

Deal? Or No Deal?

Explaining Comprehensive Land Claims Negotiation Outcomes in Canada.

by

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A thesis submitted in conformity with the requirements

for the degree of Doctorate in Philosophy

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University of Toronto

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Doctor of Philosophy

2008

Abstract

In 1973, the Canadian government created the federal comprehensive land claims process to negotiate modern treaties with Aboriginal peoples in Canada. Despite 35 years of negotiations, many Aboriginal groups have failed to complete modern treaties. This dissertation explains why some Aboriginal groups have been able to complete modern treaties and why some have not. After examining four sets of negotiations in Newfoundland and Labrador and the Yukon Territory, I argue that scholars need to pay greater attention to the institutional framework governing treaty negotiations and to a number of factors relative to the Aboriginal groups.

Acknowledgements

I am grateful to many individuals and organizations for helping me with this dissertation. First, I would like to thank my supervisor, Graham White, as well as my committee members, Grace Skogstad, and Frances Abele who gave generously of their time and expertise. Indeed, one could not have asked for a better committee. In particular, Graham White was extremely helpful throughout my entire time at the University of Toronto and has my deepest respect for his efforts as a scholar, teacher, administrator and supervisor. Second, I would like to thank Peter Russell and Doug McArthur for serving as my internal and external examiners, respectively. Both gave careful readings of the dissertation, which I greatly appreciated. Third, Anthony Sayers, Don Smith, George Breckenridge, Michael Stein, Simone Chambers, and Tom Flanagan were all helpful at different stages of my PhD career.

This dissertation could not have been written without the participation of individuals from the federal government, the Newfoundland and Labrador government, the Yukon territorial government, the Labrador Inuit, the Labrador Innu, the Kwanlin Dün First Nation, and the Kaska Nations. Each interviewee was extremely patient and generous as I tried to learn about and understand the complexities of each of the comprehensive land claims negotiations studied in this thesis. In particular, I greatly appreciated the help from Tim Koepke, Dermot Flynn, Veryan Haysom, Anne King, Ray Hawco, Bob Pelley, Ruby Carter, Dave Porter, Steve Walsh, Hammond Dick, Liard McMillan, Eileen Van Bibber, Scott Serson, Tom Beaudoin, Jim McKenzie and Chesley Anderson, among others.

Family members, friends, and colleagues are extremely important in a time consuming project such as this one. My wife, Kerry Lee Hunt, and most recently, my son,

Kees Rafael Alcantara, have been crucial throughout this process. Rafael and Eden Alcantara, my parents, have also been important to the success of this project. I also want to acknowledge the direct and indirect support of Tony and Carmen Hidalgo, Gerry and Tessie Suarez, and Josefa and Flaviano Sagun. As well, many of my fellow graduate students have been helpful and supportive over the last five years. In particular, I am grateful to my comrades Christopher Cochrane, Jen Nelles, Amardeep “watch out for that white van” Athwal, Vincent Pouliot, and David Chandonnet.

Projects such as this one cannot be completed without financial assistance. I would like to thank the Ontario Graduate Scholarship Program, the Institute for Humane Studies, the Liberty Fund, the Northern Scientific Training Program, the School of Graduate Studies at the University of Toronto, and the Labrador Institute for financial and organizational support.

Finally, I would like thank Cambridge University Press for granting me permission to use material from my article, “Explaining Aboriginal Treaty Negotiation Outcomes in Canada: The Cases of the Inuit and the Innu in Labrador,” *Canadian Journal of Political Science* 40:1 (March 2007): 185-207, and Oxford University Press for granting me permission to use material from my article, “To Treaty or Not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada,” *Publius: Journal of Federalism* 38:2 (Spring 2008): 343-369.

Table of Contents

Abstract	ii
Acknowledgements	iii
List of Tables	vi
List of Appendices	vii
Chapter 1: Explaining Comprehensive Land Claims Negotiation Outcomes in Canada	1
Chapter 2: A History of Aboriginal Treaty Making in Canada	31
Chapter 3: An Analytical Framework	67
Chapter 4: The Innu and Inuit in Labrador	117
Chapter 5: The Kwanlin Dün and the Kaska First Nations in the Yukon Territory	176
Chapter 6: To Negotiate a Treaty or Not?	248
Bibliography	271

List of Tables

Table 1.1: Completed Comprehensive Land Claims Agreements since 19736

Table 1.2: On-going Comprehensive Land Claims Negotiations in Canada7

Table 1.3 Distribution of Government and Aboriginal Officials by Job Description25

Table 1.4 Distribution of Government Officials by Level of Government and Job
Description25

Table 1.5 Distribution of Aboriginal Officials by Aboriginal Group and Job Description .25

Table 3.1: Factors Relative to the Aboriginal Groups that Affect Which CLC Negotiation
Outcomes are Obtained94

Table 3.2: Factors that Affect the Speed of CLC Negotiation Outcomes98

List of Appendices

Appendix 1 – List of Negotiating First Nations in British Columbia29

Chapter 1: Explaining Comprehensive Land Claims Negotiation Outcomes in Canada

Treaties have had a powerful effect on the relationship between Aboriginal and non-Aboriginal peoples in Canada (Asch 1997; Asch, 1984; Borrows, 2002; Cairns, 1999; Harris, 2002; Hicks and White, 2000; Macklem, 2001; Russell, 2000). At a conceptual level, proponents of treaty federalism (defined as “‘Indian consent’ in regard to the manner and form of our co-existence with the Queen’s white children under the Canadian constitutional framework” Bear Robe 1992, 6, 8) have argued that the relationship between Aboriginal and non-Aboriginal peoples should only be understood through the treaties that they have signed. Specifically, they suggest treaties ought to affirm that Aboriginal peoples have self-government and sovereignty over all of their traditional lands and treaties should legitimize the Crown’s right to exercise self-government and sovereignty on Canadian soil. In sum, treaties should establish the terms by which Aboriginal and non-Aboriginal peoples co-exist as sovereign nations in Canada (Henderson, 1994; Ladner, 2003).

On a more practical level, treaties have been central to disputes over the ownership of some of the most valuable lands in Canada. Prime commercial and residential lands in cities like Toronto, Calgary, and Vancouver were once or remain, depending on one’s view, Aboriginal traditional lands. Aboriginal and non-Aboriginal peoples have fought over whether these lands were properly acquired through treaties, or whether such lands should be included in the negotiation of new treaties. Treaties have also played a central role in the control and development of Canada’s rich and abundant natural resources. Hydro-electricity projects, forests, mines, oil, gas, mineral deposits, and fish and wildlife have all been affected by historical and modern treaties signed with Aboriginal peoples. Finally, treaties have had a powerful effect on Aboriginal peoples themselves; some Aboriginal

communities have been impoverished by treaties, while others have been culturally and economically empowered by them.

The treaty relationship is not a stagnant one; rather it is dynamic as a result of interpretation and implementation differences. Although some Aboriginal groups have relied on litigation to settle their differences with the Crown, many more have pursued negotiations through the federal specific claims process. This process is designed to address alleged wrongs or mistakes committed by the federal government in its interpretation and implementation of Aboriginal treaties. It can also be used by non-treaty Aboriginal groups to address the federal government's mismanagement of Indian assets. For instance, the Blood Tribe in Alberta is negotiating with the federal government through the specific claims process for unpaid compensation for lands surrendered to the Crown in 1889. The Mississaugas in Ontario are negotiating with the federal government over the alleged invalid surrender of 200 hectares of land on the north shore of the Credit River in 1820 (Specific Claims Branch of Indian and Northern Affairs Canada, 2006: 2, 65).

The Aboriginal-Crown treaty relationship has also been undergoing fundamental change as a result of Aboriginal groups signing new treaties with the Crown under the federal comprehensive land claims process, created in 1973. Under this process, Aboriginal groups that have never signed treaties with the federal government can negotiate with the Crown to clarify all interests in Aboriginal-claimed lands. Specifically, the federal government uses comprehensive land claims agreements to achieve certainty by giving Aboriginal peoples a set of specific, defined rights in exchange for Aboriginal peoples releasing their undefined land rights. For Aboriginal peoples, comprehensive land claims agreements affirm and protect their control over all or portions of their traditional lands. A

typical comprehensive land claim usually involves large amounts of land and money, and jurisdiction over resources, fish and wildlife, migratory birds, taxation, economic development, water management, and far-reaching governance provisions, sometimes including self-government.

Some scholars reject the treaty process in its entirety. For instance, Dan Russell (2000: 53) argues that the Nisga'a treaty is not a model that others should follow since it imposes "clear limitations on the discretion of Nisga'a governments to enact laws deemed to be culturally relevant Their jurisdictional capacity is largely limited to areas of municipal competence, and in times of conflict Nisga'a laws may be overruled by federal or provincial laws" (Russell, 2000: 54-55). Instead, Russell advocates constitutional reform for strengthening and guaranteeing Aboriginal self-determination and self-government.

Others question the usefulness of modern treaties for improving socio-economic development. James Saku (2002) and Saku and Bone (2000) look at measures of socio-economic development for a number of Aboriginal groups in the North who signed comprehensive land claim agreements. They found that although "the Inuvialuit achieved significant improvement in economic growth in the wage sector, the Cree, Inuit and Naskapi have not achieved much change. The results suggest that Modern Treaties alone do not promote economic development" (Saku, 2002: 151).

Despite these criticisms, treaties remain crucial to the Aboriginal-Crown relationship in Canada. So far, only 22 modern treaties have been completed while many more remain under negotiations. Some of these negotiations have lasted several decades while others show little sign of being completed anytime soon. This dissertation seeks to

construct an analytical framework for explaining why some Aboriginal groups have been able to complete comprehensive land claims agreements and why others have not. The focus is on comprehensive land claims as opposed to specific claims because comprehensive land claims agreements (CLCs) involve large sums of capital and land, address the issue of Canadian sovereignty, and often involve the creation of Aboriginal self-government. In short, such agreements have a significant impact on the lives of Aboriginal and non-Aboriginal peoples and governments. The Labrador Inuit Land Claims Agreement, completed in 2005, for instance, involved 72,500 square kilometers of land in northern Labrador and \$296 million in cash transfers. Of that 72,500, the Labrador Inuit own 15,800 square kilometers of land and share jurisdiction with the federal and provincial governments over the balance. The Agreement also allows the Inuit to create their own government. This new Nunatsiavut government can make laws affecting culture and language, taxation, economic development, environmental protection, community governments, health and social services, education, and the administration of justice (including a police force and court), among other things. The importance of comprehensive land claims agreements should not be understated. Students of Aboriginal politics and of Canadian politics need to pay greater attention to these agreements because they involve significant amounts of land, powers, resources and jurisdictions affecting Aboriginal and non-Aboriginal peoples throughout northern Canada.

The Royal Commission on Aboriginal Peoples confirms that treaties are extremely important for improving the relationship between Aboriginal and non-Aboriginal peoples in Canada. Treaties, which transfer “Crown” lands to Aboriginal peoples, are important because land “is absolutely fundamental to Aboriginal identity” (RCAP, 1996: 425) and are

necessary components for them to address their significant social and economic problems. Treaties are also desirable because they reduce the complexities, expenses, and inefficiencies that come from the federal government administering programs, lands, and resources to hundreds of Aboriginal groups in Canada.¹ Finally, many of the violent conflicts between non-Aboriginal and Aboriginal peoples in Canada have stemmed from unresolved treaty claims. An illustrative example is the Oka crisis in Quebec in 1990 when the Mohawks erected barricades to prevent the construction of a golf course on traditional Mohawk lands (Miller, 2000; RCAP, 1996: 425).

According to RCAP (1996: 429), “Treaty making – in areas where no treaties exist at present – and implementing and renewing existing historical treaties is the proper way to negotiate an expanded land and resource base for Aboriginal peoples.” Treaties in the modern era should lead to the creation of three types of land regimes relevant to Aboriginal peoples in Canada. In the first regime, Aboriginal peoples have full, primary, and exclusive ownership of lands and resources in accordance with their traditions. The second regime is the co-management model, in which Aboriginal peoples and the Crown share jurisdiction and representation. In the final regime, the Crown is dominant but Aboriginal peoples have some of their rights recognized and respected (RCAP, 1996: 429-430).

The Puzzle

¹ Treaties are not the only way in which Aboriginal peoples can reduce the involvement of the federal government in their lives. In a forthcoming paper (Alcantara, 2008a), I argue that federal and Aboriginal actors should consider adopting a Canadian version of the subsidiarity principle to achieve effective non-constitutional Aboriginal policy reform.

Despite the existence of the federal comprehensive land claims policy since 1973 and the publication of RCAP's report in 1996, not all Aboriginal groups have been able to complete modern treaties. Table 1.1 lists those Aboriginal groups that have completed comprehensive land claims agreements while Table 1.2 lists on-going negotiations between Aboriginal groups and the Comprehensive Land Claims Branch of Indian and Northern Affairs Canada (INAC).²

Table 1.1: Completed Comprehensive Land Claims Agreements since 1973

Treaty	Start Date	Year Settled	Total Number of Years to Complete the Treaty
James Bay and Northern Quebec Agreement	1973	1975	2
Inuvialuit Final Agreement	1976	1984	8
Gwich'in Agreement ³	1976	1992	16
Sahtu Dene and Métis Agreement	1976	1994	18
Nunavut Land Claims Agreement	1976	1993	17
Nisga'a Final Agreement	1976	1999	23
Labrador Inuit Agreement	1977	2005	28
Tlicho Agreement	1994	2003	9
Tsawwassen Final Agreement	1993	2007	14
Maa-nulth Final Agreement	1994	2007	13
Council for Yukon Indians Umbrella Final Agreement (Below are the individual Yukon First Nation that have signed Final Agreements)	1973	1993	20
Vuntut Gwich'in First Nation	1973	1995	22
Nacho Nyak Dün First Nation	1973	1995	22
Champagne/Aishihik First Nations	1973	1995	22
Teslin Tlingit Council	1973	1995	22

² These tables were built using data primarily from INAC, 2006 and supplemented by Miller, 2000; Angus, 1992.

³ The Gwich'in and the Sahtu Dene and Métis Agreements were signed after the Dene-Métis of the NWT Agreement-in-Principle fell through as a result of the Dene Nation balking at the extinguishment provision.

Little Salmon/Carmacks First Nation	1973	1997	24
Selkirk First Nation	1973	1997	24
Tr'ondëk Hwëch'in First Nation	1973	1998	25
Ta'an Kwäch'än First Nation	1973	2002	29
Kluane First Nation	1973	2003	30
Kwanlin Dün First Nation	1973	2005	32
Carcross/Tagish First Nation	1973	2005	32

Table 1.2: On-going Comprehensive Land Claims Negotiations in Canada

Aboriginal Group	Start Date	Current Status
Liard First Nation (Yukon)	1973	Negotiations suspended because federal mandate expired in 2002
Ross River Dena Council (Yukon)	1973	Negotiations suspended because federal mandate expired in 2002
White River First Nation (Yukon)	1973	Final Agreement completed in 2005 but ratification never held at the community level. No indication that ratification will ever be held.
Akaiicho Treaty 8 Dene (NWT)	1976 (as part of Dene/Métis claim)	Negotiating land and governance issues
Dehcho First Nations (NWT)	1976 (as part of Dene/Métis claim)	Negotiating an Agreement-in-Principle
Innu Nation in Labrador	1978	Negotiating an Agreement-in-Principle
Atikamekw Nation Council in Quebec	1979	Negotiating an Agreement-in-Principle
Innu of Quebec	1979	The 9 Innu community are currently discussing whether they will jointly negotiate a treaty or continue to negotiate separate agreements
British Columbia First Nations	Mid 1990s	Currently 57 First Nations are negotiating comprehensive land claim agreements. Please see appendix 1 at the end of this chapter for the status of the 57 claims.
Northwest Territories Métis Nation (NWT)	1994	Negotiating an Agreement-in-Principle
Manitoba Denesuline Negotiations North of 60	1999	Waiting for a Federal Mandate

(Nunavut and NWT claims)		
13 Mi'kmaq First Nations In Nova Scotia	2000	Negotiating a Framework Agreement
New Brunswick First Nations	2000	Tripartite exploratory discussions on establishing a negotiation process.
Algonquins of Eastern Ontario	2000	Negotiations suspended
Saskatchewan Athabasca Denesuline Negotiations North of 60 (NWT and Nunavut claims)	2000	Negotiating an Agreement-in-Principle
Nunavik Autonomous Public Government Negotiations in Quebec	2001	Negotiating a Final Agreement
Crees of Quebec Offshore Islands Claim in Nunavut	2002	Negotiating an Agreement-in-Principle
Mi'kmaq Confederacy of Prince Edward Island	2003	Tripartite exploratory discussions on creating a negotiation process
The Mi'gmawei Mawiomi Assembly in Gaspé	2003	Preliminary discussions

The puzzle that this dissertation seeks to explain is: why have some Aboriginal groups been able to complete modern treaties and why have others not? This project uses a comparative case study approach to construct an analytical framework for explaining the outcomes for four cases, with possible relevance to a larger universe of similar cases. Although it would be preferable to look at all modern treaty negotiation outcomes in Canada, any researcher who undertook such a task would face significant and prohibitive time and monetary costs. Alan Cairns (2004: 349) has written that “while it would be instructive to examine ... the 15 [now 22] comprehensive claims agreements signed since the announcement of the government of Canada’s claims policy in 1973, this would involve an intimidating research agenda.”

Although less useful than the large-n study, the comparative case study approach is still valuable for two reasons. First, this method allows for systematic and in-depth examinations of questions or cases previously ignored by the literature but which remain important to scholars, practitioners and policy makers. Second, this approach can create an empirically-grounded and theoretically-informed basis from which to understand and conduct future research on a broader universe of related cases. This strategy is preferable especially in situations where data on all of the relevant cases have yet to be collected and are not easily gathered.

Based on these considerations, the main goal of this dissertation is to explain comprehensive land claims (CLC) negotiation outcomes for four understudied yet important cases. The secondary goal of this project is to propose an empirically-grounded framework for beginning to understand CLC negotiation outcomes writ large. After analyzing the relevant literature, government and Aboriginal documents, media reports, and interview data on four Aboriginal groups in Canada, I argue that the outcomes of CLC negotiations are best understood by examining, on the one hand, the institutional structures within which these negotiations take place (conceptualized as government and Aboriginal “incentives to negotiate”), and on the other hand, the goals, strategies, and tactics of the participating actors.

Answering the Puzzle: An Overview

Explaining variation in CLC negotiation outcomes first requires specifying the relevant institutional framework. In particular, the institutional framework determines the likelihood that the negotiating parties will work towards a completed agreement. In chapter

3, I show that the government actors, the dominant players, are reluctant negotiators whereas the Aboriginal actors, the weaker players, are much more interested in negotiations. In light of these dynamics, Aboriginal groups must convince the federal, provincial, and territorial governments that completing treaties is desirable. To be persuasive, Aboriginal groups must adopt certain goals and strategies during negotiations. Although Aboriginal groups have some choice in the goals and strategies that they adopt, mainly as a result of leadership effects, their choices are conditioned significantly by their cultures, their historical interactions with the Canadian state, and the institutional framework governing CLC negotiations in Canada.

What then are the factors that determine outcomes? Based on the analytical framework described above and developed in greater detail in chapter 3, I argue that scholars need to pay greater attention to the Aboriginal groups. Specifically, a conjunction of four factors affects *whether* a final agreement will be obtained while four different factors can affect the *speed* of a negotiated outcome. I characterize all of these factors as being relative to the Aboriginal groups involved in CLC negotiations. The four factors that determine whether an Aboriginal group can complete a CLC treaty are the compatibility of its goals with those of governments, its choice of tactics, its internal group cohesiveness, and government perceptions of the Aboriginal group's capacity. These four factors are not individually necessary to obtain a CLC treaty. Rather, an Aboriginal group that achieves a *conjunction* of these four factors is highly likely to complete a CLC treaty. An Aboriginal group that fails to meet any one of these conditions is highly unlikely to complete a treaty.⁴

⁴ I adopted the language of "highly likely" and "highly unlikely" because a number of scholars have argued that it is extremely difficult to establish necessary and sufficient conditions. For instance, George and Bennett

By compatibility of goals, I mean the extent to which an Aboriginal group is willing to negotiate an agreement that is compatible with federal and provincial/territorial goals. In particular, the term refers to the willingness of an Aboriginal group to accept a final agreement that exists and operates within the political, economic, social and legal context of the Canadian constitutional order. For instance, an Aboriginal group that is willing to accept the idea of exchanging some of its undefined Aboriginal rights for a set of defined rights (cede, release, surrender) will be able to complete a treaty.

Choice of tactics refers to the mix of methods that an Aboriginal group uses to complete a treaty. An Aboriginal group that minimizes the use of confrontational tactics is more likely to complete a treaty than one that has a history of confronting the federal, provincial, and territorial governments. Confrontational tactics include protests, litigation, domestic and international media campaigns, and appeals to international tribunals, organizations, and governments.

The term “group cohesion” refers to the extent to which an Aboriginal group’s internal dynamics interfere with comprehensive land claims negotiations. An Aboriginal group that suffers from intense political divisions that revolve around land claims issues, for instance, will find it difficult to complete a treaty since such divisions can create unstable negotiating teams and positions at the negotiating table. Moreover, an Aboriginal group that suffers from severe social and economic distress (such as poverty, substance abuse, violence, and family abuse) may find it impossible to complete a land claims

(2005: 26-27) argue that “it is often not possible to resolve whether a causal condition identified as contributing to the explanation of a case is a *necessary* condition for that case, for the type of case that it represents, or for the outcome in general. It is often more appropriate to settle for a defensible claim that the presence of a variable “favors” an outcome, or is what historians often term a “contributing cause,” which may or may not be a necessary condition.”

agreement since such distress may prevent the group from focusing on negotiating, signing, and ratifying a final agreement.

The fourth factor affecting whether an outcome is obtained is government perceptions of the Aboriginal group's capacity. In essence, an Aboriginal group that is perceived by government officials as having insufficient governing capacity and poor financial accountability will find it difficult to complete a comprehensive land claims agreement. A successful outcome will be difficult because government officials are cognizant of the negative publicity that can occur when an Aboriginal group is unable to fulfill its responsibilities under a comprehensive land claims agreement. Government officials also know that implementation failure can lead to Aboriginal litigation and additional negotiations through the specific claims branch, both of which are costly in terms of time, money, and public embarrassment.

Although the way in which Aboriginal groups "score" on these four factors is highly conditioned by things like history, culture, and the power of the Canadian state, Aboriginal groups do have some control over these factors. Specifically, individual leaders can affect the ability of Aboriginal groups to adopt compatible goals, minimize confrontational tactics, forge internal cohesion, and foster positive government perceptions, despite the conditioning influences listed at the beginning of this paragraph. Nonetheless, it bears emphasizing that Aboriginal control over negotiation outcomes remains highly circumscribed by these conditioning influences.

The factors that can affect the *speed* of negotiations are trust relationships, the attributes of individual government and external negotiators, competition for the use of claimed lands, and development pressures. "Trust relationships" develop when government

and Aboriginal officials are ready to believe the word of one another. Trust allows for more compromise and focus on the issues, and less posturing and grandstanding. It also allows negotiators to propose ideas to each other outside of the formal negotiating process without fear that these proposals would be used against them in future formal negotiation sessions. The phrase “attributes of individual government and external negotiators” refers to the presence of government negotiators who are extremely committed to the resolution of comprehensive land claims and are willing to act as advocates for Aboriginal positions within the government bureaucracy. It also refers to “external negotiators”, who were not originally bureaucrats and thus enjoy the initial advantages of not being captured by the bureaucratic culture and hierarchical lines of authority. The “level of competition for use of claimed lands” also can affect the speed of negotiations. Treaty negotiations over lands that are in isolated areas far away from non-Aboriginal communities will likely be completed faster than ones involving lands located near non-Aboriginal communities. Finally, “development pressures” can affect the speed of negotiations because third party interests in claimed lands (for example, licences for resource extraction), are excluded from land claims negotiations unless the parties agree to freeze such lands from development. As such, governments are in no hurry to complete treaty negotiations involving valuable lands subject to third party interests since they can immediately benefit from the exploitation of these lands without a treaty. Conversely, valuable lands that are not subject to third party interests can speed up negotiations because governments face powerful economic incentives to clear Aboriginal title to those lands.⁵

⁵ It is worth noting here that governments also worry about holding up economic development. Hence, in Labrador, the federal and provincial governments accelerated treaty negotiations with the Inuit and Innu in

In constructing this analytical framework, this project, for the most part, treats the federal, provincial, and territorial governments as single monolithic actors, at least with respect to their preferences and incentives. Yet it also addresses the possibility that certain government actors can affect the outcomes and pace of negotiation. In particular, the election of a new prime minister or premier, or the appointment of a new minister of Indian Affairs can influence government goals (resulting in brief or permanent shifts in government negotiation policy), government perceptions of the Aboriginal groups, the appointment of different negotiators, and the presence of trust relationships. Prime ministers, ministers, and premiers can be influential because the Canadian parliamentary system concentrates power in the hands of first ministers and cabinets. In Labrador, for instance, a number of interviewees mentioned that the election of Brian Tobin as Premier accelerated Innu and Inuit negotiations in the mid to late 1990s. Similarly, in the Yukon Territory, the appointment of Bob Nault as federal Minister of Indian Affairs resulted in accelerated negotiations for a brief amount of time.

