaty negotiators must be cognizant of the effect of unresolved overlap issues with neighbouring First Nations. All five Crown negotiators interviewed (provincial and federal) discussed the Crown obligation to meaningfully consult and, where appropriate, accommodate the interests of a First Nation, as outlined by the courts in *Haida*, *Taku*, *Delgamuukw*, and *Mikisew Cree*. Potential overlap issues mean that negotiators need to be aware of overlaps when negotiating certain segments of treaties, such as land or areas where certain rights (e.g., hunting) apply. The second, and related, impact can happen post-treaty. In this case, neighbouring First Nations may view a finished treaty as an infringement of their Aboriginal rights and/or title if they happen to have territorial overlaps with the First Nation that is party to the treaty. In this situation, the jurisprudence may provide neighbouring First Nations with the leverage they need to successfully

[20] Interview with a BCTC senior-level staff, 12 July 2007.

challenge a treaty and to obligate the Crowns to consult and accommodate their interests where applicable. The effect of this vulnerability can be seen in the responses from the Crown chief negotiators as they all discussed the shift from First Nations having to resolve territorial overlaps to the Crowns now having an obligation, through their legal duty to consult and accommodate, to deal with those overlaps instead.

MANDATES, MANDATES, MANDATES

As anyone familiar with treaty negotiations in British Columbia may expect, the interviewees discussed government mandates (the instructions given to government treaty negotiators) in great depth. The ways in which legal decisions on Aboriginal rights and title affect government negotiation mandates is the epitome of the serpentine path: in some instances, legal decisions appear to have a significant effect, in other instances, they do not; in all instances, legal decisions provide part of the context and backdrop against which government develops its negotiation mandates. As such, any serious examination of legal decisions on Aboriginal rights and title must look at their relationship to government negotiation mandates.

Half of the interviewees (five of ten) discussed the relationship between legal decisions and government negotiation mandates. Not surprisingly, it was largely those closest to the mandate development process who spoke about this relationship (two of three provincial chief negotiators and both federal chief negotiators). The fifth interviewee was First Nations chief negotiator FN2.

Interestingly, no one from the BCTC discussed the role of legal decisions in shaping government mandates. It would be premature to make observations as to why this is the case. Specifically, time constraints on the research means it was not possible to contact those from the BCTC with follow-up questions regarding this issue.

The influence of legal decisions on Aboriginal rights and title on government mandates is an important consideration—mandates are the guidelines and instructions for the negotiators. As such, they have a direct impact on the conduct of negotiations. Mandates can be thought of as the "bottom line" for government—they outline what the chief negotiators can put on the table and how much leeway they have during the negotiations. If something is not in a mandate then the chief negotiator cannot introduce it. Similarly, chief negotiators must adhere to whatever limits are set within a negotiation mandate.

Contrary to observations from some interviewees, the consensus with regard to mandates is that the Crowns consider relevant legal decisions on, as well as any trends in the jurisprudence of, Aboriginal rights and title. In one of the earlier interviews, BC treaty commissioner TC1 stated, "the treaty world is still in that denial mode, if you will, with respect to this growing legal support for Aboriginal rights and title. The treaty world is still a political negotiation that wants to ignore these now defined aboriginal rights."[21] It follows from this that a political negotiation process that ignores Aboriginal rights would ignore those rights at all

[21] Interview with a BCTC treaty commissioner, 15 June 2007.

levels of the negotiation process. This means that the process of pulling together government mandates would not pay attention to the jurisprudence on Aboriginal rights and title.

However, it is apparent from speaking with federal and provincial chief negotiators that the Crowns do take into account legal decisions on Aboriginal rights and title as well as the trends in the jurisprudence on Aboriginal rights and title when pulling together a negotiation mandate. Provincial chief negotiator BC1 provided a sketch of the relationship between legal decisions and pulling together a mandate:

> The decision is made. We get advice from our lawyers. We look at it in terms of whether the phrases, the section, the concepts meet whatever is in those cases. You use them as a guideline. You check them to see that there's some relevance to them knowing that if you go and put on the table a starting position that's totally 180 degrees opposite… you're probably not going to get anywhere because the courts have already said that. So, it does guide you in how you pull your mandates and your policy together, but… you don't sit with a case beside you every day trying to understand, but you get guidance from it. That's what you do with it. It guides the way you might look at your policy.[22]

Federal chief negotiator CA2 complemented this description with his slightly more detailed commentary on the process of pulling together a federal mandate:

> There is a cross-government mandate development process by which mandates for negotiations are developed…. [I]n British Columbia the federal government has what's called the "BC-wide Mandate"… Then

[22] Interview with a provincial chief negotiator, 4 July 2007.

> for each treaty negotiation table, a specific mandate is issued. So, in the production of those specific mandates, every government department… so if it's Fisheries and Oceans, Department of Environment, National Energy Board, etc.,… They all have a seat at the table and they all have an opportunity to review these things and needless to say, three of the most important groups… are the Department of Justice—*to make sure we're not mandating negotiators to do something that's contrary to law or running against the current trend in jurisprudence*—, the Department of Finance and the Privy Council Office…. [L]egal decisions have been factored into the development of the mandates.[23] [italics mine]

Provincial chief negotiator BC3 also highlighted how the Crown considers legal decisions:

> First of all, we do take the court's decisions quite seriously. They have a significant impact on how we negotiate at the table. We have to… we clearly want to be in a position to say we are responding to the court's matters. So, we don't just take the decision and interpret it as we like and toss it aside. We spend a great deal of time looking at what comes out and then respecting that decision in terms of how we structure our negotiations going forward…. it certainly has affected the overall mandates that come out…. Once those decisions come down… it makes it quite clear from a negotiations perspective that you have to take that into account. It doesn't tell you what to do, but you have to take into account the fact that you have been given specific direction.[24]

What we are starting to see, then, is that despite the fact that the BC treaty process is a voluntary, political process, where First Nations are not required to prove their rights or title, this does not mean that legal decisions on Aboriginal rights and title have no effect on the conduct of negotiations. On the contrary, legal decisions, in some ways, have a clear, if somewhat indirect, impact.

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[23] Interview with a federal chief negotiator, 11 July 2007.
[24] Interview with a provincial chief negotiator, 13 July 2007.

By way of explaining the impetus for the Crowns to consider the relevant jurisprudence when pulling together a mandate, First Nations chief negotiator FN2 commented, governments "are prepared to do what the law says."[25] What this suggests is that even in a political negotiation process that is explicitly *not* rights-based, the government is still required to respect the law and the decisions that have come forth from the high courts. Where this seems to have the biggest impact is not on the individual negotiators at the table, but on the Crowns when they pull together their mandates and negotiating strategies. Federal chief negotiator CA2 confirmed this notion in his interview when he stated that the federal government would not negotiate a deal that would result in a "successful challenge"[26] by anyone or group who might happen to oppose the treaty.

The five respondents who discussed the effect of legal decisions on government mandates also mentioned some finer nuances. Both federal chief negotiators, for example, recalled that, to the best of their knowledge, no court case on Aboriginal rights and title has come down that has changed a federal negotiation mandate. While the respondents suggested that this is due to the comprehensive nature of the mandate development process combined with the keen eye of the Department of Justice looking out for inconsistencies with trends in the jurisprudence, there are other possible explanations. As federal chief negotiation CA2 stated, each negotiation table has a specific mandate. It therefore follows that a legal decision on Aboriginal rights or title would have to

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[25] Interview with a First Nations chief negotiator, 10 July 2007. See also his comments on p. 58 of this thesis.
[26] Interview with a federal chief negotiator, 11 July 2007.

either be specific to a table or provide guidelines out-of-line with the trends in the jurisprudence, in order to change a mandate. Federal chief negotiator CA1 commented on the case-specific nature of legal decisions being an impediment to their having a more direct and evident impact on treaty negotiations and mandates. Specifically, he referred to the case-specific nature making it very difficult to extrapolate from one case to another.

