Treaty Negotiations in British Columbia: Participants' Views

by

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B.A.,University of Victoria, 1982

A Thesis Submitted in Partial Fulfillment of the
Requirements for the Degree of

MASTER OF ARTS

in the Department of Political Science

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ABSTRACT

The issue examined in this study is what model of participatory decision-making is being used to bring the input of non-aboriginal third parties into the British Columbia Treaty Negotiation process. The methodology used in this study involved a series of interviews with federal, provincial and third party participants. The primary conclusions arising out of the study were threefold. First, the government respondents expressed the view that the treaty process follows a systematic approach to participatory decision-making and involves a combination of different models, including information-sharing, education and consultation. Second, third party participants felt that the participatory decision-making process is ad hoc and was established to address the needs of both governments. Third, all parties observed that the participatory decision-making model will evolve as treaty negotiations progress.

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INTRODUCTION

This study is concerned with two issues: what participatory decision-making model is being used by the provincial and federal governments to bring the input of non-aboriginal third parties into the British Columbia Treaty Negotiation Process and what is the benefit of using this particular model, from a participant perspective. This study puts forward the proposition that a combination of different participatory decision-making models have been utilized at one time or at different stages of policy development in this area to address complex policy issues. Treaties are one of the most comprehensive and significant areas of policy involving governments today.

This study examines the range of potential participatory decision-making models, describes the treaty-making process in British Columbia and assesses the model or models of participatory decision-making applied in treaty negotiations. In describing the treaty negotiation process, the study looks at whether or not a systematic model of participatory decision-making is being used and, if so, what is the nature of that model. Where does it fit along a continuum of participatory decision-making models from straight information-sharing to full consensus? The intent is to blend theoretical information with practical knowledge on the dynamics of the treaty process. The treaty process serves as a case study in the examination of models of participatory decision-making. The primary research is based on a series of interviews with individuals involved in or familiar with the British Columbia Treaty Process. The respondents include representatives of the Provincial and Federal governments, non-aboriginal third

parties and individuals, not included in the above categories but connected with consensus decision-making or the treaty process. The interviews seek to solicit the views of a sample of individuals on the practical function of participatory decision-making in treaty negotiations. In doing so, the interviews assess the applicability of consensus decision-making in the treaty negotiation process from a federal, provincial and third party perspective.

Treaty negotiations are a tripartite process involving the Province, the federal government and First Nations. Third parties are requested to provide policy advice and guidance on the Province's and federal government's approach to the negotiation of a diverse range of issues at the treaty table. The process is facilitated by an independent body called the British Columbia Treaty Commission (BCTC). Treaty negotiations follow a six stage process involving a diverse range of non-aboriginal interests and stakeholders. The treaty-making process in British Columbia affects such interests as business, industry, local government and environmental groups. Each interest group represents a set of values regarding the goals and outcomes of the treaty process.

Treaty negotiations involve several components designed to make the process more transparent and accessible to non-aboriginal third party interests and the public. This involves openness protocols, advisory committees comprised of third party and local government representatives and public education initiatives. There are a number of

participatory decision-making models which shed light on how the federal and provincial governments involve third parties in policy development processes. A number of these models have been used to engage non-aboriginal third parties in the negotiation of treaties. These models are designed to bring about the input of diverse stakeholders into the development of public policies.

Each model is designed to address different government objectives with regard to the shaping of government policy. First, information-sharing is used by governments to provide information to affected parties on emerging policy or changes to existing policy. Second, education processes are undertaken in situations where governments wish to increase the knowledge of third parties on public policy decisions and issues. Third, governments may gather information and perspectives to assist in making policy decisions. Fourth, consultation is a model used by governments to solicit the views of stakeholders in order to make more informed public policy decisions. Fifth, governments may bring together interested parties to review draft policies in an attempt to test the reaction of these participants to a potentially new or altered policy direction. The process is referred to as "testing reactions". Sixth, if a government is contemplating introducing a new policy to address a particular issue, it may bring together a group to help define the issues related to a particular area of policy. Seventh, the consensus or shared decision-making approach implies that it is possible to reconcile differing interests in order to achieve a common solution or agreement based on reasonable trade-offs and

collaboration. Eighth, governments may choose to establish an on-going process for interaction with the public and stakeholders on public policy matters.

The participatory decision-making process in treaties is designed to assist the provincial and federal governments to understand the impacts of potentially new or adapted policies. This paper describes the full range of participatory models but focusses primarily on the consensus approach given that it is a relatively new and a high profile process used in British Columbia in the area of land use planning. However, once the comparison is made between consensus and the treaty process, this study also refers to the general theory on the range of participatory decision-making outlined in Chapter 2 in order to identify where the treaty process fits into the continuum from information-sharing to shared decision-making.

The key questions addressed in this study are: Why is it important for the provincial and federal governments to seek the input of non-aboriginal third parties in treaty negotiations? How does the Province go about securing the views of non-aboriginal stakeholder interests on treaty issues? Is the participatory process used in treaties consistent with any existing theories of participatory decision-making such as information-sharing, education, reaction testing, idea generation or consensus, or a combination of models? Why has the current model of participatory decision-making been adopted for treaties? What is the reason for the difference in views between the

government and third party respondents regarding the nature of the participatory decision-making process in treaties? This study does not attempt to examine the nature of the actual negotiations at the treaty table nor the nature of aboriginal interests in the treaty process.

CHAPTER ONE

Treaty Negotiation Process in British Columbia

The purpose of this chapter is to describe the Provincial Government's policy and overall approach to treaty negotiations. It examines the historical context, defines the objectives of the treaty process, outlines the organization of the process, explores the nature of tripartite negotiations, reviews the rationale for participatory decision-making and identifies the main issues for negotiation.[1] This chapter helps to shape the overall study by providing a description of how the treaty process works, who is involved and how policy decisions are made in terms of non-aboriginal third party involvement. It will describe how the participatory decision-making model operates in treaties which will help to provide a basis for comparing the treaty approach with theories of public involvement.

A. HISTORICAL CONTEXT

The Royal Proclamation of 1763 recognized aboriginal rights for the first time in Canada. In 1876 the Indian Act gave special privileges and protections to Indians across Canada living on reserves and gave the federal government authority over the status designation of Indians as well as their band structure, activities, property rights, band assets and education. In 1884, the Indian Advancement Act gave some bands municipal powers and specified that only aboriginal people living on reserves would be able to receive certain federal grants.

First Nations have a long history of asserting their aboriginal rights. The first political action by aboriginal people in British Columbia was that of the north coast chiefs in 1887. Their goals of attaining recognition of title, achieving treaties and ensuring self-government proved to be the goals of all British Columbian Indians. Subsequently, in Indian political thinking the Royal Proclamation of 1763 became the critically important statement of political justice pertaining to these goals.[2] In the 1970's, many Indian bands carried out protests which related primarily to fishing rights or to Indian reserve matters. Blockades were used to close roads in order to disrupt the activities of non-aboriginal people in the province. This kind of protest continued into the 1980's and the 1990's.[3] In 1983, the Kaska-Dena blocked the activities of a timber company; in 1984, the Nuu-chah-nulth prevented logging access to Meares Island; and, in 1985, the Haida hindered logging on Lyell Island.[4]

A number of court cases have assisted aboriginal peoples in ensuring that their rights are recognized. Beginning with the 1973 Calder case in the Supreme Court of Canada, there have been many critical rulings that have recognized and, to a certain extent, defined aboriginal rights. The major cases include Guerin et al. v. the Queen (1984), Sparrow v. the Queen (1990) and Delgamuukw et al. v. B.C. et al (1993). Other important cases include Kruger and Manual v. the Queen (1978), Smith v. the Queen (1983) and Pasco v. the CNR Company (1989),

The following is a brief summary of the cases in date order from the earliest to the most recent.

In Calder v. Attorney General of B.C. (1973), the Nisga'a Tribal Council asked the courts to support their claim that aboriginal title had never been extinguished in the Nass Valley. The Nisga'a lost the case, however, three of the seven judges did recognize the concept of aboriginal title. The judges split on the issue of whether or not aboriginal title had been extinguished as a result of pre-Confederation proclamations and ordinances issued by the Governor of British Columbia. Because of this split, no clear law on the issue emerged from the case. Two of the justices concurred with Mr. Justice Judson's view that the passage of the legislative and executive acts demonstrated the exercise of jurisdiction over the land by a sovereign authority in a manner inconsistent with the continued existence of aboriginal title.

In contrast, Mr. Justice Hall, with whom two other justices also concurred, held that without a clear and plain intention to extinguish it in the legislative and executive enactments, aboriginal title continues to exist.[5]

...(per Judson) whatever property right may have existed, it had been extinguished by properly constituted authorities in the exercise of their sovereign powers. By Proclamation of December 2, 1858, the Governor of British Columbia was enabled to have Crown lands sold within the Colony and was authorised to grant any land belonging to the Crown in the Colony. These Proclamations and Ordinances reveal a unity of intention to exercise, and the legislative exercising of, absolute sovereignty over all the lands of British Columbia and such exercise of sovereignty is inconsistent with any conflicting interests, including one as to "aboriginal title".[6]

(per Hall) There is an aboriginal Indian interest usufructuary in nature which is a burden on the title of the Crown and is inalienable except to the Crown and extinguishable only by a legislative enactment of the Parliament of Canada. This aboriginal title does not depend on treaty, executive order or legislative enactment but flows from the fact that the owners of the interest have from time immemorial occupied the areas in question and have established a pre-existing right of possession. In the absence of a recognition that the sovereign intends to extinguish that right the aboriginal title continues.[7]

This decision gave some recognition to the fundamental principle of aboriginal rights for the first time in Canadian law and led to a change in federal policy. In August, 1973, the federal government responded to widespread demands for the resolution of outstanding claims with a policy statement which indicated that the government would negotiate settlements with aboriginal groups where rights of traditional use and occupancy had been neither extinguished by treaty nor superseded by law. These claims were later called "comprehensive" and thus the policy was named the Comprehensive Claims policy.[8]

The Kruger decision held that:

> the scope and content of aboriginal rights may vary from context to context according to distinct patterns of historical occupancy and use of land. The precise bundle of rights that a particular aboriginal community can assert may depend upon a number of factors, including the nature, kind and purpose of the use or occupancy of the land by the aboriginal community in question and the extent to which such use or occupancy was exclusive or non-exclusive.[9]

In the Smith case, it was determined that:

> aboriginal rights cannot be alienated other than by surrender to the Crown. The Guerin case dealt with some of the basic tenets of aboriginal title. Specifically, the decision of Dickson J. in Guerin stated that "Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown.[10]

In the Guerin case, the Musqueam Indian Band sued the federal Crown for breach of trust concerning 162 acres of reserve land that had been leased to the Shaughnessy Golf Club in the late 1950's. The Supreme Court of Canada ruled that the federal government, as trustee of the lands, had not leased the land on terms favourable to the band. The ruling was significant because it recognized pre-existing aboriginal rights both on reserves and outside reserves.

Both Calder and Guerin concluded that:

aboriginal title is one form of aboriginal right. This right is derived from the historic occupation and possession of tribal lands. It pre-dated colonization by the British and survived British claims of sovereignty.[11]

The Pasco decision confirmed that:

aboriginal rights are communal rights, although each member of the community has a personal right to exercise them.[12]

As a result of the 1990 Supreme Court of Canada Sparrow decision, and the 1991 Supreme Court of B.C. and 1993 B.C.Court of Appeal decisions on Delgamuukw, the Province is under a legal obligation to consult with First Nations whenever a proposed land use might infringe upon aboriginal rights. In the Sparrow case, a member of the Musqueam Indian Band appealed his conviction on a charge of fishing with a longer drift-net than permitted by the band's fishing license under the Fisheries Act.