Yet the effect of individual government actors such as Tobin and Nault on negotiation outcomes may be less than one might think. Brian Tobin's interest in and influence on negotiations were mostly the result of development pressures stemming from the discovery of nickel in Voisey's Bay. A similar explanation can be applied to Bob Nault and the Yukon claims. As such, I argue that it is more useful to incorporate the effect of

response to the discovery of nickel in Voisey's Bay. The level of government "worry" depends on the size and nature of the economic development under threat. Indeed, some might suggest that more emphasis should be placed on government interests in economic development. Doing so, however, may not be useful in that all Aboriginal groups have claimed lands that have some economic value, however, marginal. Indeed, some of the Yukon groups have little, if any, significant economic development prospects yet they have completed treaties. As such, although government interest in economic development is important, very little analytical leverage is gained by suggesting that it is a necessary condition.

individual government actors into the existing explanatory factors, such as compatible goals, government perceptions, and development pressures, as opposed to conceptualizing them as discrete explanatory factors. These issues and other alternative explanations are described and addressed in more detail in the theoretical and empirical chapters that follow.

Case Selection and Methodology

To explore whether the factors described above do explain CLC negotiation outcomes in Canada, I examine two cases in the Yukon Territory, the Kwanlin Dün First Nation (completed) and the Kaska Nation (incomplete), and two cases in Newfoundland and Labrador, the Inuit (completed) and the Innu (incomplete). Looking at two pairs of CLC negotiations within one province and one territory allows me to control and test for variation that may result from different groups operating within and across different institutional environments. For instance, all four groups negotiated under the federal comprehensive land claims process, thus allowing for comparison across jurisdictions. Yet, there are clear institutional differences between provinces and territories and thus it makes sense to compare two groups within one province and two groups within one territory.

The comparative case study approach also allows for the examination of one of the most often heard yet under-explored thesis regarding comprehensive land claim negotiations. The general view held by practitioners and observers is that in light of the obstacles presented by government structures and actors, a CLC agreement will only be completed if a large scale economic development opportunity is present on claimed lands. In Labrador, both the Innu and the Inuit were subject to the discovery of a multibillion dollar nickel deposit in Voisey's Bay, yet only the Inuit completed a deal. In the Yukon

Territory, all of the Yukon First Nations were subject to federal and territorial governments that were very much interested in reaping the economic potential of the North. The Kaska, for instance, claimed some of the most mineral-rich and heavily forested lands in the territory. The Kwanlin Dün claimed large portions of valuable municipal lands in the city of Whitehorse. Yet only the Kwanlin Dün completed a treaty. What explains this variation?

Using the comparative case study approach to look at both completed and uncompleted treaty negotiations strengthens the generalizability of the study's findings towards a broader set of cases. For instance, Hanson and Kopstein (2005) argue that comparative scholars studying *successful* political development have "tended to ignore cases of institutional and developmental *failure* that might have helped to pinpoint the relative causal importance of particular independent variables deemed important for explaining outcomes in more widely analyzed cases" (emphasis added) (Hanson and Kopstein, 2005: 91). Looking at both completed and incomplete negotiations provides us with greater leverage in identifying key explanatory variables for not only the cases at hand, but possibly a wider set of similar cases.

The Labrador cases are also interesting for additional reasons. First, the academic literature has generally ignored the experiences of the Innu and the Inuit in Labrador in favour of other claims such as Nunavut, Nisga'a, James Bay, and Inuvialuit, among others. This omission is surprising since both the Inuit and the Innu claims have had an immense impact on the government and peoples of Newfoundland and Labrador. Second, the Inuit claim especially needs further study since it contains a number of provisions that differ from other final agreements. Third, the Inuit claim was the last of the major Inuit claims in Canada to be completed and the first to be completed in the Atlantic provinces. As such,

the Inuit Final Agreement may not only set the template for a future agreement with the Innu, but it may also do so for other Aboriginal groups in the Atlantic provinces seeking comprehensive land claims agreements. Third, both the Inuit and the Innu entered the CLC process at about the same time and were subject to the discovery of a rich nickel deposit in Voisey's Bay, used professional negotiators for most of their negotiations, and were subject to the same set of federal and provincial processes and actors during negotiations. Yet their outcomes differed. By looking at these specific groups, I am able to control for government and economic development factors to provide a more nuanced explanation for CLC negotiation outcomes.

The Yukon claims are ripe for study for a number of reasons. In addition to the value added of comparing negotiations in a province to those in a territory, the Yukon claims are interesting because, much like the Labrador claims, the Yukon claims are understudied in the literature. For instance, a number of scholars have looked at the Yukon Umbrella Final Agreement, signed in 1993, that set out the terms by which each of the Yukon First Nations would negotiate its own individual agreement. However, little if any attention has been paid to the individual agreements signed by the Yukon First Nations. The Kwanlin Dün claim, for instance, has been virtually ignored in the literature despite it being the first claim settled involving land located in a major Canadian city. The fact that Kwanlin Dün was able to sign a final agreement despite claiming land in the territorial capital is important for understanding how Aboriginal groups who have claimed municipal land in other major cities in Canada, such as Vancouver, can settle their claims.

The Kwanlin Dün First Nation is also worthy of study because it was able to complete a final agreement despite a number of very significant obstacles. Media reports

and informal discussions with key informants indicated that the Kwanlin Dün was thought to be the most unlikely of the Yukon First Nations to get a deal done, or that if it did it would be the last to do so (see, for instance, Northern Native Broadcasting Yukon, 1997; Small, 25 September 2001). It was given little prospect of success because the Kwanlin Dün membership is an amalgam of, on the one hand, “traditional” members from around Whitehorse and the Lake Laberge (north of Whitehorse) areas, and on the other, of Indians from other First Nations across the territory who had moved to Whitehorse (Koepke, 2006; Small, 14 August 2001). Federal policy at the time required that these “come from aways” become band members of the Whitehorse Indian Band (the predecessor of the Kwanlin Dün First Nation) for the purposes of administering *Indian Act* programs and services. This mix of different Indian peoples created significant internal cohesion problems and intense political rivalries within the First Nation. The Kwanlin Dün case was also complicated by the fact that, as mentioned above, it was claiming large parts of the city of Whitehorse, including parts of the waterfront, which the City of Whitehorse was interested in developing. Negotiators, policy makers, and observers at the time doubted whether Kwanlin Dün and the City of Whitehorse could reconcile their competing interests in municipal lands.

The Kaska have also been ignored in the literature, yet are also worthy of further study for two main reasons, in addition to the ones mentioned above. First, studying them is useful for understanding the effect of internal politics on land claims negotiations. In the eyes of the Crown, the Kaska are in fact five separate First Nations: two in the Yukon Territory, Liard First Nation near Watson Lake, and Ross River Dena Council near Ross River, and three in northern British Columbia. In the minds of the Kaska, however, they

constitute one Kaska Nation, politically represented by the Kaska Tribal Council. For much of their negotiating history, the Liard First Nation and the Ross River Dena Council have negotiated at separate tables towards separate agreements. However, beginning in the late 1980s and more prominently in the 1990s, they began to adopt a “one Kaska Nation” approach. As part of this approach, they demanded one set of negotiations and one deal for all the Kaska. At first, the governments refused their demands but in the late 1990s, they agreed to negotiate with the two Yukon First Nations at one table, and with the three B.C. Kaska First Nations at another table.

This “one nation” approach has been emulated elsewhere by other Aboriginal groups at different times and under different circumstances. For instance, the Innu communities of Sheshatshiu and Natuashish in Labrador have been represented by the Innu Nation since the beginning of their claim in 1978, and the multiple Inuit communities in Labrador have been represented by the Labrador Inuit Association since the beginning of their claim in 1977. Other Aboriginal groups have taken the opposite approach by starting out as one nation and separating into multiple groups for the purposes of negotiating their own individual land claims agreements. The Kwanlin Dün and the Ta’an Kwäch’än First Nations, for instance, were originally one First Nation known as the Whitehorse Indian Band, until the federal government separated them in 1998 to negotiate their own final agreements. Studying the Kaska is thus especially useful for analyzing the effects of internal politics on claims negotiations.

Second, the Kaska are worthy of further study because they have long employed the same group of professional negotiators to negotiate their claim. Professional negotiators, some argue, are crucial for completing comprehensive land claims agreements in Canada

(see for instance Penikett, 2006). Indeed, in the early summer of 2002, the Kaska negotiators had come to an agreement with their federal and territorial counterparts on a comprehensive land claims package, and the Kaska negotiators agreed to present the package to their peoples. To date, however, the federal and territorial governments have yet to receive a formal response from the Kaska. Nonetheless, federal and territorial officials acknowledge that the lack of a formal response indicates that the Kaska have rejected the package. This conclusion is confirmed through discussions with Kaska negotiators and begs the question: why have the Kaska failed to complete a treaty despite employing professional negotiators for many years?

More generally, the Yukon claims are interesting because they were among the first to be accepted for active negotiations following the *Calder* decision (described later) in 1973. Yet three of the fourteen Yukon First Nations have only partially settled their claims since they have not yet signed individual final agreements. The fact that three First Nations have not settled their claims is surprising because the federal government in 1975 thought it could settle all of the Yukon claims relatively quickly. Moreover, after the negotiating parties signed the Umbrella Final Agreement in 1993, participants and informed observers thought that all of the individual claims would be settled by 2000.

Looking at the Yukon and Labrador claims also allows me to study two of the three processes currently being used to settle comprehensive land claims agreements in Canada. The first process is the federal comprehensive land claims process and is the one that the Innu and the Inuit in Labrador used to negotiate their claims. Thus, the findings generated from those cases will have applicability to a wide range of other negotiations that have been completed or are on-going in other parts of Canada.

The second process, in the Yukon Territory, is a variant of the federal comprehensive land claims process. In 1993, the fourteen Yukon First Nations and the federal and territorial governments signed the Umbrella Final Agreement to guide individual negotiations with each of the Yukon First Nations. The Umbrella Final Agreement is the only process that the Yukon First Nations can use to negotiate their individual final agreements. In essence, the Umbrella Agreement sets out the land, money, and powers that are available to individual Yukon First Nations to negotiate their own individual final agreements. Specifically, for instance, the Umbrella Final Agreement lists the amount of land and money that each First Nation will receive once it completes its individual agreement. It also lays out the types of powers over which a First Nation can negotiate for control and describes the exact nature of the nation's Aboriginal rights once its land claims are resolved.

The third process for negotiating a comprehensive land claims agreement in Canada is the British Columbia Treaty Commission (BCTC) process. Each First Nation seeking to settle a land claim in British Columbia must do so through a six-stage process established by the British Columbia Treaty Commission. In the end, I decided not to look at the BCTC process because at the time that this research was undertaken, only the Nisga'a had completed a treaty, and that treaty was negotiated under the federal comprehensive land claims process. As such, any comparison between the Nisga'a and another B.C. group was going to be problematic and would not fit into the "paired comparison" methodology. Therefore, the findings of this dissertation will have only some relevance for the B.C. situation where a slightly different negotiating process operates.

Another reason for selecting the Labrador and Yukon cases was because they involved treaties and negotiations that occurred relatively recently. A serious problem with choosing a set of negotiations that occurred five or more years ago is that the participants in those negotiations may not remember things accurately. When I interviewed Tony Penikett, former Premier of the Yukon Territory and who was deeply involved in claims negotiations in the mid to late 1990s, he began our interview by saying that the passage of time had “wrecked havoc” with his memory to the point where he was unsure how useful he could be in remembering specific details. Information obtained in another interview with a participant involved in negotiations that occurred in the late 1980s to the early 1990s did not quite match what he said in public documents published around the time he was a negotiator. By choosing negotiations that were still on-going or had concluded in the last couple of years, I increased the probability that the officials whom I interviewed would still be able to recall events accurately and in detail. These interviews were supplemented with discussions with negotiators who had long moved out of the negotiating processes to be replaced by the current or last negotiating team.

Field Work and Data

In February 2006, I visited Happy Valley-Goose Bay, Sheshatshiu (Innu community), Natuashish (Innu community), Nain (Inuit community), Makkovik (Inuit community) and St. John’s in Newfoundland and Labrador. In October 2006, I visited Vancouver and Lower Post (Kaska), both in British Columbia, as well as Whitehorse (Kwanlin Dün), Ross River (Kaska), and Watson Lake (Kaska) in the Yukon Territory. I spent a total of five and a half weeks in these areas interviewing 65 government and

Aboriginal participants. I also followed up and conducted additional interviews by phone with officials who were unable to meet with me during my visits to the various fieldwork locations. The interviewees were identified by consulting public documents, published sources, and through discussions with informants who were knowledgeable about the processes and their participants. The initial focus was on establishing a list of the negotiating teams, the senior bureaucrats or officials who were in charge of the teams, and if possible, relevant political leaders. As I met and spoke with the interviewees, they provided me with additional names to contact. In many instances, interviewees gave me names of people who were both allies and opponents during negotiations.

Each of the interviewees was initially contacted by email or phone. During the initial contact, the purpose of the study and informed consent were explained. Individuals were told about the nature of the project, how information gained during the interview would be used, and the procedures in place to guarantee their anonymity if they requested it. They were also told that they could withdraw from the study at any time. At the time of the actual interview, informed consent was again explained. After each interview was finished, I asked interviewees whether they wanted anything stricken from the record and whether they wanted to see my interview notes or portions of the chapters to which their interview material was to be attributed. I also reminded individuals during the interview that they could choose anonymity at any time. I especially made sure to do this during points in the interviews that were possibly damaging to themselves. Nevertheless, most of the participants refused to sign the informed consent forms, preferring to give oral consent. For instance, three government officials agreed that whatever was said during our interview would be on the record unless they specified otherwise during the interview. In another

instance, I was told it was inappropriate to ask five Innu elders to sign the forms. The Innu negotiator who had set up the meeting for me had tried to get the elders to autograph a document on their land claims as a keepsake for me but they refused because they were suspicious of signing their names to any document. This reluctance to sign the informed consent forms was in marked contrast to my previous experiences interviewing Aboriginal politicians and land and housing managers in southern Canada. I endeavored as much as possible to accurately record and use interview data in a manner that was consistent with interviewees' expectations. In terms of writing up respondents' experiences in my dissertation, for instance, a number of participants orally agreed that I could use their interviews in my dissertation as long as they were guaranteed complete anonymity. As such, any identifying information for these participants was excluded from the dissertation. Others orally agreed that they could be listed in the bibliography, but that certain portions of their interviews should not be directly attributed to them in the text.

The interviewees themselves were Aboriginal, federal, and provincial/territorial politicians; senior and mid-level bureaucrats; legal counsel; and government and external negotiators. I also spoke with Aboriginal elders and citizens, City of Whitehorse politicians, and a number of informed observers who had been involved in either the negotiations themselves as participants, or in other First Nations' negotiations and were now living in the communities studied in this dissertation. The interviews were semi-structured open interviews, ranging anywhere from 30 minutes to 2 hours in length. The average interview lasted seventy five minutes. No tape recorder was used during the interviews, and as described above, I explained ethics considerations during initial contact, before the interview began, during the interview, and after the interview ended.

Of the 65 individuals I interviewed for this dissertation, 26 were government officials and 39 were Aboriginal officials. The following tables list the distribution of government and Aboriginal officials according to job descriptions, level of government, and Aboriginal group.

Table 1.3 Distribution of Government and Aboriginal Officials by Job Description.⁶

Job Description	# of Government Officials	# of Aboriginal Officials
Lawyers	3	5
Negotiators	12	14
Politicians	3	13
Public Servants	16	8
Elders	0	9

Table 1.4 Distribution of Government Officials by Level of Government and Job Description.

Job Description	Federal	Provincial (Nfld. and Labrador)	Territorial (Yukon)	Municipal (Whitehorse)
Lawyers	1	1	1	0
Negotiators	4	4	4	0
Politicians	0	0	1	2
Public Servants	3	5	6	2

Table 1.5 Distribution of Aboriginal Officials by Aboriginal Group and Job Description.

Job Description	Inuit	Innu	KDFN	Kaska
Lawyers	1	1	3	3
Negotiators	3	4	5	7
Politicians	4	4	1	4
Public Servants	2	3	3	2
Elders	1	6	0	2

⁶ In some cases, individuals held multiple positions when they were involved in comprehensive land claims negotiations. As such, for example, some interviewees were listed as negotiators and civil servants, or lawyers and negotiators. Moreover, some officials worked for or with multiple Aboriginal groups, resulting in some interviewees being counted twice (i.e. as an Aboriginal official for both the Inuit and the Innu). Finally, the total number of interviewees listed here (65) doesn't match the number of interviewees listed in the bibliography because the total number listed here includes 12 anonymous interviewees.

The number and distribution of interviews conducted for this dissertation represent my best possible effort to speak to as many relevant officials as possible. Many potential interviewees declined to be interviewed for a variety of reasons. Nonetheless, I am confident in the validity and accuracy of my data. I asked some of the individuals whom I interviewed to read various chapters of the dissertation and they all expressed satisfaction with the accuracy of my findings. Moreover, although this dissertation relies heavily on the 65 interviews, it does not rely solely on them. The interviews have been supplemented with a variety of primary and secondary sources, including government and Aboriginal group documents, newspapers articles, local newscasts, archival material, and published literature.

In his classic book on federal-provincial diplomacy, Richard Simeon (1972, 2006) noted that “Much of this process [intergovernmental negotiations] takes place outside public view and goes unreported in the press. Therefore a great deal of the data used must come from those most knowledgeable about it: the participants” (Simeon, 2006: xiv). Simeon’s observations about the closed nature of federal-provincial negotiations are also applicable to comprehensive land claims negotiations. Robert McPherson’s book on the Nunavut land claim, for instance, acknowledges that the Nunavut negotiations were largely undocumented (McPherson, 2003: xv) and thus he had to rely on interview data, some media reports, and his own observations as a participant to describe how Nunavut negotiations led to a final agreement.

Primary and secondary materials were gathered from the Yukon Archives in Whitehorse, the Labrador Institute in Happy Valley-Goose Bay, online databases, as well

as from those participants who were willing to share their materials from their personal files. In one instance, an interviewee allowed me to examine, take, and keep land claims negotiation materials from his office. Most of the other officials, however, were much more reluctant to share their files. Although I considered using freedom of information laws to access relevant documents that were not publicly available but were in the hands of government officials, I decided not to do so for two related reasons. First, using freedom of information laws would have threatened the individual interview data I had collected. According to University of Toronto ethics guidelines, participants are allowed at any time to withdraw from my study and must be informed of this right. A number of participants had asked that I not pursue confidential documents through freedom of information laws. I respected their requests rather than risk them withdrawing from my study were I to use freedom of information laws. Second, I felt that the wishes of the participants should be respected not only for the reasons above, but also to preserve them for future researchers. For example, before I was allowed to speak to five Innu elders in Sheshatshiu, I was subjected to what can only be described as a series of very uncomfortable questions that related to what previous researchers had done with the materials that the elders had shared with them over the years. It was clear that the practices of past researchers had created intense negative feelings towards all researchers. This experience reminded me that as researchers, we have a responsibility to preserve the integrity of participants for future researchers. So as much as possible I tried to respect the requests of participants in relation to acquiring documents and how they wanted their material treated in my work.

One of the costs of adopting such a strategy was that I was unable to get copies of certain documents. If a participant refused to give me a document, I tried to ask other

participants for a copy of that document. Sometimes I was provided with the documents, but most of the time I was not, especially when they involved sensitive issues. As such, I relied on speaking to as many participants as I could, as well as consulting newspaper articles, news videos, publicly available government documents, published speeches, and secondary literature to confirm my interview data while respecting the wishes of my participants. I do not believe, however, that my inability to obtain certain documents has adversely affected my research in any significant way.

The dissertation is organized as follows. Chapter 2 provides an historical overview of the Aboriginal-Canadian treaty relationship as well as providing essential background information on the modern treaty process. Chapter 3 constructs the analytical framework of the dissertation. This framework is intended to overcome the tendency in the literature on Aboriginal treaties to be dominated by structural analyses of the treaty process with no systematic study of the effect of both the institutional structure of comprehensive land claims negotiations and the factors associated with the actors doing the negotiating. Chapter 4 presents the case studies of the Innu and the Inuit in Labrador while chapter 5 describes and analyzes the Yukon cases. Chapter 6 concludes the dissertation with a discussion of the relevance of this study for the practice of comprehensive land claims negotiations in Canada. It also moves beyond the explanatory nature that has been the focus of this dissertation to talk about some of the normative issues that arise out of an explanation that places the burden of completion on Aboriginal peoples.

Appendix 1 – List of Negotiating First Nations in British Columbia

The following is a list of the 57 First Nations in British Columbia who are negotiating comprehensive land claims agreements through the B.C.T.C. process. This list was compiled from information posted on the British Columbia Treaty Commission website (<http://www.bctreaty.net>) on January 2007.

B.C. First Nation	Start Date	Current Status ⁷
Acho Dene Koe First Nation	2000	Stage 2
Allied Tribes of Lax Kw'alaams	2005	Stage 2
Carcross/Tagish First Nation	1997	Stage 4
Carrier Sekani Tribal Council	1994	Stage 4
Champagne and Aishihik First Nations	1993	Stage 4
Cheslatta Carrier Nation	1995	Stage 3
Council of Haida Nation	1993	Stage 2
Da'naxda'xw Awaetlatla Nation (formerly Tanakteuk First Nation)	1997	Stage 4
Ditidaht First Nation	1993	Stage 4
Esketemc First Nation (formerly Alkali Lake Indian Band)	1993	Stage 4
Gitanyow Hereditary Chiefs	1993	Stage 4
Gitxsan Hereditary Chiefs	1994	Stage 4
Gwa'Sala-'Nakwaxda'xw Nation	1997	Stage 4
Haisla Nation	1994	Stage 4
Heiltsuk Nation	1993	Stage 4
Hul'qumi'num Treaty Group	1993	Stage 4
Hupacasath First Nation	2000	Stage 3
In-SHUCK-ch Nation	2002	Stage 5
Kaska Dena Council	1993	Stage 4
Katzie Indian Band	1994	Stage 4

⁷ “There are six stages in the B.C. treaty process: **Stage 1:** First Nations start the negotiation process when they file a statement of intent to negotiate a treaty; **Stage 2:** At stage 2 of the process, federal and provincial governments and the First Nation ready themselves for negotiation by establishing negotiating teams, preparing background information, identifying preliminary topics for negotiation and setting up consultation mechanisms; **Stage 3:** The three parties negotiate a framework agreement -- an agenda that sets out the topics, process and timing for negotiations; **Stage 4:** At stage 4, the three parties negotiate an agreement-in-principle (AIP) -- negotiators discuss each topic listed in the framework agreement and this forms the basis of the treaty; **Stage 5:** At stage 5, the parties negotiate a final treaty using the AIP as a working document; **Stage 6:** Finally, in Stage 6, the three parties work co-operatively to implement the treaty according to the plan set out in the treaty.” (taken from the British Columbia Treaty Commission website: www.bctreaty.net); see also Abele and Prince, 2003: 149

Klahoose Indian Band	1994	Stage 4
Ktunaxa/Kinbasket Treaty Council	1993	Stage 4
Kwakiutl Nation	1997	Stage 4 (Suspended)
Laich-Kwil-Tach K'omoks Tlowitsis Council of Chiefs (Hamatla Treaty Society)	1993	Stage 4
Lake Babine Nation	1994	Stage 4
Lheidli T'enneh Band	1993	Stage 5
Liard First Nation	1993	Stage 2
Maa-nulth First Nations	1994	Stage 5
McLeod Lake Indian Band	2004	Stage 2
Musqueam Nation	1993	Stage 4
'Namgis Nation	1997	Stage 4
Nazko Indian Band	1994	Stage 4
Northern Shuswap Treaty Society (Cariboo Tribal Council)	1994	Stage 4
Nuu-chah-nulth Tribal Council	1994	Stage 4
Pacheedaht Band	1996	Stage 4
Quatsino First Nation	1996	Stage 4
Ross River Dena Council	1993	Stage 2
Sechelt Indian Band	1994	Stage 5
Sliammon Indian Band	1994	Stage 5
Snuneymuxw First Nation (formerly Nanaimo First Nation)	1994	Stage 4
Squamish Nation	1993	Stage 3
Sto:Lo Nation	1995	Stage 4
Taku River Tlingit First Nation	1993	Stage 4
Te'Mexw Treaty Association	1994	Stage 4
Teslin Tlingit Council	1994	Stage 4
Tlatlasikwala Nation	1997	Stage 4
Tlowitsis First Nation	2005	Stage 3
Tsawwassen First Nation	1993	Ratified
Tsay Keh Dene Band	1994	Stage 4
Tsimshian First Nations	1995	Stage 4
Tsleil-Waututh Nation	1994	Stage 4
Westbank First Nation	1994	Stage 4
Wet'suwet'en Nation	1994	Stage 4
Wuikinuxv Nation (formerly known as Oweekeno Nation)	1993	Stage 4
Xwemalhkwa (formerly known as Homalco Indian Band)	1993	Stage 4
Yale First Nation	1994	Stage 5
Yekooche Nation	1995	Stage 5

Chapter 2: A History of Aboriginal Treaty Making in Canada

This chapter provides important background information and context for the theoretical and empirical chapters that follow. It begins by providing a history of the treaty relationship between Aboriginal peoples and the Crown in Canada, dividing their relationship into three periods: historical treaties, the period between the signing of the last numbered treaty in 1921 and the James Bay Treaty in 1975, and modern treaties. It concludes by identifying and describing in greater detail the participants and the processes for negotiating comprehensive land claims agreements in Canada.