At any rate, there is a paradox here: some of the interviewees clearly outlined how legal decisions influence the way the Crown pulls together a mandate while other interviewees stated that no legal decision has ever gone back and caused the Crowns to change an already issued mandate. If the Crown truly pays so much attention to the jurisprudence, then how can it be true that no decision has ever caused them to go back and change a mandate? The only conclusion that seems reasonable here is that no decision has ever changed a mandate at the particular tables for which the interviewed negotiators are responsible but that this does not mean the Crowns would never change an issued mandate.

In other cases, however, court decisions are not specific enough. The *Delgamuukw* decision, for example, clarified the nature of Aboriginal title but did not establish where any Aboriginal title exists in British Columbia. As a result, the decision has not provided an incentive for the Crowns to increase the value of the deals they sign with First Nations (see Dacks 2002 for a more in-depth discussion of this point). First Nations chief negotiator FN2 alluded to this

dynamic when he said, "[a] good title decision will have a significant impact on the mandates of governments that they bring to the table."[27] The forthcoming Xeni Gwet'in court case may have this effect if the court finds in favour of the Xeni Gwet'in. The reason is simple: once it is clear that a First Nation has been dispossessed of land for which they previously held legal title, then the doors are open to compensation for the loss of that land and any foregone revenues. This very reason is likely why federal chief negotiator CA1 commented, "Canada does not admit, in negotiations, that rights and title exist. This is a point of contention with some of the First Nations looking for acknowledgement. But because it's not a rights-based negotiation, we're not asking people to prove what rights [and title] they have and then negotiating on the basis of it."[28] This is a key point: it will be interesting to observe the effects of the Xeni Gwet'in decision given that the treaty process has no requirement to prove title. Therefore, it could be argued that the title decision may not have a significant impact on treaty mandates. It will take some time after the Xeni Gwet'in decision to see how this plays out in the treaty world.

It is clear that there is a bit of a discrepancy between the chief negotiators who discussed the myriad ways that legal decisions influence the mandate development process and BC treaty commissioner TC1 who suggested that the Crown is in denial of the growing legal support for Aboriginal rights and title in Canada. Perhaps what TC1 was referring to is not a flat-out denial of Aboriginal

[27] Interview with a First Nations chief negotiator, 10 July 2007.
[28] Interview with a federal chief negotiator, 4 July 2007.

rights and title; rather, TC1 may have been referring to the difference between the Crown actively recognizing and acknowledging Aboriginal rights and title as opposed to the Crown taking a more passive stance where they comply with only the minimum required of them by the courts. This observation is supported by BCTC senior-level staff TC3's comments that absent an official recognition of Aboriginal rights and title, there is often *de facto* recognition of those rights and title. In other words, he stated the Crown knows First Nations will be evaluating deals through a rights-based lens and therefore the Crown considers those when putting together an offer. Further, TC3 implied that the Crowns would not engage in treaty negotiations if they did not believe, at some level, that those with whom they are negotiating might possibly hold rights and title to the territory in question.

APPLYING RIGHTS IN A POLITICAL WORLD

There is a tension within the BC treaty process that many (seven of ten) of the interviewees mentioned and discussed. That tension is the one that has emerged between the rights-based narrative of legal decisions on Aboriginal rights and title, and the voluntary, political process of treaty negotiations in BC where there is no requirement to prove rights or title to participate in the process. Not only is there no requirement, but the process is set up in such a way that integrating rights-based instruments is inherently problematic.

Amongst the comments in this area was extensive mention of the Crowns being in denial with respect to what the respondents referred to as the growing

legal support for Aboriginal rights and title. In the first interview conducted for this thesis, BC treaty commissioner TC1 commented,

> [a]nd the treaty world, I guess, and it was one of the reasons I was willing to come and talk to you today, the treaty world is still in that denial mode, if you will, with respect to this growing legal support for Aboriginal rights and title. The treaty world is still a political negotiation that wants to ignore these now defined Aboriginal rights.[29]

What TC1 was referring to is the disjuncture between the rights-narrative of legal decisions on Aboriginal rights and title and the voluntary, political nature of treaty negotiations in British Columbia. As several respondents explained, the treaty process is premised on the idea that First Nations participation in the process is voluntary. Further to this, there is no requirement for First Nations to prove their rights or title to their traditional territory. This is unlike the Specific Claims process in which First Nations are required to provide evidence and prove their case, much like in court. Contrary to Comprehensive Claims, such as in the BC treaty process, Specific Claims "arise from the breach or non-fulfilment [sic] of government obligations found in treaties, agreements or statutes" (Indian Claims Commission 2005, 4). The result is the BC treaty process has difficulty integrating rights-based instruments such as legal decisions on Aboriginal rights and title because the process itself is not designed in such a way as to facilitate the integration of rights-based mechanisms into treaty negotiations.

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[29] Interview with a BCTC treaty commissioner, 15 June 2007.

Perhaps because of this difficulty in integrating rights-based mechanisms, a few of the research participants also pointed out that the treaty tables with the least amount of progress tend to be those where the First Nation exclusively uses a rights-based narrative in negotiations. BCTC senior-level staff TC3 stated, "where these negotiations are based upon, exclusively upon, an analysis of Aboriginal rights, I often think that those tables are going nowhere."[30] This was congruent with BCTC treaty commissioner TC1's analysis of the tension between the rights narrative and the political nature of treaty negotiations:

> I guess it's probably what shapes where the various tables are at in the process. You probably have roughly a third of the tables who are motivated and want to do a deal and they're prepared to accept that dynamic. They are challenged in having to explain how they get to a particular provision of a treaty as it might be shaped or contrasted with the legal precedents that are out there. Then you've got another third of the tables who are very uncomfortable and are really quite significantly slowed down by this tension that exists between having to make a political decision about a right that they believe has been established. Then you've got about a third of the tables who are really stalled out and that's probably one of the biggest issues facing the folks who are making little or no progress. Then if you want to take the next trench below that you've got the whole Union of BC Indian Chiefs who aren't even in the process and who are perhaps taking, quite understandably maybe, the strongest position with respect to the Supreme Court decisions and their rights as they see them.[31]

What is clear, then, is that it is no simple matter to apply a rights narrative to treaty negotiations. It follows that meaningfully integrating legal decisions on Aboriginal rights and title into the treaty negotiation process is not an easy task. This difficulty is further compounded by the already identified Crown denial of the

[30] Interview with a BCTC senior-level staff, 12 July 2007.
[31] Interview with a BCTC treaty commissioner, 15 June 2007.

growing legal support for Aboriginal rights and title. When two of the three parties to negotiation insist that the process is voluntary and political, then it is that much more difficult for legal decisions to have an impact at the level of the negotiators at the treaty table.

An interesting observation is that most of the commentary on the tension between the rights-based nature of litigation vs. the political nature of treaty negotiations came from within the BC Treaty Commission. Crown negotiators—federal and provincial—paid scant attention to the tension in their interviews and for the most part emphasized the voluntary, political nature of the process. There is also a rough correlation between the respondents with a business/industry background and not discussing this area in an in-depth manner. The one exception is the one BC treaty commissioner with a background in business/industry who spoke at length about the treaty world being in denial of the growing legal support for Aboriginal rights and title. Unfortunately, given some of the constraints on this research project, it is difficult to draw solid conclusions from these observations. The observations are mentioned here in order to indicate a pattern that may contain more layers and depth and that warrants further investigation.

A further complication is what one interviewee referred to as the discordance between the legal tests set out in court decisions and what is required as part of an interest-based, voluntary, political negotiation process.

Since the treaty negotiation process is not rights-based, it becomes problematic to attempt to use legal tests to determine Aboriginal rights or title as part of the negotiation process.