According to the Sparrow decision:

the Crown's fiduciary obligation arose not only from the unique nature of Indian title but also from the historic powers and responsibilities assumed by the Crown such that its fiduciary responsibilities relate not only to surrendered lands but also to the Crown's treatment of all aboriginal rights. Sparrow also confirms that aboriginal rights in existence as of 1982 were recognized and affirmed by section 35 (1) of the Constitution Act of 1982 and now enjoy constitutional protection.[13]

The Delgamuukw appeals confirmed that:

The Common Law will recognize as aboriginal rights those practices and traditions which were integral to the distinctive culture of an aboriginal society at the date sovereignty was asserted in B.C. in 1846.[14]

The main message arising out of the above cases has been that the solution can best be found through negotiation, not litigation. Mr. Justice MacFarlane, in his Appeal Court comments in the Delgamuukw case, stated that:

> The parties have expressed willingness to negotiate their differences. I would encourage such consultation and reconciliation, a process which may provide the only hope of an early and satisfactory agreement which not only gives effect to the aspirations of the aboriginal peoples but recognizes there are many diverse cultures, communities and interests which must co-exist in Canada. A proper balancing of all those interests is a delicate and crucial matter.[15]

The public and the courts have made it clear that the matters in contention are properly resolved politically, not by confrontation or violence, and not by resorting to the legal process. Whatever the issues may be, it is crystal clear that any new relationships must be achieved through voluntary negotiation fairly conducted in which First Nations, Canada and B.C. are equal participants.[16]

Paul Tennant states in his book, Aboriginal Peoples and Politics, that:

> By the end of 1989, most of the senior officials had concluded that the province's refusal to negotiate was no longer politically or legally defensible.[17]

Historically, British Columbia chose not to participate in treaty negotiations between the federal government and First Nations. Jack Weisgerber stated in the debates in the House on the Treaty Commission Act that:

> There has been in British Columbia, over the last 125 or 130 years, a strategy of denial. Successive governments have looked at land claims, at the enormous complexity in British Columbia and at the very serious complexities to resolution of land claims. They have looked at the fact that there are 200 bands or more in British Columbia and a whole series of tribal councils and languages.[18]

The strategy of delaying or avoiding land claim settlements was adopted by the Liberal government, the Conservative government, coalition governments, the Socred government and the NDP government, 1972-75.[19] Part of the reason for this denial arises out of the provincial perspective that the federal government has a fiduciary obligation in relation to aboriginal people in Canada. Under the Canadian Constitution, the Federal Government is responsible for "Indians, and lands reserved for Indians". Therefore, the federal Government has the primary obligation to conclude treaties. However, the Provincial government has an interest in how the outstanding issues of aboriginal claims are resolved in British Columbia. This legal obligation has created uncertainty for both the Government of British Columbia and First Nations who are being asked to respond to consultation requests from Government on a vast range of issues.

B. EVOLUTION OF THE B.C. TREATY PROCESS

The first treaty process entered into in British Columbia was the Nisga'a claim. The federal government and the Nisga'a First Nation initiated negotiations in 1976 without provincial participation. The Province agreed to join the negotiations in 1990 and, in 1991, the three parties signed a Framework Agreement as a basis for broadened negotiations of all outstanding issues in the Nisga'a claim. In early 1993, a series of consultations were commenced with non-aboriginal third parties which have continued to the present day. While the Nisga'a negotiations were proceeding, there was considerable unrest in the summer of 1990 on the part of other First Nations in the province. First Nations initiated road and rail blockades in an effort to assert their aboriginal rights. They wanted the provincial and federal governments to listen to and acknowledge their

aboriginal title and rights.[20] At that time, the Premier's Council on Native Affairs recommended that the British Columbia Government should create a process for resolving aboriginal land claims as quickly as possible.[21] In October, 1990, First Nations leaders met with the Prime Minister and the Premier and Cabinet of British Columbia requesting that a tripartite task force be established to create a treaty negotiation process in British Columbia.

On December 3, 1990, the federal and provincial governments and the leaders of First Nations established a task force that would develop a negotiation process in response to the interests of the many First Nations in B.C. who expressed a desire to negotiate settlements.[22] Two members were appointed by the Government of Canada, two members by the Province and three members by the leaders of First Nations in British Columbia. The task force deliberated on this issue for over five and a half months which included an invitation for anyone with experience in similar negotiations to offer advice and proposals. The terms of reference required the task force to make recommendations on the scope of negotiations, the organization and process of negotiations, interim measures and public education.[23] On June 28, 1991, the task force reported with 19 recommendations including a recognition of aboriginal rights and self-government. The First Nations Summit, Canada and British Columbia accepted all of the recommendations.

One of the key recommendations was to establish the British Columbia Treaty Commission as an independent *Keeper of the Process.*[24] On September 21, 1992, the

Commission was officially formed when the Prime Minister of Canada, the Premier of British Columbia and the leaders of the First Nations Summit signed the British Columbia Treaty Commission Agreement.[25] Section 2 of the Agreement committed the then Minister of Aboriginal Affairs to introduce legislation into the B.C. Legislature to establish the Treaty Commission as a legal entity. In 1993, the province passed Bill 22, the Treaty Commission Act, to enable the creation of the B.C. Treaty Commission. The companion piece of federal legislation, Bill C107, the B.C. Treaty Commission Act, passed third reading on December 14, 1995, and received Royal Assent on December 15, 1995.

C. OBJECTIVES OF THE TREATY PROCESS

The Province's general objective for negotiations is to achieve fair, affordable, long-term solutions that respect the rights and reflect the interests of all British Columbians. The objective of the federal government is similar but is concerned with the rights and interests of Canadians as a whole. The long-term vision for modern treaties in British Columbia is based on eight principles.[26] These are as follows:

1. Address existing legal issues regarding rights to the use of Crown lands and resources in British Columbia and to define self-government powers.
2. Ensure affordability of treaties and increase the province's economic strength.
3. Ensure a fair distribution of opportunities throughout the province.
4. Provide access to quality programs and services for all residents.

5. Recognize and respect existing legal rights of all citizens.
6. Encourage greater participation of aboriginal people in the economy.
7. Manage public lands and resources in an effective and sustainable manner.
8. Ensure durability of treaties over time and the overall fit within the Canadian Constitution.

D. ORGANIZATION OF THE TREATY PROCESS

The organizational structure and operation of the treaty process is made up of several components. This section of the chapter provides a brief overview of the key components of the treaty process, including the role of the British Columbia Treaty Commission, mechanisms for management of the process and the six stages of negotiation.

British Columbia Treaty Commission (BCTC)

According to the Task Force:

> Its role will be to ensure that the process is fair and impartial, that all parties have sufficient resources to do the job, and that the parties work effectively to reach agreements.[27]

The British Columbia Treaty Commission is an independent body of five commissioners appointed by the Federal Government, the Provincial Government and the First Nations Summit, an umbrella organization of First Nations and Tribal Councils. Commissioners were appointed as of April 15, 1993. The original members of the BCTC were: C.J. (Chuck) Connaghan, Chief Commissioner, Art Sterritt, Commissioner, Lorne Greenaway, Commissioner and Barbara Fisher, Commissioner. Chuck Connaghan left the BCTC as of

December 31, 1994. Barbara Fisher assumed the role of Acting Chief Commissioner until May 1995. Alec Robertson, Q.C., was appointed the new Chief Commissioner effective May 16, 1995. The current members in addition to the Chief Commissioner are Barbara Fisher, Wilf Adams, Peter Lusztig and Miles Richardson.

The role of the Treaty Commission is to facilitate the negotiation of treaties and, where the parties agree, other related agreements. The parties at each table (the First Nation, Canada and British Columbia) conduct their own negotiations. The BCTC does not play a direct role in the actual negotiations or in the participatory decision-making process used in treaties. However, as part of its monitoring function, it does ensure that public information sharing is established and there are mechanisms in place for involving non-aboriginal third parties in the treaty process.

The Treaty Commission is responsible for overseeing the six-stage treaty negotiation process. The Commission reviews the applications from First Nations to enter treaty negotiations, accepts the First Nations into the process and brings the parties together for an initial meeting. It ensures that a negotiating table has been established in the region of the province in which the First Nation resides once all three parties are ready to negotiate. Once negotiations have commenced, the main function of the Commission is to ensure negotiations progress at a timely pace. The key activities of the Commission include: allocating funds provided by Canada and British Columbia through loans and contributions to First Nations; monitoring the progress of each negotiation through the six

stages; assisting the parties to obtain dispute resolution services where requested; and, reporting to the Principals and the public.[28] Since the Treaty Commission commenced operation on December 15, 1993, it has accepted Statements of Intent from over fifty First Nations.

In the first six months which followed the establishment of the BCTC, the Commission's initial focus was on setting in place the necessary policies and procedures governing the operation of the Commission. Once these policies were set in place, the Commission proceeded to accept First Nations into the process.[29]

In its second year of operation, the main task of the Commission was distributing funds to First Nations to help them prepare for the negotiation of Framework Agreements. As the Treaty Commission enters its third year of operation, its activities will increasingly focus on monitoring negotiations, a significant and important task. The Commission will still accept applications from First Nations to enter the process and declare the parties ready to negotiate. However, since some negotiations will have reached or be concluding the Framework Agreement stage, substantive negotiations will begin.

The purpose in describing the above list of the functions of the B.C. Treaty Commission is to point out that, as "keeper of the process", the Commission will place emphasis on different tasks as treaty negotiations progress. As First Nations move into various stages of the negotiations so the role of the Commission adapts to the progress of negotiations.

When applications are received in large numbers by the Commission, which has been the case up until now, its main task is to declare the First Nations ready to negotiate and allocate funds. As more First Nations actually become engaged in substantive negotiations, the focus of the Commission shifts to monitoring the negotiations and ensuring that the negotiations progress at a reasonable pace.

Six Stage Treaty Negotiation Process

According to the B.C. Task Force:

The proposed (six) stages of negotiations are designed to assist the parties to progress rapidly, without compromising the goal of achieving lasting agreements.[30]

Stage 1: This stage starts the treaty process. A First Nation submits an application to negotiate a treaty to the BCTC. The purpose of the Statement of Intent is twofold: a) to identify the First Nation and the people it represents; and, b) to describe the general geographic area of the First Nation's traditional territory. This is the area that the First Nation has traditionally used and occupied.

Stage 2: Within 45 days of receiving a Statement of Intent, the BCTC sets up a meeting involving the three parties - First Nation, the Federal Government and the Provincial Government. The purpose of the meeting is to review criteria for determining readiness to negotiate; discuss the research requirements in preparation for negotiations; and, identify the issues of concern to each party.

Stage 3: The three parties negotiate a Framework Agreement, which identifies the topics and the objectives of the negotiations. The Framework Agreement also establishes a timetable and any special procedural arrangements for the negotiations. This is one stage of the process which involves non-aboriginal third parties.

Stage 4: During this stage the three parties begin substantive negotiations on issues identified in the Stage 4 workplan. The goal is to develop sub-agreements on major issues for negotiation that will form the basis of the final treaty. The outcome of this stage is the conclusion of an Agreement in Principle which contains the major agreements on the full range of subjects under negotiation. This is a critical stage of treaty negotiations where linkages to the participatory decision-making process must be established.

Stage 5: The three parties negotiate a final treaty which incorporates the principles and agreements reached in the Agreement in Principle. At this time the parties also finalize how the treaty will be implemented.

Stage 6: During this stage the actual treaty provisions are implemented. Each of the parties establishes a process for ratifying the final agreement to ensure that the agreement is legally binding and long lasting. Non-aboriginal third parties and local government representatives play essential roles in the implementation of final treaties.

During the negotiation of the Framework Agreement, the Agreement in Principle and the final agreement, the Province's ratification process includes extensive consultation with

non-aboriginal third party interests and the public. All final agreements will be debated and ratified by the B.C. legislature.

Management of the Treaty Process

The Province has adopted a model for the management of the treaty process which links the actual negotiations with the development of treaty policies. Negotiators do not actually draft the treaty policy but they are kept aware of the progress made in policy development. A separate group of staff identify the critical treaty issues and prepare the policy and negotiating instructions. This ensures that there is accountability between the policy development process and the actual negotiations. The federal process of policy development is more complex given that policies are generally developed in Ottawa and communicated to regional staff in British Columbia. While the linkages between negotiators and policy staff exist, they are not as easily identified given the complex nature of the federal system. Provincial and federal negotiators have been designated to carry out the province's role in treaty negotiations. Negotiation teams have been created based on geographical regions and the cultural groupings of First Nations.

One key issue related to treaty policy development is how to integrate this process with the participatory decision-making model within treaty negotiations. Government must solicit input from non-aboriginal third parties and local government once the mandates have been developed in draft but before they are finalized by Cabinet.

E. NATURE OF TRIPARTITE NEGOTIATIONS

This section explores the key issues associated with the nature of treaty negotiations involving the three parties: Province, Federal Government and First Nations. A tripartite table is set up for each negotiation, although a federal or provincial team may be required to handle more than one individual negotiation at the same time. In tripartite negotiations, the parties come to agreement, through negotiation and conflict resolution, on the issues to be negotiated, the pace of negotiations and procedures for negotiation. The teams develop joint workplans which define how the three parties are going to reach a final treaty. The workplans include the topics to be negotiated, the timelines for the negotiation of each topic and the lead roles and responsibilities.