Historical Treaties

Scholars interested in historical treaties have usually focused on the differences between Aboriginal and European world views, cultures, and languages, as well as on the purposes of historical treaties, their texts, who signed them, how they were implemented, and how they affected each of the signatory parties. Although these contributions have been crucial for understanding Aboriginal treaties in Canada, they have tended to focus on only single treaties and ignore instances of incomplete treaty negotiations. They typically do not fully explore all of the possible factors affecting negotiations, and sometimes fail to tease out the relationship among the explanatory factors.

a) Pre-Contact to 1780s: Nation-to-Nation

“Treaties” and “treaty relationships” are not exclusive European inventions. Prior to the arrival of European colonists, Aboriginal groups in Turtle Island (now known as North America) negotiated and engaged in a variety of different treaties with each other.

The Iroquois Confederacy, for example, was a political union of five (later six) separate Aboriginal nations: Mohawk, Cayuga, Seneca, Oneida, and Onondaga. In addition to possessing their own lands and internal governing structures, they each could send representatives to a confederacy council, whose main purpose was to forge a consensus among the five nations on issues that affected them all. Any decisions made by the council, however, were non-binding and each nation could in the end choose its own path (see for instance Benn, 1998; Graymont, 1972; Richter, 1992). Treaties were used not only to create political unions, but also to facilitate the trade of tobacco, maize, and copper, among other things. Sometimes two or more groups agreed to join together to attack another Aboriginal group. These military alliances lasted anywhere from the duration of a battle to the length of a war (Dickason, 1997; Miller, 2000).

Treaties signed between Aboriginal groups were not recorded in written documents; rather, they were oral in nature or were codified using a variety of symbols. For instance, some Aboriginal groups used two-row wampum belts to indicate the terms of a treaty. A two-row wampum belt consisted of two rows of purple wampum (beads) representing the parties to the agreement separated by three rows of white wampum, symbolizing peace, friendship, and respect. The idea behind the two separate but bound rows was that each party agreed to “travel the river together, side by side, but in our own boat. Neither of us will try to steer the other’s vessel” (Borrows, 1997: 164; see also Snow, 1994).

The arrival of European colonists had a significant impact on the treaty relationships between Aboriginal peoples. Initial contact between Aboriginal and European peoples has been described as “a mixture of mutual curiosity, halting efforts at friendship and some considerable apprehension” (RCAP vol.1, 1996: 100). Aboriginal peoples in Canada at the

time of contact were more numerous and knowledgeable about how to survive in the new world. Due to these advantages, French and British colonists relied heavily on them for survival, exploration, and the harvesting of fish and fur (Dickason, 1997: 84; Miller, 2000: 36-40). The first treaties between Aboriginal peoples and the colonial powers were oral and economic in nature, establishing trading relations mostly for fur. For instance, economic treaties allowed the French to set up trading posts, secure Aboriginal guides to explore and trap in the hinterland, and gain a European monopoly over certain Aboriginal fur trade networks (Miller, 2000).

As European ambitions in North America grew, so, too did their need for Aboriginal peoples as political and military allies (Alcantara, 2003: 395; Tobias, 1983). The first written treaties were nation-to-nation non-aggression pacts signed by the French and the Haudenosaunee in 1624, 1645, and 1653 (RCAP vol. 1, 1996: 123). More often than not during this period, Aboriginal-Crown treaties were recorded according to the customs of the Aboriginal parties. For instance, the various peace and non-aggression treaties signed by the British Crown and the Iroquois were recorded in the two row wampum belts described above (Snow, 1984).

In terms of how treaties were negotiated during this period, European officials adopted the procedures and protocols of each Aboriginal nation that they dealt with. Most negotiations involved an exchange of gifts before and after negotiations (Burrows, 1997: 158; Tobias, 1983: 40). In dealing with the Iroquois Confederacy, for instance, Crown officials made “condolences” before entering into negotiations (Havard, 2001; Richter, 1992). With the Cree, they smoked the peace pipe and used the language of kinship and kith rather than European contract law (Venne, 1997: 191). Actual negotiations tended to

occur between Crown officials and Aboriginal chiefs, who frequently consulted the rest of the band before making a decision (RCAP vol. 1, 1996: 130). Some Aboriginal nations negotiated according to the authority given to them by their women (Venne, 1997).

The Royal Proclamation of 1763 was an important event in the relationship between the British Crown and Aboriginal peoples in Canada. The Proclamation emerged out of the context of the Seven Years War (1756-1763) between the French and the English, culminating in the Battle of the Plains of Abraham in 1759. The result of this battle, fought in present day Quebec, was the end of French dominance in North America and the establishment of British hegemony. The French eventually capitulated to the British outside of Montreal in 1763, and formally surrendered control over New France to the British through the Treaty of Paris, signed in 1763 (Miller, 2000: 85-86).

To quell Aboriginal concerns and fears regarding European squatters, and for some Aboriginal groups, the defeat of their French allies, the British government issued the Royal Proclamation of 1763 (Dickason, 1999: 160-161). Under the Royal Proclamation, some argue that the Crown recognized Aboriginal nations as autonomous political units with undefined internal autonomy subject to the Crown's protection. More importantly, the Royal Proclamation stated that Aboriginal lands could only be acquired if Aboriginal peoples voluntarily ceded them to the Crown (Alcantara, 2003: 395; Foster, 1999; Miller, 2000: 86-88; RCAP vol. 1, 1996: 116). That is, the Crown was the only party that could negotiate treaties. According to John Borrows (1997: 159-160), "The Proclamation attempted to convince First Nations that the British would respect existing political and territorial jurisdiction by incorporating First Nations understanding of this relationship in the document. The Proclamation does this by implying that no lands would be taken from

First Nation peoples without their consent. However, in order to consolidate the Crown's position in North America, words were also placed in the Proclamation which did not accord with First Nations' viewpoints of the parties' relationship to one another and to the land. For example, the British inserted statements in the Proclamation that claimed 'dominion' and 'sovereignty' over the territories that First Nations occupied."

John Burrows (1997) argues that the Royal Proclamation of 1763 cannot be understood without reference to the Treaty of Niagara, signed in the summer of 1764. In July 1764, Sir William Johnson, superintendent of Indian Affairs, invited First Nations peoples from the northeast, midwest, and mideast of North America to come to Niagara to sign a treaty renewing their relationships with the Crown. The Treaty of Niagara, which was signed and recorded in two-row wampum belts in August 1764, affirmed "a First Nation/Crown relationship that is founded on peace, friendship, and respect, where each nation will not interfere with the internal affairs of the other. An interpretation of the Proclamation using the Treaty of Niagara discredits the claims of the Crown to exercise sovereignty over First Nations" (Burrows, 1997: 164). For many subsequent years, Aboriginal groups used the Treaty of Niagara to protest the Crown's interference in their internal affairs and in their traditional lands (Burrows, 1997: 165-166).

Overall, the treaty relationships between European and Aboriginal peoples during this period were nation-to-nation economic, political, and military relationships. Their relationships were nation-to-nation (RCAP, 1996) because Aboriginal peoples enjoyed two significant advantages over their European allies in the new world. First, they had larger populations and second, they had greater knowledge of how to survive and navigate the new world. Although European and Aboriginal peoples were decidedly different in terms

of their world views, cultures, languages, and religions, these differences did not fully materialize in their treaty relationships until later. These fundamental differences became more pronounced and problematic as exposure between the two societies increased, as the nature of their treaties shifted from military/economic alliances to land acquisition, and as the Aboriginal advantages of population size and knowledge decreased over time.

One of the key differences between Aboriginal peoples and European settlers was how they viewed land ownership. Europeans came from a tradition where ultimate title to all lands belonged to the Crown and where individuals could gain private property rights to land through a legal contract of purchase. Land was not shared; it was owned (Abele, 2005; Alcantara, 2003: 396-397). Aboriginal peoples, on the other hand, believed that their lands were held as common property by each tribal nation with each individual Aboriginal person (both living and dead) having an undivided interest in the lands. Furthermore, ownership over the lands was not held only by human beings. Rather, it was also held by other living things such as animals, plants, and sometimes rocks (Dickason, 1999: 328). Land could not be “owned”; it could only be shared (Erasmus and Sanders, 1992: 5; Fumoleau, n.d.: 17-18; RCAP, 1996).

Treaties with the Crown, therefore, were “solemn, oral and mutual promises to coexist in peace and for mutual benefit.” By signing treaties, Aboriginal peoples were not extinguishing title, but were agreeing to share their lands (Asch and Zlotkin, 1997: 216-217; Erasmus and Sanders, 1992; RCAP vol. 2, 1996: 39-40, 45). According to Olive Patricia Dickason (1999: 328), Amerindians “were astonished at the idea that their hunting and fishing rights originated with the [Royal] Proclamation of 1763; in their view, those rights had always existed. The treaties had confirmed an already existing situation, subject to

limitation only in areas where settlement had occurred. A Gitksan-Carrier (Wet'suwet'en) declaration in 1977 wasted no words: 'Recognize our Sovereignty, recognize our rights, so that we may fully recognize yours.'

A number of scholars disagree with these characterizations of Aboriginal pre-contact conceptions of property rights, arguing that Aboriginal peoples in Canada and the United States did have forms of private property that were akin to western ones. Galbraith, Rodriguez, and Stiles (2006: 6-7, 8) argue that "there is ample historical and anthropological research to indicate that precolonial indigenous populations had a highly developed sense of individual private property, including that of land Different tribes used different methods such as rocks or sticks to mark property boundaries, and the recording and transfer of these property rights differed from tribe to tribe, usually by a combination of written and oral traditions." Bruce Benson observes that the Plains Indians long struggled against each other to create and enforce western-style property rights in agricultural lands and in buffalo in North America (Benson, 2006). Flanagan and Alcantara (2006) document how Aboriginal peoples and families in western Canada frequently claimed and recognized individual parcels of land prior to contact and afterwards. Finally, Terry Anderson (2006: 33) shows that in the United States, Indian land tenure systems did exist, "ranging from completely or almost completely communal systems to systems hardly less individualistic than our own with its core of fee simple tenure" (quoting Copper, 1949: 1).

In short, this literature argues that Aboriginal peoples did understand and did have experience with contractual exchanges of property. Taking this argument further, it may be plausible that Aboriginal peoples had full knowledge of the fact that they were engaging in

private property exchanges when they signed the various historical treaties. Nonetheless, RCAP, Dickason, and others show that even if there were some similarities between Aboriginal and western notions of property ownership, Aboriginal people did have distinctive views about their relationship with the land. As described above, this relationship was not only economic in nature, but also spiritual. In contrast, westerners did not have a spiritual connection to their acquired lands. This crucial difference in Aboriginal and non-Aboriginal notions of property ownership, among others, is at the centre of current Aboriginal – non-Aboriginal disputes over lands and treaties.

b) 1780s to 1921: Civilization and Assimilation

From about 1780 onwards, three factors changed the way in which colonial governments conducted their relations with Aboriginal peoples in Canada. The first factor was a change in the relative size of the colonial and Aboriginal populations. Over the course of 200 years, colonial populations had grown immensely while Aboriginal populations had greatly diminished. One source of population shrinkage was deadly diseases brought over from Europe. These diseases wrecked havoc with Aboriginal peoples who had no immunities to small pox, whooping cough, tuberculosis, and sexually transmitted diseases (Dickason, 1997: 39, 106, 174). A second source of population reduction came from the constant warfare between Aboriginal nations and especially between Aboriginal and European nations. The War of 1812, for instance, was particularly hard on the Iroquois because it ended up dividing their five nations against each other in the war between Britain and the U.S. (Benn, 1998; Surtees, 1983: 68). After the war, the

Iroquois population was dramatically smaller, leaving it unable to resist American demands for lands and relocation (Benn, 1998).

The second factor causing a shift in Crown views about Aboriginal peoples during this period was the collapse of the fur market in Europe. The market had begun to collapse mainly because of over-hunting and over-supply. As a result, the Crown felt it was no longer advantageous to maintain Aboriginal economic treaties that required annual gift giving and brought little income in return (RCAP vol. 1, 1996: 138).

The final factor causing a shift in Crown views was the changing nature of European politics in the new world. The end of French influence in Canada after the Treaty of Paris and the end of the American threat after the War of 1812 resulted in Britain deciding that it no longer needed Aboriginal military allies (Alcantara, 2003: 396, 398; Good, 2001: 99). After the War of 1812, Britain let its military treaties with Aboriginal peoples lapse and transferred the military's jurisdiction over Aboriginal peoples in Canada to civilian authorities (RCAP vol. 1, 1996: 138).

As a result of the above factors, the previous nation-to-nation relationship between the Crown and Aboriginal peoples evolved into a paternalistic one. Now, the main goals of the British Crown were to acquire Aboriginal lands that it believed were valuable, and to civilize and assimilate Aboriginal peoples into colonial society. In terms of treaties, the government sent out negotiators to acquire Aboriginal lands for settling its burgeoning colonial population (Fumoleau, n.d.: 24) and to bring wealth into imperial coffers (RCAP vol. 1, 1996: 140). Aboriginal lands that did not have any "value" were usually ignored by government treaty makers (Fumoleau, n.d.: 31). Around the 1820s, the Crown began to move some Aboriginal groups to land reserves as part of the terms of their treaties. In

addition to ensuring that Aboriginal peoples had somewhere to live after being removed from their valuable lands, land reserves were thought of as places where Aboriginal peoples could be civilized through formal education, farming, and conversion to Christianity (Alcantara, 2003: 399; Carter, 1990; Tobias, 1983: 41-42).

During this period, the differences between European and Aboriginal conceptions of land ownership became more pronounced. These different conceptions of ownership led to different expectations about what treaties were meant to accomplish. Aboriginal peoples thought that by signing treaties, they were agreeing to share their lands in exchange for the Crown's protection and recognition of their rights. The Crown, on the other hand, thought it was negotiating the permanent transfer of title.

Treaties in this era were also problematic because significant linguistic and cultural differences prevented a free and accurate exchange of information between the parties. Aboriginal peoples, for instance, had no word or concept for "surrender" or "fee simple ownership." On the other hand, Crown negotiators did not understand the unique relationship that Aboriginal peoples had with the land and its inhabitants. According to the Royal Commission on Aboriginal Peoples (1996: 175), "Negotiation and dialogue did not, and could not, venture into the meaning of specific terminology, legal or otherwise, and remained at a broad general level, owing to time and language barriers." René Fumoleau observed that "many words of the treaty text, their meaning and their consequences, were beyond the comprehension of the northern Indian it is very probable that the two parties [the Crown and the Aboriginal group] neither understood each other nor agreed on what the treaty meant" (Fumoleau, n.d.: 19).

The treaties signed after 1815 were problematic on a number of levels. According to Robert Surtees (1983), between 1815 and 1830, the British Crown completed seven major land transactions involving 2.8 million hectares of land in Upper Canada. These land transactions came about as a result of the Crown's interest in acquiring Aboriginal lands for colonial settlement and resource extraction. They also came about as a result of Aboriginal groups petitioning the Crown for protection from British squatters (RCAP vol. 1, 1996: 155). After the War of 1812, Aboriginal peoples in Upper Canada were severely weakened by famine and the war. Exhausted Aboriginal groups sought treaties that they thought would guarantee them the Crown's protection from squatters and extinction. Crown negotiators were able to use this desperation to their advantage, negotiating land surrenders in exchange for reserves and promising terms that they had no intention of keeping. For instance, in the treaty with the Mississaugas for their lands in the Rice Lake Region, negotiator William Claus guaranteed that the Mississaugas could hunt and fish in their traditional areas. He also assured them that the governor would agree to recognize their rights to a certain island in the region. The final treaty document, however, did not mention these guarantees. Instead, it simply listed the annuities to be paid, and the 780,500 hectares to be surrendered to the Crown (Surtees, 1983: 74-75).

Summing up the seven land transactions completed during this period, Surtees observed that "The meetings were brief; the demands were minimal, and the government agents appeared to have anticipated no trouble as they prepared for the formal surrender councils. And they received none." The Aboriginal peoples in this area at the time were demoralized and docile, having no choice but to surrender to the wishes of the Crown (Surtees, 1983: 80).

This trend would continue throughout Ontario where negotiators frequently presented Aboriginal groups with written texts that did not match what had been negotiated. An example of this is the Lake Huron and Lake Superior Treaties of 1850 signed between the Ojibwa and the Crown. In the written treaties, the Crown had included a clause stating that the Ojibwa agreed to permanently surrender their territories to the Crown. The Ojibwa, however, contend that they never agreed to do this; rather, the Crown was only supposed to have limited access rights to their lands for the purposes of subsurface exploration and extraction (RCAP vol. 1, 1996: 158).

This type of Crown behaviour was not limited to Ontario. Paul Tennant (1990) has provided evidence that the government of British Columbia was devious and hostile to Aboriginal land claims in that region. He describes how Jeremy Douglas, Governor of Vancouver Island from 1851 to 1864, regularly “had the chiefs indicate their approval [of the treaties by indicating their mark] at the foot of a blank sheet of paper.” To the blank sheet, Douglas would add text that was usually at odds with what treaty makers from both sides had agreed upon (Tennant, 1990: 17). In other instances, the colonial government in British Columbia regularly denied Aboriginal groups access to important documentation that was crucial for proving their Aboriginal title claims (Ibid., 1990: 102, 107).

There were also a number of problems with the numbered treaties. Sharon Venne (1997) argues that Treaty 6 is problematic due to the dubious circumstances around its signing. Looking at oral traditions and Cree culture, she finds that the written text would never have been agreed to by the Cree community. In Cree culture, women were the true wards of the land because of their strong spiritual connection to it. Yet Treaty 6 was negotiated by a few Cree men, none of whom had the authority to cede Cree lands on

behalf of their members (Venne, 1997: 91). Patrick Macklem (1997) agrees with the spirit of Venne's conclusions, arguing that Treaty 9 can only be interpreted correctly by moving beyond the text and taking into account Aboriginal understandings of what was originally agreed to during the actual negotiations of the treaty.

According to elder testimony, Treaty 7 was subject to treaty interpretation problems although in this case caused by linguistic/cultural differences. During Treaty 7 negotiations in Alberta, Blood Tribe members had a custom of uttering the phrase "ah, ah" while a speaker was talking to acknowledge that the person could continue to speak. It did not indicate that the listeners agreed to what was being said. The commissioners may have misinterpreted this phrase to mean that Blood Tribe members were agreeing to what they were proposing or saying during negotiations (Hildebrandt et al., 1997: 69).

In general, the historical literature has focused on European and Aboriginal differences in terms of their world views, values, languages, and cultures. These differences in conjunction with the Crown's strong desire for Aboriginal lands created a number of problems for Aboriginal peoples. Aboriginal groups that voluntarily entered into written treaties with the Crown were harmed as a result of the treaties failing to match what they thought they had agreed to during negotiations. These groups became impoverished and lacked a sufficient land base to carry out the economic, political, and cultural activities that were vital to their way of life. In other instances, many Aboriginal groups signed treaties because they felt they had no other choice in light of their poor circumstances and the growing might of the Crown (see for instance Fumoleau, n.d.: 18). These Aboriginal groups wanted protection from encroachment and squatting, and were willing to share their lands to protect their ways of life (Miller, 2000: 212, 214). In sum,

Aboriginal groups entered into treaties to protect their ways of life while government negotiators wanted Aboriginal lands for settlement and expansion (see for instance Fumoleau, n.d.: 39).

Another set of studies argues that Aboriginal groups signed treaties because their leaders were persuaded or forced to do so. According to elder recollections, Treaty 7 First Nations gave Crowfoot, a traditional Siksika leader, the power to negotiate and sign Treaty 7 on everyone's behalf. According to Siksika elder, Margaret Bad Boy, Crowfoot originally did not want to sign, but was convinced to do so by Father Lacombe, a missionary who had gained a number of religious converts within the Siksika nation. Another Siksika elder, Beatrice Poor Eagle, believed that Crowfoot signed the treaty because his brother, Three Bulls, threatened to sign it if Crowfoot did not (Hildenbrandt et al., 1997: 71, 74-77).

In sum, the historical literature informs modern treaty negotiations by documenting the injustices of the past, informing us about the changing nature of the relationship between Aboriginal and non-Aboriginal peoples over time, and providing practitioners with some lessons on how not to negotiate modern treaties. It also suggests that linguistic and cultural differences matter for how negotiation processes unfold. Although the literature does provide some insights into why historical treaties were signed, the applicability of those insights is limited since the context and environment in which negotiations occur today are considerably different.

1921-1975 : Assimilation, Repression, and the Growth of Aboriginal Activism

The signing of the last numbered treaty in 1921 marked the end of the historical treaty-making era. Although there were a few adhesions to a number of previously completed treaties, no new treaties were negotiated or completed until the early 1970s. Instead, the federal government during this period (1921-1975) abandoned its strategy of negotiating new treaties in favour of policies that encouraged the integration and assimilation of Aboriginal peoples into mainstream Canadian society. Some of these policies were quite repressive. For instance, the federal government amended the *Indian Act* in 1927 to prohibit status-Indians from raising money for the purposes of political representation (Abele, 2000: 140). In western Canada, the federal government outlawed the potlatch, prairie dances, and other important cultural activities (Miller, 2000: 260-263), and forced Indians who wanted to work off-reserve to obtain a pass from an Indian agent. The federal government also encouraged assimilation by forcibly sending young Aboriginals to residential schools (Miller, 2000: 265-269), giving Aboriginal peoples the right to vote in federal elections, and by introducing western forms of individual property rights on Canadian Indian reserves (Alcantara, 2007b; Alcantara, 2005; Alcantara, 2003; Flanagan and Alcantara, 2004).

The federal government's policy of assimilation reached its peak in 1969 with its release of the White Paper on Indian policy. This document called for the final and complete transformation of Aboriginal peoples into ordinary citizens (Abele, 1999: 448; Cairns, 2000; Coates, 2003: 337; Graham, 1987: 242). In practice, this meant the elimination of the *Indian Act*, the Department of Indian Affairs, Indian and reserve status, and all other federal responsibilities over Aboriginal peoples in Canada. In essence, the White Paper was a clear statement that the federal government believed "that differential

treatment based on race was antithetical to Canadian political traditions and that claims of Aboriginal title are so general and undefined that it is not realistic to think of them as specific claims capable of remedy” (Macklem, 2001: 268).

During the period leading up to the White Paper, Aboriginal peoples were neither silent nor docile. Nor were all government policies repressive. Indeed, this period is notable for the rise of Aboriginal activism and for a fundamental shift in ruling ideas. A key event triggering these developments was World War Two which had resulted in a number of fundamental changes to Canadian society. Partly in response to the return of war veterans to Canada, the federal government created and expanded the welfare state, giving “rise to [new] expectations of expanded and universal citizenship entitlements” (Abele, 2000: 140). As well, there began to develop a general distaste for “ethnic antagonism and prejudice in all its forms, a general revulsion against the hideous ethnic crimes of the Second World War” (Abele, 2000: 140). Finally, shifts in ruling ideas were very much influenced by the fact that Aboriginal peoples had joined the army, had fought and died alongside Canadian soldiers, and had come back from the war to poverty and unemployment (Abele, 1999: 447). As a result, there was some concern about the federal government’s treatment of Aboriginal peoples and especially Aboriginal war veterans as second class citizens (Alcantara, 2003; Coates, 2003: 334; Miller, 2000: 324-326). Veteran organizations, churches, and citizen groups in the 1950s, for instance, called on the federal government to establish a Royal Commission to investigate the living conditions on Canadian Indian reserves and to evaluate whether its programs were effective in addressing Aboriginal poverty (Tobias, 1983: 51).