It bears mentioning that negotiators, and chief negotiators, work within a structure (government or a Tribal Council) and are subject to instructions (mandates). As such, while several of the provincial and federal chief negotiators commented on the tension that exists between the rights narrative of legal decisions and the negotiated settlements (i.e., non-rights based) of the treaty process, they are poorly situated to exert much of an influence on that dynamic. Chief negotiators are not in an easy position: they are the point of connection between two processes that do not easily fit together. Charged with taking mandates and following them in the conduct of negotiations, they must also attempt to work with directives coming from the Courts. They neither make legal judgments nor set negotiation mandates but part of their role is to mediate between the rights-based legal system and the process seeking negotiated settlements.

The research question of this thesis speaks directly to the essence of this challenge: how do legal decisions on Aboriginal rights and title shape the conduct of negotiations? This is the truly interesting area: investigating how chief negotiators make use, or not, of legal decisions on Aboriginal rights and title and

make them work in their practical negotiations when their own agency is limited by the negotiation mandates they are required to follow.

CHALLENGES

In addition to the challenges inherent in applying rights in the political world of treaty negotiations, all interviewees identified obstacles to legal decisions on Aboriginal rights and title having a greater, or any, impact on treaty negotiations. The principal challenges discussed were:

- **Specificity of legal decisions:** eight of the ten interviewees discussed, to some extent, how the case-specific nature of legal decisions inhibits the use of legal decisions on Aboriginal rights and title in treaty negotiations because what has been proven in one case for a specific First Nation is not necessarily true in the case of all First Nations. Federal chief negotiator CA1 put it simply: "the court cases are all, so far, based on this specific set of facts, this specific territory, blah, blah, blah. Like the *Marshall* decision—after all the years then it comes down and what do the courts say? It applies to eels. So how do you extrapolate that into negotiations?"[32] The challenge lies in having a decision that may clearly outline a right for one First Nation (for example, the Heiltsuk right to a spawn-on-kelp fishery as outlined in *Gladstone*) but since court decisions are case-specific and evidence-based, it is simply not possible to automatically or easily extrapolate that right to all coastal First Nations involved in treaty negotiations. Lawyers may argue that negotiators could

[32] Interview with a federal chief negotiator, 4 July 2007.

use the legal technique of "false analogy" to extrapolate a case from one situation to another. However, given the number of respondents who cited specificity of decisions as an impediment, it is clear this is not happening. In the author's view, this is likely a reflection of a treaty process that is not designed to incorporate rights and legal decisions as opposed to a reflection of negotiators who lack the capacity to extrapolate a case to a new situation.

- **Complexity of the Issues:** In some cases, it may be that the issues under consideration are too complex for a court to render a truly effective decision. One provincial chief negotiator commented that it takes a minimum of one year to develop a basic understanding of the issues. He highlighted the word basic and said it takes even longer to develop an in-depth understanding of the issues.[33] Chief negotiator turnover probably plays a role here as well. The negotiators interviewed had all been at different tables for different amounts of time. In addition to a basic understanding of the issues, the chief negotiators must also learn about the details and particulars of each individual table and this is something that takes time.
- **Negotiators do not Interpret Decisions:** Simply put, individual negotiators (chief or otherwise) at the table do not interpret legal decisions on Aboriginal rights and title as they come down and then apply them as they see fit. In the words of federal chief negotiator CA2,

[33] Interview with a provincial chief negotiator, 13 July 2007.

> it's not a one-man show. If you knew the number of people involved in getting a federal mandate approved, I mean, it's just goes out of proportion. It's very bureaucratic, but it's set up with all the checks and balances so when you finally turn someone loose with a mandate you're not saying, "OH MY GOD, I wish we'd taken more time to figure X or whatever." It doesn't happen.[34]

- **Basic Framework already in Place:** One interviewee stated that the influence legal decisions on Aboriginal rights and title exert on treaty negotiations is circumscribed by the fact that the basic framework for modern-day treaties in British Columbia has been in place since the Nisga'a treaty negotiations. What this refers to is the claim that the Nisga'a Treaty (i.e., its substantive sections and provisions) is being used as a basic template for other treaty negotiations in British Columbia. This is problematic because the three principals to the BC Treaty Process have not sat down and approved it as a basic template for future treaties.[35]
- **Decisions do not set out Content:** As was echoed by the majority of the interviewees, legal decisions on Aboriginal rights and title do not set out the content of treaties; they merely provide instruction to negotiate and guidelines that should assist in treaty negotiation.
- **Parties do not want to give up control over the outcome:** Several respondents cited that the parties do not want legal decisions to influence the conduct of treaty negotiations because they do not want to lose their control over the outcome that is inherent in a collaborative negotiation

[34] Interview with a federal chief negotiator, 11 July 2007.
[35] This can be contrasted with the experience in the Yukon, where all the principals (including First Nations) to the treaty process sat down and approved an Umbrella Agreement which became the basic template for all further treaty negotiations in that territory. The Umbrella Agreement provided the basic template (e.g., sections and provisions to be covered, such as fishing, self-governance, etc.) and then each table would negotiate the specifics.

process. This is, in part, related to the Crowns not wishing to have a court determine settlement amounts. Further, the respondents cited that if they release control over the process, they may end up with an agreement that is contrary to their interests.

SYMBIOSIS? THE COURTS AND NEGOTIATIONS

The research also uncovered a great deal of information regarding the hypothesis presented in the literature of making intentional use of the courts to assist and facilitate treaty negotiations. As it is somewhat beyond the scope of this thesis to go into detail regarding the use of courts in this way, it is important to make some general observations in order to shed further light on the relationship between legal decisions on Aboriginal rights and title and treaty negotiations in British Columbia.

Without exception, all the interviewees who commented on this stated that it would not be a practical nor easily workable solution. Some went so far as to state that such a proposal could only result from people researching treaty negotiations without having treaty negotiation experience themselves. Some of the reasons stated for why it would be near impossible to integrate the courts with treaty negotiations in a formal manner are:

- the challenges, already noted, of the tension between the rights narrative and the voluntary, political treaty negotiation process;

- the give and take nature of negotiations: many interviewees commented on the need for all parties to make compromises during negotiation. They stated that no one is ever completely happy with every section of a treaty, but that you give up more in one area to gain more in another. Following from this, the interviewees stated it would be problematic to have an entire process of give, take, and compromise, and to then have one of the parties be able to refer an issue to the courts at their discretion. The ability to make such a referral would have a negative impact on the negotiation dynamic itself, possibly further entrenching the parties in their respective positions as there would be a reduced incentive to negotiate in a collaborative, interest-based manner;
- in what is allegedly a voluntary, political, and collaborative process, the parties would not want to give up their control over the outcome as referring issues to the courts introduces a level of uncertainty. In the opinion of one federal chief negotiator, no government in its right mind wants courts to be settling these issues and being responsible for setting compensation amounts in either land or money. They considered that it would be very difficult to obtain federal Crown buy-in for such a process as the individual Ministries and the Treasury Board would not consent to allowing the courts to decide certain issues;
- from the researcher's own observations, and as stated previously, proposing the use of the courts to help treaty negotiation tables get past impasses assumes that such impasses result from a lack of legal clarity

and that a court is the best body to assist treaty negotiations. Similarly, even if legal clarity is not at the root of the impasse, there is an assumption that the issue(s) causing the impasse are best resolved by a court rather than a different process. In short, proposing that the courts be used to help resolve treaty negotiation impasses is a prescriptive solution.