The negotiations proceed on a topic-by-topic basis. As the negotiation of each new topic commences, each party presents a statement of its primary interests related to that topic. There is a considerable amount of debate on most topics depending on the sensitivity of the issue. The parties may choose to create a small working group to define the issue in question, identify strategies and develop a proposal. Each party is primarily concerned with the interests of its own constituents. Tripartite discussions continue until the parties reach agreement on how to resolve an issue. The proposed resolution to an issue is set out in a document called a sub-agreement which is a tripartite agreement containing language that all parties have discussed and endorsed.

There are no facilitators or mediators in tripartite treaty negotiations. The facilitation of negotiations occurs through the three-way debate on issues. It is clear that all parties must agree on a particular approach to an issue before the matter can be considered resolved. There is a potential for standoffs if the parties cannot agree. However, the desire to conclude treaties may motivate the parties to address or avoid standoffs.

F. RATIONALE FOR PARTICIPATORY DECISION-MAKING

This section explains why the Provincial Government has chosen to involve non-aboriginal third parties and local government in the treaty negotiation process and what model is being used to achieve this. According to the principles of representative democracy, the Governments of British Columbia and Canada represent all the citizens of British Columbia and Canada respectively at the treaty negotiation table. Making information on the negotiations available to third parities and the public is critical to ensuring the smooth negotiation and implementation of treaties. This has to be balanced against the need, in some circumstances, to preserve the confidentiality of aspects of the negotiations. The successfulness of implementing treaties depends, to a large extent, on the level of community and third party support and buy-in. This section provides a set of definitions for key terms, traces the evolution of an advisory body established to give advice to the Province on treaties into a federal-provincial committee, identifies the rationale for creating such an entity and describes how the present-day federal-provincial Treaty Negotiation Advisory Committee and Regional Advisory Committees operate.

What does the term third party mean? The term "third party" has been used traditionally to describe persons or groups, other than the negotiating parties, who have an interest in or are affected by two-party negotiations. While not accurate in British Columbia, where treaties will be negotiated by three parties, the term "third party" is commonly used to describe interest groups or stakeholders directly affected by treaty and pre-treaty negotiations.

Why is consultation with these groups necessary? Aboriginal issues in British Columbia are very complex and surrounded by a sensitive history of contentious relationships between aboriginal and non-aboriginal peoples. Establishing a new relationship and negotiating workable and lasting treaties that will create a "good neighbour environment" in the Province requires widespread public involvement and support. This is being accomplished partly through public information and education initiatives, which the B.C. Claims Task Force recommended the governments and First Nations undertake jointly, and the creation of advisory groups comprised of third parties directly affected by negotiations.

What are the target groups for the participatory decision-making model? The target groups include organizations representing the forestry; energy, mines and petroleum resources; fisheries; tourism industries; labour organizations; business groups such as Chambers of Commerce; environment, outdoor recreation and wildlife organizations; local governments; and, private firms and government agencies responsible for province-wide

infrastructure such as telephone, hydro and transportation lines. Since the Province agreed to join treaty negotiations in the fall of 1990, non-aboriginal third parties have demanded participation in the process. The Province engaged in a dual provincial-regional consultation process for the Nisga'a treaty negotiations which consisted of a Provincial Treaty Advisory Committee on Land Claims and a regional consultation process.

In the spring of 1992, provincial and federal officials recommended that a working group of the existing provincial advisory committee work with provincial and federal officials to formulate an improved provincial advisory structure that would involve both governments, provide a more meaningful role for third parties in negotiations and recognize the need for local consultation. The working group examined consultation models that had been successful in other negotiations, including the Canada-U.S. Free Trade negotiations, with a view to recommending a joint provincial-federal process that would meet the needs of non-aboriginal third parties and be acceptable to both governments. The working group considered consultation processes used for the Pacific Salmon Treaty Negotiations and other international fisheries negotiations, some of which allowed third party observers in the negotiating room.

Why is consultation necessary at both the provincial and regional level? The complexity and scale of modern-day treaty negotiations in British Columbia is unprecedented in Canada and elsewhere. There are many unanswered questions of policy and implementation that can only be resolved through the negotiation process itself. This

creates a level of uncertainty and anxiety among groups that demands their involvement at a very early stage. The involvement and support of provincial groups, which in British Columbia constitute powerful public lobbies, will be necessary to provide a foundation for broad public support. The provincial groups can also lend sectoral expertise, resources and networks to assist both governments in negotiations. These groups also have the potential to assist government in consensus-building and co-ordination as multiple negotiations commence. The involvement and support of regional groups is also essential to provide knowledge and expertise of local conditions and interests and to assist in building the grassroots public support needed for successful negotiations.

According to the B.C. Task Force report, the federal and provincial governments have the difficult task of properly representing the full range of non-aboriginal interests in treaty negotiations. As treaties will cover a wide variety of issues in the area of lands, natural resources and self-government, they will significantly affect British Columbians and other Canadians.[31] The current participatory decision-making model in treaties was developed based on input from non-aboriginal third parties. Potential members of the Treaty Negotiation Advisory Committee were brought together to help create a mechanism for soliciting third party input. Through this process, all parties compromised to establish the existing decision-making structure.

The Task Force suggested that, at the Framework Agreement stage, the parties may wish to consider special procedural arrangements to involve non-aboriginal interests during the

negotiations.[32] In the past, non-aboriginal interest groups have criticised the federal and provincial governments for not undertaking adequate consultation or not making sufficient efforts to keep them informed during negotiations. This perspective has resulted in demands by third party interests for a seat at the negotiating table, or for the opportunity to observe negotiations.[33] The provincial treaty model of participatory decision-making has two components: provincial advisory process and regional advisory process.

Provincial Advisory Process

As part of the consultation process, the Governments of British Columbia and Canada have established the Treaty Negotiations Advisory Committee (TNAC). TNAC is a cross-sectoral committee, co-chaired by the provincial and federal governments with a co-operative government secretariat. It is designed to provide province-wide policy and negotiating advice to both governments on general matters and sectoral issues related to treaties. This committee is made up of 31 representatives from all major provincial interest and industry groups, including: organized labour, the business community, forestry, fish, wildlife and environmental groups and the Union of British Columbia Municipalities. Members are appointed jointly by the federal and provincial ministers from nominees of organizations. TNAC is kept informed of the process and progress of treaty negotiations.

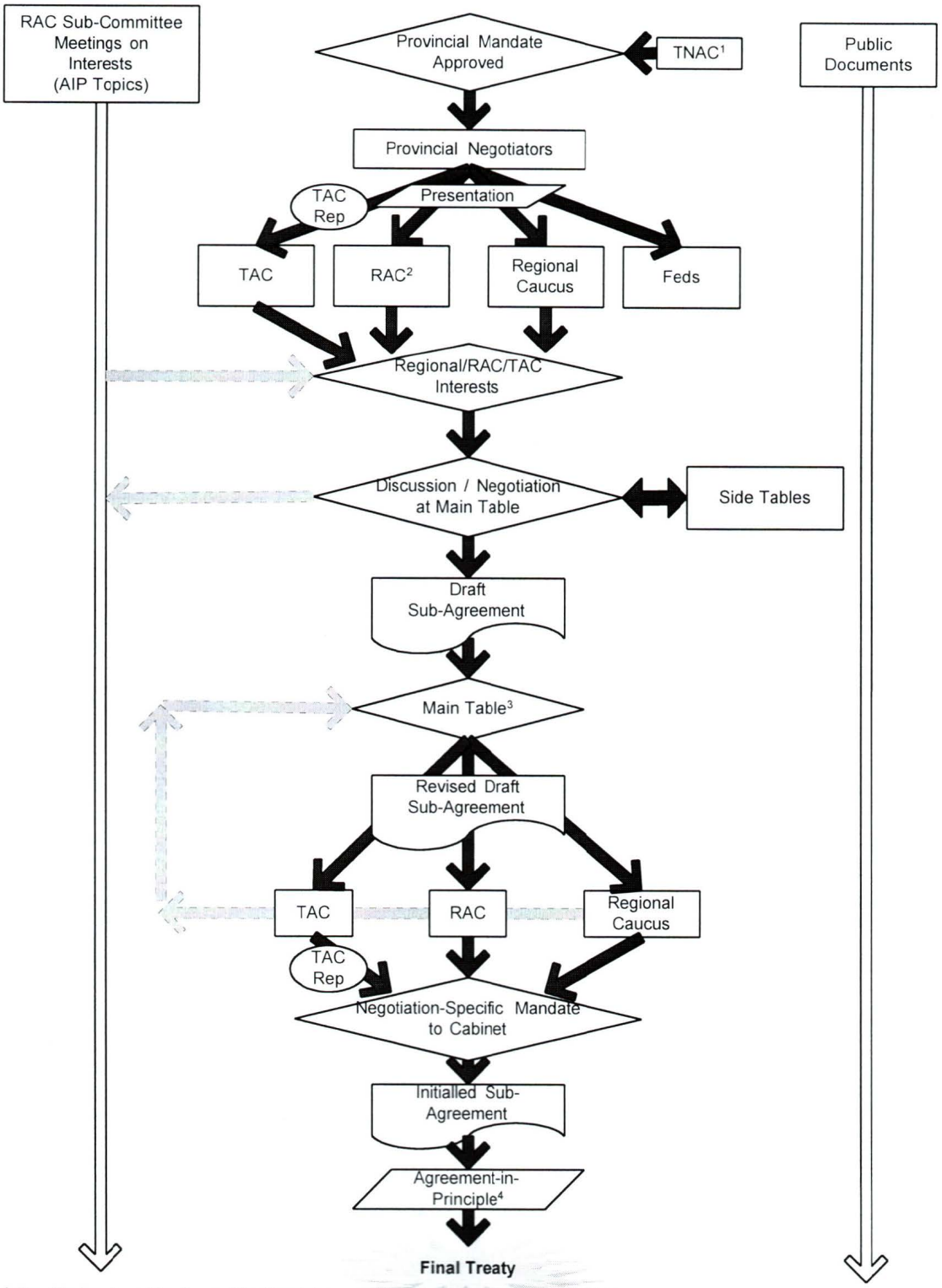
TNAC meets as a group, commonly referred to as the Main Table, and has also established sub-committees to address specific issues such as: Land and Forests, Fisheries and Governance. The provincial and federal governments update TNAC on the status of negotiations and policy development. The critical issue in promoting the effectiveness of TNAC is to allow the members sufficient time to provide comprehensive and reasoned comments on treaty policies. Each sector representative needs to take the specific policies back to their respective provincial organizations and constituencies to solicit comments. In most instances, the feedback on treaty policies is received from TNAC members on a sector by sector basis. However, on some issues, the views of this diverse group merge and provide a common perspective. For example, the issue of certainty in treaties and the extent of aboriginal jurisdiction have been addressed by one overarching TNAC opinion or position.

Regional Advisory Process

Local or regional advisory committees (RAC's) have been established in the areas where treaties are being negotiated to provide advice to provincial and federal treaty negotiators on issues of a regional and local nature. RAC's represent the core component of the participatory decision-making model in treaties. At RAC meetings, negotiators solicit the interests of the non-aboriginal third party representatives and bring forward options for discussion.

The mandate of RAC's is to provide a means for local industries, governments and key interest groups to receive information from governments on specific negotiations and to provide advice on aspects of negotiations that directly affect them. Input from these advisory bodies will ensure that local interests and issues are represented at the table by the negotiators. Figure 1 outlines the process for consultation and information-sharing with RAC's. RAC's operate differently than TNAC. The main difference is that TNAC reviews province-wide treaty policies or mandates, while RAC's provide advice to negotiators regarding the development of local and regional-based solutions within the parameters of provincial policy. RAC's do not provide direct advice on the shaping of provincial policy only on how provincial policies are interpreted to develop components of specific treaties.