In response to these broad shifts in public values, the federal government's Aboriginal policies became less repressive and in some ways, more empowering of Aboriginal peoples as time went on. In the 1960s, for instance, the federal government repealed its prohibitions on the potlatch, the consumption of alcohol, the need for a permit to work off-reserve, and on raising funds for political representation (Miller, 2000: 326). The federal government also created a number of programs to help establish and fund a variety of minority group organizations, including Aboriginal ones (Jenson and Phillips, 1996; Pal, 1993). These programs were instrumental in helping Aboriginal peoples develop highly sophisticated and effective political organizations and networks for promoting and achieving their goals in government and society (Abele, 2000: 142).

One of the more popular methods for advancing Aboriginal goals was litigation in Canadian courts (Coates, 2003: 334, 335). After meeting with reluctant provincial and federal officials, for instance, the Nisga'a First Nation in British Columbia went to court to have its Aboriginal title to its ancestral lands recognized. Although the Supreme Court of Canada ultimately dismissed its claim in *R. v. Calder*, the majority of the court recognized "the legitimacy of a claim of Aboriginal title to land. The court viewed Aboriginal title as a bundle of common law rights of use and enjoyment of ancestral land that stemmed not from any positive legal enactment but from Aboriginal 'possession from time immemorial'" (Macklem, 2001: 268-269). As a result, "the federal government was forced to reconsider at least some elements of its policy on land claims because of *Calder*, a decision that confirmed that Indian title is a valid right in common law" (RCAP, 1996: 533; see also Macklem, 2001: 269). Reflecting on the court's decision in *Calder*, Prime Minister Pierre

Trudeau remarked that “perhaps you had more legal rights than we thought when we did the White Paper” (Asch, 1999: 432).⁸

In 1973, the federal government responded to the uncertainty created by the *Calder* decision by inviting Aboriginal groups to file what it termed comprehensive land claims. Rather than deny the existence of Aboriginal title, the federal government indicated it was willing to negotiate with those Aboriginal groups that had yet to sign a treaty but had a valid claim to Aboriginal title to their traditional lands. In 1973, it began negotiations with the James Bay Cree to facilitate the development of a hydroelectric project in northern Quebec. This treaty, the first modern one in Canada, was completed in 1975 and came into effect in 1977. With the James Bay Agreement completed, the federal government in 1976 began negotiations with a number of other Aboriginal groups, including the Nisga’a in British Columbia, and the Dene, the Métis, and the Inuit in the Northwest Territories.

Modern Treaties

The modern treaty era differs from the historical treaty era in four important ways. First, the nature of modern treaties tends to be more expansive in terms of the lands, resources, and powers that an Aboriginal group can receive. In contrast to historical treaties, for instance, Aboriginal groups in the modern treaty era can gain full control over subsurface resources in their treaty lands. Second, the Supreme Court of Canada has made a number of decisions that confirm the existence of Aboriginal title (*Calder*), the fiduciary

⁸ Christa Scholtz (2006) suggests that the federal government adopted a treaty negotiation policy not because of the *Calder* decision per se, but because Aboriginal peoples organized and mobilized effectively during the 1960s and 1970s. In essence, negotiation policies emerge only when significant Aboriginal mobilization occurs before positive judicial decisions.

duty of the federal government (*Taku River* and *Haida Nation*), and the admissibility of oral evidence (*Delgamuuk'w*) (see Macklem, 2001: ch. 9). These rulings are important because they demand that the Government of Canada act in good faith during comprehensive land claims negotiations, and not in the devious and exploitive manner it exhibited when it negotiated and implemented some of the historical treaties.⁹ Third, Aboriginal leaders today are better connected to each other, and more organized and savvy than their predecessors were on how Canadian society and government works (Tennant, 1990: 81, 140). Language and cultural barriers have been reduced as a result of a generation of leaders who were forced to go through the residential school system and who took advantage of the expansion of funding for postsecondary education. Today, many Aboriginal leaders have post-secondary degrees and are knowledgeable about the institutions, languages, and norms of non-Aboriginal society and governments.

Finally, Aboriginal groups in the modern treaty era have greater access to financial resources to hire experts and lawyers who are conversant in western property law, institutions, negotiation methods, and land tenure. These experts are important for empowering Aboriginal people to interact with governments officials on a more equal footing, especially during specialized discussions about land selection, subsurface resources, land use planning, self-government, and the nature of Aboriginal rights (for a first hand account of the role of advisors, see McPherson, 2003: ch. 7). Most Aboriginal groups, however, do not have the financial resources on their own to hire these experts. Rather, they must borrow money against their cash settlements from the federal government to

⁹ Recall in the above discussion Governor Douglas's practice of acquiring Aboriginal signatures to blank pieces of paper, to which treaty text was added later.

negotiate their comprehensive land claims agreement (Miller, 2000: 344). Nonetheless, although significant disparities do still exist, Aboriginal peoples today are better equipped than their historical counterparts in terms of their resources and organizational capacities for negotiating treaties (see Samson, 2003; McClellan, 1987: 99).

As I describe above, the federal government in 1973 invited Aboriginal groups to negotiate with it under the federal comprehensive land claims process. A significant number of Aboriginal groups responded to that invitation, but the federal government decided to allow only a maximum of six groups to negotiate with it at one time. The first six groups were the James Bay Cree, the Inuvialuit, the Nisga'a in B.C., the Council of Yukon Indians in the Yukon Territory, the Inuit of Nunavut, and the Dene and Métis in the Northwest Territories.

In general, the process was extremely slow (Fleras and Elliott, 1992: 34). Between 1973 and 1991, only two comprehensive land claims agreements were settled: the James Bay and Northern Quebec Agreement (JBNQA) in 1975 and the Inuvialuit Final Agreement in 1984. Immediately after the *Calder* and *Malouf* decisions in 1973, the northern Cree and Inuit in Quebec and the governments of Canada and Quebec negotiated the JBNQA to facilitate the development of a massive hydro-electric project (Rynard, 2000: 216). As part of the deal, the nine Cree communities gained ownership over 5,544 square kilometers of land while the fifteen Inuit communities gained ownership over 8,151 square kilometers of land. They also both received exclusive hunting and trapping rights to 150,000 square kilometers of settlement land and a cash settlement package of \$225 million: \$135 million of this package went to the Cree and \$90 million to the Inuit. In addition to cash and lands, the JBNQA gave the Cree and the Inuit the right to participate in

environmental and social management, the creation of an income security fund for hunters and trappers, as well as self government (INAC 2006: 4).

The second comprehensive land claims agreement completed in Canada was the 1984 Inuvialuit Final Agreement. This agreement, signed by the federal government and the Inuit in the northwestern part of the Northwest Territories, involved a settlement area of 435,000 square kilometers. Of that total amount, the Inuit gained ownership rights to 91,000 square kilometers of land, including 13,000 square kilometres of mineral rights. The cash settlement was \$78 million, plus a one time payment of \$10 million for an economic enhancement fund and \$7.5 million for a social development fund. As in the JBNQA, the Inuvialuit Final Agreement provided the Inuvialuit with wildlife harvesting rights and the right to participate in economic, environmental, and social programs management (INAC, 2006: 5). The Inuvialuit also gained land rights in some parts of the Yukon Territory.

Why did negotiations between 1973 and 1991 generate only these two agreements? One reason, as I mentioned above, was that the federal government would only negotiate with six claimant groups at any one time. Another reason was that the federal government required that all comprehensive land claims agreements result in the blanket extinguishment of Aboriginal rights in Canadian lands. This requirement was a major obstacle for many Aboriginal groups that were negotiating under the comprehensive land claims process. Finally, negotiations were impeded by a sustained federal interest in amending the constitution to address the “problem” of Quebec. As a result, although Aboriginal groups continued to negotiate comprehensive land claims with the federal

government, most of them shifted their focus to pursuing constitutional reform that protected their Aboriginal rights.

In the late 1970s, the Trudeau government tried to counter Quebec separatism by constitutional reform. The main thrust of Trudeau's strategy was to reduce the differences between Quebec and the rest of Canada by introducing a set of individual and group rights constitutionally entrenched in a Charter of Rights and Freedoms (Coates, 2003: 338; Russell, 2004). Among other things, Part II of the Constitution Act 1982 recognized and affirmed existing Aboriginal and treaty rights in Canada. However, in one sense, s. 35 was a failure because it only protected *existing* Aboriginal and treaty rights; moreover, Quebec refused to sign the patriated Constitution.

In 1984, Brian Mulroney and his Progressive Conservative Party came to power. In addition to being interested in addressing the issues surrounding Quebec, Mulroney inherited a highly complex Indian and northern policy environment from the previous Liberal government (Graham, 1987: 238). In 1985, the Mulroney government asked Erik Neilson, a Yukon MP, to conduct a program review of the entire government, including the Department of Indian Affairs and Northern Development. The final report of the Neilson task force was eerily similar to the 1969 White Paper; the report called for the abolition of the Department of Indian Affairs and the transfer of responsibilities over Aboriginal peoples to other federal departments and to the provinces (Graham, 1987: 247-248; Miller, 2000: 360-361). Much like the White Paper in 1969, Aboriginal peoples responded quite negatively to the report and Mulroney quickly shelved and distanced himself from it (Graham, 1987: 248). Nevertheless, his views about the comprehensive land claims process were not very compatible with the desires of many Aboriginal groups in Canada.

Soon after that report, for instance, Mulroney signed the Sechelt self-government agreement which conferred municipal-style powers on the Sechelt Indian band in British Columbia, a model that many Aboriginal groups reject (Miller, 2000: 361-362).

Nonetheless, in response to Aboriginal dissatisfaction with the Neilson report and the treaty process itself, Mulroney's government did make a number of important changes to the federal comprehensive land claims policy. In 1985, Mulroney asked Murray Coolican to study and make recommendations about the federal treaty process. Coolican's report, delivered in 1986, had four central principles guiding its findings. Comprehensive land claims agreements should recognize and affirm Aboriginal rights, allow for the negotiation of more expansive self-government arrangements, lead to the sharing of jurisdiction and management of lands and resources, and ensure the fair treatment of third party interests. The most important finding of the report was that the federal government's "blanket extinguishment" requirement was a significant obstacle to the completion of comprehensive land claims agreements in Canada.

In response to Aboriginal complaints and the findings of the Coolican report, the federal government changed its comprehensive land claims policy in 1986 (Graham, 1987: 255-256). The most important reform was the government's willingness to allow negotiators to pursue alternatives to blanket extinguishment. Other reforms to the federal policy included allowing Aboriginal groups to negotiate for "offshore wildlife harvesting rights, resource-revenue sharing, Aboriginal participation in environmental decision-making, and self-government arrangements." The negotiators could also negotiate interim measures to protect Aboriginal interests in lands that were under negotiations, as well as the inclusion of an implementation plan for the final agreement (INAC, 2003: 6). In 1990, the

federal government made another important change to federal policy when it formally dropped its policy of negotiating with only six claimant groups at one time. It stated it was ready to negotiate with all Aboriginal groups who had never signed a treaty but who could prove that their claims were worthy of being accepted for active negotiations.

Despite these policy reforms, until 1992 the federal government and some Aboriginal groups remained focused on constitutional reform.¹⁰ Indeed, Mulroney's main goal in office was to bring Quebec back into the constitutional fold. His first attempt to do so was the Meech Lake Accord in the late 1980s. The Accord proposed not only to recognize Quebec as a distinct society, but also to empower the province so it could protect its distinctiveness. Many Aboriginal leaders were critical of the Accord because several weeks earlier the Prime Minister and the provincial Premiers had refused to recognize Aboriginal self-government in the Canadian constitution. As such, during the ratification of the Meech Lake Accord, Aboriginal groups mobilized to defeat it. Elijah Harper, an Aboriginal member of the Manitoba provincial legislature, was one Aboriginal government actor who was instrumental in preventing the Accord from being ratified in that province (Miller, 2000; Russell, 2004).¹¹

After the defeat of the Meech Lake Accord, Mulroney's government held a series of intense consultations with those societal groups that had mobilized against it. The result of those consultations was the 1992 Charlottetown Accord, which among other things, contained a clause that acknowledged that "the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and

¹⁰ Yet negotiations continued with some Aboriginal groups like the Nisga'a and Yukon First Nations.

¹¹ It should also be pointed out that non-Aboriginal figures such as Newfoundland and Labrador Premier Clyde Wells were also instrumental in scuttling the Meech Lake Accord.

traditions and to ensure the integrity of their societies, and their governments constitute one of three orders of government in Canada” (Miller, 2000: 378). The Accord also called for the entrenchment of Aboriginal self-government, albeit subject to the “peace, order, and good government” clause of the *Constitution Act, 1982*. The Charlottetown Accord was defeated in a national referendum in October 1992 (Russell, 2004).

The failure of constitutional reform resulted in a renewed focus on comprehensive land claims negotiations. In 1991, Mulroney’s government established the Royal Commission on Aboriginal Peoples (RCAP) as a way of responding to the defeat of the Meech Lake Accord and to the aftermath of the Oka crisis (on the Oka crisis see Cape, 1992; Gabriel, 1992; Miller, 2001: 380-384). The RCAP had an extensive research program, drawing upon massive amounts of public consultation and academic study of the past, present, and future relationships between Aboriginal and non-Aboriginal peoples in Canada. Significant sections of the RCAP (1996) detailed the historical injustices inflicted on Aboriginal peoples through the historical treaties that they had signed with the Crown, while other sections called for a renewed effort to establish new, fair, equitable, and just treaty settlements with Aboriginal peoples in Canada.

From 1992 to the present, Aboriginal peoples and the Crown made significant progress toward completing comprehensive land claims agreements. In 1992 and 1993, the Gwich'in and the Inuit in the Northwest Territories each signed their own land claims agreements with the federal and territorial governments as did the Sahtu Dene and Métis in 1994. These two agreements were essentially variations of the failed Dene-Métis Agreement-in-Principle (1990), which was rejected by the Dene Nation because of the extinguishment clause. In 1995, the federal government amended its comprehensive land

claims policy by allowing Aboriginal groups to negotiate concurrently self-government packages as part of their land claims agreements. In 1999, the Nisga'a in British Columbia completed their final agreement as did the Tlicho of the Northwest Territories in 2003. In 2005 the Inuit in Newfoundland and Labrador settled their comprehensive land claims agreement with the federal and provincial governments of Canada. In the Yukon Territory, the first four Yukon First Nations completed their final agreements in 1994 and since then, all but three have completed final agreements. Finally, in 2007, the Tsawwassen First Nation and the Maa-nulth First Nations completed their treaties in British Columbia.

Despite these completed agreements, a number of comprehensive land claims negotiations remain incomplete. As mentioned in chapter 1, in British Columbia alone, 57 First Nations are currently involved in comprehensive land claims negotiations with the federal and provincial governments. Moreover, several groups in the Yukon Territory, the Northwest Territories, and in the provinces of Quebec and Newfoundland and Labrador, continue to negotiate with the Crown.

Negotiation processes vary depending on the province or territory. The most commonly used process is the federal comprehensive land claims process (described in greater detail below). Some provinces and territories such as British Columbia and the Yukon Territory have developed their own variants on the federal process. The B.C. process, which is very similar to the federal one, requires the Aboriginal group to submit a statement of claim, negotiate a framework agreement, negotiate a non-binding agreement-in-principle, and negotiate a final agreement, all of which is done through a six stage process established by the British Columbia Treaty Commission. In the Yukon Territory, all fourteen Yukon First Nations must use the collectively-negotiated Umbrella Final

Agreement (which in essence is a binding agreement-in-principle) as the basis from which to negotiate their individual final agreements.

In addition to comprehensive land claims agreements, the federal government is also negotiating hundreds of specific claims which in general are generally much less far-reaching than CLCs agreements (INAC, 2003). The purpose of the specific claims process is to provide an alternative to the courts (negotiations) for resolving allegations that the Crown has failed to interpret or implement the terms of a treaty properly. The process can also be used by non-treaty Aboriginal groups “to address past grievances related to the administration of Indian lands and other assets” (Specific Claims Branch, 2007). Comprehensive land claims agreements, on the other hand, are modern treaties negotiated by the Crown with those Aboriginal groups that have never signed a treaty.¹²

The remainder of this chapter describes the comprehensive land claims processes used in the Yukon Territory and Newfoundland and Labrador.

The Comprehensive Land Claim Process

The federal government created the comprehensive land claims (CLC) process in 1973 to facilitate the exchange of undefined Aboriginal rights for a set of specific treaty rights. When the federal government created the process in 1973, it had no formal process to follow once an Aboriginal group submitted a claim. In 1981, the federal government adopted a formal process called *In All Fairness*, made major modifications to it in 1986, and then made a number of minor changes in the 1990s and 2000s. Today, under the CLC

¹² It is important to note that the federal government’s CLC policy does allow groups with a treaty to negotiate a CLC if their treaties are fundamentally flawed. This situation occurred with Treaty 11 and Treaty 8 in the NWT.

process, an Aboriginal group submits a statement of intent to the federal and relevant sub-national governments to prove three things: that its rights to its claimed lands have never been extinguished; that it has historically occupied and used its claimed lands to the exclusion of other groups; and finally that it is a clearly identifiable and recognizable Aboriginal group (Indian and Northern Affairs Canada, 1998: 5; RCAP, 1996: 536-537).

Once these requirements are met, the three parties can begin negotiating a framework agreement. This agreement sets out the issues that are to be negotiated, how they will be negotiated, and by what date they must be resolved. A comprehensive land claims agreement can only address a limited range of issues and must in the end provide a full, certain, and final listing of all the rights and lands that a group may have now and in the future. The federal policy guide lists some of the issues that are available for negotiations and afterwards I list the typical chapters in an AIP:

Under this approach, the range of matters that the federal government would see as subjects for negotiation could include all, some, or parts of the following: establishment of governing structures; internal constitutions; elections; leadership selection processes; membership; marriage; adoption and child welfare; Aboriginal language; culture and religion; education; health; social services; administration/enforcement of Aboriginal laws, including the establishment of Aboriginal courts or tribunals and the creation of offences of the type normally created by local or regional governments for contravention of their laws; policing; property rights, including succession and estates; land management, including: zoning; service fees; land tenure and access, and expropriation of Aboriginal land by Aboriginal governments for their own public purposes; natural resources management; agriculture; hunting, fishing and trapping on Aboriginal lands; taxation in respect of direct taxes and property taxes of members; transfer and management of monies and group assets; management of public works and infrastructure; housing; local transportation; licensing, regulation and operation of businesses located on Aboriginal lands.” In the following areas, Aboriginal groups may gain some power but federal and/or provincial law making authority is paramount: “divorce; labour/training; administration of justice issues, including matters related to the administration and enforcement of laws of other jurisdictions which might include certain criminal laws; penitentiaries and parole; environmental protection, assessment and pollution prevention; fisheries co-management;

migratory birds co-management; gaming; emergency preparedness.” Finally, the federal government retains law making authority over “(i) powers related to Canadian sovereignty, defence and external relations; and (ii) other national interest powers (Indian and Northern Affairs Canada, 1995).

Once a framework agreement is achieved, the parties negotiate a non-legally binding agreement-in-principle (AIP). AIP negotiations are by far the most difficult and time consuming part of the process. Most AIPs contain chapters on eligibility and enrollment in the Aboriginal group, land, access, economic development, culture and heritage, water management, fish and wildlife, migratory birds, forest resources, harvesting, environmental assessment, taxation, dispute resolution, implementation, compensation, and sometimes a self-government provision. The AIP does not have to resolve all negotiation issues. Rather, it can leave some issues for final agreement negotiations. Typically, for instance, the negotiating parties wait until final agreement negotiations to select the actual parcels of settlement land to be included in the final agreement. Sometimes the parties also wait to negotiate the exact wording of the “cede, release, and surrender” provision.

Although it is not legally binding, the AIP usually forms the basis for drafting the final agreement. Previously, an AIP did not need to be ratified for final agreement negotiations to begin. However, this policy was changed after a number of Aboriginal communities failed to ratify their final agreements. To reduce the possibility that future final agreements will be rejected, federal policy now requires that all Aboriginal groups ratify their AIPs before final agreement negotiations can begin.

The purpose of the final agreement is to translate the AIP into a modern treaty, formalizing the negotiated terms. For instance, the Final Agreement sets out the settlement lands and land management powers that the Aboriginal group gains and it clarifies the roles

and responsibilities of each level of government in the settlement and non-settlement lands. Once signed, ratified, and enacted by laws passed in Parliament and the relevant sub-national legislature, the final agreement becomes a constitutional document under s. 35 and guides future interactions and disputes between the signatories and the Aboriginal and non-Aboriginal peoples affected by the treaty.¹³

The negotiating parties in comprehensive land claims negotiations are the Aboriginal groups, the federal government, and the relevant provincial or territorial governments in which the Aboriginal groups are located. For the federal side, the lead agency overseeing negotiations is Indian and Northern Affairs Canada (INAC) (Graham, 1987: 240). INAC undertakes negotiations according to guidelines set out in the federal comprehensive land claims policy and more importantly, according to the negotiation mandates given to it by the federal cabinet. These mandates are extremely important (see for instance Penikett, 2006: 161-173) because they set out the scope and range of lands, powers and jurisdictions that the federal negotiating team can negotiate.

Compared to other government actors, INAC's position as the lead agency in negotiations gives it a substantial amount of power over negotiations (Serson, 2006). The most influential INAC officials are the chief federal negotiators and the minister and deputy minister. The chief federal negotiators act as the federal government's main liaison with the negotiating Aboriginal groups, whereas the minister and deputy minister have the task of *informing* and most importantly, *seeking agreement* from fellow ministers and deputy ministers in such departments as Finance, Industry, Justice, Environment, and Fisheries and

¹³ Indeed, an amendment in 1983 to section 35 removes any doubts about the constitutional status of comprehensive land claims agreements in Canada.

Oceans regarding the land claims provisions that may affect their ministries. In many instances, opposition to negotiated positions tends to come from ministers and deputy ministers in other departments who are much more reluctant to cede ground on issues like taxation, environmental protection, and fish and wildlife management. INAC ministers and deputy ministers, therefore, become important “middlemen” for building bridges between the positions being negotiated at the treaty table and the positions held by ministers and deputy ministers in other government departments.

INAC officials also have significant influence on negotiation mandates. Although cabinet has the final say over negotiation mandates, it usually calls upon INAC officials to draft the initial mandates for cabinet consideration. Once approved, INAC’s minister and deputy minister enforce the mandates and are responsible for seeking modifications to them on behalf of Aboriginal groups and the territorial/provincial governments. Moreover, the INAC’s minister and deputy minister are the key officials who ensure that different government departments adhere to the mandates drafted by cabinet.

Other federal officials who can have a substantial influence on land claims negotiations are the Prime Minister and key figures in such central agencies as the Privy Council Office, the Prime Minister’s Office, and Finance; their influence stems from the fact that Canada’s parliamentary system is executive-dominated (Bakvis, 2001; Savoie, 1999; Thomas, 1999). A motivated Prime Minister, for instance, can unilaterally alter a mandate to speed up or delay the process, regardless of cabinet objections. Nonetheless, INAC remains the most important federal agency in influencing comprehensive land claims negotiations because of its position as the lead agency in conducting negotiations with the Aboriginal groups, and in moving land claims provisions through the machinery of the

federal government (Graham, 1987: 240; Serson, 2006; but also see Abele and Graham, 1988: 123).

At the provincial level, most provinces do not have a ministry solely dedicated to Aboriginal affairs. Usually, the Aboriginal affairs ministry or secretariat, if it exists, is tied to another department, or is situated in the office of the Premier. In Newfoundland and Labrador, for example, the Aboriginal affairs portfolio is located in the Department of Labrador and Aboriginal Affairs. Under previous administrations, such as that of Premier Clyde Wells (1989 to 1996), the minister responsible for Aboriginal affairs was the premier himself (Haysom, 1990). As at the federal level, the provincial Aboriginal affairs department is the lead agency in land claims negotiations. It helps cabinet draft negotiation mandates, enforces them, and makes recommendations on altering them. It takes the lead in coordinating and undertaking the negotiations themselves, and plays an important role in acting as a liaison with other departments and the premier. In general, as at the federal level, provincial Aboriginal affairs departments have substantial control over how negotiations unfold, subject to the influence of the premier.