As shown in the analysis, the tension that exists when trying to apply a rights-based solution to a negotiated settlement should seriously call into question whether such assistance is even appropriate. Proposals to use the courts to resolve impasses should only be appropriate if a lack of legal clarity is, in fact, the cause of the impasse. Furthermore, if treaty tables are to look for assistance from outside the table, an elicitive approach (Lederach 1995) to determine the nature and form of that assistance would be more effective and appropriate;

- problems identified with the courts themselves, such as tying up an already loaded court system, referring incredibly complex issues to judges who may have very little experience with Aboriginal issues, lengthy timeframes to resolve cases (often lasting years), and exorbitant costs (often costing millions, particularly for cases that go to the Supreme Court[36]), and;

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[36] However, the BC Treaty Commission has allocated approximately $362 million in support fund to negotiating First Nations (British Columbia Treaty Commission 2007a). Additional to this are the funds the federal and provincial Crowns have spent on the process. To date, there have only been two treaties signed so it is clearly debatable whether the costs of the going to court are in excess of the costs of negotiating treaties.

- one interviewee commented that at least one of the negotiators from Nisga'a stated that referring an issue to the courts would have been an indication of their failure as negotiators and therefore was something they never wanted to do even when they had the opportunity.

An interesting observation is that the respondents appear to follow the same underlying assumption as the literature in this area: that negotiation impasses stem from a lack of legal clarity. That is, the respondents' comments are congruent with this assumption. Unfortunately no hard conclusions can be drawn here, as that would require following up with some of the respondents to investigate further if they truly do share the same opinion as the literature or if other factors shaped their responses.

Finally, this section of the analysis leads the author to ask: what kind of direct role *do* the courts have in treaty negotiations if not to assist in impasses as proposed in the literature? While there may be many possibilities, one possibility to mention here is some kind of tribunal, such as that currently proposed to deal with land claims at the federal level (for more information, see Indian and Northern Affairs Canada 2007). The reasons for proposing such a tribunal are simple: the reality of treaty negotiations is that they tend to be positional and not interest-based; therefore, applying a rights-framework to them (i.e., a court-like process that determines who is right and who is wrong) may not be so difficult after all. Further, a dedicated tribunal would resolve some of the issues identified with using the courts to assist in negotiations: tribunal members would have in-

depth knowledge of Aboriginal issues; it would not add to an already loaded court system; it would have a specific mandate and therefore keep timeframes and costs smaller. There are, of course, drawbacks to using a tribunal as well: the complexity of treaties itself may make a tribunal an inappropriate forum. Further thought on such a tribunal will need to be debated in other forums than this thesis.

SUMMARY

This chapter has presented the data collected during the research for this thesis. First, the chapter began with a brief discussion of the legal decisions on Aboriginal rights and title mentioned in the interviews and categorized those decisions into several categories according to why the respondents considered them to have an impact on the conduct of negotiations. The respondents identified that legal decisions on Aboriginal rights and title have the most impact on the conduct of negotiations when they: set the stage and context by dictating that negotiations must happen; outline the duty of the Crown to consult and accommodate First Nations before allowing resource extraction on land to which they may hold Aboriginal rights or title; detail under what conditions the Crown may infringe Aboriginal rights or title; instruct the Crown to negotiate in good faith, and; (potentially) establish definitive Aboriginal title over a specific area of land. These categories identify why the respondents discussed certain legal decisions on Aboriginal rights and title. However, it is important to note that this does not imply that the inverse holds true—that legal decisions not mentioned do not fall into any of these categories. This is clear because not all interviewees

mentioned all the same legal decisions. Additionally, one would need to follow-up with the interviewees to determine why they omitted some legal decisions.

Further to this, four broad themes emerged from the data with regard to the research question: setting the stage; consultation and accommodation; the impact on Crown negotiation mandates; and the tension between the rights-based narrative of legal decisions on Aboriginal rights and title and the non-rights-based voluntary, political treaty negotiation process in British Columbia. The respondents explained at length the myriad ways in which these themes relate to the research question. Moreover, they also discussed some of the ways in which legal decisions on Aboriginal rights and title do not have much of an impact on the conduct of negotiations.

What becomes clear in the analysis is that when legal decisions on Aboriginal rights and title do influence the conduct of negotiations, that impact tends to be serpentine and indirect. In some cases, the influence is clearer and more direct. In others, the influence of a decision may be negligible at best. The respondents' answers also indicate that a consideration of the context and particularities of individual treaty tables is also important in understanding how legal decisions on Aboriginal rights and title influence the conduct of treaty negotiations.

As noted, there were various challenges inherent in the analysis of the data. These challenges will be discussed in the next chapter as part of the section on the strengths and weaknesses of the research methodology.

Chapter 5: Conclusions

Meaning and Significance of the Analysis

The initial analysis provided by the majority of the research participants was that legal decisions on Aboriginal rights and title do not usually have a significant impact on the conduct of treaty negotiations. However, as the analysis in this thesis shows, the interviewees spoke at great length about all the different ways in which legal decisions do affect the conduct of negotiations. To be fair, the researcher based the interview guide on the original research question, *how do legal decisions on Aboriginal rights and title shape the way negotiators negotiate in the BC treaty process?* In that sense, the responses reveal that legal decisions have a lesser impact on individual negotiators. What is clear now is that although the researcher has modified the research question, legal decisions on Aboriginal rights and title *do* have an unmistakable role in shaping the conduct of treaty negotiations.

Research participants almost all initially answered that legal decisions on Aboriginal rights and title did not have much of an impact on how they conducted negotiations. Interestingly, the respondents *always* followed such statements with in-depth discussions of all the ways in which legal decisions do have an impact. While this may appear contradictory, it in fact uncovers a layer of complexity in the relationship between legal decisions on Aboriginal rights and title and treaty negotiations: that such decisions do not have a readily apparent clear and direct

impact on negotiators, specifically, hence the research participants' opinions that their impact was small or non-existent. In fact, the analysis of the data reveals that legal decisions exert an influence in a variety of ways and do so in both direct and indirect manners. It also became clear in the analysis that chief negotiators themselves appear to have limited agency in treaty negotiations—they receive their negotiation instructions from "higher up" (e.g., Cabinet, Tribal Council, etc.) and must follow them. For those unhappy with the progress of treaty negotiations in British Columbia, this is an important structural consideration because it demonstrates where they might focus efforts in order to improve the process, particularly if one of the parties is considering litigation.

Conclusions Examined in Relation to Theoretical Underpinnings of the Research

The results bear out some of the theoretical underpinnings examined earlier in this thesis. For example, the analysis clearly demonstrates the serpentine influence of legal decisions on Aboriginal rights and title. It is difficult to state that certain legal decisions *either* facilitate *or* constrain treaty negotiations. In fact, legal decisions on Aboriginal rights and title have a much more subtle, indirect and serpentine relationship with treaty negotiations. In many cases, such decisions simultaneously constrain *and* facilitate treaty negotiations. This is particularly apparent in legal decisions (such as *Delgamuukw*, *Sparrow*, *Gladstone*, for example) that further clarify an Aboriginal right or the nature of Aboriginal title, but at the same time establish, in the common law, the conditions under which the Crown may lawfully infringe upon those same rights and title.

When this study began, a key theoretical underpinning was that legal decisions on Aboriginal rights and title exerted a more or less direct influence at the micro-level of treaty negotiations. That is, at the level of the treaty tables. It has become clear throughout the course of this research that this is not the case. Legal decisions have a far more significant influence at the macro-level (mandates/negotiation instructions). With regard to legal decisions on Aboriginal rights and title, what happens at the micro-level is merely a representation of what has happened at the macro-level. That is to say, chief negotiators do not interpret legal decisions and decide how to apply them. Furthermore, treaty negotiations are not a "one-person show." The assumption that legal decisions influence chief negotiators in a direct and clear way has been shown to be a false assumption. While it is perhaps arguable that the jurisprudence surrounding negotiating in good faith may have a direct impact on chief negotiators, they are still following their mandates so presumably instructions to negotiate in good faith are set during the mandate development process and form part of the framework within which chief negotiators operate.