FIGURE 1.0
CONSULTATION/INFORMATION-SHARING: RAC/TAC



[1] Provide input on Province-wide Mandates
[2] RAC's role to provide regional/local interests to provincial and federal Governments
[3] Updates to RAC/TAC on regular basis
[4] Consultation Process will be expanded to include AIP

To use one example, the objectives of the Northern Interior Regional Advisory Committee are as follows: to provide advice and information to the federal and provincial negotiators on treaty negotiations in the Northern Interior, including Lheit lit'en, Yekoochet'en, Carrier Sekani Tribal Council, Cheslatta Carrier Nation and Tsay Keh Dene; to ensure that the interests and expertise of economic, resource, environmental and social constituencies and local communities are understood and taken into account; to contribute to treaty arrangements which are workable and lasting and which have the support of affected communities in the Northern Interior; and, to act as a vehicle for information exchange among the various affected interests and the federal and provincial negotiators.

The RAC members are responsible for defining their constituents and ensuring accountability to them for sharing information on the progress of negotiations and issues being negotiated. RAC members should establish their own procedures within their constituencies to exchange relevant information and ensure that they understand the interests and concerns of their constituents. The roles and responsibilities of federal and provincial negotiators with respect to RAC's are to: solicit advice on how the interests of RAC members may be impacted by the topics under discussion; look for innovative and cost-effective ways to inform members of the RAC and working groups about the progress of treaty negotiations; and, ensure there is meaningful and timely dissemination of information and material to RAC members prior to all meetings.

RAC members engage in critical and detailed debate on how issues will affect their communities. According to the diagram, RAC's play a role at several points in the tripartite negotiation of each topic that will shape the final treaty. RAC's compile and express their key interests by treaty topic, give advice on which strategies are most appropriate for their region, review agreements between the three negotiating parties to identify their local impacts and participate in the design of implementation plans for final treaty settlements. It is at the RAC table that dynamic debate will occur on how treaties will be settled. The function and role of RAC's is still evolving. Most RAC's are entering or completing a significant information-sharing phase with both governments. It is envisioned that RAC's will provide fairly detailed input as negotiations progress.

Public Education and Openness

The Task Force recommended that the parties jointly undertake a public information program for each set of negotiations.[34] The B.C. Government has pressed for open negotiations as the rule and closed negotiations as the exception in order to ensure that information is shared as widely as possible. As negotiations proceed, regular updates, public fora and general public information are made available to inform the public as the parties reach milestones in negotiations. These meetings, fora and information exchanges represent one component of the participatory decision-making model in treaties. The public interest has been focused on how public money is being spent and whether the provincial and federal governments are adequately representing the interests of all British Columbians at the treaty table.

The Provincial Government's approach to the openness of treaty negotiations is designed to respond to the public's need to clearly understand the treaty negotiation process; to increase the responsiveness of the negotiators to the general public; to increase the accountability of provincial officials to public interests; to achieve a better informed decision-making process; and, to facilitate the support for ratification of Final Agreements. The openness arrangements in treaties are guided by four main principles. The first principle recognizes that it is important to obtain a balance between the development of trust amongst the parties to the negotiations and the need to develop public confidence in the treaty negotiation process through continued education, access to the process and the flow of information. The second principle pertains to the need to have an open process where confidentiality is only applicable in exceptional circumstances and within established parameters as set out in the openness protocol for each negotiation. The third principle emphasizes that public confidence facilitates the implementation of treaties. The fourth principle acknowledges that there is a need to communicate complete and accurate information to the public and the media.

Treaty negotiations are supposed to be carried out as a transparent process. Transparency refers to the ability of the public to see how the parties are negotiating treaties. The parties must agree that the public will know who is on each negotiating team; the agenda for each negotiating session; when and where negotiations will take place; and, the contact persons for each party. As mentioned earlier, this is primarily a form of information-sharing.

A study conducted by ARA Consulting on the social and economic impacts of treaty settlements concludes that:

> Community buy-in and support is critical to the success of treaties. The level of non-indigenous support for, or acceptance of, treaty negotiations and settlements is closely related to the availability of information. In the early years of the modern treaty process, negotiations proceeded in secret and with little public education or consultation with affected interests.[35]
>
> This served to heighten uncertainty and raise fears about the likely outcomes. In those areas - the Yukon Territory being a very good example - where the public was kept informed of the progress of the discussions, public opposition and third-party concern declined substantially.[36]

As part of the approach to opening up negotiations, the parties agree to hold regular tripartite public information meetings in all regions of the province where negotiations are in progress. Negotiators attend public information meetings to highlight the milestones in the regional negotiations and to answer specific questions from the public on the negotiations in their respective regions. The goal of this sort of information-sharing is to raise the comfort level of the public regarding why the Province is entering into negotiations and how the Province is going about treaty negotiations, thereby facilitating the acceptance of treaties.

Other Components of Participatory Decision-making in Treaties

One of the other key provincial elements of the participatory decision-making process associated with treaties are the Premier's Working Sessions on treaty negotiations. To date, Premier Harcourt has held two policy tables with non-aboriginal third parties, key

stakeholders and local government to obtain direct advice on issues pertaining to the treaty negotiation process in British Columbia. The first one was held on June 16, 1995, and the second one on December 1, 1995.

The agenda and format for the sessions were developed by an advisory group of third parties and local government. This group recommended the issues to be discussed and the format for addressing the issues. The material arising out of these sessions is packaged as action items which the provincial government has committed to consider in light of the current treaty process. Third party representatives chair working sessions on individual issues. Their role is to facilitate the discussion on a given issue, identify the range of views at the table and present a summary of recommended actions. While local governments are represented on TNAC and at the above policy meetings, they have also requested and created a separate process to address their unique interests.

Local Government Involvement

Local governments in British Columbia have maintained from the outset of provincial involvement in treaty negotiations that they have a special interest in the negotiations beyond that of third parties. This special interest is based on the fact that municipalities represent a delegated level of government whose taxation base and citizens will be affected by treaties. It is this different interest that requires a unique process for consultation with local governments. A Memorandum of Understanding (MOU) was signed in March, 1993, between the Province and the Union of British Columbia

Municipalities. This MOU recognizes the special interests and role of local governments in treaty negotiations. The Province and the Union of B.C. Municipalities signed a Protocol Agreement in September 1994 to implement the MOU.

Local Treaty Advisory Committees (TAC), made up of local government representatives, have been established for each community. These committees act as a caucus to provide input into the treaty negotiations. TAC (local government) representatives have been included as members of the regional caucuses comprised of provincial government staff, subject to the same responsibilities and constraints as any other member of that caucus. Table 1 illustrates the main components of the participatory decision-making model in treaties.

TABLE 1

Overview of Participatory Decision-making Model in Treaty Negotiations

Key Step (s)	Stage of Negotiations
Identification of key sectoral stakeholders	Table declared ready to negotiate
Information workshops with sector representatives on the treaty process	Following Readiness
Establishment of Regional Advisory Committees (RAC's)/Treaty Advisory Committees (TAC's)	Beginning of Framework Agreement stage
Establishment of Terms of Reference/ selection of chairperson for RAC's	Beginning of Framework Agreement stage
Information sessions with RAC's to define the key issues	During Framework Agreement stage
Review of provincial interests papers, prepared by TNAC, with RAC's	During Framework Agreement stage
Review of draft Framework Agreement with RAC's/TAC's	End of Framework stage
Discussion of substantive negotiation topics with RAC's	Agreement in Principle (AIP)stage
Review of draft sub-agreements	Agreement in Principle stage
Sharing of information between RAC members and their constituencies	Ongoing
Review of final treaty	Final Treaty stage
Discussion of Implementation	AIP to Final Treaty stage

G. CONCLUSION

The treaty negotiation process is complex involving three negotiating parties, multiple issues and a diverse range of interests. It requires a delicate balance between the need to address as many non-aboriginal third party interests as possible and the need to make significant progress towards the finalization of treaty settlements. Both the federal and provincial governments recognize the importance of third party involvement in the negotiation of treaties. There needs to be adequate "buy-in" from local communities and non-aboriginal stakeholders in order to make treaties work. As the Treaty Commission observed:

> This is an historic process. Finally, First Nations have been able to sit at a table with senior representatives of Canada and British Columbia, and begin to discuss issues which have been unresolved for over 140 years.
>
> The process provides a solid structure for negotiations, but the relationships upon which this process is based are fragile. This makes the process itself fragile.[37]

CHAPTER TWO

Participatory Decision-making Models

The purpose of this chapter is to describe the range of participatory decision-making models used to assist governments and other authorities in developing public policy. This chapter is an important component of the thesis as it provides a general theoretical context within which to review the participatory decision-making approach used in treaties. These models form a continuum from information-sharing to shared decision-making. A critical issue which has emerged in the debate on participatory decision-making models is what constitutes effective public involvement. By identifying the range of potential models, the reader is able to ascertain why a participatory decision-making model is being used in the treaty negotiation process and where it sits on this continuum.

A. RATIONALE FOR PARTICIPATORY MODELS

A fundamental question in looking at participatory decision-making is why do governments initiate public involvement processes? The basic objective of using participatory models is to develop better public policies that lead to more informed decisions. "Public involvement processes should provide decision-makers with a better understanding of facts, values and opinions pertaining to a policy issue."[38]

Not only does public involvement inform decision-makers, it also informs the public of the facts and issues. If people feel that their views, interests and concerns have been heard, they are more likely to support the decisions of governments. The public wants to

know that their opinions and comments have had an impact on public policy choices. The public and stakeholders are seeking greater input into the formulation of public policy decisions which affect them and their communities. The public is becoming less inclined to accept the traditional unilateral decision-making processes of governments or what has been referred to as the "customary promotion of single solutions" given that these methods exclude them from influencing public policy.[39] Ronald Doering concludes that:

> Everywhere people are demanding more meaningful input into decisions that directly affect them or the place where they live. In making these decisions we will have to find ways to accommodate deeply held and differing values.[40]

According to the B.C. Round Table on the Environment and the Economy:

> There is a critical need to rethink the current, conventional approach to decision-making in British Columbia. British Columbians are becoming increasingly well-informed about environmental, economic and social issues. Many question the ability of government to represent the full range of their interests and values. Existing decision-making processes are often considered to be closed, ad hoc and arbitrary.[41]

Public input into government decision-making is bringing a new dimension to the notion of democracy. Participatory decision-making processes are intended to supplement, rather than replace, parliamentary democracy. The demand for more input into public decision-making may, in part, arise out of dissatisfaction with representative democracy. There may be a perception that the only way to address this issue is to participate more directly in the decision-making processes of government. "Wengert (1976) proposed that the stimuli for the increase in participation were dissatisfaction with representative democracy resulting from the expansion and centralization of government, and the policy-makers' dependence on professionals resulting from the increased use of technical

and scientific bases for decision-making."[42] Governments have increasingly realized that they can make decisions that are more credible by involving external expertise.

> It is becoming apparent that individuals and groups may be more knowledgeable than government about certain issues as a consequence of their own background or experience. The public is also more informed about issues through education, media coverage, and access to information which, until recently, was exclusively the purview of government or large corporations.[43]

Multi-stakeholder processes, such as consensus, are becoming more important as governments attempt to redefine the way they operate and make decisions involving the public and stakeholders more directly. Ronald Doering emphasizes that:

> These multi-stakeholder processes have been described as innovative institutional adaptations that will play an increasingly important role in future years as we reinvent government by trying to improve our ability to engage citizens more deliberately in policy choices.[44]

B. OVERVIEW OF MODELS

Governments are faced with a significant number of public policy questions from the general to the specific. Leaders and policy-makers must decide, based on the policy issue to be resolved, what type of participatory model is most appropriate given the situation.

At a more general level, governments may seek to clarify issues, determine public opinion, and develop public policy on such broad matters as constitutional change, health care or water export. At the more specific level, governments may seek input on strategies for implementing a policy; for example, whether guidelines versus legal rules are needed, or private versus public sector delivery of a service should occur.

Governments may also seek advice on the content of proposed regulations or standards; for example, the draft Forest Practices Code or means of regulating secondary suites. The models of participatory decision-making or public involvement lay along a continuum from informing, to consensus, to the involvement of third parties on an on-going basis in public policy issues.

Informing

In this model, government informs the public of an initiative and its decision-making process. This model involves a one-way flow of information from governments to the public and stakeholders. It is strictly intended to provide information to update them on current issues and initiatives and is not designed to solicit feedback on issues. The benefit of this process is that it is expedient and not very cumbersome. The disadvantage is that the public may expect more involvement or input on the issue in question.