In contrast to territorial land claims negotiations, provinces have constitutional jurisdiction over most of the important negotiation stakes. Their jurisdiction includes ownership of lands and natural resources, municipalities, taxation, land use planning, water management, self-government powers like education and the administration of justice, and fish and wildlife. The federal government recognizes the importance of provincial governments in land claims negotiations; indeed, federal policy declares that provincial governments must be involved in Aboriginal land claims located within provincial

boundaries.¹⁴ As such, much of the actual negotiating tends to occur between the provincial government and the Aboriginal groups. The fact that provincial governments do most of the negotiating is important because Christa Scholtz (2006) has found that sub-national (provincial) governments tend to be more reluctant than national ones to adopt Aboriginal treaty negotiation policies. By extension, they tend to be more reluctant to complete modern treaties because treaties tend to have a larger effect on provincial lands, powers, and jurisdictions.

Until the late 1980s, territorial governments tended to have a smaller role in comprehensive land claims negotiations. They had a smaller role because they were creatures of the federal government and only had jurisdiction over their lands at the pleasure of the federal government (Coates and Powell, 1989: 112). However, as a result of devolution, over time the Canadian territories have developed into pseudo-provinces, with powers and responsibilities that mimic provincial ones (Cameron and White, 1995; Small, 27 March 2002; White, 2002b: 17). Although comprehensive land claims negotiations in the territories were originally mainly bilateral negotiations, they are now trilateral with the territorial government acting as the key government negotiating player. A number of Yukon government officials and others told me that territorial governments are the primary government negotiators in the final stages of negotiations because it is their governments and their citizens that will have to live with the aftermath of a final agreement (Armour, 2006; Beaudoin, 2006; Flynn, 2006; McCullough, 2006; Porter, 2006; see also Small, 9 December 2002). In the Yukon Territory, this was true to the extent that most of the negotiations near the end of the negotiations revolved around issues like land selection and

¹⁴ These issues are discussed in more detail in the empirical chapters. For now, see Haysom, 1990.

jurisdiction, most of which was of more concern to the territorial government rather than the federal government. Officials involved with the Labrador negotiations mentioned the same thing, noting that provincial negotiators were more likely to be the dominant negotiations than the federal government.¹⁵

At the territorial level, the land claims secretariat or the Aboriginal affairs ministry is in charge of supervising and conducting comprehensive land claims negotiations. In the Yukon Territory, the land claims secretariat belongs to the office of the Premier. This institutional setting has powerful implications for the political clout of the secretariat, especially since the Yukon Territory employs a parliamentary system with political parties and a vigorous form of responsible government (McCormick, 2001). By contrast, the Northwest Territories has a consensus-style government (White, 2003). As such, Yukon land claims officials benefit from having the premier as their minister because it makes it easier to establish and modify negotiation mandates, seek agreement and advice from other departments, and receive political direction, depending on the premier's interest (Armour, 2006; Flynn, 2006; McCullough, 2006).

The final negotiating party in comprehensive land claims negotiations is the Aboriginal group. Usually, it is represented by negotiators hired by either the band council or some sort of umbrella organization formed to represent an Aboriginal community or communities in negotiations. For instance, in Labrador, the Inuit communities of Nain, Rigolet, Hopedale, Postville, Makkovik, and the Upper Lake Melville area near Happy Valley-Goose Bay, were represented by an elected Labrador Inuit Association (LIA) at the

¹⁵ This is also probably true because a number of Aboriginal informants mentioned that provincial and territorial officials were more inflexible than federal ones.

negotiating table. The Labrador Innu formed Innu Nation to represent their two communities (Sheshatshiu and Natuashish) during their land claims negotiations.

In the Yukon, all fourteen First Nations joined together to form the Council of Yukon Indians to jointly negotiate an Umbrella Final Agreement. The Umbrella Agreement was meant to provide a common basis from which each individual First Nation would negotiate an individual final agreement. For instance, after the Umbrella Final Agreement was completed in 1993, the Kwanlin Dün First Nation began negotiations in the late 1990s and completed its Final Agreement in 2005. The two Kaska Nations of Ross River and Liard First Nation, on the other hand, chose to form an umbrella organization called the Kaska Tribal Council to represent their interests during Umbrella and final agreement negotiations for their individual communities. Their decision to create the Kaska Tribal Council was the result of a growing pan-Kaska nationalism movement. Today, the Kaska Tribal Council represents Ross River Dena Council and Liard First Nation in the Yukon Territory and the three Kaska First Nations in B.C. The Kaska maintain that both the B.C. provincial government and the Yukon territorial government must negotiate a comprehensive land claims agreement with the Kaska Tribal Council rather than with the individual Kaska First Nations.

Since 1973, Aboriginal groups and the Crown have completed 22 comprehensive land claims agreements in Canada. Yet a number of negotiations remain incomplete. In Newfoundland and Labrador, the Inuit were able to complete a final agreement in 2005 but its neighbours, the Innu, have not. In British Columbia, only the Nisga'a and the Tsawwassen First Nations have signed and ratified final agreements. In the Yukon Territory, 11 of 14 First Nations have signed final agreements with the federal and

territorial governments. Of the remaining three, the White River First Nation had an agreement at one point, but in the end decided not to hold a ratification vote (Tobin, 2005 April 1). The other two groups in the Yukon Territory without treaties are the Kaska Nations of Ross River Dena Council and Liard First Nation. Currently, they are nowhere near an agreement and are pursuing litigation against the federal government over allegations of bad faith negotiations, the illegal ratification of the Umbrella Final Agreement, and unpaid compensation for illegally alienated Kaska traditional lands (Walsh, 2006; Porter, 2006).

Conclusion

The literature reviewed in this chapter provides historical and background information relating to the negotiation of modern treaties in Canada. The next chapter builds on these contributions to develop an analytical framework for understanding the divergence in comprehensive land claims negotiation outcomes for four Aboriginal groups in Canada: the Inuit in Labrador (settled in 2005); the Innu in Labrador (stalled at agreement-in-principle negotiations); the Kwanlin Dün in the Yukon Territory (settled in 2005); and the Kaska Nations of Liard First Nation and Ross River Dena Council (negotiations terminated in 2002).

Chapter 3: An Analytical Framework

In this chapter, I construct an analytical framework for explaining variation in comprehensive land claims negotiation outcomes for four cases in Canada. I begin with a brief discussion of causality and an analysis of two possibly-helpful literatures before constructing an analytical framework using rational institutionalism, Simeon's (2006) federal-provincial diplomacy framework, and Paul Nadasdy's (2003) legitimacy framework. I then apply this framework to the preferences (goals) and incentives (opportunities and constraints) of the negotiating actors before describing and theoretically grounding my explanatory factors. I conclude with some final theoretical considerations to pave the way for the empirical chapters.

Causality, Interest Groups, and New Social Movements

King, Keohane, and Verba (1994: 100-113) argue that social scientists should be building causal theories. These theories should be falsifiable, internally consistent, use carefully selected dependent variables, maximize concreteness, and explain as much of the world as possible. Establishing causality in the social sciences, however, is virtually impossible to achieve. Scholars have yet to develop the tools to control perfectly all of the possible independent variables in the social world. Some go further to argue that causality is impossible to establish, regardless of the methodological tools employed. As such, the most that scholars can do is argue that certain factors are "highly likely" to affect variation in the dependent variable. In light of the difficulties in establishing causation, this dissertation focuses on constructing an analytical framework that identifies a set of factors that are highly likely to affect variation in CLC negotiation outcomes.

One body of scholarship that might be a useful for constructing such a framework is the new social movement literature. This literature focuses on the relationships between governments and marginalized peoples (like Aboriginal peoples) in the pursuit of their preferences. According to Susan Phillips (2004: 330-331), social movements have three distinct features.

First, a social movement is a *network* of organizations and individuals, rather than a single organization. Second, social movements form and express *collective identities* rather than merely articulating common interests The third defining element is that social movements undertake collective action that is intended to influence *both* the state and society.

Unfortunately, these features do not describe Aboriginal groups involved in the comprehensive land claims process. It is true that Aboriginal groups negotiating under the comprehensive land claims process are linked to other organizations and individuals, but during negotiations they act as single organizations (as opposed to broad networks) negotiating with the federal and sub-national governments to achieve their own specific interests (see for instance Feit, 1980: 164). Second, although Aboriginal groups do form and express collective identities (i.e. Aboriginal; Inuit), negotiations are meant to lead to individual settlements that benefit the common interests of a specific set of people like the Kwanlin Dün First Nation or the Labrador Inuit, as opposed to all Yukon First Nations or all Inuit in Canada (again see Feit, 1980: 164). Finally, the collective action undertaken by Aboriginal groups in the comprehensive land claims process is not intended to influence both state and society. Rather, Aboriginal groups negotiate treaties to gain comprehensive control over their lands and for clarifying their relationships with the Canadian state. Aboriginal peoples involved in the negotiation process are less concerned with influencing non-Aboriginal society.

If Aboriginal groups negotiating comprehensive land claims agreements are not social movements, then perhaps they are interest groups. According to Paul Pross (1986: 13), interest groups are “organizations whose members act together to influence public policy in order to promote their common interest.” Susan Phillips derives three core concepts about interest groups from this definition. First, interest groups are formal organizations, with structures, policies and infrastructure. Second, their focus is on the state and influencing the public policy choices that the state makes. “Thus, interest groups are inherently political actors, not formed merely for the purposes of self-help or community development” (Phillips, 2004: 325). Finally, interest groups tend to focus their efforts on influencing state actors from inside rather than outside the formal apparatuses of the state.

Aboriginal groups involved in the comprehensive land claims process are not interest groups; rather, they are groups of individuals represented by highly complex quasi-governments, and band and community governments. For instance, the Council for Yukon Indians, the Labrador Inuit Association, the Innu Nation, and the Kaska Tribal Council not only negotiate comprehensive land claims agreements, they also provide government services to their communities, including community development, community healing, economic development, and education, health, and social services. Other groups at the table are represented by band councils or community governments that have municipal-like powers and responsibilities like taxation, social housing, zoning, and the like. Finally, many Aboriginal groups view themselves as interacting with the Canadian government on a nation-to-nation basis (RCAP, 1996).

Constructing an Analytical Framework

A more promising approach is one that begins with Richard Simeon's classic book on federal-provincial diplomacy (Simeon, 2006). In that book, Simeon uses eight variables to explain the dynamics and outcomes of federal-provincial policy making in the areas of pensions, taxation, and constitutional change. His eight variables are: social and institutional context, actors, issues, sites and procedures, goals and objectives, political resources, strategies and tactics, and outcomes and consequences (Simeon, 2006: 12). By "social and institutional context", Simeon is referring to the institutional arrangements that structure the nature and form of the negotiation process. More specifically, context shapes the issues, tactics, dialogue, and resources (power relations) available to the participants. The term "actors" refers to the participants in the negotiating process. For Simeon, the federal government and the ten provincial governments are the actors. Although he does pay some attention to differences between political leaders and civil servants, for the most part he treats the eleven governments as monolithic single units. "Issues" refers to the stakes that are being negotiated and how they are perceived by the actors. Depending on their perceptions of the stakes, different actors may treat the same stakes differently. "Sites and procedures" refers to the effects that the negotiating process and its rules have on the interactions of the participating actors. "Goals and objectives" are the preferences of the actors in terms of what they want to achieve from negotiations. Here, Simeon focuses on whether the interests of the participating governments are compatible or incompatible in terms of the "proper roles of the two levels of government." "Political resources" is a measure of power relations. Simeon looks at the distribution of political resources among the actors and considers the ability of the actors to influence each other towards certain

strategies and outcomes. “Strategies and tactics” are the range of actions that the actors can take to achieve their preferences (goals). Simeon differentiates between legitimate and illegitimate strategies and tactics and finds that the way that these actions are perceived can have a powerful effect on outcomes. Finally, “outcomes and consequences” refers to “who won?” and what impact outcomes have on future negotiations between the participating players (Simeon, 2006: 12-16).

This dissertation modifies Simeon’s framework to fit the phenomena under examination. Much like in federal-provincial diplomacy where negotiations are meant to alter the Canadian federation in favour of the negotiating actors, comprehensive land claims negotiations are fundamentally driven by government and Aboriginal actors seeking to negotiate treaties that maximize their preferences (goals). Although “thin-rationalists” argue that the contents of preferences do not matter (hence preferences are “thin”), “thick-rationalists” argue that they do matter (and hence preferences are “thick”) (Shapiro and Green, 1996: 17-19). They matter because if the contents of the preferences of the actors are similar, then an agreement may be easier to achieve. If actors have different preferences, then an agreement may be more difficult to achieve. Preferences tend not to be perfectly aligned. Rather, what matters is the distance between preferences. This formulation of preferences is consistent with Simeon’s “goals and objectives” variable where he argues that it is “important to examine the bases and dimensions of conflict and consensus in the system” with respect to the actors’ “broader set of overall goals” (Simeon, 2006: 14-15).

Preferences alone do not determine outcomes nor do actors negotiate without context. Rather, actors are subject to incentives (opportunities and constraints) that

organize their strategic interactions with each other. In other words, incentives determine whether the negotiating actors should work towards or against completed agreements. These incentives are generated by the relevant institutional structures under which the actors negotiate (North, 1990). Government and Aboriginal actors in the comprehensive land claims process will interact with each other according to their preferences and their positions within the existing institutional context (Simeon, 2006: ch. 2). The institutional context, however, does not predetermine political outcomes (Encarnacion, 2000: 486). Rather, it determines the range of possible outcomes and the likelihood that such outcomes will obtain, given the preferences that actors bring to the process. In the words of Knill and Lenschow (2001), “Institutions are conceived as an opportunity structure that constrains and enables the behavior of self-interested actors. Institutions limit the range of strategic options that are available to actors, however – in contrast to structure-based approaches – without entirely prestructuring political decisions towards certain outcomes” (Knill and Lenschow, 2001: 195; see also Shepsle 1989).

The institutional context is also important for shaping the power relations between the negotiating actors. Power relations matter because the relative power of the actors can greatly affect variation in outcomes (see Macklem, 2001: 96). Gerardo Munck (1994) makes a similar observation: “Now to say actors have choices does not mean that outcomes are random or that actors are equally likely to pick any set of potential institutional designs. Probably the primary factor explaining the shape of emerging institutions, as has been underlined by various authors, is the *relative power* of the actors involved in the process, the rulers and the opposition” (emphasis added) (Munck, 1994: 370). In the case of comprehensive land claims negotiations, the outcomes will be influenced by the power

relations between the governments on the one hand, and the negotiating Aboriginal groups, on the other (Macklem, 2001: 96). If the power relations are not balanced, then the outcomes will very much depend on the ability of the weaker actors to influence the stronger actors, assuming their preferences are different (see for instance Rueschemeyer, Stephens, and Stephens, 1992). In Simeon's language, power relations are affected by the distribution of "political resources." Different actors have varying amounts of political resources that they can use to influence each other (Simeon, 2006: 15). In comprehensive land claims negotiations, as will be shown below, the governments (federal, provincial, and territorial) are the dominant actors and benefit greatly from the status quo, which is to delay treaty completion for as long as possible. The Aboriginal actors, on the other hand, are much weaker and would benefit greatly from completing modern treaties.

The above discussion places a great deal of importance on the preferences (goals) and negotiating incentives of the participating actors. The main task of the Aboriginal groups (the weaker actors) is to convince the federal, provincial, and territorial governments (the dominant actors) that completing treaties is in their interests. The ability of Aboriginal groups to accomplish this goal is conditioned heavily by the institutional framework, Aboriginal cultural legacies, and Aboriginal historical interactions with the Canadian state. Paul Nadasdy (2003: 5) argues that:

If Aboriginal peoples wish to participate in co-management, land claims negotiations, and other processes that go along with this new relationship, then they must engage in dialogue with wildlife biologists, lawyers, and other government officials. First Nations peoples can of course speak to these officials any way they want, but if they wish to be taken seriously, then their linguistic utterances must

conform to the very particular forms and formalities of the official linguistic fields of wildlife management, Canadian property law, and so forth. Only through years of schooling or informal training can First Nations people become fluent in the social and linguistic conventions of these official discourses. Those who do not do so are effectively barred from participation in these processes.

This argument is consistent with the “social and institutional context,” the “issues”, the “sites and procedures”, and the “strategies and tactics” variables that Simeon (2006: 12) uses. To be successful in treaty negotiations requires Aboriginal groups to adopt the official discourse, to negotiate only those issues that the governments want to negotiate, and to acquire particular types of expertise to skillfully navigate the negotiation process. The cost of doing so, however, is that Aboriginal groups are implicitly acknowledging the legitimacy of the negotiation process and the unequal power relations between themselves and the Canadian state. They are in essence legitimizing their unjust historical relationships with the Crown (Nadasdy 2003: 6). Although some Aboriginal groups have been able to maintain their own distinctive beliefs and values while participating in the negotiating process (Nadasdy, 2003: 12), doing so may be preventing them from completing comprehensive land claims agreements with the Crown (described below).

Historical and cultural legacies enter into the analytical framework as conditioning influences on the likelihood of different Aboriginal groups adopting the goals, behaviour, and strategies that government actors require to complete treaties. Some Aboriginal cultures, for instance, may be more compatible with the cultural norms of the Canadian governments than others, thus affecting the likelihood of certain outcomes. Also, the level and timing of historical interactions between Aboriginal groups and the Canadian state may

affect the propensity of the Aboriginal groups to adopt the necessary actions for completing a treaty. Yet such historical, cultural, and institutional constraints do not completely predetermine Aboriginal choices and outcomes. In the empirical chapters, I will show that Aboriginal leaders can give their groups *some* agency in the way that they choose to respond to the requirements of the dominant government actors. These findings are consistent with the structure-agency arguments made by Encarnacion (2000) and Knill and Lenschow (2001), described above.

Although this dissertation focuses most of its analysis on the Aboriginal actors, it should also be noted that government actors can engage in strategic or organizational changes that affect outcomes. As I described in chapter 2, the federal government over time reformed its negotiation policies to better achieve its goal of clearing title for economic development purposes. Recall how, in 1969, the federal government denied that there was any reason to negotiate modern treaties. In 1973, it recognized that it did have to negotiate modern treaties (because of the *Calder* and *Malouf* decisions and sustained Aboriginal mobilization – see Scholtz 2006), but that it did not have to negotiate political rights. By 1985, federal actors began to add political rights incrementally to modern treaties. In 1986, the federal government dramatically reformed its treaty process by dropping the extinguishment requirement and replacing it with a cede, release, and surrender requirement. In 1995, the federal government decided to negotiate full self-government agreements concurrently with comprehensive land claims negotiations. At the same time, federal actors were becoming more flexible with regard to the “cede, release, and surrender” provision. Although this dissertation does not explore systematically why the federal government made these changes, it can speculate that mutual influence among

government and Aboriginal actors and accrued experience with treaties and negotiations had some effect. As a result of this study's findings, future research can now be more profitably done on the evolution of federal negotiation policy.

In sum, government and Aboriginal actors come to the negotiating table with a set of preferences and incentives regarding the CLC negotiation process. Their interactions are influenced heavily by the distance between their preferences and the relevant institutional framework. The main task of Aboriginal groups, the weaker actors, therefore, is to convince the government actors, the dominant actors, that completing treaties is in their best interests. The ability of Aboriginal groups to do so, however, is conditioned heavily by historical and cultural legacies. Nonetheless, Aboriginal groups do have *some* agency through their leaders to complete treaties.

To explore the usefulness of this analytical framework for explaining variation in negotiation outcomes, this dissertation uses both mid- and micro-levels of analyses. My primary level of analysis is the mid level. Here, I focus on Indian and Northern Affairs Canada, a federal department, and the departments of the Yukon and Newfoundland and Labrador governments responsible for land claims. On the Aboriginal side, I focus on First Nation governments (i.e. Kwanlin Dün First Nation) and on the non-profit umbrella organizations created by Aboriginal groups to negotiate modern treaties (i.e. Labrador Inuit Association, Innu Nation, Kaska Tribal Council). These Aboriginal and government organizations do much of the actual negotiating and have substantial control over the flow and direction of information from the negotiating table to higher government authorities and to the public. Therefore, understanding the outcomes of negotiations requires using the mid-level of analysis which focuses on the interactions of these government and Aboriginal

departments with each other. The second level of analysis used by this dissertation is the individual level (micro), with particular attention paid to how individual government and Aboriginal actors can influence the course of negotiations. This micro level of analysis means recognizing that not only are government and Aboriginal departments important, but so are the negotiators, bureaucrats, politicians, leaders, and community members affected by negotiations.

The next section of this chapter draws upon empirical evidence to specify the preferences and negotiating incentives of the government and Aboriginal actors that are the focus of this dissertation. It then lists the factors that best explain comprehensive land claims negotiation outcomes in Canada and relates those variables to the above analytical framework before turning to a consideration of some final theoretical issues.

Setting the Stage: Preferences and Incentives

Preferences

The federal government in comprehensive land claims negotiations is primarily interested in ensuring certainty and finality for the purposes of encouraging economic development (Mitchell, 1996: 343-344, 347; Rynard, 2000: 232). It is also interested in empowering Aboriginal peoples by helping them to increase their capacity for governance and self-sufficiency (Serson, 2006; Shafto, 2006). According to INAC's (1998) *Federal*

Policy for the Settlement of Native Claims:

The primary purpose of comprehensive claims settlements is to conclude agreements with Aboriginal groups that will resolve the debates and legal ambiguities associated with the common law concept of Aboriginal rights and title. Uncertainty with respect to the legal status of lands and resources, which has been created by a lack of political agreement with Aboriginal groups, is a barrier to

economic development for all Canadians and has hindered the full participation of Aboriginal peoples in land and resource management (5).

These policy goals have been confirmed by Aboriginal, federal, provincial, and territorial interviewees who state that the federal government's main goal is to foster and encourage economic development, usually to reap the revenues generated from them (Andersen III, 2006; Ben Andrew, 2006; John-Pierre Ashini, 2006; Gingell, 2006; Innes, 2006; Mitander, 2006; Shafto, 2006; Serson, 2006). Government actions to facilitate economic development, however, have not always respected Aboriginal concerns or interests. In many instances and despite opposition from Aboriginal groups, the federal government has provided permits, generous tax write-offs, and infrastructure to encourage businesses to engage in economic development on Aboriginal lands (Angus, 1992: 68-69; McPherson, 2003: 142; Miller, 2000: 365-366; Nuke, 2006).

The goals of the Newfoundland and Labrador government are similar to those of the federal government. Although the provincial government does not have a formal land claims policy akin to the federal one, it has clearly shown an overwhelming interest in economic development especially since the collapse of the fishing industry (Dyck, 1996: 31; Summers, 2001: 23). In light of this collapse and the historical difficulties that it has had in generating wealth, provincial government officials see land claims agreements as important mechanisms for generating much needed economic development. According to Minister Ernest McLean (2001), "successful land claims negotiations with the LIA [Labrador Inuit Association] and the Innu will ensure economic, legal and social certainty for governance and business and social development." Settling these claims is necessary because Labrador

is the key to the economic health of the entire province. According to Minister Tom Rideout (2004),

The goal of this government is to achieve economic health for the province. Building the economic health of Labrador is a key part of that plan. We are building a strong foundation that will enable all regions of the province to achieve their enormous potential. From what I have seen during my visit to Labrador, the potential there is certainly enormous As we move forward with implementing the strategy, our investments will be made where they will have the most positive impact for all regions of the province.

Others have reiterated that economic development should benefit all provincial citizens and should not be at the expense of Aboriginal peoples in the province (Pelley, 2006). “It is imperative that we ensure any land claim settlement reached with the Inuit and Innu are [sic] fair to all Labradorians – Aboriginal and non-Aboriginal” (Lush, 2001). In sum,

The provincial government's objective in negotiating comprehensive land claim agreements is to achieve certain and final settlement of Aboriginal claims to the territory within the Province. Certainty as to the ownership of lands and how such lands are to be managed will provide a more stable environment for development and investment Settlement of the land claim is necessary to provide for the long term economic and social development of the province, and contribute to the economic, social and cultural development of Labrador Inuit claimants. Negotiations are intended to accommodate the interests of Labrador Inuit, governments and third parties (Executive Council, 1997).