Implications for Practice

The analysis of the data reveals several implications for treaty negotiations in practice. Some of these include:

- Negotiators work within structures and according to instructions/mandates; therefore, for legal decisions to have an effect on negotiators at the table,

those decisions must first have an effect on their mandates and the structures within which negotiators work. An understanding of the necessary macro-level impact of legal decisions should assist in deciding on strategies to pursue at the micro-(treaty table) level. If a legal decision has not had an impact on mandates, then it will be difficult to have the parameters of that decision incorporated into negotiation instructions and offers at the table.

- A deeper understanding of the conditions under which legal decisions have the largest impact on treaty negotiations may prove beneficial to some or all parties at the table. With a more complete understanding of the context of treaty negotiations, the parties should be able to develop better overall interventions and strategies and better manipulate the litigation-negotiation dynamic. For example, understanding what types of legal decisions tend to have an impact means that a First Nation can tailor its litigation in order to increase that impact. Similarly, a greater understanding should help the Crowns better interpret the existing jurisprudence as well as any emerging trends and how that might influence their process of pulling together a mandate.
- There may be a lesson for First Nations: that both Crowns will meet an overt, rights-based agenda with both passive and active resistance; however, incorporating rights and title into a less overt strategy, such as using legal decisions to influence mandates, may be a more productive path for treaty First Nations in the long term. By attempting to manipulate

and influence the structure within which Crown negotiators operate, First Nations may be best able to achieve their ends.

- Any analysis of the effect of legal decisions on Aboriginal rights and title will need to be detailed, far-reaching, and consider both the facilitative and constraining possibilities. The research shows that legal decisions do not always have a direct or easily identified impact on treaty negotiations. The dynamic is much more complex than simply establishing whether a given decision does or does not facilitate treaty negotiations. A detailed analysis and investigation of the impacts of legal decisions with regard to specific treaty tables, by all parties, should be a necessary part of any effective negotiations.

Critical Review: Strengths and Weaknesses of Design and Implementation

- **Research question:** since the research question changed over the course of the study, a different research participant profile could have been used. In addition to chief negotiators, it would have made sense to speak with those who participate(d) in the development of treaty policy and mandates. This might include cabinet ministers as well as the appropriate people from the variety of government ministries/departments that are part of the treaty negotiation mandate-development process. On the First Nations side, this might include band and tribal councils in addition to chief negotiators.

- **Small target group:** the small number of participants (ten) makes some comparisons meaningless or impossible. For example, with two out of ten research participants having legal backgrounds, one cannot reliably pinpoint differences in the respondents' comments that are attributable to the presence or lack of legal training. Further study would be required to be able to draw some firm conclusions on the role of having a legal background. Similarly, with only one woman out of ten research participants, it was impossible to make any meaningful observations or conclusions when analyzing participant responses on the basis of gender.

  Similarly, the small number of research participants has also meant that when only one respondent mentions a given interview code (concept, theme, etc.), it has proven difficult to ascribe a level of significance to the code. A greater number of research participants would possibly help to mitigate some of these issues. For example, if that one respondent happens to have over twenty years experience negotiating treaties, then how do you establish the importance of their responses? Is it the same as if several chief negotiators with only three years experience mentions the same code?

  Finally, with more time for the data collection and analysis phases of the project, it would have been possible to test out some of the less frequent concepts and themes by going back to some of the research participants

for further exploration. For example, there are a number of interview codes that only appear in one out of the ten interviews. With more time, it would have been possible to go back to some of the other interviewees and ask about those codes and why they may not have mentioned them in the original interview.

- **Lack of First Nations representation:** despite an earnest attempt to secure the participation of the three First Nations involved in the treaty tables selected for this study, the researcher was unable to obtain the participation of any First Nations chief negotiators who also belonged to the Nations they negotiate on behalf of. While the researcher was able to obtain interviews with one non-Aboriginal treaty adviser who advised certain sections of treaty negotiations for a First Nation, as well as an Aboriginal chief negotiator who is not a member of the First Nations he has negotiated for, it would have been desirable to have the direct participation of the First Nations in question.

New Questions and Future Inquiries

The author identified several new questions and lines of future inquiry throughout the course of this research study. Some of the most interesting are presented here:

1. One area for further research is an examination of the background of academics and how that influences the literature they produce regarding the treaty process. Specifically, several interviewees raised a concern

regarding people who are not treaty negotiators, nor directly involved in the treaty process, writing on the treaty process and proposing solutions when they are unfamiliar with the day-to-day reality at the treaty tables. For example, when the researcher asked one interviewee for their thoughts on using the courts to resolve negotiation impasses, he responded that such a proposal is indicative of someone who does not really understand how treaty negotiations work on the ground[37]. It would be useful to contrast such research against an examination of the literature produced by people directly involved in treaty negotiations in order to establish commonalities and differences. Such a study would be further enhanced by examining how practitioners (e.g., chief treaty negotiators) make use of the literature on treaty negotiations. As stated above, there is a concern from some chief negotiators that people with no experience at the table are proposing alternatives and processes that would simply be unrealistic in real life treaty negotiations. This means the value of their contributions to the field is substantially reduced—if negotiators are discounting their academic work, then there is a divergence between the theory and the practice of treaty negotiations.

2. Related to this, another area of future inquiry is an examination of the literature to see how much is based on empirical research as opposed to strictly theoretical works. The purpose of such a study would be to determine whether more empirical research needs to be carried out and if

[37] One notable exception to this statement is of course experienced treaty negotiator Tony Penikett (see Penikett 2006).

some of the theoretical works need to be tested in real-life scenarios. In short, it would help to address the divergence between theory and practice identified in point 1 above.

3. An assessment on the causes of impasses at treaty negotiation tables and effective means of dealing with them. This would include investigating how often, if ever, impasses are the direct result of a lack of legal clarity. It would also include an examination of how increased legal clarity affects impasses and overall treaty negotiation outcomes.
4. To what extent does reliance on a rights narrative impede a First Nation's progress in treaty negotiations? Are the tables that use only a rights-based narrative the ones with the least progress? What other variables might explain a lack of progress? Does lack of a rights-based narrative explain progress at the more advanced tables? Are there other variables that might explain that progress? How might the tension between the rights narrative and the political nature of treaty negotiations be best addressed?
5. The role that the jurisprudence on consultation and accommodation plays in the decisions of neighbouring First Nations to launch a suit against a Final Agreement alleging infringement of their own rights and title. What other factors beyond this jurisprudence help to explain the challenging of Final Agreements by neighbouring First Nations? What role does that same jurisprudence play in the decision of a treaty First Nation to *not* resolve its territorial overlaps with its neighbouring First Nations? Further

to this, how does the jurisprudence modify Crown behaviour to deal with overlaps effectively?

Concluding Remarks

At the time of this writing, the British Columbia legislature has recently ratified the Tsawwassen First Nation Final Agreement—the first legislative ratification of a treaty negotiated under the now 14-year old BC treaty process. Also this autumn, four of the five Maa-nulth Treaty Society First Nations held successfulcommunity ratification votes, sending their treaty on for ratification by British Columbia and Canada.. These are promising signs of progress after the failed ratification vote of the Lheidli T'enneh Final Agreement in early 2007 (for consideration of the reasons for the failed vote, see British Columbia Treaty Commission 2007b; Mustel Group 2007). While the progress of the Tsawwassen and Maa-nulth Final Agreements is cause for celebration, the process also has its critics within First Nations and many of them protested outside the legislature on October 17 (the day of provincial ratification of the Tsawwassen Final Agreement), protesting what they perceived as the lack of fairness and progress in treaty negotiations (Rud 2007).