Educating

With this approach, the government educates the public about the background to a decision or policy, indicating the alternatives and their pros and cons. Education processes take the participatory model a step further by ensuring that the public understands the range of potential policy options available to address an issue. The public becomes more informed about the choices facing the government but is not being asked to provide input on which policy option is most appropriate. The advantage of this approach is that the public perceives that the government has taken the time to help them

understand how it has arrived at a public policy decision. The disadvantage is that the public again may want to play a greater role in commenting on policy choices and assisting the government in making policy decisions.

Gathering Information and Perspectives

The process of gathering information and perspectives from the public and stakeholders is undertaken to supplement existing sources of information in developing a policy or formulating a decision. According to this model, government is actually seeking the views of stakeholders on a particular policy issue. This information is used by government to make more informed decisions. The advantage of this model is that the public and stakeholders feel that the government is interested in hearing their concerns and perspectives with regard to an issue and will take this information into account when it is developing public policy. The disadvantage is that the public or stakeholders may believe that there should be greater accountability regarding how or to what extent government uses the information and perspectives to formulate final decisions.

Consulting

With consulting, the government is obtaining responses or reactions from the public or stakeholders to a proposed initiative. This model gives the public and stakeholders more power over policy decisions and outcomes but does not guarantee that government will change its potential course of action based on the results of the consultation. The advantage is that the model provides an opportunity to advise government on the likely

impacts of a proposed initiative or policy. The disadvantage of this approach is that the public may wish to have more influence over the options giving rise to a policy decision rather than simply responding to a particular policy direction.

Defining Issues

Governments may choose to involve the public in a process to define the issues related to an area of public policy. The government may approach the public and stakeholders with a general description of a policy question or problem and ask them to identify the main issues or concerns which need to be addressed. The advantage of this model is that the public may feel more assured that their issues and views will be addressed in the final policy decision because they were able to influence the breadth and scope of the matter in question. The disadvantage is the inability of the stakeholders to directly influence the actual policy decision.

Testing Ideas and Seeking Advice

With respect to this model, government is going to the public and asking for advice on possible policy options and may also ask for additional proposals. This process gives the public and stakeholders far more involvement in shaping the policies of governments. The advantage is that the public perceives that the government is sincerely interested in hearing their views and perceptions especially through the government's invitation to submit new or revised proposals. The disadvantage is that there is no guarantee to what

extent the government will use this advice in developing its policy should stakeholders take the time to provide government with an alternative proposal.

Seeking Consensus

This process involves the public and stakeholders in defining the areas of commonality and dissension regarding an issue or policy area, in exploring options and in making specific recommendations. This model is far more interactive and complex than the other processes described above. With this approach, the government is transferring some decision-making power to the stakeholders. The advantage is that the public and stakeholders feel that they have a direct impact on the decisions of government. The disadvantage is that the process can be time-consuming and expensive.

On-going Interactions

This model involves a fairly intensive level of public involvement whereby government commits to continue to seek the input of the public and stakeholders on an on-going basis. As policy issues arise, government representatives meet with stakeholders to test ideas and gather their input and feedback. The advantage is that the public and stakeholders feel that government is making a longer term commitment to participatory decision-making. The disadvantage is similar to consensus in terms of the time and resources required to implement intensive public involvement.

The above models can be used individually or combined in order to address one or more policy development objective. There are several attributes or factors associated with each model that change as you move from the left to the right end of the above continuum: an increasing level of interaction between government and the public; an increasing level of intensity; increasing commitment from government and the public; increasing expectations on the part of the public; and, increasing influence by the public in shaping public policy.[45] Table 2 summarizes the potential methods used to implement each model.

TABLE 2

Participatory/Public Involvement Continuum:
Models and Potential Methods

Inform	**Educate**	**Gather Info.**	**Consult**	**Define Issues**	**Test Ideas**	**Seek Consens.**	**On-going Inter-action**
White paper	White Paper; Open House	Open House	Public Meeting	Work-shop	Tech. Advisory Cttee.	Tech. Advisory Cttee.	
Toll Free Line	Toll Free Line	Public Meeting	Focus Group	Advisory Group		Round Tables; Public Advisory	Public Advisory
Public Seminar; Confer. Survey	Public Seminar; Confer. Survey	Public Seminar; Confer. Survey	Public Seminar; Confer. Survey				

Increasing Level of Interaction → →

Increasing Level of Commitment, Costs and Time → →

C. THE CONSENSUS MODEL IN MORE DETAIL

The consensus model will be examined in more detail in this section given that this approach is relatively new and of significant interest to third parties in the treaty process in British Columbia. Systematic consensus-building is a relatively new process for assisting governments in making decisions on contentious public policy issues. Ronald Doering in the National Round Table Review states that:

> The principal institutional response to the cross-sectoral, cross-disciplinary and cross-temporal challenges of sustainable development in Canada has been round tables or multi-stakeholder processes.[46]

Along with negotiation, dispute resolution, "getting-to-yes" and facilitation techniques, consensus recognizes a need for collaboration and agreement within the making of public policy decisions. The word consensus has been defined by the B.C. Round Table on the Environment and the Economy in the following way: Reaching a 'consensus' involves 'negotiations' that lead to 'compromises' in order to resolve 'conflicts'.[47] The Round Table further describes it as 'general agreement' that assumes all participants accept decisions reached through the consensus process."[48] Sandy Scott in an article on multi-stakeholder processes concludes that:

> Multi-stakeholder processes are designed to bring a range of interests around a single table to determine together, in an integrated way, how best to deal with a particular public policy issue.[49]

This approach implies that a series of trade-offs is necessary among the involved interests in order to achieve 'general agreement'. The Round Table affirms that: "There must be a

clear process and criteria for identifying the appropriate parties to take part in the consensus-building process."[50] Considerations include geographical representation, areas of interest and gender.

The Ombudsman states in a report on the aquaculture industry that:

"Because the various interests will value aspects of the public issue differently, resolution packages can be crafted which satisfy each party's major concerns while trading off less vital ones."[51]

The key issue is what constitutes 'general agreement'. Achieving 'general agreement' requires that the interests of all participants are identified and acknowledged. Other public decision-making processes involving multiple stakeholders require less collaboration and agreement amongst third parties and stakeholders. Decisions are reached through voting (majority rule) or through a body making a unilateral decision (a designated government decision-maker or judicial process).

According to the B.C. Round Table, not all multi-stakeholder processes are designed to reach consensus.[52] Consensus-building allows stakeholders to participate on a more equal basis in the collaborative process. It does not encourage winners and losers like other forms of decision-making such as voting. Despite the fact that unanimity may be the ultimate objective of consensus processes, participants must define the term 'consensus' for their own operational purposes. Each consensus process will contain different goals regarding the nature of 'the agreement' depending on the type of issue and

the number and diversity of the participants. However, participants must agree on the definition.

According to the B.C. Round Table, consensus could be defined as:

> 100% agreement (unanimity); agreement by vast majority (all but a very few of the parties); and a lack of dissension. It does not mean total concurrence on all aspects of a decision.[53]

There appears to be a trend in land use planning and environmental areas of public policy toward the involvement of stakeholder and third parties in the development of public policy decisions. This is due in part to the escalating level of conflict over environmental issues. There is a parallel between general land use planning and treaty-making. Both areas of public policy attempt to define how limited lands and resources will be allocated amongst and managed by a diverse range of interests.

One specific example is the aquaculture industry in the province. In the Ombudsman's report noted above it is stated that:

> The dramatic increase in aquaculture activity along the B.C. coast in the past few years has brought about with it the promise of greater economic growth and stability for many coastal communities; it has also underlined the potential for conflict among the many legitimate and sometimes competing users of coastal resources.[54]

There is more than one party interested in the management of coastal resources. These include local government, the federal government and the provincial government. The Ombudsman comments on the nature of consensual resolution as follows:

The consensual resolution of public interest disputes requires a recognition by all major private and public interests that the best chance of achieving their individual objectives will occur through the enhancement rather than at the expense of apparently competing interests.[55]

"If any one party believes it can win the dispute outright, judicially or politically, then the process will not work."[56]

Round tables are held out as the most recent model of consensual resolution involving multiple stakeholders:

Round tables are the newest form of consensus-based decision-making at the community and regional level. In B.C., the Round Table on the Environment and the Economy created a Task Force on local round tables. This task force consulted with a variety of interests on the roles and functions of a round table.[57]

The B.C. Round Table found that in every community, the public expressed an interest in having some mechanism by which local residents could undertake locally-led sustainability initiatives and resolve local sustainability conflicts. Where local round tables have gained support and allegiance of the key interests in the community, their impact can be considerable.[58]

Round tables are designed to create a microcosm of a local community reflecting a diversity of interests. In most cases, round tables are established in response to a potential problem in a community or region, or as a community response to a crisis or conflict. Local governments may resist the creation of a round table because they may feel that it will potentially challenge their authority rather than complement existing government structures. The above view may encourage misconceptions regarding the nature of consensus. The Round Table has stated in one report that consensus "does not necessarily mean that parties agree to everything about that decision."[59]

The critical aspect of consensus-building is not so much what the nature of the agreement is but how you arrive at that decision. Were all of the interests of the participants heard and acknowledged? You may have an agreement on an issue by the vast majority but acknowledge dissenting views. Participants may not agree on the whole decision but they do not disagree enough to justify their opposition to the overall proposal. Parties may agree to disagree and to clearly identify areas of disagreement.

The Round Table indicates that there are two critical elements to making consensus work:

"- Participants must come to a common understanding of what consensus is in operational terms before embarking on the process."

"- There must be a clear understanding of the consequences of failing to achieve consensus."[60]

The participants in the process must make an effort to address the concerns of the dissenting party, if the dissenting party can support his or her perspective. Alternative processes to consensus when consensus processes fail are referred to as "fallbacks". The options include reverting to majority rule or unilateral government decision-making.[61] These fallbacks should be clearly delineated and understood before commencing a consensus process. Fallbacks are often perceived as incentives for concluding a consensus process. "While consensus may be the preferred way of reaching a decision or resolving a conflict, the situation may not be appropriate for a consensus process. Some

issues are so strongly based in fundamental values that the parties cannot compromise their positions."[62]

D. Consensus Approach: Pros and Cons

Table 3 summarizes the pros and cons associated with the consensus approach.

TABLE 3

Pros and Cons of the Consensus Approach

Pro	Con
useful for issues not needing urgent response	labour intensive
time encourages reasoned decisions	time consuming
	method for stalling gov't decisions
relief for overburdened court system	
value of output can exceed costs	costs can be high
achieve more durable outcomes	many variables can affect success
	hard to identify all interests
public learn more about gov't decision-making	hard to reach agrmt. with multiple opinions
exposes public decision-making	issue takes on too high a profile
not create winners/losers	lead to avoidance of contentious issues
decisions tend to be more enduring	can compromise gov't mandate by using collaboration
provides in-depth review of issues	

Pros

One advantage is that consensus-building encourages an in-depth discussion of the issue and buy-in from stakeholders. It is less susceptible to the creation of winners and losers and domination by stronger and louder interests. A second advantage is that consensus decisions tend to be more enduring, easier to implement and are amended more easily if conditions change. This is because individuals with vested interests have assisted in developing a solution to an issue. A third advantage in this area is that the consensus process brings forward a broad range of expertise.[63] In most cases, the outputs of decision-making are much more useful if a range of views have been considered.

A fourth advantage is that through consensus-building a government will have received invaluable information on different policy choices and their impacts. In addition, stakeholders have assisted in managing the process, they tend to feel like they own the outcome. As a result of consensus processes, governments can make more insightful decisions that attract more support from the public and stakeholders.[64]

A fifth advantage is that consensus processes can create a level playing field amongst the participants. Ideally, participants in a consensus process must have a level playing field in terms of their ability to participate in a meaningful way. This includes equal access to decision-makers and information.[65] The National Round Table includes this criterion in its list of principles for guiding the development of consensus processes.[66] One way to encourage a level playing field is to provide participant funding for those organizations

with fewer financial resources. Other methods include providing access to the same level of information to all participants.

Cons

Consensus processes have been criticized for being cumbersome and time-consuming. The first disadvantage is that the nature of the process itself requires a dedication of time and money to make it work. The B.C. Round Table concludes that consensus processes can be "time-consuming, costly and frustrating to government, industry or any interest that wants to 'get on with the job'"[67] The most time-consuming elements are defining the issue, identifying the affected interests and allowing sufficient time for participants to consult with their constituents. It is a process that if carried out properly with sufficient time for research and the exploration of issues and interests, will succeed in most cases. Consensus processes will not necessarily bring positive results if the participants feel rushed into making a decision. Consensus processes may be criticised as representing a method by which a government can stall the decision-making process. It may be viewed as a process to detract attention from the government while it carries on with its business and the decision-making process.