The actions of the provincial government, however, do not reflect the province's stated belief that economic development should benefit both Aboriginal and non-Aboriginal peoples. Between the 1970s and 1990s, the provincial government engaged in a number of economic development projects in Labrador without consulting the Innu or the Inuit. These projects included commercial logging, hydroelectric projects, fishing, and mining (Tony Andersen, 2006; Nuke, 2006; Paul Rich, 2006). According to members of both Aboriginal groups, the proportion of revenues that governments and businesses have derived from

these projects dwarfs the amount that the Aboriginal groups have received (Tony Andersen 2006; Ben Andrew, 2006; John-Pierre Ashini, 2006; Jararuse, 2006; Nuke, 2006; Riche, 2006).

Much like the Newfoundland and Labrador government, the Yukon territorial government is very much focused on maximizing the development of its lands for the purposes of enhancing the well-being of its citizens (Cameron and White, 1995: 12; Flynn, 2006; McArthur, 2006; McCullough, 2006; McCormick, 2001: 369; Penikett, 2006; Waddell, 9 May 2001). For instance, the Yukon government has long lobbied the federal government to devolve control over Yukon lands and resources to the territorial government (Armour, 2006; McArthur, 2006; McCormick, 2001; McCullough, 2006; Penikett interview, 2006). Successive Yukon governments felt that the territory's lands and resources could only be properly developed by eliminating federal jurisdiction. Land and resource issues have also driven land claims negotiations. The Yukon government was strongly interested in establishing certainty in areas that were ripe for development but where title was potentially unclear and not subject to third party interests. As in the Labrador case, the Yukon territorial government, the federal government, and the resource industry engaged in economic development on Yukon Indian lands before and during negotiations. According to Aboriginal and Yukon government officials, there was never a time during negotiations when economic development was frozen except for those lands that the federal, territorial and Aboriginal representatives agreed to freeze.¹⁶

¹⁶ The parties were free to negotiate a freeze on development for lands up to the specified amount listed in the Umbrella Final Agreement for each Yukon First Nation. The Kaska First Nations, for instance, were able to negotiate an agreement to protect 9,450 square kilometers from development until 2008 (see Small, 27 June 2002).

Aboriginal interests, in contrast, are much broader. In general, Aboriginal peoples want to maximize their control over their traditional lands to protect their traditional ways of life and practices, to derive revenues and jobs from economic development, and to take control of their lives in areas such as education, health, law enforcement, environmental protection, culture, heritage, fishing, and hunting (Ben Andrew, 2006; Beaudoin, 2006; Brown, 2006; Jack, 1990: 23; Joe, 2006; Mitander, 2006; Nuke, 2006; O'Brien, 2006; Porter, 2006; Samson et al., 1999: 30-34; Wadden, 1991: 200).

There are some differences among the four Aboriginal groups studied in this dissertation. The most important difference is the way in which each group views its position relative to Canada. The Innu leaders, negotiators, and community members originally came to the table with the notion that any agreement must recognize Innu sovereignty (Ben Andrew, 2006; Innes, 2006; Innu Nation, 1995: 175; Pelley, 2006; Wadden, 1991: 200). Their desire for sovereignty, which is tied to their relationship to the land, has softened over time, but some Innu leaders continue to hold Innu sovereignty as the end goal for their comprehensive land claims agreement (CLC). The same is generally true for the Kaska nations. Kaska leaders and community members were originally opposed and continued to be opposed to any sort of “cede, release, and surrender” of their traditional lands. They believe very much in the idea that any final agreement must confirm, not extinguish, their Aboriginal title. For instance, a 2003 bilateral agreement signed between the Kaska and the Yukon territorial government affirms that the “Yukon [government] acknowledged, in agreements entered into with the Kaska in January 1997, that the Kaska have Aboriginal rights, titles and interest in and to the Kaska Traditional Territory in the Yukon” (preamble). In practice, section 3 of the bilateral agreement

requires Kaska consent before any proposed economic development projects on Kaska land can occur. The key point here is that most Kaska leaders, elders, and community members reject “cede, release, and surrender.” Rather, they desire a guarantee of their Aboriginal title to *all* of their traditional territories (Armour, 2006; Hanson, 2006; McCullough, 2006; Porter, 2006; Van Bibber, 2006; Walsh, 2006).

Contrast this to Inuit leaders and negotiators who have rarely, if ever, invoked the language of sovereignty. They have always preferred to negotiate an agreement that safeguards their traditional ways of life and interests in economic development, and that allows them to take control over important policy areas through some form of self-government *within* the federation. Indeed, the language and strategies used by Inuit leaders (LIA presidents, vice presidents, board members, negotiators, and elders) were consistently based on conciliation, compromise, and accommodation (Tony Andersen, 2006; William Barbour, 2006; Haysom, 2006; Hibbs, 2006; Pain, 2006; Rowell, 2006; see also McPherson, 2003: 129 regarding the Inuit’s general propensity for consensus building rather than confrontation). For instance, Labrador Inuit Association (LIA) chief negotiator Toby Andersen (2001) has said: “We hope there will be benefits in the land claims settlement for non-Aboriginal as well as for Aboriginal peoples.” Former LIA President and Current Nunatsiavut President William Andersen III (1990: 20) has said “with respect to land claims, we’ve chosen a route of negotiation rather than confrontation. And we are not opposed to development, provided environmental standards are met. But the people in the area should have first priority. It makes no difference to us who benefits from development as long as it’s the people of Labrador.”

The views of Kwanlin Dün leaders and negotiators on sovereignty and negotiations are similar to the views of Inuit officials. Since the beginning of the 20th century, the Kwanlin Dün First Nation has been one of the strongest proponents among the Yukon First Nations for a treaty settlement. Many of the leaders who drove the original claim, the agreement-in-principle negotiations, and the Umbrella Final Agreement (UFA) negotiations were from the Kwanlin Dün First Nation. Chief Bose, for instance, asked Ottawa in the early 1900s to negotiate a land claim only to be refused (Joe, 2006; Mitander, 2006). Chief Elijah Smith in the early 1970s was instrumental in writing and presenting the Yukon First Nations statement of claim, *Together Today For Our Children Tomorrow*, to the federal government in 1973 (Coates, 1991: 237-238; Yukon Native Brotherhood, 1973). Kwanlin Dün Chief Rick O'Brien (who later became an important leader within the Council for Yukon First Nations) was instrumental in the late 1990s in building a new Kwanlin Dün land claims department with a mandate to complete negotiations after the previous department fell apart due to political infighting. Chief Mike Smith was a chief of the Council for Yukon First Nations in the mid 1980s, a Kwanlin Dün land claims negotiator and lawyer in the late 1990s, and Chief of Kwanlin Dün First Nation from 2003 onwards. All of these leaders were interested in negotiations and were willing to engage in them without insisting on Aboriginal sovereignty. In addition to leadership, further evidence of the Kwanlin Dün's preference to "avoid" the language of sovereignty during negotiations comes from the fact that it adopted the Umbrella Final Agreement (UFA) as its Final Agreement with some minor modifications as permitted by the UFA. More importantly, Kwanlin Dün's Final Agreement contains the "cede, release, and surrender" provision (Kwanlin Dün Final Agreement, 2005).

Differing Incentives to Negotiate and to Delay

Federal, provincial and territorial politicians, bureaucrats, and negotiators have powerful incentives as well as resources to delay completing an agreement. The actual CLC process, with its formal rules and procedures, places Aboriginal groups in a weaker position relative to federal, provincial, and territorial governments. The negotiating process forces Aboriginal groups to prove to the governments that their claims are valid and therefore acceptable for negotiations. Aboriginal groups must adopt western standards of knowledge, proof, discourse, and negotiation processes if they want negotiations to proceed. Rather than being able to use their traditional knowledge, languages, and oral histories in negotiations, they are forced to produce maps, hire Euro-Canadian anthropologists, linguists, lawyers and historians to prepare and document their claims, and engage in formal proposal-counter proposal negotiations, all in the English language (Ben Andrew, 2006; John-Pierre Ashini, 2006; Macklem, 2001: 271-272; McPherson, 2003: 140; Michel, 2006; Samson, 2003). This last requirement can be a significant problem for Aboriginal groups like the Innu and the Kaska where traditional languages remain strong among the majority of members. Aboriginal groups also have little power to influence the agenda as they can only negotiate those responsibilities and jurisdictions that are listed under the federal comprehensive land claims policy (INAC, 1998: 7-8). Moreover, the government can at any time declare that certain lands are no longer on the table for discussion. For example, in 1994, the Voisey's Bay area of Labrador was taken off the table after large nickel deposits were found there.

In essence, under the CLC process, the federal, provincial and territorial governments have become rights-granting entities while Aboriginal groups have become petitioners, forced to prove the validity of their claims to the governments before they can ask the governments to cede to them land, rights, self-government, and jurisdiction (Ben Andrew, 2006; Backhouse and McRae, 2002: 58; Samson, 2003). This rights-granting status is enhanced by the sovereign power that the governments enjoy under the Constitution Act of 1982 (see Macklem, 2001: 87). The constitution, which is an important aspect of the social and institutional context, gives the federal government, the Newfoundland and Labrador government, and the Yukon territorial government a wide range of powers over the land, water, and peoples of Canada. These governments have frequently exercised their powers without consulting the Aboriginal peoples in those areas (Andersen III, 2006; Tony Andersen, 2006; Ben Andrew, 2006; Ashini, 1992: 124; Marshall, 2006; Nui, 2006; Rich, 2006). For instance, according to Wadden (1991: 45), “Canadian governments have always acted as though the Innu, and their land rights in Nitassinan,¹⁷ do not exist. Mines, hydroelectric projects and pulp and paper mills have sprouted up all over the Innu homeland during this century, enriching the coffers of provincial governments and multinational companies but wrecking havoc with Innu lives.” Peter Penashue, former Innu Nation President, expresses his people’s exasperation with the federal and provincial governments’ unilateral actions in Innu land. “When we tried to express ourselves, they put us in jail in St. John’s and Stephenville. We are vulnerable and

¹⁷ “Nitassinan” is what the Innu call their traditional lands in Labrador and Quebec.

easy to put in jail. We don't have a military. We don't have voting power; we are small in numbers" (Penashue, 1992: 129).¹⁸

The other three Aboriginal groups examined in this dissertation have also experienced unilateral action on their claimed lands. For instance, the Inuit have had to deal with the federal and provincial governments imposing fishing and environmental regulations on them, harvesting their fish, wildlife and forests, and developing Voisey's Bay, all without Inuit consent or consultation (Tony Andersen, 2006; Andersen III, 2006; Barbour, 2006). The Kwanlin Dün has had to deal with "illegal" economic development on its traditional lands located in the city of Whitehorse. The Kaska nations have long had to deal with "illegal" resource development in the form of mines and lumber harvesting on their traditional lands. In the 1960s, the governments and industry cooperated to open a mine on Kaska lands in Faro without obtaining Kaska consent (Porter, 2006; Sterriah, 2006; Sharp, 1976). In short, the power relations (as a result of the distribution of political resources) clearly favour the federal, provincial, and territorial governments.

Government incentives to drag out negotiations are also affected by the negotiation stakes, which Simeon calls "the issues." Many of the jurisdictional powers and lands

¹⁸ This is not to say that Aboriginal peoples are without sovereignty. In *Campbell v. British Columbia* (2000) BCSC 1123, B.C. Supreme Court Judge Williamson argued that Aboriginal peoples retain some sovereignty. In paragraph 179, Judge Williamson states: "I have concluded that after the assertion of sovereignty by the British Crown, and continuing to and after the time of Confederation, although the right of aboriginal people to govern themselves was diminished, it was not extinguished. Any aboriginal right to self-government could be extinguished after Confederation and before 1982 by federal legislation which plainly expressed that intention, or it could be replaced or modified by the negotiation of a treaty. Post-1982, such rights cannot be extinguished, but they may be defined (given content) in a treaty. The Nisga'a Final Agreement does the latter expressly." And in paragraph 181, he states: "Section 35 of the *Constitution Act, 1982*, then, constitutionally guarantees, among other things, the limited form of self-government which remained with the Nisga'a after the assertion of sovereignty. The Nisga'a Final Agreement and the settlement legislation give that limited right definition and content. Any decision or action which results from the exercise of this now-entrenched treaty right is subject to being infringed upon by Parliament and the legislative assembly. This is because the Supreme Court of Canada has determined that both aboriginal and treaty rights guaranteed by s. 35 may be impaired if such interference can be justified and is consistent with the honour of the Crown."

involved in comprehensive land claims negotiations belong to the provinces or greatly affect the territories. In Newfoundland and Labrador, the federal government has an interest in cash transfers, taxation, implementation costs, fisheries, migratory birds, and environmental protection. The province, on the other hand, has jurisdiction over inland water, economic development, renewable and non-renewable resources, lands, environmental protection, and local governance. Overall, the provincial government has much more at stake in negotiations than the federal government (Carter, 2006; Feit, 1980; Pelley, 2006). This jurisdictional situation means that the main task of Aboriginal groups is to convince the province that a modern treaty is consistent with its interests (Hawco, 2006; INAC, 1998: 6-7; Rowell, 2006).

In the Yukon Territory, the federal government had jurisdiction over Yukon lands and resources for the majority of the land claims negotiations. However, these issues were more important to the Yukon territorial government (YTG) because once CLCs negotiations were completed, the federal government would withdraw from the Yukon, leaving the YTG to deal with the Aboriginal and non-Aboriginal peoples affected by the treaties. Moreover, the territorial government had more at stake because it knew that the land claims agreements would have a powerful effect on future land use and economic development in the territory. In the long run, the territorial government hoped to achieve quasi-provincial or provincial status and thus it had significant interest in ensuring that the treaties did not hinder its future ability to manage its lands and resources (Armour, 2006; McCullough, 2006; McArthur, 2006).

Mixed incentives to negotiate have come from Canadian courts. In *Delgamuukw v. British Columbia* (1997), the Supreme Court ruled that constitutionally protected

Aboriginal rights can be infringed for the greater good of economic development. However, the ability to engage in economic development is not unfettered since the Crown is still bound by its fiduciary duty to Aboriginal peoples to negotiate in good faith (Macklem, 2001: 252-253). Canadian courts have also ruled that provincial and territorial governments have a duty to consult and/or accommodate Aboriginal interests (Penikett, 2006; RCAP, 1996).¹⁹ Overall, according to Monture-Angus (1999), Canadian courts have generated mixed results in terms of advancing Aboriginal self-determination and independence in Canada.

Other incentives to negotiate through to a treaty come from a growing awareness of Aboriginal rights. Former Deputy Minister of INAC, Scott Serson (2006), has observed that bureaucrats and negotiators felt pressure to get a deal done after the publication of the Royal Commission on Aboriginal Peoples (RCAP 1996) and the federal government's response, *Gathering Strength*.²⁰ Federal bureaucrats felt they had to demonstrate that *Gathering Strength* could successfully accommodate the concerns raised in RCAP about treaty making in Canada. YTG officials have mentioned that in addition to the quest for legal certainty, that they were also driven by a moral responsibility to correct the historical wrongs inflicted by the Crown on Yukon First Nations (Armour, 2006; Flynn, 2006; McCullough, 2006). Floyd McCormick (1997), however, has shown that, in general, government motivations stemming from rights are usually trumped by economic concerns.

Economic concerns create disincentives to negotiate only when governments can engage in

¹⁹ It is unclear whether the provinces are subject to the exact same fiduciary duty as the federal government. The *Haida* case, for instance, mentions that the provincial government has a duty to consult *and* accommodate, but elsewhere says the government has a duty to consult *or* accommodate. Future litigation may clear up whether provincial governments are indeed subject to a fiduciary duty. These issues are discussed in further detail in Chapter 6.

²⁰ For details on the relationship between *RCAP* and *Gathering Strength*, see Abele (1999: 450-453).

economic development on Aboriginal lands without having to negotiate a treaty. As long as government actors can engage in development without a treaty, they will be reluctant to negotiate simply because they can reap the rewards of development without a treaty.

Recent litigation, however, has changed this situation. Governments are now less likely and less able to engage in unilateral development on Aboriginal lands. Therefore, this disincentive, while still in effect, is much less influential on government incentive structures.

In short, government incentives to negotiate come from judicial decisions and a growing awareness of rights while stronger disincentives come from institutional structures like the constitutional division of powers and the nature of the federal comprehensive land claims process. The result is that government actors are willing to negotiate with Aboriginal groups but only at a slow pace; structural and economic imperatives seem to trump the influence of rights, making governments reluctant to negotiate.²¹ It is clear that governments are interested in clearing the path for development. However, if governments can get away with developing lands without completing treaties, then they will do so. For instance, the provincial government of British Columbia has been issuing permits to companies to develop Carrier Sekani First Nations' lands despite the fact that it is negotiating with First Nations under the BCTC process. This situation has led the Carrier

²¹ See also Salée, 2006: 25; Dacks, 1981: 61, 64; This characterization of government reluctance to settle land claims also applies in B.C. (see for instance Penikett, 2006). According to B.C. Auditor General Arn van Iersel and federal Auditor General Sheila Fraser, Premier Gordon Campbell prefers interim agreements over land claim agreements because the latter are too difficult and expensive to negotiate, and have too much potential to adversely affect the powers of the province. Tony Penikett points out that the federal government is also reluctant to quickly complete agreements. This reluctance, he argues, is the result of the influence of federal treasury officials and risk-averse civil servants who prefer endless negotiations to completed agreements (Cayo, 2006).

Sekani First Nations to drop out of the BCTC process to pursue alternative mechanisms for controlling development on their lands (Brethour, 2007: A2).

Aboriginal groups, on the other hand, have powerful incentives to negotiate final agreements. First and most importantly, they have no better options by which to satisfy their preferences within the current institutional framework. Members from all four Aboriginal groups in this study have mentioned that the comprehensive land claims process is the “only game in town” for achieving the type of control they want over their lands (Andersen III, 2006; Beaudoin, 2006; Dick, 2006; Hibbs, 2006; Jararuse, 2006; Porter, 2006; Paul Rich 2006; Riche 2006; Sterriah, 2006). Aboriginal groups throughout Canada have considered and used litigation, but judicial outcomes are unpredictable and can be as damaging as helpful (Curry, 2007: A7; Diamond, 1985: 279; Feit, 1980: 163; Macklem and Townshend, 1992: 78-79; Monture-Angus, 1999; Penikett, 2006; Warren, 2006). This unpredictability, however, has not stopped the Kaska from being the most litigious First Nation in the Yukon Territory; as of October 2006, they had eight lawsuits pending against the federal government (Armour, 2006; Hanson, 2006; Koepke, 2006; Walsh, 2006). Nonetheless, there are a few Kaska negotiators who want to get back to the table, albeit on different terms than the UFA (Porter, 2006; Sterriah, 2006; Walsh, 2006).

Some Aboriginal groups have used protest tactics, but these actions rarely lead to Aboriginal groups gaining the type of control they want. The Innu, in the 1980s and early 1990s, were one of the most active groups in Canada in their use of protests and other confrontational strategies. However, these strategies tended to generate unsatisfactory outcomes and as a result, the Innu have focused solely on negotiating since 2001 (Benuen, 2006; Innes, 2006; Riche, 2006; Rich, 2006).

Aboriginal groups face another incentive to negotiate, mainly that “once it became clear that development was going to happen even in the absence of a settlement, pressure began to grow at the community level to resolve claims and to “catch a ride” on the development that was occurring” (Angus, 1992: 71). Aboriginal groups realize that governments will engage in economic development anyway, so coming to an agreement is necessary if they are to have a voice in how governments and businesses undertake those developments (Dick, 2006; Jararuse, 2006; Joe, 2006; Mitander, 2006; Porter, 2006; Paul Rich, 2006; see also McPherson, 2003 regarding Inuit in Nunavut; and Rynard, 2001: 12-13 regarding the Cree in Quebec).

In summary, the institutional framework governing comprehensive land claims negotiations in Canada gives the federal, provincial and territorial governments a significant advantage over participating Aboriginal groups. Although all of the negotiating parties face incentive structures that pressure them to negotiate, the federal, provincial, and territorial governments are also subject to much stronger incentives to delay negotiations as much as possible. These incentives to delay are artifacts of the institutional structures that have arisen as a result of past legacies that leave governments in superior positions.

Aboriginal groups begin the process by filing a statement of intent signaling their intention to negotiate a claim with the federal and relevant sub-national governments. Governments can respond in two ways. They can either refuse to accept the statement of intent because it fails to satisfy the requirements set out in government policy, or they can recognize the claim and begin negotiations. The acceptance by both levels of government is required for a claim to move forward. If a government refuses a land claim (i.e. the claim fails to satisfy the requirements described in the introduction), then the Aboriginal

group must prepare a new claim and file it with the governments. If the governments accept the claim, the default negotiations path is prolonged negotiations (because of the incentive structures that governments face). On this path, negotiations take a very long time to complete. Although framework agreements tend to be signed relatively quickly, agreements-in-principle tend to take much longer to complete. Usually, it is in the agreement-in-principle negotiations stage when most negotiations stall, get suspended, or end.

Negotiations can be accelerated, however, in the presence of four factors discussed below. Yet accelerated negotiations do not always lead to a completed settlement. Rather, they can instead lead to alternatives to a completed treaty, such as an interim agreement (i.e. a side agreement or bilateral agreement on a specific issue) which may or may not lead to a final agreement. In the case of the Labrador Innu, accelerated negotiations led to a set of interim agreements on Voisey's Bay that ended up slowing negotiations down. Interim agreements can slow down negotiations because they help governments to achieve their preferences, economic development, without drastically altering the institutional framework, which is what a final agreement does. Yet the Inuit were able to complete a treaty despite signing interim agreements. The difference in outcomes for the Inuit and the Innu are the result of a conjunction of four factors relative to the Aboriginal groups, discussed below.

Explanatory Factors

What then explains variation in comprehensive land claims negotiation outcomes in Canada? Why have some Aboriginal groups and governments been able to complete treaties and what has stopped others from doing so? In light of the analytical framework

described above, this dissertation argues that the Aboriginal groups themselves have an important role in determining whether comprehensive land claims agreements will be completed. Governments are driven by economic development and wealth motivations while Aboriginal groups prefer to maximize their control over their traditional lands. Governments face an incentive structure that makes them reluctant negotiators whereas Aboriginal groups face incentives that make them active negotiators. The key, then, is to determine the conditions under which governments are willing to negotiate towards completed agreements. I argue that treaties are completed when Aboriginal groups *are able and willing* to complete them on terms that satisfy governments. The ability of Aboriginal groups to do so is conditioned heavily by historical and cultural legacies. Nonetheless, Aboriginal groups do have some control over whether they are able and willing to complete treaties. This control stems from Aboriginal leaders who have some influence over the content of the Aboriginal group's goals and strategies. Below I describe a set of factors relative to the Aboriginal groups that explains why some Aboriginal groups have been able to complete treaties and why others have not. Note that history, culture, and leadership are not conceptualized as discrete explanatory factors in the schema below. Rather they are best thought of as conditioning influences on the ability of Aboriginal actors to adopt the "correct" conjunction of factors.

Factors Affecting Outcomes

Table 3.1: Factors Relative to the Aboriginal Groups that Affect Which CLC Negotiation Outcomes are Obtained

Factors Promoting a Successful Outcome	Factors Leading to An Unsuccessful Outcome
<ul style="list-style-type: none"> - Compatibility of Government and Aboriginal Group Goals - Minimal use of Confrontational Tactics by the Aboriginal Group - Strong Aboriginal Group Cohesion - Positive Government Perceptions of Aboriginal Group Capacity 	<ul style="list-style-type: none"> - Incompatibility of Government and Aboriginal Group Goals - More Frequent Use of Confrontational Tactics by the Aboriginal Group - Weak Aboriginal Group Cohesion - Negative Government Perceptions of Aboriginal Group Capacity

The four factors that determine whether an Aboriginal group can complete a CLC treaty are compatibility of government-Aboriginal goals, Aboriginal group choice of tactics, Aboriginal group cohesion, and government perceptions of the Aboriginal group’s capacity. These four factors are not individually necessary to obtain a CLC treaty. Rather, an Aboriginal group that achieves a *conjunction* of these four factors is highly likely to a complete a CLC treaty. If an Aboriginal group fails to meet any of these conditions, then it is highly unlikely that it will complete a treaty.

By compatibility of goals, I mean the extent to which an Aboriginal group’s goals are consistent with federal and provincial/territorial goals. This factor is consistent with Simeon’s “goals and objectives” variable, which argues that it matters to what extent

federal and provincial government goals are common and conflicting. In comprehensive land claims negotiations, the goals of the two parties are likely to be compatible when the Aboriginal group is willing to accept a final agreement that exists and operates within the political, economic, and legal context of the Canadian constitutional order. An Aboriginal group that adheres to a strong sense of Aboriginal sovereignty will find it difficult to complete a treaty. Although Aboriginal positions on this issue are heavily influenced by culture and history, Aboriginal leaders can have some influence on the compatibility of goals.