There has also been progress on the legal front. The *Xeni Gwet'in* case (*Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700) mentioned by three of the interviewees was issued from the BC Supreme Court on 20 November. In the decision, Justice Vickers found, *inter alia*,, that the Xeni Gwet'in had met the legal test to prove their Aboriginal title over approximately 2000 km^2 of their

claimed territory. A legal technicality, however, prevented him being able to grant title to the Xeni Gwet'in. Time will tell whether this case will influence treaty negotiations. It is not the first legal decision on Aboriginal rights and title that may be able to influence the conduct of treaty negotiations, despite not finding in favour of the First Nation. Given the precedence of cases like *Calder* where, despite a majority decision against the First Nation, there has been a significant effect on treaty negotiations, there is reason to hope that the *Tsilhqot'in* decision may be the kind of title decision that will effect positive (from a First Nations perspective) change on the treaty process.

If one thing is certain, it is that some First Nations feel that the BC treaty process offers them the hope of the best deal possible with the provincial and federal Crowns while at the same time other First Nations think the process does not go far enough. Establishing whether current treaty negotiations are the best means to deal with the longstanding grievances of First Nations in BC, while meeting the interests of the provincial and federal Crowns, is a topic for another forum.

A better understanding of the ways in which legal decisions on Aboriginal rights and title act in a serpentine and indirect manner to simultaneously facilitate and constrain the conduct of treaty negotiations can only help the parties to better understand the complexities of how legal decisions exert an influence on the conduct of treaty negotiations. With a better understanding of those complexities, the parties should be better prepared to tailor their negotiation

strategies and interventions in order to have the final negotiated settlement meet their needs in a mutually satisfactory manner.

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Appendices

Appendix I: Stages of the BC Treaty Process

From the BC Treaty Commission website (British Columbia Treaty Commission 2007d):

Stage 1: Statement of Intent to Negotiate

A First Nation files with the Treaty Commission a statement of intent (SOI) to negotiate a treaty with Canada and BC. The SOI must identify the First Nation's governing body for treaty purposes and the people that body represents and show that the governing body has a mandate from those people to enter the process. The SOI must describe the geographic area of the First Nation's distinct traditional territory and identify any overlaps with other First Nations. …

Stage 2: Readiness To Negotiate

The Treaty Commission must convene an initial meeting of the three parties within 45 days of accepting a statement of intent. For most First Nations, this will be the first occasion on which they sit down at a treaty table with representatives of Canada and BC. This meeting allows the Treaty Commission and the parties to exchange information, consider the

criteria for determining the parties' readiness to negotiate and generally identify issues of concern. The meeting usually takes place in the traditional territory of the First Nation. The three parties must demonstrate that they have a commitment to negotiate, a qualified negotiator, sufficient resources, a mandate and a process to develop that mandate and ratification procedures. The First Nation must have begun addressing any overlaps. The governments of Canada and BC must have a formal means of consulting with third parties, including local governments and interest groups. When the three parties have everything in place, the Treaty Commission will declare the table ready to begin negotiating a framework agreement. …

Stage 3: Negotiation Of a Framework Agreement

The framework agreement is, in effect, the "table of contents" of a comprehensive treaty. The three parties agree on the subjects to be negotiated and an estimated time frame for stage four agreement-in-principle negotiations. Canada and BC engage in public consultation at the regional and local levels. A municipal representative sits on the provincial negotiation team at each treaty table. …

Stage 4: Negotiation Of An Agreement In Principle

This is where substantive treaty negotiations begin. The three parties examine in detail the elements outlined in their framework agreement. The goal is to reach agreement on each of the topics that will form the basis of the treaty. These agreements will identify and define a range of rights and obligations, including: existing and future interests in land, sea and resources; structures and authorities of government; relationship of laws; regulatory processes; amending processes; dispute resolution; financial component; fiscal relations and so on. The agreement in principle also lays the groundwork for implementation of the treaty. …

Stage 5: Negotiation to Finalize a Treaty

The treaty formalizes the new relationship among the parties and embodies the agreements reached in the agreement in principle. Technical and legal issues are resolved at this stage. A treaty is a unique constitutional instrument to be signed and formally ratified at the conclusion of Stage 5.

Stage 6: Implementation of the Treaty

Long-term implementation plans need to be tailored to specific agreements. The plans to implement the treaty are put into effect or phased in as agreed. With time, all aspects of the treaty will be realized

and with continuing goodwill, commitment and effort by all parties, the new relationship will come to maturity. …

Appendix II: Letter of Invitation

DATE

ADDRESS

Dear Mr. NAME,

My name is Patrick Richmond and I am currently pursuing my MA in Dispute Resolution at the University of Victoria. I am writing to you today to invite you to participate in a research study I am conducting, as part of my thesis requirements, on how legal decisions on Aboriginal rights and title shape the way negotiators negotiate in the BC Treaty Process. The study will consist of a small number of in-depth interviews (approximately one to two hours in length, but this is flexible) with senior-level negotiators and BC Treaty Commission (BCTC) commissioners directly involved in a treaty negotiation table. Please see the attached consent form for details on the project and how I will conduct it.

I have contacted you because you are a senior-level negotiator with direct involvement at a treaty negotiation table. As I am interested in the effects of legal decisions on negotiator decision-making, you are part of the appropriate target group for my research.

If you are interested in participating in this study, please respond to me via email, telephone or letter at your earliest convenience. Please see my contact information below. I will also follow-up this letter with a phone call in approximately one weeks time to

ensure you have received this invitation and to answer any questions you may have about your participation. I will endeavour to conduct all interviews in BC in-person (I will travel to your location) but if you are located elsewhere then the interview will likely be conducted by telephone.

I look forward to your response and please do not hesitate to contact me if you have any questions about this study.

Best regards,

Patrick Richmond

Candidate, MA in Dispute Resolution

ADDRESS

CONTACT INFORMATION

Appendix III: Consent Form

Institute for Dispute Resolution

University of Victoria

Participant Consent Form

Building an Even Table? How Legal Decisions on Aboriginal Rights and Title Shape the Way Negotiators Negotiate in the British Columbia Treaty Process

You are being invited to participate in a study entitled *Building an Even Table? How Legal Decisions on Aboriginal Rights and Title Shape the Way Negotiators Negotiate in the British Columbia Treaty Process* that is being conducted by Patrick Richmond.

Patrick Richmond is a Master's level graduate student in the department of Dispute Resolution at the University of Victoria and you may contact him if you have further questions by emailing patrickr@uvic.ca or calling PHONE NUMBER.

As a graduate student, I am required to conduct research as part of the requirements for a degree in Dispute Resolution (MA). It is being conducted under the

supervision of Professor Maureen Maloney, Q.C. You may contact my supervisor at PHONE NUMBER.

This study seeks to understand how legal decisions concerning Aboriginal rights and title shape the behaviour and decision-making of negotiators involved in the British Columbia (BC) Treaty Negotiation Process. The study involves conducting in-depth, qualitative interviews with the corresponding First Nations, Provincial and Federal chief treaty negotiators and BC Treaty Commission commissioners from a number of treaty negotiation tables.

Research of this type is important because given that the BC Treaty Negotiation Process is now in its thirteenth year, with only three final agreements initialled (and one recently rejected by First Nation community referendum), this study will contribute to the body of knowledge regarding effective, cross-cultural negotiations between settler and colonized peoples in Canada. Research results will be shared with participating First Nations, the BC Treaty Commission, and government (provincial and federal) treaty negotiation offices.

You are being asked to participate in this study because you have been directly involved in the BC treaty process as either a chief or senior-level negotiator or as a BC Treaty Commission commissioner.

If you agree to voluntarily participate in this research, I will conduct an interview with you. If scheduling and finances allow, I will travel to your location and conduct the interview in person. If this is not possible, then I will carry out the interview via telephone. Please note that telephone interviews will be conducted on land lines only as cell phones are not as secure as land lines. I foresee the interviews lasting approximately one to two hours, though this can be adjusted to fit your schedule.

There are no known or anticipated risks to you by participating in this research.