The second disadvantage are the costs associated with consensus processes which can be measured in terms of stakeholder expenses, research, mediation and expenditures required for administrative purposes such as a secretariat function. The costs associated with conducting consensus processes are linked to the issue of timing. If it is anticipated that

the expenditures on the consensus process will derive concrete outcomes and credible solutions then the costs may be considered worth the results. It is critical that government officials weigh out the costs and benefits before initiating a consensus process. Officials can assess the complexity of the issue, the extent of the conflict and the likelihood of reaching a general agreement before committing to consensus.

The third disadvantage is that consensus processes can create the perception in the minds of the public that solutions to contentious issues are being avoided. The fourth disadvantage is that consensus processes can result in vague and undefined outcomes. Processes that try to accommodate many diverse views and seek common ground often create less specific and tangible solutions to an issue. The fifth disadvantage relates to the fact that there may be a concern that a government mandate will be compromised by collaborating with stakeholders. Government decision-makers may bind themselves to the results and lose their impartiality in decision-making.

Conclusion

Any government or other decision-making body needs to consider why and how to involve stakeholders in public decision-making. The incentives for undertaking participatory decision making include more informed decisions, more effective public policy and self-preservation on the part of the government. Governments are moving away from unilateral, non-participatory forms of decision-making. There are various methods for soliciting input from multiple interests and the public on any given issue and

creating means of involving affected parties. The purpose of participatory decision-making models are not mutually exclusive. Any participatory model may serve one or more purpose. However, a move from the left end to the right end of the continuum of participatory decision-making brings increased interaction, intensity, commitment, expectations and influence over the development of public policies.

The key question for government is whether a participatory or public involvement model is necessary to develop a specific public policy, who should be involved and how should it be carried out. Governments need to ensure that issues have been clearly defined, the level of controversy surrounding the issue has been assessed and the appropriate stakeholders have been identified. Fred Leonard noted that:

There are probably many situations in which:

the public believe we spend too much time trying to achieve consensus and 'get to yes', and not enough time delivering the service. Common sense fits in somewhere in terms of knowing when consensus needs verification in some sort of public process and when to just get on with the job. The challenge is knowing when consensus already exists.[68]

CHAPTER THREE

Participatory Decision-making in Treaties: Participants' Views

This chapter addresses the questions raised in the thesis statement: how public decision-making involving non-aboriginal stakeholders is carried out in treaty negotiations and why this particular model is being used. The analysis in this chapter is based on interviews with representatives of the provincial and federal governments, local government and third parties. This chapter represents the core component of the study as it summarizes the main perspectives of the participants regarding how the participatory decision-making model operates in treaties. It considers their views on the nature of the model used in treaty negotiations, the viability of consensus-building in treaty negotiations, the results of consensus versus consultation processes and the similarities and differences between the participatory model used in treaty negotiations and land use planning.

A. METHODOLOGY

The respondents were selected for their experience with the treaty process. As the focus of the thesis is on the use of participatory processes to solicit the input of non-aboriginal third parties and stakeholders into the treaty negotiation process, First Nation representatives were not included in the interview list. A list of the respondents and interview questions is attached as Appendix A. There were five federal participants selected for the interviews. Two of the respondents are Chief Negotiators responsible for several treaty tables. These respondents have extensive hands-on experience in

negotiating treaties. The other two federal participants are responsible for policy development in the area of treaties. One respondent has considerable background on negotiation processes in the fisheries sector, including the use of round tables.

Three of the provincial participants are Chief Treaty Negotiators who possess significant experience and knowledge of treaty negotiations. The other respondents are senior officials in the provincial government involved with the treaty process, either in a role of managing the overall process or in policy development. One provincial respondent is involved with the land use planning process at the Commission on Resources and the Environment (CORE) and has had exposure to treaty negotiations.

The third party respondents represent provincial sector organizations, specifically labour, local government and sport fishing. They have extensive background in negotiation and have been involved with the B.C. treaty negotiation process since its inception. The respondents in the "other" category have knowledge of the treaty process and negotiation practices. One participant has hands-on experience with the B.C. Treaty Commission while the other participant has worked on the land use planning process through CORE.

The questions are grouped according to five key issues: models of decision-making in treaties, viability of consensus-building, reconciliation of interests, results of consensus processes versus consultation and similarities and differences between the treaty negotiation process and land use planning. Each participant was asked to respond to the

questions as fully and completely as possible. There were no time limits on the participants' responses to the questions. If a respondent felt that his or her answer in a previous question answered a later question then a second full answer was not required. Appendix B provides a summary of the responses divided into the categories of federal, provincial, third party and other.

The first issue pertaining to the participatory decision-making model used in treaty negotiations is designed to find out whether or not there is a systematic approach for soliciting third party input into treaty settlements. This issue raises two main questions: a) Is the process systematic or ad hoc in nature? b) What does the decision-making process in treaties look like? Who does it involve and how are the issues discussed? By describing these elements, it is possible to compare the treaty model with other approaches to participatory decision-making such as consensus.

The second major issue relates to the viability of using consensus as a participatory decision-making model in treaties. Once the decision-making process in treaties is described, it is possible to then establish whether consensus is viable for treaty negotiations.

The third major issue is the reconciliation of stakeholder interests. The main reason for raising this issue is to explore how the interests of non-aboriginal third parties are solicited and how these interests are used in treaty negotiations. The key aspect of the

issue is whether the government solicits the interests of stakeholders and to what extent the government can or should reconcile different interests into one common set of interests.

The fourth issue addresses the question of whether or not the outcomes of consensus versus consultation processes are the same. This issue is important because if the results of both are the same then it is not as critical which process is used. However, if the processes result in different outcomes then the process becomes more critical.

The fifth issue relates to the similarities and differences between treaty negotiations and land use planning processes. The assumption made in addressing this issue is that land use planning processes in British Columbia have utilised the consensus approach. The two policy issues are similar in that they both focus on land and resource use and involve a number of affected interests.

B. KEY FINDINGS

Model of Public Decision-making in Treaties

One of the fundamental questions is whether or not treaty negotiations follow a systematic model of participatory decision-making. If so, one would expect the main components of this model to be easily described or compared with other known models of participatory decision-making.

The federal and provincial respondents felt that the participatory decision-making model in treaties follows a systematic method but this method is not necessarily consistent with one particular theoretical model (see "Model for Treaties" column in the summary table in Appendix B). They expressed the view that it may in fact represent a combination of different models.

The process used in treaty negotiations was described as a hybrid model (a blend of consensus, consultation and advisory processes). From a government perspective, it was not seen as a decision-making model but a near decision-making model. Third party respondents believed that the process was developed in response to the needs of the federal and provincial government and was perceived to be mostly information-sharing. Overall, it was believed by most respondents that treaty negotiations represent a made-in-B.C. process. The purpose of consultation in the treaty negotiation process was described as two-fold: a) to elicit input into the negotiating positions and interests; and, b) to engender public support for treaties. It was felt that if the government can achieve the second, this will pave the way for addressing the first.

Treaty negotiations were characterised as a mix of interests and bottomlines. When the nature of the decision-making process is positional versus interest-based, it was considered harder to reach agreement on issues. When interests are expressed as bottomline positions, it was perceived to be more difficult to achieve agreement amongst multiple stakeholders.

Provincial respondents agreed that it appears to be the view of third parties that they should be the fourth party at the negotiating table in addition to the provincial and federal governments and First Nations. The Claims Task Force rejected this approach and recommended that the governments are there to represent third party and public interests at the negotiating table.

The participants concluded that the formal mechanism being used in treaties are the Regional Advisory Committees and the Treaty Negotiation Advisory Committee. The process also involves consultation with individual stakeholders on a sector-by-sector basis. Public fora are also used to probe the temperature of the public arena.

The province was seen as wanting to be effective in the treaty process, and attempting to provide information to the participants. It was not clear, however, whether the federal government had ever embraced shared decision-making or whether they are strictly following a traditional consultation process.

Viability of the Consensus Process

On the one hand, the perspective of government respondents was that it was difficult to achieve consensus in British Columbia on treaty issues given the scope and diversity of interests throughout the province. It was commented that treaties are an exhaustive process due, in part, to the diversity of issues and the number of affected parties.

Achieving consensus in the treaty process was seen as difficult because treaties impact on a diverse range of interests, involve a wide range of issues, require three parties to the negotiation and do not provide sufficient time to reach consensus. On the other hand, the third party perspective was that consensus is both viable and necessary for treaties. Information-sharing was not seen as sufficient.

The issue of whether or not consensus is viable for treaty negotiations also depends on other factors. One key factor noted was whether or not the appropriate interests are represented in the process. In the case of treaty negotiations, it was considered critical that the main interests are represented on the RAC's.

The general view amongst provincial government representatives was that consensus processes may be viable amongst stakeholders in the treaty process on some issues. In the attached table, the comments indicate that the viability of consensus depends on the participants and on the true meaning of consensus. However, there were dissenting views. It was indicated that the treaty process does not lend itself to a formal decision-making approach but that participatory decision-making in treaties is a process through which third parties influence the views and policies of government.

The federal view was that government can achieve consensus in treaties either on high level issues or on more sector-specific issues (see the summary in Appendix B). It was commented that governments may need to generalise issues into guiding principles in

order to achieve consensus. It was believed that there are some issues that most people will agree on such as conservation and resource stewardship. There was, however, a lack of consistency in the responses to this question.

The view of the respondents was either that consensus is difficult to achieve or governments must try to accommodate as many interests as possible. A distinction was made between "consensus-getting" and "consensus-building". The view was expressed that government can build a more common set of interests based on input from third parties but this does not mean that a common solution will emerge. There was agreement that consensus-building is important, more in terms of the process of understanding interests and seeking common ground, than in actually achieving common agreement. The common third party view was that consensus is not only viable but necessary. However, it was acknowledged that achieving true consensus in treaties could be time-consuming. Public decision-making processes can stall by trying to reach true consensus. However, it may be possible to achieve a modicum of consensus. This means reaching a general agreement on some issues. The third party respondents commented that governments can look for and build support and buy-in on the overarching issues.

Reconciliation of Interests

How do negotiators create one set of interests in order to negotiate treaties? The intent behind this question is to discover how negotiators reconcile the diverse interests of stakeholders in order to achieve a negotiating strategy. This issue addresses two other

related issues: a) Is it possible to achieve one set of interests? and b) Are trade-offs desirable or viable?

It was agreed by the provincial respondents that a careful balancing is required to reconcile interests (see the third column in Appendix B). Because the public and third parties each represent one set of interests, the provincial government needs to balance those against other interests including local governments, the federal government and provincial government departments. This view is highlighted in the table in Appendix B.

It was commented that the parties involved in treaty negotiations are engaged in a broad-based review of sectoral interests which will be articulated at the treaty negotiation table. Essentially, interests are being developed on a sector-by-sector basis (such as fishing, forestry and mining). The key question noted by several respondents was when do you say that you have a consistent enough base of interests in order to negotiate on behalf of stakeholders. The challenge in reconciling interests is to find a common thread. Finding this balance requires considerable discussion between stakeholders and government.

It was suggested that stakeholder interests should be developed based on input from the RAC's and the Treaty Negotiation Advisory Committee. However, the government should use existing policy and legislation as well as general provincial principles including stewardship, sustainability and safety to develop its interests and negotiating

mandates. This essentially means that a framework should be developed for the Province which guides negotiations based on the above sources of information.

It was commented that there is some uncertainty as to whether or not negotiators can, or should, attempt to achieve one set of interests. Government is responsible for representing the interests of the majority but cannot represent every single view. These broad, high level interests can be used to develop common views until government moves to specific issues during the substantive stages of treaty negotiations.

The best model of decision-making was described by one third party respondent as having several key steps. First, you gather people together telling them why they are involved in the process but do not overwhelm them with information. The next step is to describe to the participants what is expected of them in the process. The governments explain that they are going to provide them with information and show them what is involved in making a treaty. The governments would explain what issues are going to be discussed and keep a record of the questions asked and ideas expressed. Following the above information exchange, the government would describe to the participants what the conditions are for their participation. The participants should be encouraged to do some visioning around treaties. By doing this, participants will likely see that they have more issues and interests in common. Essentially, treaties are designed to address human problems. The focus should be on solving these problems rather than on pointing out differences.