Choice of tactics refers to the ways in which an Aboriginal group seeks to achieve a treaty. According to Simeon, “strategies and tactics” matter in that some strategies and tactics are viewed as legitimate, while others are illegitimate. Legitimate strategies and tactics tend to have a more positive effect on outcomes than illegitimate ones, at least in terms of influencing the dominant actors to cooperate with the other negotiating actors. In comprehensive land claims negotiations, an Aboriginal group that minimizes the use of confrontational tactics to concentrate on negotiating is more likely to complete a treaty than one that has a history of confronting the federal, provincial, and territorial governments. Recently in Ontario, for instance, former Aboriginal Affairs Minister David Ramsey threatened to withdraw the Ontario Government from the Six Nations negotiating table if Six Nations members continued to stage protests and land occupations (Buick, 30 May 2007). In general, confrontational tactics include protests, litigation, domestic and international media campaigns, and appeals to international tribunals, organizations, and governments. Again, the propensity of an Aboriginal group to use such tactics will be influenced by its culture and its history of interactions with the Canadian state. Yet,

leadership can mitigate somewhat the Aboriginal group's propensity to engage in confrontational tactics.

Aboriginal group cohesion refers to the degree of unity within an Aboriginal group towards comprehensive land claims negotiations. This factor is similar to Simeon's "actors" and "political resources" variables. An Aboriginal group that suffers from intense political divisions that revolve around land claims issues, for instance, will find it difficult to complete a deal since divisions among leaders and members can create fatally unstable negotiating teams and positions at the negotiating table. Moreover, an Aboriginal group that suffers from severe social and economic distress (such as poverty, substance abuse, violence, family abuse) may find it impossible to complete a land claims agreement since such distress may prevent the group from focusing on negotiating, signing, and ratifying a final agreement. In particular, socio-economic distress can create division among community members and leaders regarding on whether to focus on negotiating a CLC treaty or focusing on non-treaty solutions. As such, I characterize socio-economic distress as part of the Aboriginal group cohesion factor.

As will be discussed later, Aboriginal group cohesion can be very much affected by historical circumstances, interactions with the Canadian state, and most importantly, leadership. It may be that some groups, for instance, are less cohesive than others because of resettlement patterns, the under-servicing of Aboriginal communities, residential schools, or government assimilation policies. Cohesion can be fostered, however, by leadership. As will be shown later, Chief Rick O'Brien was able to foster Aboriginal group cohesion among the Kwanlin Dün First Nation after he was elected in 1998.

The fourth factor affecting whether an outcome is obtained is government perceptions of the Aboriginal group. Government perceptions are related to the Aboriginal group's use of political resources to convince government actors that it is ready to negotiate and implement a treaty.²² An Aboriginal group that is perceived by government officials as having insufficient governing capacity and poor financial accountability will find it extremely difficult to complete a comprehensive land claims agreement. Government officials also may look at the Aboriginal group's level of acculturation as an indicator of whether an Aboriginal group will be successful in implementing its treaty. Government officials are cognizant of the negative publicity²³ that can occur when an Aboriginal group is unable to fulfill its responsibilities under a comprehensive land claims agreement and thus are highly unlikely to negotiate a treaty with those groups whom they think will fail. Government actors know that implementation failure can lead to Aboriginal litigation and additional negotiations through the specific claims branch, both of which are costly in terms of time, money, and public embarrassment.

Also worthy of mention here under the government perceptions factor is acculturation. In the Labrador cases, a number of interviewees and sources mentioned that the level at which an Aboriginal group is westernized may affect government perceptions. On the other hand, there are very few data indicating that this was a factor for the Yukon cases. As such, I mention the factor only to say that it can be important, but it is not essential to conditioning government perceptions of participating Aboriginal groups.

²² Simeon (2006: 15) quotes Dahl as saying that a resource "is anything that can be used to sway the specific choices or strategies of another individual."

²³ Simeon (2006: 13) states: "Moreover, the governments do not operate in a vacuum. They must bear in mind other groups – audiences – which form their environment and on which they depend for support." See also Cornell and Kalt, 2006: 9. Finally, thanks to Peter Russell who pointed this out to me.

Again, Aboriginal leadership can help to modify government perceptions. In some cases, poor Aboriginal leadership can worsen perceptions whereas strong leadership can significantly strengthen perceptions. The point here is to emphasize that although perceptions are very much influenced by history and culture, Aboriginal groups can institute some change in those perceptions through the actions of their leaders.

Factors Affecting Speed

Table 3.2: Factors that Affect the Speed of CLC Negotiation Outcomes

Factors Affecting Quickly Completed Treaties	Factors Affecting Prolonged Completed Treaties
- Presence of Trust Relationships Between Governments and Aboriginal Groups	- Lack of Trust Relationships Between Governments and Aboriginal Groups
- Presence of Supportive Governmental Negotiators and Presence of an External Government Negotiator	- Lack of Supportive Governmental Negotiators and Lack of an External Government Negotiator
- Low Competition for Use of Aboriginal-Claimed Lands	- High Competition for Use of Aboriginal Claimed-Lands
- High Development Pressure Affecting Aboriginal-Claimed Lands	- Low Development Pressure Affecting Aboriginal-Claimed Lands

Four different factors can affect the speed of negotiations. They are trust relationships, the attributes of individual government and external negotiators, competition for use of claimed lands, and development pressures. Trust relationships occur when government and Aboriginal officials are ready to believe one another. Solid trust relationships allow for more compromise and focus on the issues, and less posturing and

grandstanding.²⁴ Trust also allows officials to propose ideas to each other outside of the formal negotiating process without fear that these proposals would be used against them in future formal negotiation sessions. “Attributes of individual government and external negotiators” refer to the presence of a government negotiator who is extremely committed to the resolution of a comprehensive land claims agreement and is willing to act as an advocate for Aboriginal positions within the government bureaucracy. An external negotiator is a government negotiator who was not originally a bureaucrat and thus enjoys the initial advantages of not being captured by the bureaucratic culture and hierarchical lines of authority. The level of competition for use of claimed lands can affect the speed of negotiations. Lands that are in isolated areas far away from non-Aboriginal communities will likely be completed faster than ones that involve lands near non-Aboriginal communities. Finally, development pressures can affect the speed of negotiations because third party interests (such as licences for resource extraction) in claimed lands are excluded from land claims negotiations unless the parties agree to freeze such lands from development. As such, governments are in no hurry to complete treaty negotiations involving valuable lands subject to third party interests since governments and businesses can immediately benefit from the exploitation of these lands without a treaty. Conversely, valuable lands that are not subject to third party interests can speed up negotiations. For instance, negotiations for both the Labrador Inuit and the Labrador Innu greatly sped up after the discovery of valuable nickel deposits in Voisey’s Bay, an area in which no third

²⁴ Steve Dupre wrote the first important piece on trust ties for the Macdonald Commission. For further information on the importance of trust ties in intergovernmental relations, see Pelletier, 2002; Renzsch, 2001: 6.

party interests previously existed. As such, government actors, especially provincial ones, felt strong development pressures to accelerate negotiations with both Aboriginal groups.²⁵

Final Theoretical Considerations

In this final section, I justify why I chose to adopt the analytical framework described above. I also discuss the limits of a four-case study. Finally, I list a number of alternative explanations and describe how they are incorporated into my explanatory schema.

Why this Analytical Framework?

All analytical frameworks have their strengths and weaknesses. In the absence of grand theories that explain everything, the task of the researcher is to choose a framework that gives the most analytical leverage over the question under examination. As mentioned earlier in this chapter, causality is almost impossible to establish, meaning that the researcher is limited to developing frameworks that identify and state the likelihood of certain factors affecting the phenomena under study.

²⁵ As will be shown later, development pressures by themselves do not determine negotiation outcomes. Rather, they only affect the speed of negotiations. Both the Labrador Inuit and Labrador Innu benefited from accelerated negotiations as a result of Voisey's Bay but only the Inuit were able to complete a treaty. The Labrador Inuit's success was a result of compatible goals with government ones, minimal use of confrontational tactics, internal cohesion, and positive government perceptions. Innu negotiations failed because they lacked compatible goals, had a history of confrontational tactics, had weak internal cohesion, and had negative government perceptions. Hence, this dissertation does not include development pressures as a factor affecting whether a treaty is obtained. It should also be emphasized that both the Innu and the Inuit had strong claims to the Voisey's Bay area. The strength of their claims is confirmed by my interviews and by a court injunction that ordered a halt on all development in the area until Inuit and Innu consent were obtained.

This dissertation draws upon the relevant comparative literatures to construct an analytical framework that is parsimonious, empirically testable, and useful for predicting outcomes. It establishes that four factors relative to the participating Aboriginal groups have the most effect on CLC negotiation outcomes. Using these clear and parsimonious factors, my analytical framework predicts that Aboriginal groups that have compatible goals with those of governments, use minimal confrontational tactics, forge internal cohesion, and foster positive government perceptions are highly likely to complete treaties. On the other hand, Aboriginal groups that have incompatible goals with those of governments, fail to minimize confrontational tactics, are unable to forge internal cohesion, and fail to foster positive perceptions are highly unlikely to complete treaties. These factors can be empirically tested by applying them to the experiences of other Aboriginal groups.

Some may argue that the choices available to Aboriginal peoples are in fact completely circumscribed. The Innu, Deh Cho Dene, and the Kaska, for instance, may have incompatible goals with governments because their historical circumstances and traditional cultures privilege a strong collective responsibility and stewardship to their lands. Nonetheless, I argue that Aboriginal leaders, negotiators, elders, and community members still have some freedom (albeit circumscribed) to make choices that “violate” historical and cultural legacies, mainly through the actions and influences of their leaders.

In light of the paucity of theoretical literature on this topic, and more importantly, in light of my empirical findings, the analytical framework presented in this chapter provides the best available explanation of four cases of CLC negotiations in Labrador and in the Yukon Territory. I originally began this study using a social movement framework but

quickly found that the empirical evidence did not support that framework. Rather, the evidence suggested that the framework constructed in this chapter was more accurate and useful. Besides being empirically grounded, my framework is also useful because it builds upon a number of competing alternative explanations, described below. Taken individually, the competing explanations fail to adequately explain the CLC negotiation outcomes in Labrador and the Yukon Territory. When combined into the analytical framework presented in this chapter, however, their utility and value are greatly increased.

One possible weakness of this framework is that sometimes it treats “government as a single actor,” especially in its discussion of government preferences and incentives during CLC negotiations. Scholars adopt the “government as single actor” approach because it allows them to generate empirically testable propositions and to achieve parsimony and reasonable prediction power. Also, depending on the political system and the political phenomena under study, sometimes it makes empirical sense to treat governments as single actors. Richard Simeon’s (2006) book on federal-provincial diplomacy, for instance, treats the eleven federal and provincial governments as single, monolithic actors, interacting with each other in the intergovernmental arena. Christa Scholtz’s (2006) study of the emergence of treaty negotiation policies in Canada does the same thing, equating the “federal government” with “cabinet” while ignoring the variety of other government officials who were part of the decision to create the federal CLC negotiation policy. Simeon and Scholtz adopted these perspectives because the Canadian cabinet-parliamentary system concentrates power in the hands of the executive, namely the prime minister/premiers and their cabinets. As a result of this concentration of power, Simeon and Scholtz were able to discern overall patterns that could be applied to the federal and provincial governments as

general characteristics, infusing government actors with a similar set of preferences, strategies, and biases. In the same way, this dissertation found that the government as single actor approach accurately described federal, provincial, and territorial goals and incentives during CLC negotiations. Government goals and incentives, at least according to my interview data and the secondary literature, were surprisingly consistent despite the turnover of government officials over time.²⁶ In particular, federal, provincial, and territorial government actors are driven by the need to achieve certainty and finality for the purposes of economic development on Aboriginal-claimed lands. According to my interview data and the secondary literature (see Mitchell, 1996; Penikett, 2006; Rynard, 2000, for instance), this characterization has been consistent since 1973.

This is not to say, however, that individual government actors do not matter and that they do not have their own preferences and incentives. Subsequent chapters show that personnel changes at the federal, provincial, and territorial levels can affect the course of negotiations. For instance, I argue that individual government negotiators, premiers, ministers of Indian Affairs, and prime ministers can sometimes speed up or delay negotiations. These personnel changes, however, tend not to affect outcomes unless they lead to systemic changes in government goals or government perceptions of the Aboriginal groups. Instead, I believe that it is more profitable to focus on the four factors relative to the Aboriginal groups described above to explain outcomes. The effect of individual premiers, ministers, and prime ministers are more useful as factors when they are

²⁶ Please see the above “preferences” and “incentives” sections for the interview data and the secondary literature used to generalize about federal, provincial, and territorial preferences and incentives during CLC negotiations.

conceptualized as being part of the presence of compatible goals and development pressures.²⁷

This dissertation does acknowledge that changes to the policy framework governing negotiations over the last 30 years may have affected the pace and possibility of CLC negotiations succeeding. Indeed, throughout this dissertation, I find that the evolution of government policy has affected the compatibility of government and Aboriginal goals. Recall earlier the discussion of the election of Brian Mulroney as prime minister and the subsequent changes to the federal government's negotiating mandate with respect to the surrender provision. For the Inuit, this change was an important one in that it helped them achieve more compatible goals with the federal government. Although I agree that changes to the policy framework can affect the compatibility of goals, my project does not explain with any precision explain why the policy framework changed. Failing to explain why the policy framework changed does not undermine this dissertation's explanatory power since the empirical evidence suggests that a conjunction of four factors relative to the Aboriginal groups best explains CLC negotiation outcomes in Canada. In other words, it is not just the policy framework that matters, but more importantly the institutional framework, the goals and strategies of the actors, history and culture, and leadership matter. Nonetheless, the question of why changes to the policy framework occurred is an important and understudied one that can be more profitably explored now as a result of this project's contributions.

²⁷ Again, please refer to the discussion in chapters 1 and 2 regarding how this dissertation considered and dealt with the "government as single actor" problem.

The Limits of a Four-Case Study

As I argued in chapter 1, the four-case study approach is useful for tackling questions in which large-n data do not exist. Specifically, this approach allows the researcher to use systematic methods to build a theoretically- and empirically-informed analytical framework for studying both the outcomes at hand and the related cases within the broader universe of cases. The findings generated by this approach, however, are limited to the four cases being studied. Although the findings may be applicable to other cases, scholars need to engage in further research to determine whether they are in fact transferable to other related cases. Doing so will determine the exact universe of cases to which the findings apply. According to George and Bennett (2005: 27), “even when a plausible argument can be made that a factor is necessary to the outcome in a particular case, this does not automatically translate into a general claim for its causal role in other cases. If equifinality is present, the factor’s necessity and causal weight may vary considerably across cases or types of cases.”

Other Plausible Explanations

In this section, I review eight plausible alternative explanations for CLC negotiation outcomes in Canada. Based on the empirical evidence gathered for my four cases, I concluded that, by themselves, none of the eight explanations could adequately explain the successful conclusion of CLC negotiations, but that each of them did have something to contribute. Accordingly, in the end, I incorporated the explanations into my analytical framework to provide a more accurate and nuanced analysis. The eight alternative interpretations are: i) resource development pressures; ii) the evolution of federal policy; iii)

the uncertain legal and economic climate created by Canadian courts; iv) the different understandings of the treaty process held by government and Aboriginal actors; v) government factors including inflexible mandates, lack of political will, and insufficient incentives for negotiators to complete agreements; vi) the legacy of historic indigenous cultures; vii) state development effects and mutual influence; and viii) Aboriginal group contact history.

i) The Development Pressure Explanation

The first alternative explanation is that many treaties get completed only after the discovery of a major non-renewable resource development on Aboriginal lands. For instance, Rynard (2001), Feit (1980) and Diamond (1985), have argued that the only reason negotiators completed the James Bay treaty was because governments were interested in developing a major hydroelectric project on Cree lands. This argument is valuable for emphasizing the importance of economic and development pressures on CLC negotiations and indeed this project argues that such pressures can affect the speed of negotiations. However, these pressures by themselves do not determine whether treaties are obtained. In Labrador, for instance, the Innu and the Inuit negotiations were both subject to strong development pressures after the discovery of nickel in Voisey's Bay yet only the Inuit were able to complete a deal despite the fact that both groups had strong claims to the area.²⁸

²⁸ Indeed, Canadian courts granted both groups an injunction to stop development in the mid 1990s based on the strength of their claims. Afterwards, the governments and Inco (the mining corporation holding the rights to Voisey's Bay) negotiated a set of agreements with both groups to allow the development to proceed. Some might argue that the Innu claim was much weaker than the Inuit claim, but the empirical evidence does not support this contention. Court cases (September 1997 Nfld Court of Appeal ruling), interview data, and the fact that the governments, businesses and the Aboriginal groups signed a number of MOUs and trilateral

Instead, I argue that a number of other factors relative to the Aboriginal groups determined whether treaties were completed.

ii) The Evolution of Federal Policy Explanation

Another interpretation might be that negotiation outcomes are the result of periodic shifts in federal negotiation policy. In 1969, the federal government denied that there was any reason to negotiate new treaties. In 1973, it decided that it should negotiate treaties but that such treaties must extinguish Aboriginal rights and could not involve political rights. By the mid 1980s, the federal government agreed to negotiate some political rights and to drop its extinguishment policy. By the mid 1990s, it was negotiating full self-government agreements concurrently with treaty negotiations and was allowing for greater flexibility in negotiating certainty and finality. As federal policies evolved, more Aboriginal groups were able to complete treaties because the changes were more favourable to what Aboriginal groups wanted from the treaty process (see Abele, Graham, and Maslove, 2000).

This argument by itself, however, does not fully explain outcomes. As I described above, all Aboriginal groups negotiating CLCs were affected by changing federal negotiation policies. Yet some groups completed treaties while others did not. This study argues that there must have been other factors affecting outcomes, or, at a minimum, we need to better specify the exact effect that evolving federal negotiation policies had on CLC negotiation outcomes. My findings suggest that the evolution of federal policy can have a significant effect on outcomes by influencing whether Aboriginal and non-Aboriginal

agreements regarding the development of Voisey's Bay indicate that the Innu and the Inuit claims to Voisey's Bay were both strong.

government goals are compatible or incompatible. Yet, I also argue that other factors relative to the Aboriginal groups influenced outcomes. As such, a more comprehensive and nuanced explanation is needed.

iii) Legal and Economic Uncertainty Explanation

Michael Murphy argues that the driving force behind the completion of the Nisga'a treaty was the "uncertain legal and economic climate" created by Canadian courts, which forced reluctant federal and provincial policy makers to negotiate with the Nisga'a in good faith (Murphy, 2005: 4). Ambiguity means that government actors are unsure of their ownership rights on Aboriginal lands not subject to treaty and therefore have powerful incentives to complete CLC agreements. However, this argument ignores the fact that judicial decisions that foster legal and economic uncertainty do not automatically lead to completed agreements. Uncertainty does not automatically translate into governments speedily negotiating completed agreements. For instance, the *Calder* decision in 1973 made no mention of the federal government having to negotiate treaties. Rather, Trudeau and his cabinet decided to negotiate treaties due to previous Aboriginal political mobilization *and* the judicial decision (Scholtz, 2006). Therefore, the legal and economic climate created by Canadian courts can affect government incentives to negotiate, but it does not by itself explain CLC negotiation outcomes.

iv) Different Understandings Explanation

James Tully (2001), as well as Abele and Prince (2003), have argued that comprehensive land claim negotiations in B.C. and perhaps elsewhere in Canada have been

slow and difficult because of the fundamental differences between government and Aboriginal understandings of the treaty process. For instance, Abele and Prince (2003: 150-151) argue that federal and provincial governments see themselves as “representatives of the Crown meeting with minorities within Canada” whereas Aboriginal peoples see themselves as nations negotiating with the Canadian nation as equals. This dissertation builds upon and supports their work by offering empirical evidence that shows that different understandings of the treaty process can affect CLC negotiation outcomes by conditioning the presence of compatible or incompatible goals. However, other factors, in addition to the different understandings argument, need to be taken into account to fully explain CLC negotiation outcomes for the four Aboriginal groups studied in this project. Specifically, compatible goals must be paired with minimal use of confrontational tactics, Aboriginal group cohesion, and positive government perceptions of the Aboriginal group.

v) Government Factors Explanation

A number of scholars have suggested that government factors best explain why some Aboriginal groups have failed to complete treaties. Tony Penikett (2006) argues that the BCTC process has failed to produce completed treaties because government actors have inflexible political mandates, lack political will, and have failed to provide sufficient incentives for professional negotiators to complete agreements quickly. Ravi de Costa (2003) agrees, arguing that government policy is far too inflexible and does not provide adequate financial and organization support to participating Aboriginal groups to successfully complete treaties. Colin Samson (1999) argues that the current comprehensive land claims process is an “ethnocidal” instrument of colonial domination that most

Aboriginal groups are reluctant to participate actively in. Andrew Woolford (2005: viii) agrees, criticizing the BCTC process as failing “to provide a reliable means for the parties to negotiate between justice and certainty.” As a result, the BCTC process remains extremely slow in producing completed treaties.

These contributions are valuable in pointing out the important role that governments have in the negotiation process. However, these accounts fail to acknowledge that some Aboriginal groups have completed CLC agreements, including several in British Columbia.²⁹ If mandates are too inflexible, why, for instance, have Aboriginal groups in Labrador, NWT, Quebec, the Yukon Territory, and now B.C. successfully negotiated treaties? The contribution of this dissertation is to inject the *Aboriginal groups* into the explanation. In essence, the literature supporting the government factors argument has not controlled for Aboriginal group variables in explaining comprehensive land claims negotiation outcomes in Canada.

vi) The Legacy of Historic Indigenous Cultures Explanation

Another plausible argument has to do with the legacy of historic Indigenous cultures. It may be that some Indigenous cultures are more or less compatible with the cultures of the Canadian state (see Kulchyski, 2005; McPherson, 2003). For instance, some observers (like McPherson, 2003) have noted that the Inuit tend to have cultures that are more in tune with the norms of Canadian culture, at least in terms of negotiating treaties. Specifically, commentators have mentioned that the Inuit are more consensus-oriented and

²⁹ Although to be fair, the cited works above were all published before two First Nations recently completed their treaties in British Columbia under the BCTC process.

less prone to using conflictual tactics. Some interviewees mentioned that Inuit negotiations were easier to complete because they were more acculturated with western culture than the Innu. This dissertation does acknowledge that the legacy of historic Indigenous cultures can affect compatible goals, choice of tactics, internal cohesion, and government perceptions. Yet it also realizes that it is difficult to specify and measure cultural characteristics. Moreover, this argument ignores the fact that leaders can sometimes transcend historical cultural norms and legacies to change the direction of negotiations and ultimately affect negotiation outcomes in positive or negative ways. These leadership effects are explored in more detail in the empirical chapters that follow.

vii) State Development Effects or Mutual Influence Explanation

Another possible explanation is that outcomes may be affected by the period of state development in Canada when Aboriginal groups came into sustained contact with state institutions.³⁰ Specifically, state actions like the resettlement of Aboriginal peoples, the creation of band council governments, and the under-funding of Aboriginal communities, among other things, may affect the ability of Aboriginal groups to marshal the necessary resources to complete treaties. Indeed, as I emphasized in chapter 2, Aboriginal peoples and the Canadian state have a long and varied history of intense interaction. This interaction has affected not only government-Aboriginal relationships, but also the internal dynamics of governments and Aboriginal groups. For instance, the internal dynamics of Kwanlin Dün First Nation were heavily influenced by the federal

³⁰ See J.R. Miller's (2000) discussion of directed vs. non-directed change regarding Indian-White relations in Canada.

government creating the Whitehorse Indian Band out of Kwanlin Dün members, Ta'an Kwäch'än members, and all other Aboriginal peoples living in Whitehorse. Similarly, the Innu in Labrador suffered from intensive internal cohesion problems because of the actions of the Newfoundland and Labrador provincial government to permanently settle the Innu in Sheshatshiu and Davis Inlet.

Mutual influence also affects other factors in my explanatory schema. For instance, some Aboriginal groups may use more confrontational tactics because the federal and sub-national governments refuse to negotiate with them. Some governments may decide to hire external negotiators to represent them at the negotiating table because some Aboriginal groups refuse to negotiate without one. Finally, trust relationships may or may not exist prior to the start of negotiations because previous government-Aboriginal interactions were positive or negative.