The potential benefits of your participation in this research include contributing to the body of knowledge regarding effective, cross-cultural negotiations between settler and colonized peoples in Canada. Additionally, it is expected the research participants may gain some new insights into the way they, and the other parties at the table, negotiate.

As a way to compensate you for any inconvenience related to your participation, I will leave with you a complementary copy of *Toward an Understanding of Aboriginal Peacemaking* by Richard T. Price and Cynthia Dunnigan, published by the Institute for Dispute Resolution at the University of Victoria. It is important for you to know that it is unethical to provide undue compensation or inducements to research participants and, if you agree to be a participant in this study, this form of compensation to you must not be coercive. If you would not otherwise choose to participate if the compensation were not offered, then you should decline.

Your participation in this research must be completely voluntary. If you do decide to participate, you may withdraw at any time without any consequences or any explanation. If you do withdraw from the study your data will only be used if you give permission.

It is possible that further questions may arise in my research during the course of my data collection. To make sure that you continue to consent to participate in this research, I will request your on-going consent at the time of our interview. Please note that you may also withdraw your on-going consent at any time without consequence or explanation.

In terms of your anonymity, the researcher will know who all the participants are given the interactive nature of conducting interviews. Please be assured that your confidentiality and the confidentiality of the data will be protected by not including any directly attributable information in the final write-up of the research. Specifically, the researcher will not explicitly name or identify the research participants and will make no reference to which treaty table they negotiated at. However, given the nature of the study and the small group of research participants, it may be possible for some people to infer identities based on the data presented in the final write-up. Therefore, you must understand that there is a limit to protecting your confidentiality and accepting that limit is part of giving your free and informed consent to participate in this research study.

It is anticipated that the results of this study will be shared with others in the following ways: directly to all participants; directly to the BC Treaty Commission; directly to the First Nations Summit; thesis presentation; possibility of published article; possibility of presentation at scholarly meetings; archival of thesis in the University of Victoria library.

Data from this study will be disposed of one year after the completion of the research study. Electronic data (transcripts of interviews and digital audio files of interviews) will be securely erased. Any paper copies of the data will be shredded.

Individuals that may be contacted regarding this study include the researcher, Patrick Richmond, or his supervisor, Maureen Maloney. Please see their contact information at the beginning of this consent form.

In addition to being able to contact the researcher and/or supervisor at the above phone numbers, you may verify the ethical approval of this study, or raise any concerns you might have, by contacting the Associate Vice-President, Research at the University of Victoria (250-472-4545).

Your signature below indicates that you understand the above conditions of participation in this study and that you have had the opportunity to have your questions answered by the researcher.

_______________________	_______________________	_____________
Name of Participant	*Signature*	*Date*

A copy of this consent will be left with you, and a copy will be taken by the researcher.

Appendix IV: Interview Guide

Interview Guide: Negotiators

Date: Time: Duration:

Interview/Interviewee Location:

Interviewee Name:

Job Title:

Treaty Table:

Which Party? First Nations ☐ Provincial ☐ Federal ☐ BCTC ☐

Other notes:

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1. Personal introductions.

2. Verbally review the terms and conditions of the consent form, including (among others) their right to stop the interview or to not answer a specific question.
3. Ensure consent form is signed or verbal consent given (for phone interviews).
4. Request permission to record the interview and explain what will happen with the transcript.

Interview Questions:

Part 1: Introductory Questions

1. Please state your name and job title (both during the negotiation and currently).
2. What role did you play in the negotiations at table X?
3. What section(s) of the treaty did you negotiate?
4. How long did your negotiations at your table last in total? How long was your own participation at the table?
5. Please describe your legal background and/or any negotiation training.
6. Any other relevant background information? (e.g., previous government positions held, negotiator at other tables, etc.)

Part 2: The Impact of Legal Decisions

1. What legal decisions on Aboriginal rights and title have had an impact on the way you have conducted negotiations?
2. In your view, which of these decisions have had the most influence in shaping the way you negotiate?
3. What is your interpretation of decision X?
    i. What does decision X mean for the party that you negotiate for?
    ii. What do you think decision X means for the other parties at the table?
4. What effect, if any, has decision X had on the way you have negotiated? How significant was decision X for your negotiations?
    i. How has it facilitated the way you have negotiated?
    ii. How has it constrained the way you have negotiated?
    iii. What effect, if any, do you think decision X had on the other parties at the table?
5. Any other comments on how legal decisions influence negotiations? Are there other ways that legal decisions influence negotiations?

At end of interview:

1. Revisit consent form and its terms and conditions.

2. Discuss future “involvement”: e.g., whether or not they wish to see their interview transcripts, permission to contact in order to clarify anything that arises during data analysis, etc.
3. Thank interviewee for their participation in the research.
4. Present interviewee with their gift, if not already given to them.

Notes/Comments:

Interview Guide: Commissioners

Date: Time: Duration:

Interview/Interviewee Location:

Interviewee Name:

Job Title:

Treaty Table:

Which Party? First Nations ☐ Provincial ☐ Federal ☐ BCTC ☐

Other notes:

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1. Personal introductions.
2. Verbally review the terms and conditions of the consent form, including (among others) their right to stop the interview or to not answer a specific question.
3. Ensure consent form is signed or verbal consent given (for phone interviews).
4. Request permission to record the interview and explain what will happen with the transcript.

Interview Questions:

Part 1: Introductory Questions

1. Please state your name, job title and length of time in your current position.
2. What role did you play in the negotiations at the tables?
3. What section(s) of the treaty did you observe?

4. How long did your negotiations at your table last in total? How long was your own participation at the table?
5. Please describe your legal background and/or any negotiation training.
6. Any other relevant background information? (e.g., previous government positions held, negotiator at other tables, etc.)

Part 2: The Impact of Legal Decisions

1. What legal decisions on Aboriginal rights and title have had an impact on the negotiation tables you are part of?
2. In your view, which of these decisions have had the most influence in shaping the parties negotiate at your table?
3. How significant do you think decision X has been for the negotiations at your table? How do you think the different parties interpret decision X?
    i. How do their respective interpretations shape the way the parties negotiate at the table?
        1. How has it facilitated the way they have negotiated?
        2. How has it constrained the way they have negotiated?
4. Any other comments on how legal decisions influence negotiations? Are there other ways that legal decisions influence negotiations?

At end of interview:

1. Revisit consent form and its terms and conditions.
2. Discuss future “involvement”: e.g., whether or not they wish to see their interview transcripts, permission to contact in order to clarify anything that arises during data analysis, etc.
3. Thank interviewee for their participation in the research.
4. Present interviewee with their gift, if not already given to them.

Notes/Comments:

Appendix V: Legal Decisions on Aboriginal Rights and Title

What follows are brief summaries of all legal decisions on Aboriginal rights and title that the research participants highlighted in their interviews. For each decision, the author directs the reader to where they can find further information.

Issued Decisions

Calder v. Attorney-General of British Columbia [1973]

In *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313, the Supreme Court of Canada issued a landmark decision in the jurisprudence regarding Aboriginal rights and title. In this case, the Nisga'a sued the Attorney-General of British Columbia contending that the Crown had never extinguished their Aboriginal title over their traditional territory. The Nisga'a asked "the courts to recognize pre-existing title as a legal right and to declare that extinguishment required explicit action" (Tennant 1990, 219). While the *Calder* decision did not find in favour of the Nisga'a, it is significant because it established that Aboriginal title, in general, existed prior to the arrival of European settlers.

The *Calder* decision has been widely discussed in the literature (see Asch 2001; Christie 2006; Foster 2002; McKee 2000; Molloy 2000; Penikett 2006; Rotman 2004; Tennant 1990; Woolford 2005). See also Foster, Raven, and Webber (2007, forthcoming).

Guerin v. The Queen [1984]

Guerin v. The Queen [1984], 2 S.C.R. 335, involved the Musqueam Indian Band and found that the Crown has a fiduciary duty to First Nations in Canada. Further to this, the Supreme Court of Canada established that Aboriginal title is *sui generis*.