The government would ask participants to participate and confirm whether any of them feel that they are there to disrupt the process. These participants should be asked to reconsider their involvement in the process. The government would present scenarios to participants regarding treaty settlements and ask them what they think. The participants would be asked to analyze the scenario that they support the least. In doing so, the participants would be asked to recommend how they would address the interests of the other parties. The above process describes some of the key steps involved in consensus processes. Many of these steps are taken from land use planning models.

Results of Consensus Processes Versus Consultation

This section examines whether or not consensus and consultation processes achieve the same results. This includes the nature of the decision arising out of the process and the extent to which the decision will endure over time (see the fourth column in Appendix B).

The overall perspective of the participants can be characterised as likely not. From a provincial and federal perspective, it was felt that the results depend on whether or not government has involved the appropriate interests in the consensus process. This refers to whether the process involves true opinion leaders or singular interests without an identifiable constituency. Third party respondents expressed the view that the results of the two processes are absolutely not the same. The main difference noted is that consensus involves the facilitation of an outcome, while consultation involves the use of

government as the arbitrator. The main difference identified is that consensus processes bring more "buy-in" from stakeholders regarding the outcome. It is evident from the summary of responses that third parties felt strongly that the results of consensus versus consultation are quite different.

Similarities and Differences Between Treaties and Land Use Planning Processes

This section identifies the similarities and differences between land use planning and the treaty process (see the fifth column in Appendix B). The purpose in looking at this issue is to examine what issues affect the use of consensus or consultation as a public decision-making model. This examination is based on the assumption that provincial land use planning processes have experimented with consensus decision-making, one of the first examples in British Columbia.

The summary notes that there appeared to be a common theme amongst the responses that treaty negotiations are different than land use planning processes. The provincial respondents felt that these are fundamentally different processes. However, many of the players in the communities are the same. Although both processes are making decisions on the allocation and management of land in British Columbia, treaties involve a wider range of issues. The respondents generally agreed that issues related to the treaty process are more complex. In addition, there are more parties to the negotiation than in land use planning. These are important differences. It was commented that treaties tend to be more adversarial. The issues are not defined in the same way as there is a different

interest base in treaties than in land use planning. It was pointed out that land use plans and policies are being used to develop treaty negotiation mandates on lands and resources. Land use plans are considered the starting point for negotiating land at the treaty table.

The other difference is that with land use planning and the use of round tables all stakeholders are represented at the table where the decisions are being made. This comment is highlighted in the attached table. The general view was that governments would not reach agreement on treaties if they brought every single interest to the table. However, there may be a need for more substantive thinking on the subject of consensus in treaty negotiations as the process unfolds. Governments may need to seek more specific sectoral advice and seek consensus with each sector affected by the components of treaty settlements.

Respondents felt that it is somewhat premature to describe fully the model of decision-making in treaties. The consultative structure involving provincial and regional third party interests is workable but has not reached its full stage of development. The system and structure will evolve as negotiations move forward. The consultative structure and approach will likely not be fully functioning until after stage 3 (Agreement in Principle) of negotiations. It is at this stage that substantive negotiations between the three parties commence.

Conclusion

The interview process identified a wide range of comments on the nature of the public decision-making process in treaties. The main conclusions were that there is a participatory process in treaties but it is not a pure decision-making model. In comparing the treaty approach to the continuum of participatory decision-making models identified in Chapter 2, it is clear that the process in treaties involves a combination of methods. The participatory decision-making model in treaties was perceived to be evolving since its inception and that perhaps the continuum of potential models will be applied at different stages of negotiations. It appears from the findings that treaty negotiations, as an area of significant public policy, may require the use of a range of participatory decision-making approaches as the negotiation process progresses.

CONCLUSION

The issues which this study addresses are: how the provincial and federal governments bring the input of non-aboriginal stakeholders into treaty negotiations and why this particular model is being used. The six main questions related to these issues are: 1) Is a systematic process of participatory decision-making used in treaties to bring the input of non-aboriginal third parties into treaty negotiations? 2) Does the participatory approach in treaties follow a particular model of participatory decision-making? 3) What is the rationale for using this particular model? 4) How effective is the current model from a participant perspective? 5) Why do the government and third party respondents hold different views regarding the nature of the participatory decision-making model in treaties? 6) What insights, if any, can be gained into the evolution of the treaty model?

The responses to these questions are important to the debate on the use of participatory decision-making models to address complex public policy issues. Treaty-making is a significant area of public policy with far-reaching impacts and consequences. It is one of the most comprehensive policy issues facing most governments today. Treaties are reshaping the structure and functions of governments as we know them by recognizing the formal authority of First Nation governments. The examination of treaty negotiations as an area of significant public policy helps to shed light on how and when participatory models of decision-making can be used in policy development. It appears from this study that non-aboriginal third parties are given an opportunity to influence policies at a

provincial and regional level, but are not actually making policy recommendations based on consensus.

The provincial and federal governments have adopted a participatory decision-making model for negotiating treaties in recognition of the need to solicit the expertise of third parties given the far-reaching implications of treaty outcomes. In addition, both governments acknowledge the interest on the part of third parties to participate in the process. Ronald Doering has stated that the public at large want more meaningful input into the decisions that affect them.[69] According to the B.C. Round Table on the Environment and the Economy, a critical need has been identified by governments to rethink the traditional methods of decision-making because the public is questioning the ability of government to represent their interests.[70] There will always be debates as to where and when to use certain models of participatory decision-making. This decision depends to a large extent on the nature of the public policy issue, the existence of a real conflict and the amount of time available to resolve the issue.

Chapter 2 described several models of participatory decision-making. These are: informing, educating, gathering information, consulting, defining issues, testing ideas and seeking advice, striving for consensus and interacting on an on-going basis. It appears from the findings in this study that treaty negotiations use a systematic approach to participatory decision-making but this approach does not follow one particular model of participatory decision-making. The view was expressed that the treaty process involves a

combination of different participatory decision-making models and may still evolve over time. The participatory model for treaties is fairly unique given the diversity and scope of the issues being negotiated and the number of interests affected by the outcomes of treaties. The model requires different methods of participatory decision-making in order to achieve the objectives of treaty negotiations. The primary models mentioned, directly or indirectly, were informing, educating, gathering information and consulting. However, a view was expressed by some of the respondents that consensus may be possible on some issues. It can be concluded that the range of models used in treaty negotiations is due mostly to the complexity of the treaty process. Treaty negotiations is an area of public policy which requires different decision-making approaches in order to reach better and informed policy decisions. This conclusion points to the fact that governments engaged in a complex policy development exercise such as treaty negotiations require different participatory decision-making tools according to the specific goals of each stage of the process. The hybrid decision-making model, described by the provincial and federal government respondents, highlights the fact that treaty negotiations involve interaction with non-aboriginal third parties at different levels and at different stages.

The primary mechanisms described by the participants to implement the participatory decision-making models are the federal-provincial Treaty Negotiation Advisory Committee (TNAC), Regional Advisory Committees (RAC's) and Treaty Advisory Committees (TACs), comprised of local government representatives. Informing is undertaken through the provision of information on government policy to TNAC, RAC

and TAC members and the receipt of information from these members by the federal and provincial governments. Information-sharing is also needed to inform the public and third parties regarding the key legal and historical issues associated with treaty negotiations and to increase the knowledge of all parties regarding the interests of each participant involved in treaty negotiations. Educating occurs through the release of information by governments to the public and third parties on the objectives and operation of the treaty process. Both governments are continuously gathering information to supplement existing sources of information on issues affecting third party interests. TNAC, RAC's and TAC's will become more involved in defining issues at a provincial, regional and local level in specific policy areas such as environmental protection, health and education as the treaty process progresses. Consultation is used consistently throughout the entire process to solicit feedback on issues and policy directions. The federal and provincial governments consult with the above groups in order to obtain their feedback on specific proposals and initiatives. The above methods can be used in combination or on an individual basis depending on the stage of negotiations and the complexity of the issues. For example, the governments may provide information to third parties on an issue and at the same time, or at a later stage, test ideas or seek advice on how best to address that issue. The participant interview process pointed to a variation in perspectives amongst the third party and government respondents.

The main participatory model that was not identified by the respondents as being actively used in treaty negotiations at this point in time was seeking consensus. One comment provided that may help to explain why this model may have not been cited is that the participatory model in treaties is still relatively new and is at the beginning stages of its development. The participants have primarily been involved in an intensive exchange of information on the legal, historical and cultural issues associated with treaty negotiations.

The primary difference between the views of the government and the third party respondents is related to what model of participatory decision-making is actually being used in treaty negotiations and what model is most appropriate and viable. On the one hand, the third party perspective was that consensus is feasible and necessary in treaty negotiations. On the other hand, the federal and provincial respondents felt that the treaty process is too complex with the number of interests involved and there are not sufficient resources to undertake a consensus process for treaties. The fundamental basis for this difference is the perspective that governments have the ultimate responsibility to represent third parties and all British Columbians at the treaty table while third parties believe that they have a legitimate right to participate more directly in decision-making and perhaps even have a seat at the negotiating table. It is clear that while governments have this ultimate responsibility, they recognize that treaty settlements will be viable and effective if third parties, with significant interests, have provided input into the negotiations. Third parties feel that the only way to negotiate treaties which accommodate the diverse range of interests impacted by treaty settlements is to follow the

consensus model. In listening to the views of all of the participants it appears that a balance needs to be achieved between the establishment of a sufficient level of third party involvement in negotiations and the need to ensure that negotiations progress at a reasonable pace. As treaty negotiations proceed, the participatory decision-making model will also evolve.

Overall, the participatory model in treaty negotiations was seen to be fairly effective, particularly as an information-sharing and consultative approach. It was noted that at times it seemed difficult from a participant perspective to maintain interest-based versus positional negotiations. This means that it was difficult to stay focussed on the objectives of the parties in the treaty process rather than on the minimum acceptable outcomes. The third party respondents felt that information-sharing could be developed into more of a two-way process and should be utilized in conjunction with consensus. The federal and provincial respondents commented that the main focus of the process to date had been on information-sharing and consultation. All participants agreed that the participatory model was in the developmental stages and would progress over time.

In terms of the future development and evolution of the participatory decision-making model in treaties, it is possible that the model will move along the continuum of public involvement, from less interaction to more interaction with the substantive phase of negotiations. It is not certain that the model will incorporate a consensus approach given the complexity of the treaty process. The view was expressed that governments may need

to develop the participatory model more on a sector-by-sector basis and that consensus may be more viable within individual sectors rather than across sectors. Some respondents envisioned that as the treaty process progresses and the three negotiating parties become increasingly involved in substantive negotiations on specific issues, governments will need to solicit more specific advice from non-aboriginal third parties and perhaps even explore where consensus can be achieved.

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APPENDIX A

LIST OF RESPONDENTS AND QUESTIONS

Provincial

Angus Robertson
Assistant Deputy Minister
Treaty Negotiations Division
Ministry of Aboriginal Affairs

Joy Illington
Assistant Deputy Minister
Policy, Planning and Research Division
Ministry of Aboriginal Affairs

Bill Valentine
Treaty Negotiator
North Interior Team
Ministry of Aboriginal Affairs

Mark Stevenson
Treaty Negotiator
Northwest Team
Ministry of Aboriginal Affairs

Murray Rankin
Treaty Negotiator
Vancouver Island Team
Ministry of Aboriginal Affairs

Judy Birch
Director
Public Consultation
Ministry of Aboriginal Affairs

Stuart Gale
Assistant Commissioner, Commission on Resources and Environment

LIST OF RESPONDENTS AND QUESTIONS (CONT'D)

Federal

Lorne Brownsey
Director
Policy and Research
Federal Treaty Negotiation Office

Tom Molloy
Chief Negotiator
Federal Treaty Negotiation Office

Robin Dodson
Chief Negotiator
Federal Treaty Negotiation Office

Al Wood
Department of Fisheries and Oceans
Government of Canada

Lynne Gregor
Federal Treaty Negotiation Office

Third Party

Richard Taylor
Union of British Columbia Municipalities

Dick McMaster
B.C. Fishing Resorts and Lodges

Susan Anderson
B.C. Federation of Labour

Other

Gordon Sloan
Lawyer/Consultant
Former Facilitator for CORE process

Barbara Fisher
Commissioner
B.C. Treaty Commission

INTERVIEW QUESTIONS

Purpose:

To obtain first-hand knowledge of the applicability of consensus-building n the treaty negotiation process, from a provincial, federal and third party perspective.