For an in-depth discussion of *Guerin*, see Christie (2006), McKee (2000), Rotman (2004), Tennant (1990) and Woolford (2005).

R. v. Sparrow [1990]

R. v. Sparrow, [1990] 1 S.C.R. 1075, again involving the Musqueam Indian Band, is notable for two main points: One, it established an Aboriginal right to fish protected under Section 35 of the Constitution Act, 1982. Two, it outlined under what conditions that the Crown may infringe upon and limit that Aboriginal right.

For further treatment of *Sparrow*, see Bell (1998), Christie (2005, 2006), Imai (2003a), Isaac (1993, 2001), Natcher (2001), Penikett (2006), Rotman (2004), Sharma (1998) and Woolford (2005).

R. v. Gladstone [1996]

Two Heiltsuk brothers were involved in *R. v. Gladstone*, [1996] 2 S.C.R. 723, for allegedly selling herring spawn-on-kelp without the appropriate licence. The Supreme Court ruled that the Heiltsuk had an Aboriginal right to a commercial herring spawn-on-kelp fishery. Further to this, the Court found that contrary to the Department of Fisheries and Oceans' assertions, government regulation of a resource does not in and of itself extinguish an Aboriginal right.

Finally, as *per* the Aboriginal right to fish in *R. v. Sparrow* and as would be seen in *British Columbia v. Delgamuukw* with regards to Aboriginal title, the Court ruled that the government may infringe this right when justified. The text of the *Sparrow* decision outlines under what conditions infringement is justifiable.

A brief discussion of different aspects of *Gladstone* can be found in Alfred (2000), Christie (2006), Harris (2000, 2005), Harvey (2005), Penikett (2006) and Point (2005).

Delgamuukw v. British Columbia [1997]

In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, the Gitxsan and Wet'suwet'en First Nations attempted to establish their Aboriginal title over approximately 58, 000 km2 in north-western British Columbia. The Supreme Court of Canada "confirmed aboriginal title does exist in British Columbia, that it's a right to the land itself—not just the right to hunt, fish or gather—and that when dealing with Crown land, the government must consult with and may have to compensate First Nations whose rights are affected" (British Columbia Treaty Commission 1999, 1).

Further to this, the decision also laid out the acceptability of oral testimony as evidence as well as the conditions under which the Crown may infringe upon Aboriginal title.

Delgamuukw is arguably the most extensively written about legal decision on Aboriginal rights and title (for a wide and varied discussion, see Alcantara 2007; Alfred 2000; Bell 1998; Borrows 1999, 2001; British Columbia Treaty Commission 1999; Christie 2003, 2004, 2005, 2006; Culhane 1998; Dacks 2002,

2004; de Costa 2003; Foster 2002; Imai 2003a; Isaac 2001, 2006; Lawrence and Macklem 2000; Mandell 1998; McKee 2000; McNeil 2005, 2006; Molloy 2000; Napoleon 2005; Natcher 2001; Penikett 2006; Roth 2002; The Delgamuukw/Gisday'wa National Process 2006; Woolford 2005; Yurkowski 2000).

R. v. Marshall [1999] and R. v. Marshall [1999]

Marshall refers to two related decisions that came out in 1999. The first *Marshall* decision (*R. v. Marshall*, [1999] 3 S.C.R. 456) found that the Mi’kmaq First Nation had a protected treaty right to catch and sell eels and that regulation of the eel catch would be an infringement of that treaty right. The second *Marshall* decision (*R. v. Marshall*, [1999] 3 S.C.R. 533) elaborated on the first decision and declared that the Mi’kmaq eel catch was still subject to federal law.

For more details on *Marshall*, see Christie (2004), Imai (2003a), Isaac (2001) and Penikett (2006).

Haida Nation v. British Columbia [2004] and Taku River Tlingit First Nation v. British Columbia [2004]

Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73 and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74 are two landmark cases that the Supreme Court of Canada considered together.

The significance of these cases was the Supreme Court finding that the Crown has a legal obligation to consult and, where appropriate, accommodate a

First Nation for any resource extraction/development that might occur on territory to which they may hold Aboriginal rights and/or title.

A more in-depth treatment of *Haida* can be found in Christie (2005, 2006), Dacks (2004), de Costa (2003), Foster (2002), Hudson (2005), Isaac (2006), Lanyon and Penikett (2003), McNeil (2005), Penikett (2006) and Woolford (2005). *Taku* has been discussed in Dacks (2004), de Costa (2003), Foster (2002), Lanyon and Penikett (2003), McNeil (2005), Penikett (2006), and Woolford (2005).

Huu-ay-aht First Nation et al., v. The Minister of Forests et al [2005]

In Huu-ay-aht First Nation et al., v. The Minister of Forests et al., 2005 BCSC 697, the Huu-ay-aht First Nation took the BC Minister of Forests, et al., to court alleging that their blanket use of forest and range compensation formulas breached their legal duty to consult and accommodate. The British Columbia Supreme Court found in favour of the Huu-ay-aht.

Please refer to the court ruling for further details on *Huu-ay-aht*.

R. v. Marshall; R. v. Bernard [2005]

In *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, the Supreme Court of Canada considered whether the Aboriginal defendants had an Aboriginal right to log as per the Peace and Friendship treaties signed in 1760 and 1761. The court convicted the defendants, finding they had no such right. The convictions were overturned on appeal.

For further information, see the Supreme Court ruling along with Christie (2006), McNeil (2006) and Isaac (2006).

Mikisew Cree First Nation v. Canada [2005]

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, 2005 SCC 69, was a case where the Mikisew Cree First Nation took the federal Crown to court due to lack of consultation over a highway development in their territory. The court found in favour of the Mikisew Cree. For more information see the ruling along with Christie (2006).

R. v. Morris [2006]

In *R. v. Morris*, [2006] 2 S.C.R. 915, 2006 SCC 59, the court found that members of the Tsartlip Indian Band have an Aboriginal right to hunt at night using illuminating devices as *per* their traditional hunting practices. See the ruling for further information.

R. v. Douglas et al [2007]

R. v. Douglas et al, 2007 BCCA 265 was an appeal of an earlier case in 2004 that saw members of the Cheam First Nation challenge that a Fisheries Act requirement that they fish with a licence was an infringement of their Aboriginal right to fish for food, social, and ceremonial purposes. The Crown agreed it was an infringement but argued the infringement was justified as per the test set out in Sparrow. The Cheam First Nation members were initially acquitted (in the 2004 case), but that ruling was subsequently overturned by the BC Court of Appeal.

See the ruling for further information.

Forthcoming Decisions

As the following two decisions are forthcoming, there is little information available about either.

Nuu-chah-nulth [forthcoming]

The Nuu-chah-nulth fisheries case trial began on April 24, 2006. In the case, the Nuu-chah-nulth claim they "have a constitutionally-protected right to fish commercially. The claim is based on Nuu-chah-nulth ownership of traditional territories and culture of fishing and trading in fish" (Nuu-chah-nulth Tribal Council 2007). The case is on-going. See the Uu-a-thluk website (Nuu-chah-nulth Tribal Council 2007): http://uuathluk.ca/index.htm.

Xeni Gwet'in [expected fall 2007]

In their court case, the Xeni Gwet'in are attempting to prove that they hold Aboriginal rights and title to the area of the Brittany Triangle and Xeni trap line, both within their traditional territory of the Nemaiah Valley (Friends of the Nemaiah Valley 2007b). The decision is expected in October or November 2007.

For further information, see the websites of Friends of the Nemaiah Valley (Friends of the Nemaiah Valley 2007a) and the Xeni Gwet'in: People of Nemiah website (Xeni Gwet'in 2007): http://www.fonv.ca/index.html and http://xenigwetin.com/, respectively.