Questions:

Model of Public Decision-making

1. Do you think the treaty process is built around a particular model of decision-making?

2. What model is generally being used to invite public participation in the decision-making process around treaties?

Viability of Consensus-building in treaties

3. What is your perspective on consensus-building as a public decision-making approach - strengths and weaknesses?

4. Is consensus-building viable amongst stakeholders? If so, why? If not, why not?

5. What is the model for public decision-making at your treaty table?

Reconciliation of Interests

6. Given the diversity and breadth of interests, how do negotiators achieve one set of interests to present at the treaty table?

Results of Consensus Processes Versus Consultation

7. Is the end result of consensus-building versus consultation the same?

INTERVIEW QUESTIONS (CONT'D.)

Similarities and Differences Between Treaties and Land Use Planning

8. What is your view of the similarities and differences between the Consensus approach used in land use planning (use of Round Tables) and the treaty-making process?

Other Comments

Appendix B: Summary of Interview Responses

Respondent	Responses				
Provincial	**Model for Treaties**	**Viability of Consensus**	**Reconciliation of Interests**	**Results: Consensus vs. Consultation**	**Treaties & Land Use**
1.	- Hybrid model of dec-making - Combination of Consensus and consultation	- Not practical for treaties	- Careful balancing of of public & third party interests	- Hopefully - Principles & objectives the same	- Different - 3 Negotiating parties - multiple interests
2.	- "Enhanced" consultation - Not dec-making mechanism	- Not appropriate - Not sufficient time and resources	- Reconcile third party and public interests	- No; Consensus is dec-making process	- Different - Multiple issues
3.	- No particular model - Hybrid or blended approach - Stakeholder participation and public fora used	- Consensus not always achievable in timely way	- Broad-based sectoral consultation	- No; two different outcomes	- Different - Treaties more adversarial
4.	- No particular model - Form of sharing information - Not decision-making	- Depends on true meaning of consensus - If community opinion leaders involved - possible	- Share interests - Not really reconciliation - May occur later on specific treaty issues	- Can be similar if using true consensus and meaningful consultation	- Very different - Land use less adversarial
5.	- Consultative - Give and take - Gov't accountable to using results	- Viable for specific issues - Depends on participants - Equal playing field	- Gov't brokers interests - Gov't receives & reconciles interests - Cabinet decision	- Yes - More supportable outcomes	- Different - Social interests not in - Many players same

Appendix B: Summary of Interview Responses

Respondent	Responses				
Provincial	**Model for Treaties**	**Viability of Consensus**	**Reconciliation of Interests**	**Results: Consensus vs. Consultation**	**Treaties & Land Use**
6.	- Largely positional - Notion of interest-based approach	- Yes - More informed decisions - Desirable (even if no consensus achieved)	- Use existing policy and legislation & gov't	- Not same - Achieve agreement in consensus processes	- Treaty issues varied - Two gov'ts involved
7.	- Ostensibly - Information-sharing - Advisory approach - Interest-based	- Depends on definition - Perhaps on general shape of treaty	- Sector by sector - Woven together by overall treaty land model	- Hard to tell with few real examples - Fewer number of parties - Difference is finality & stability of decisions	- Only one jurisdiction
Federal					
8.	- Public/third party consultation - Formal process	- No - Accommodate as many interests as possible	- Broad-based interests to start - Specific interests on on issues	- No - Consensus-getting different than consensus-building	- Land use more specific issue - Fewer stakeholders involved - Easier to negotiate with one party
9.	- Advisory approach; evolving - Building process as you go - Made in B.C. process	- On some issues - If similar interests	- Focus on relevant interests by subject - Develop spheres of of comfort	- If political process - more likely same	- Similar - Treaties deal with jurisdiction & authority as does land use

Appendix B: Summary of Responses

Respondent	Responses				
Federal	**Model for Treaties**	**Viability of Consensus**	**Reconciliation of Interests**	**Results: Consensus vs. Consultation**	**Treaties & Land Use**
10.	- Extensive consultation Have advisory bodies	- Depends on issue - At high level - yes - On details in treaties - no	- Expose general mandates to advisory bodies - No input/consultation - Have survey of interests	- Processes are different - If consensus achieved, brings more buy-in	- With round table all stakeholders at negotiating table
11.	- Not decision-orientated - Mostly consultation	- Brings interests together - Maybe on some issues - Difficult given diversity of interests - May need to generalise on issues - Consensus may actually inflame - Gov't owner of resources & mediator	- More sector-by-sector	- Processes are different - Outcomes are different	- Land use & treaties are different Treaties create winners/ losers - Land use involves sharing
12.	- Yes (RAC'S;TNAC)	- Two-way consultation - Difficult to do full assessment this early - Consensus-building is important - Consensus may create dominant players - May be possible on some issues	- Sector-by-sector - Trade-offs not possible	- Could be; not necessarily - Likely not same - Consultation results in advice; consensus results in decisions	- Not familiar with B.C.

Appendix B: Summary of Interview Responses

Respondent	Responses				
Third Party	**Model for Treaties**	**Viability of Consensus**	**Reconciliation of Interests**	**Results: Consensus vs. Consultation**	**Treaties & Land Use**
13.	- Consultation - Varies somewhat by region	- Yes - ADR process needed - Is possible	- Requires time - Not one set of interests	- No - Consensus shifts power	- In land use, gov't bound by consensus decision - Not just land use processes that use consensus
14.	- No one model - Mostly information-sharing	- Modicum of consensus	- Iterative process - Based on agreement	- No - Consensus provides ownership of outcomes by participants	- More issues in treaties - Action/reaction in treaties not clear
15.	- Internat'l treaty model - Agreement by 3 parties	- Depends on scale of issue- - Exchange of information - Gov't responded through statement of bottomlines - On larger issues - yes - Difficult to represent all interests - Need effective process to achieve consensus	Important in development of mandates - Need interests before going to table - Are sectoral issues	- Does not have to be different - Consensus is not the decision - Gov't makes final decision	- Land use brings single decision - Treaties involve 3 negotiating parties

Appendix B: Summary of Interview Responses

Respondent	Responses				
Other	**Model for Treaties**	**Viability of Consensus**	**Reconciliation of Interests**	**Results: Consensus vs. Consultation**	**Treaties & Land Use**
16.	- Consultative - Gov't gathers and considers interests in provincial mandates	- Not necessarily practical for all issues - Could be issue-specific - Need appropriate climate	- Issue-driven - Need cohesion	- If true consensus and consultation - yes - Difference is who makes decisions	- Land use decisions serve as input into treaty negotiations - Issues more specific
17.	- Private trilateral process strength in constituency away from table - Difficult to apply to trilateral process - Difficult to negotiate "harder-edged" agrmts with more parties	- Consensus builds agrmt - Opportunity to develop - Each party should be developing mandates that seam interests together	- Done through accommodating - Consensus brings degree of political irresistibility given joint outcomes	- Not same - Purposes are different - Different values at stake - In land use easier to resolve conflicts	- Nature of conflict is different in land use

[1] The material in this chapter is based, in large part, on official government documents and therefore much of the information cannot be quoted.
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[3] Ibid., p. 207.
[4] Ibid., p. 207.
[5] Federal government, *Living Treaties: Lasting Agreements, Report of the Task Force to Review Comprehensive Claims Policy* (December 1995), p.9.
[6] *Calder et al. v. Attorney General of British Columbia* (January 31, 1973), p. 145.
[7] Ibid., p. 146.
[8] Federal government, *Living Treaties: Lasting Agreements, Report of the Task Force to Review Comprehensive Claims Policy"* (December 1995), p.12.
[9] Ibid., p. 2-3-3.
[10] Ibid., p. 2-3-3.
[11] Ibid., p. 2-3-2.
[12] Ibid., p. 2-3-3.
[13] Ibid., p. 2-3-2 and 2-3-3.
[14] Ibid., p. 2-3-2.
[15] *Delgamuukw et al. v. B.C. et al*, Court of Appeal for British Columbia, "Reasons for Judgement of Mr. Justice MacFarlane, p. 69.
[16] *Report of the B.C. Claims Task Force Report*(June 1991), p. 17.
[17] Paul Tennant, p. 237.
[18] Province of B.C., *Edited Blues (Hansard)* (May, 1993), p. 10.
[19] Ibid., p. 10.
[20] *Report of the British Columbia Claims Task Force* (June 1991), p. 14.
[21] *B.C. Claims Task Force Report*, p. 15.
[22] Ibid., p. 4.
[23] *B.C. Claims Task Force Report* (June 1991), p. 15.
[24] Ibid., p. 4.
[25] Ibid., p. 4.
[26] Adapted from a provincial policy document on the approach to treaty negotiations.
[27] B.C. *Claims Task Force Report*, p. 35.
[28] Ibid., p. 6.

[29] Ibid., p. 6.
[30] *B.C. Claims Task Force Report*, p. 41.
[31] *B.C. Claims Task Force Report*, p. 54.
[32] Ibid., p. 55.
[33] Ibid., p. 54-55.
[34] Ibid., p. 68-69.
[35] ARA Consulting Group Inc., *Social and Economic Impacts of Aboriginal Land Claim Settlements: A Case Study Analysis* (July, 1995), p. 9.
[36] Ibid., p. 54-55.
[37] Ibid., p. 1.
[38] Anthony Dorcey, Lee Doney and Harriet Rueggeberg, "Public Involvement in Government Decision-making: Choosing the Right Model", *A Report of the B.C. Round Table on the Environment and the Economy* (June 1994), p. 3.
[39] Laurie Jackson, *Public Involvement in Resource Management: A Western Canadian Perspective*" (March 1994), p. 2.
[40] Ibid., p. 1.
[41] B.C. Round Table, *Reaching Agreement: Implementing Consensus Processes in British Columbia*, vol. 2, p. 1.
[42] Laurie Jackson, *Public Involvement in Resource Management: A Western Canadian Perspective*, (March 1994), pp.1-2.
[43] Anthony Dorcey, Lee Doney and Harriet Rueggeberg, *Public Involvement in Government Decision-making: Choosing the Right Model* (June 1994), p. 3.
[44] Ronald Doering, *National Round Table Review: Evaluating Round Table Processes* (Winter 1995), p. 1.
[45] Anthony Dorcey, *Public Involvement in Government Decision-making: Choosing the Right Model*, A Report of the B.C. Round Table on the Environment and the Economy (June 1994), p. 6.
[46] Ronald Doering, *National Round Table: Evaluating Round Table Processes* (Winter 1995), p. 1.
[47] B.C. Round Table on the Environment and the Economy, *Reaching Agreement: Consensus Processes in B.C.*, vol. 1 (1991), p.3.
[48] Ibid., p. 4.
[49] Sandy Scott, "Multi-stakeholder Processes: A Panel Discussion" *National Round Table Review* (Winter 1995), p. 11.
[50] Ibid., p. 16.

[51] Ombudsman, *Aquaculture and the Administration of Coastal Resources in British Columbia, Public Report No. 15* (December 1988), p. 91.
[52] B.C. Round Table, *Reaching Agreement: Consensus Processes in British Columbia*, vol. 1 (1991), p. 4.
[53] Ibid., p. 4.
[54] Ombudsman, *Aquaculture and the Administration of Coastal Resources in British Columbia, Public Report No. 15* (December 1988), p. i.
[55] Ibid., p. 90.
[56] Ibid., p. 91.
[57] B.C. Round Table, *Realizing Their Full Potential*, p. 19.
[58] Ibid., p. 19.
[59] B.C. Round Table, *Reaching Agreement* vol. 2, p. 2.
[60] B.C. Round Table, *Reaching Agreement* vol. 1, p. 5.
[61] B.C. Round Table, *Reaching Agreement* vol. 2, p. 3.
[62] B.C. Round Table, *Reaching* Agreement vol. 1, p. 21.
[63] Ibid., p. 5.
[64] Peter Gillespie, *National Round Table Review*, p. 17.
[65] Ibid., p. 17.
[66] Ronald Doering, *National Round Table Review*, p. 2.
[67] B.C. Round Table, *Reaching Agreement* vol. 2, p. 5.
[68] Fred Leonard, "Consensus: A Powerful Management Tool" *Institute of Public Administration Victoria Forum* (April 1992), p. 4.
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Title of Thesis:

Treaty Negotiations in British Columbia: Participants' Views

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March 4, 1996