This dissertation acknowledges that government-Aboriginal relationships are dynamic and that mutual influence has occurred. However, there is a danger in placing too much emphasis on mutual influence because doing so obfuscates the explanation in ways that are not very helpful. It is true that mutual influence, as a result of government-Aboriginal interactions over the years, may predispose Aboriginal groups towards taking certain actions. For instance, the empirical chapters document how mutual influence did affect some Aboriginal groups in their ability to achieve compatible goals (i.e. government actors, over time, became more flexible with what they could accept in key treaty provisions), forge internal cohesion (affected by government actions to settle, create, and sometimes under-serve Aboriginal communities), foster positive government perceptions of the Aboriginal groups (based on government evaluations of Aboriginal program delivery

efforts and financial audits), develop trust relationships (previous “intergovernmental” interactions between Aboriginal groups and governments), and achieve the presence of external negotiators (sometimes as a result of Aboriginal demands). However, the empirical chapters also show that Aboriginal groups have some ability (through their leaders) to influence CLC negotiation outcomes, despite the effects of mutual influence. As well, by specifying the four factors that affect outcomes, we are better able to disentangle the concept of “mutual influence” to show precisely which factors are important for affecting outcomes and how mutual influence can condition those factors.

viii) Aboriginal Group Contact History

A final possible explanation is that specific features of an Aboriginal group’s contact history may affect negotiation outcomes. It may be that those Aboriginal groups that have been in contact longer with western civilizations may be more likely to complete treaties. Such an explanation, however, does not specify how such contact histories would matter for negotiations. This dissertation builds on this argument by specifying exactly how specific features of contact history might matter, if they do matter at all. Drawing on Paul Nadasdy’s (2003) work, I argue that those Aboriginal groups that have been in contact with western cultures for longer periods of time are more likely to adopt compatible goals, minimal confrontation tactics, and to foster positive government perceptions. However, the evidence for this contention is not very strong and seems to apply only to the Inuit case. Moreover, Aboriginal groups can sometimes transcend the effects of their contact history through their leaders.

An Assessment

In sum, although all of these eight explanations do not appear as discrete factors in my explanatory schema, they have been considered and incorporated into my analytical framework in one way or another. More specifically, they are useful for understanding why some groups are more likely to adopt compatible goals, minimal confrontational tactics, reasonably strong internal cohesion, and secure positive government perceptions, and why other groups are not. However, to focus solely on these alternative interpretations does not allow the researcher to explain with any precision why some treaties get completed and why some do not. To say, for instance, that the legacies of historic Indigenous cultures determine outcomes is not very useful because such an explanation does not specify how these legacies matter. The contribution of this dissertation, therefore, is to generate a parsimonious, falsifiable, and concrete analytical framework that is useful for generating proposals that policy makers and practitioners can use to directly affect outcomes. This framework recognizes that Aboriginal groups have some control over negotiation outcomes depending on whether they “choose” the right conjunction of factors to complete treaties. However, the word “choose” is somewhat misleading because Aboriginal groups do not make choices without constraints. Rather, their choices are heavily influenced by the institutional framework governing CLC negotiations, historical cultural legacies, previous interactions with the Canadian state, social conditions, leadership, and geographic location, all of which are explored in more detail in chapters 4 and 5. In many ways, therefore, Aboriginal group “choice” is predetermined. Yet, Aboriginal leaders can sometimes help their Aboriginal groups to break away from their predetermined choices, although in the four cases that I examined, such instances do not occur very frequently.

Conclusion

In this chapter, I have presented an analytical framework for explaining comprehensive land claims negotiation outcomes in Canada that combines the propositions of rational institutionalism, Simeon's federal-provincial diplomacy framework, and Nadasdy's legitimacy theory. Comprehensive land claims negotiations are moments in time when specific government (the national and the relevant sub-national) and societal (Aboriginal groups) actors negotiate to complete modern treaties. The negotiating preferences and incentives of these actors structure their willingness to work towards completed agreements. Governments prefer certainty and finality to reap the rewards in lands where title was previously uncertain, whereas Aboriginal groups prefer to maximize their control over their traditional lands. In terms of negotiating incentives, governments are reluctant to negotiate towards completion since they are the dominant actors and benefit greatly from the status quo. Aboriginal groups, on the other hand, are very interested in negotiations since they lack a better alternative to satisfy their preferences; a treaty offers Aboriginal groups potentially the best solution for obtaining the type of control they want over their traditional lands.

In light of these considerations, comprehensive land claims negotiation outcomes are best understood in terms of a set of factors relative to the Aboriginal groups. Aboriginal groups that are willing to work within the preferences of governments, are willing to minimize the use of confrontational tactics, are able to forge some sort of internal cohesiveness, and are able to create positive government perceptions of themselves, are the ones who will be able to complete treaties. The ability of Aboriginal groups to "choose"

these goals and strategies, however, is conditioned significantly by the legacy of history and cultural norms and practices. Yet groups can sometimes break away from these conditioning influences depending on the actions of their leaders. The next chapters illustrate how this framework and its accompanying factors provide a plausible explanation for the negotiation outcomes experienced by two Aboriginal groups in Labrador, and two Aboriginal groups in the Yukon Territory.

Chapter 4: The Innu and the Inuit in Labrador

This chapter presents two of the four case studies that make up the empirical contributions of this dissertation. These two case studies are the Inuit and the Innu in Labrador. The chapter begins by providing historical and demographic descriptions of these two very different groups. Next, I map out the significant events in both of their comprehensive land claims negotiations beginning in 1977 and ending in 2006. Finally, I conclude by arguing that a set of factors relative to the Aboriginal groups best explains the divergent outcomes that the two groups experienced in their negotiations.

Who are the Inuit and the Innu?

Maps

Below are three maps that are relevant to the contents of this chapter. Map 4.1 illustrates the main cities, highways, and waterways of Labrador. Map 4.2 shows the lands over which the Labrador Inuit gained control through their land claims agreement. Map 4.3 shows Nitassinan, the traditional lands of the Innu.

Map 4.1: Labrador – taken from the Government of Canada, Natural Resources Canada website, www.atlas.gc.ca on 30 May 2007. This map has been removed due to copyright restrictions.

Map 4.2 – The lands controlled by the Nunatsiavut government under the Labrador Inuit Land Claims Agreement. Taken from the Government of Newfoundland and Labrador, Labrador and Aboriginal Affairs Website, <http://www.laa.gov.nl.ca/laa/landclaims.htm> on [30 May 2007](#). This map has been removed due to copyright restrictions.

Map 4.3 – Innu Traditional Territories. Taken from Smithsonian, National Museum of Natural History website, http://forces.si.edu/arctic/04_00_28.html, on 30 May 2007. This map has been removed due to copyright restrictions.

A Brief History of the Inuit

The traditional territories of the Labrador Inuit are found in the northeastern part of the province along the coast of Labrador (Crowe, 1991: 17-18). Historically, most Inuit “lived in extended family units, place-groups or bands,” related by blood with a common interest in specific hunting or resource areas (Nunatsiavut, “Early History” 2006). Inuit culture viewed men and women as relative equals with each gender having dominance in certain social roles and responsibilities (Dorais, 2002: 138). Before coming into contact with the Moravians in the mid 1700s, the Inuit did not believe in the existence of gods. Rather, they believed that the universe was filled with a variety of souls, including human, spirit, animal, and inanimate. Shamans acted as intermediaries between the spirit and non-spirit worlds and the Inuit relied on them to perform important ceremonial and ritual tasks (Dorais, 2002: 142).

In terms of their seasonal round of activities, the Inuit were constantly on the move throughout the year, hunting game. Although the Inuit did hunt caribou, porcupine, and other game during the warmer months, much of their time was spent on the ocean fishing or hunting for seals and whales. The whale hunt was particularly important to the Inuit, not only for cultural reasons, but also for basic survival during the cold winters. During the winter season, the Inuit preferred whale meat for personal consumption and for their dog teams, the only feasible means of transportation during the winter. The Inuit also used

whale oil for fueling lamps and cooking fires, rib bones as frames for winter housing, and skins for insulating their roofs. Other parts of the whale bones were shaped into a variety of basic tools, including knives, sledge runners and harpoon edges (Brice-Bennett, 2003:15; Dorais, 2002: 135, 137-139). Although the Inuit did enjoy hunting caribou, porcupine, and seals, the whale hunt was their most important resource and activity.

In terms of their daily existence, the Inuit preferred to travel on rivers, lakes, and the ocean in one person kayaks or in larger “umiaks”, which were large wooden boats covered by seal skins. They also used snowshoes, toboggans, and dog teams to get around their territories during the colder months. In the warmer months, they walked or traveled in boats. They also wore seal pelts and lived in skin tents during these milder periods. In the winter they wore caribou pelts and lived in earthen sod huts with roofs supported by whale parts, or in structures made from blocks of hard snow. Prior to contact, the Inuit generally kept to themselves, with only intermittent interaction and trade with Labrador Innu. Otherwise, they mainly interacted with themselves, trading, socializing, hunting, living, and traveling together when it was mutually convenient.

First contact with the Europeans occurred in the mid-16th century when Basque whalers began to establish land stations on the southern parts of the north coast (Nunatsiavut, “Early History”, 2006). These whalers came to hunt bowhead and other whale species that migrated to the Labrador coastline during the summer and autumn months. The Basque whalers used these land stations as bases of operation and as places to preserve their catch before returning to Spain. Contact between the Basque whalers and the Inuit was infrequent. When they did meet, relations were usually antagonistic and conflictual. The Basque tended to be hostile because the Inuit frequently visited Basque

land stations during the winter to scavenge whatever the whalers had left behind. The Inuit, on the other hand, were unfriendly because the whalers during the summer frequently encroached on Inuit hunting and fishing areas (Brice-Bennett, 2003: 15; Brice-Bennett, 1997). Other examples of hostility included the capture of an Inuk women and her child in 1566, and in 1567 when several local Inuit killed and captured some of British explorer Martin Frobishers's crew (Dorais, 2002: 133; McMillan and Yellowhorn, 2004: 288).

By the 1620s, the Basque whalers had moved on to fishing areas near Greenland. They were quickly replaced in the area by French and English whalers and fishermen. At the same time, the Inuit had become more interested in acquiring European goods, especially iron, which was more durable than stone, bone, or ivory. However, very little trade occurred between the Inuit and Europeans mainly due to the lack of a common language, the negative stories told by Basque whalers to other Europeans, and the lack of "desirable" goods that the Inuit had to trade. The Inuit were also particular about the type of goods they wanted. They were interested in iron but not liquor, which the sailors preferred to trade. To meet local demands for iron, the Inuit resorted to raiding coastal stations to take the goods they wanted. The French and later the English would retaliate by attacking Inuit groups and settlements (Brice-Bennett, 2003:15-17).

Increased contact would eventually lead to increased trade between Dutch, Basque, and French whalers and the Inuit. The result of this increased contact was the development of a common Inuit-French-Basque pidgin language (Dorais, 2002: 133). Eventually European traders established temporary trading posts in Inuit lands to facilitate the transfer of European goods to the Inuit along the northern coast. In the late 1760s, the Moravian missionaries, a protestant group based in Germany, applied for and received from the

British Crown large tracts of land to establish trading posts and churches in Labrador. In 1771, the Moravians built a mission and a trading post in Nain to become the first Europeans to establish a permanent presence in the area. In 1790, they built schools in the areas of Nain, Okak, and Hopedale (Dorais, 2002: 133, 143; McMillan and Yellowhorn, 2004: 288; Nunatsiavut, “Winds of Change”, 2006). These Moravian communities would later evolve into the Inuit communities of Nain, Okak, Hopedale, and Hebron (Nunatsiavut, “Winds of Change”, 2006).

The Moravians had an immense impact on Inuit society, culture, and life. During the first years of contact, Inuit life continued as normal. They continued to hunt for food and materials for daily existence. They continued to use kayaks, wore clothing made from seal and caribou pelts, and constructed houses from whale parts and blocks of hard snow. As the Inuit became more exposed to the Moravians, however, Inuit life changed dramatically. Moravian trading posts in Inuit communities provided the Inuit with immediate access to European goods and expertise. Previously, the Inuit had to travel to southern Labrador to acquire these goods. As a result, the Inuit became less dependent on travel during the winter and more willing to stay in the Moravian communities. Also contributing to a more sedentary life was the influence of the Moravian religion. Most of the Inuit eventually converted to Christianity and abandoned their nomadic, season-centred living habits to settle in the permanent Moravian mission-centred communities (Brice-Bennett, 1997; Dorais, 2002: 142; Nunatsiavut, “Winds of Change” 2006).

By the end of the 19th century, almost all of the Inuit had settled in the Moravian communities. In the process of settlement, the Inuit eventually acquired Christianity and the English language, and were regularly using European goods such as guns, steel traps,

tea, sugar, flour, and tobacco (Dorais, 2002: 142, 133). They also acquired European diseases (McMillan and Yellowhorn, 2004: 289), which in 1918 wiped out one-third of the Labrador Inuit population. Inuit behaviour also changed as they shifted from a sole reliance on traditional hunting to fox trapping, seal netting, and cod and salmon fishing. The Inuit were also more interested in adopting modern technologies “and became increasingly integrated in the emerging market economy of Newfoundland and Labrador” (Nunatsiavut, “Winds of Change”, 2006).

During the 20th century, the Inuit became more dependent on the market economy of Canada. In addition to hunting and fishing, some Inuit began to participate in wage labour after the construction of a military air base in central Labrador in 1941 (now known as Happy Valley-Goose Bay) and several radar sites along the coast after that. In 1949, Newfoundland and Labrador joined Confederation. Immediately following Confederation, the federal and provincial governments negotiated a deal that stated that the federal government would provide the province with money to cover its expenses as they related to the administration of the Labrador Inuit and Innu. In the 1950s, the provincial government relocated Inuit residents living in Okak and Hebron to the communities of Nain, Hopedale, Makkovik and North West River (McMillan and Yellowhorn, 2004: 291; Nunatsiavut, “Winds of Change” 2006). Government officials believed that this relocation was necessary to improve the Inuit’s social and economic status. It was also more cost effective for the provincial government to move them because Okak and Hebron were located in the most northern parts of Labrador. Most of the relocated peoples, however, suffered as a result of the relocation because they were “relegated to more distant and less prolific resources ... [and] were ostracized in their new communities” (Nunatsiavut, “Winds of

Change” 2006). By the end of the 20th century, almost all of the Inuit were Christianized, educated in English schools, and could speak the English language.

In 1973, the Inuit formed the Labrador Inuit Association (LIA) “to promote Inuit culture, improve the health and well-being of our people, protect our constitutional, democratic, and human rights, and advance Labrador Inuit claims to our land and to self-government.” (Nunatsiavut, “A New Beginning”, 2006) The LIA, which was incorporated as a non-profit organization under provincial law in 1975, was governed by a 21-member democratically elected board of directors, representing the coastal Inuit communities of Nain (four members), Makkovik (three), Postville (three), Rigolet (three), and Hopedale (three), and the inland communities in Happy Valley-Goose Bay (two) and North West River (one). The LIA also had a President and a Vice-President, both of whom were directly elected by the Inuit. Board members had to be residents of the communities they represented, while all Inuit were eligible to run for the President and Vice-President positions.

The LIA quickly became an important advocate for the Labrador Inuit, establishing a number of vital organizations such as the Labrador Inuit Development Corporation, the Labrador Inuit Health Commission, and the Torngasok Cultural Centre. These organizations offered the Inuit economic development opportunities, health-care services, and cultural enrichment (Baikie, 1990; Nunatsiavut, “A New Beginning” 2006). In addition to providing a variety of services and programs, the LIA was also responsible for negotiating a comprehensive land claims agreement with the federal and provincial governments (Haysom, 1990). After the LIA successfully negotiated a treaty in 2005, it was replaced by a new Inuit government called the Nunatsiavut Government.

The Nunatsiavut Government has two levels: a “national” government with administrative headquarters in Nain and a legislature in Hopedale, and five community governments located in Nain, Hopedale, Rigolet, Makkovik, and Postville. At the community level, beneficiaries vote for community councilors and a “mayor” called an AngajukKâk. Once elected, the community councils can enact a variety of municipal bylaws concerning issues such as community parks, recreation, community lands, curfews, community economic development, public libraries, public works and facilities, parking lots, taxis, and other matters of a local nature (Labrador Inuit Final Agreement, 2005: ch. 17).

At the national level, the Nunatsiavut government is led by an elected President and Vice-President and is supported by the Nunatsiavut House of Assembly. The House of Assembly has 16 members, five of whom are the AngajukKâks from the five community councils as well as eleven elected “ordinary members.” Elections are held every four years with the President limited to holding office for a maximum of three terms. The Nunatsiavut House of Assembly is designed to be a forum of policy and debate using a consensus style of government, rather than the adversarial or partisan parliamentary system used throughout much of Canada. The House is led by the First Minister of Nunatsiavut, chosen from among the ordinary members in the House and appointed by the President (Labrador Inuit Association, 2002: chs. 3-5).

The executive and legislature are supported by five government departments. The Nunatsiavut Secretariat is responsible for overseeing the activities of the executive council, intergovernmental affairs, community healing initiatives, and cultural affairs. The Department of Nunatsiavut Affairs looks after legal services, public property, beneficiary

registration, youth and recreational services, land claims implementation, and fisheries policy. The Department of Health, Education, Social and Economic Development administers post-secondary support programs, economic diversification initiatives, economic development, as well as a variety of health programs addressing mental health, environmental care, non-insured services, addictions, child care, and disease control. The Department of Lands and Natural Resources looks after land use, environmental planning, water management, fisheries, wildlife, and all natural resources within treaty settlement land. Finally, the Department of Finance and Human Resources administers the Nunatsiavut civil service and the Nunatsiavut government finances.

In terms of revenues, the Nunatsiavut government relies heavily on capital transfers from the federal government. According to the treaty, the Nunatsiavut government is to receive approximately \$140 million in 1997 dollars over 15 years, minus \$51 million in LIA negotiating loans repaid over the same 15 year period. The Nunatsiavut Government will also be able to directly tax its Inuit members and will have access to revenues from income and sales taxes collected by the Canadian governments. The Nunatsiavut government will also be able to negotiate for the power to tax non-Inuit peoples in Inuit lands. Finally, the Nunatsiavut government will continue to have access to federal and provincial programs and services as they relate to health, education, and other related areas (Labrador Inuit Land Claims Agreement, 2005). In March 2006, the Nunatsiavut government passed a budget of \$39.4 million for the 2007-2008 fiscal year.

*A Demographic Profile of the Inuit*³¹

The size of the Inuit population in Labrador is somewhere between 2,436 (Statistics Canada, 2001) and 5,300 (Nunatsiavut Government, 2006).³² The latter figure includes those of Inuit-only descent and *Kablunângajuit*, people of Inuit and European ancestry. In general, the Inuit population is quite young (49.1% of the population in 2001 were aged 0-24, 30.9% were 25-44, 15.6% were 45-64, and 4.4% were 65 and above), whereas the Canadian population is much older (32.4% were between the ages of 0-24, 30.3% were aged 25-44, 24.3% were aged 45-64 and 13% were 65 and over). Reflecting the influence of the Moravians, 80% of Inuit speak English while 20% speak Inuttut. Moreover, a substantial majority of Inuit adhere to the Protestant faith (93.7% adhere to the Protestant faith, 3.2% are Catholic, 0.4% are other Christian, 0.4% are Sikh, and 2.3% have no religious affiliation).

In terms of education, most Inuit in 2001 had some high school education (37.9% had less than a high school graduation certificate, 22.4% had a high school graduation certificate and/or some postsecondary). Fewer Inuit had completed post-secondary education (21.3% had a trades certificate or diploma, 11.4% had a college certificate or diploma and 10.5% had a university certificate, diploma, or degree). In comparison,

³¹ Except where indicated, the data in this section are taken from 2001 Canadian Census data (Statistics Canada, 2001) for the five Inuit communities of Nain, Makkovik, Postville, Rigolet, and Hopedale. In general, it is difficult to get an accurate picture of the Aboriginal populations studied in this dissertation. The only reliable source for demographic data on the four Aboriginal groups studied in this dissertation is Statistics Canada. However, Statistics Canada makes no distinction between different Aboriginal groups. Rather, it records whether an Aboriginal person identifies herself as belonging to a First Nation, Inuit, or Metis peoples, or whether she is a status-Indian. Hence, the data presented in these sections only give a very general demographic picture of the Aboriginal peoples living in Inuit, Innu, Kwanlin Dün, and Kaska communities in Labrador and the Yukon Territory.

³² The large population range is the result of differences in Nunatsiavut and Statistics Canada data collection and classification methods. As noted above, for instance, the Statistics Canada data do not include *Kablunângajuit*.

provincial and Canadian residents had more education in 2001 (respectively, for instance, 14% and 18.2% had a college certificate or diploma and 13.8% and 21.7% had a university certificate, diploma, or degree). Finally, younger Inuit had more education than older Inuit in 2001.

In terms of earnings, the average Inuk earned \$15,861.25 in the year 2000 while 13.4% of Inuit reported that they worked full time in 2000. These numbers were substantially lower than the provincial and national numbers (respectively, \$24,165 and \$31,757, and 25.5% and 28.9%). Inuit earnings mainly came from employment income (71.2%), government transfers (26.5%) and other sources (2.2%). Provincial earnings were similar to the Inuit distribution (69.3% from employment wages and 21.2% from government transfers) except that provincial residents earned more from other sources (9.5%). In terms of national earnings, Canadians earned more of their income from employment (77.1%) and other sources (11.3%) and less from government transfers (11.6%).

A Brief History of the Innu

Despite having a similar name, the Labrador Innu, also known as Montagnais, are a completely different Aboriginal group from the Labrador Inuit. The Innu were a nomadic hunting culture, traveling throughout the interiors of what is now Quebec and Labrador in the winter to hunt, and migrating to the coast of Labrador in the summer to fish (Matthews et al., 2006). Prior to contact, most Innu made their living by hunting, fishing, and trading amongst themselves and with other Aboriginal groups in the south. After the arrival of European peoples to Labrador and northeastern Quebec, however, most Innu turned to the

fur trade as their primary means of earning cash. Throughout their existence in Labrador, the Innu have hunted and valued caribou, which they ate, turned into lodge coverings and tools, and traded for goods with other Aboriginal groups. Their main food, however, was fish (cod, whitefish, red char), supplemented by caribou, ducks, porcupines, seals, and some vegetation. To hunt they used deadfall pits, snares, bows and arrows, and spears, and to fish they used nets, spears, and fishing decoys. In their daily lives, Innu men and women used crooked knives (a type of carving tool), ice chisels, pots, needles, tents, and other tools made from bone, caribou antlers, the wood and bark of white birch trees, animal hides, and fish skins. The seasonal round consisted of the Innu spending their spring and summer months on the banks of lakes and rivers to fish, court, and socialize at festive gatherings. During these months, the main modes of transportation were walking and paddling in canoes. Winter months were spent on the move, hunting mostly for caribou, porcupine and seals, while living off of dried fish and game meat gathered during the summer months. Innu members used snowshoes and toboggans to traverse their traditional lands during the winter (Rogers and Leacock, 1981).

Historically, Innu society generally emphasized individual freedom balanced with mutual responsibility. Authority, for the most part, was decentralized and dispersed among families and groups. During the hunting season, hunting groups usually had one informal leader, the *utshimau* (first man), chosen based on his hunting skills. Gender relations were non-hierarchical and egalitarian, with both genders having different spheres of responsibility. Women were autonomous in their areas and had great freedom, including the freedom to court who they liked, take on lovers, and divorce easily (Samson, Wilson, and Mazower, 1999: 11-13). Most Innu organized themselves into lodge groups, which

were three or four families of 15 to 20 individuals living and traveling together. These lodge groups relied on consensus to make decisions, using effective orators to deliver their decisions to other groups when necessary.

Beginning in the late 18th century, the Innu slowly became dependent on the fur trade and the variety of European goods that they acquired from this economy. As a result, lodge groups were replaced by trading-post bands that were small, amorphous units, with membership based on friendship and blood. The main goal of these bands was to hunt and trap for animal furs to acquire European goods. Many of these bands established hunting areas that other groups and bands respected. These hunting areas, however, were not “owned” by these bands. Rather, usage rights to these hunting areas fluctuated as game migrated (Rogers and Leacock, 1981: 179).

Contact with European peoples first occurred with the Vikings one thousand years ago, then John Cabot in 1496, and then a multitude of whalers, settlers, traders, and missionaries beginning with the Basque and ending with the French and English (Wadden, 1991: 26). The primary reason Europeans first came to Labrador was to fish in its abundant coastal waters. During their fishing expeditions off the coast of Labrador, European visitors established camps to process the fish and sometimes traded goods with the Innu. Initial trades involved meat and animal skins for European goods such as hunting, cooking, and fishing gear. The Innu eventually used their trading relations to become middlemen between European traders and native groups in the south. Their role as middlemen did not last long, however, as European nations set up permanent trading posts around the gulf of the St. Lawrence River. The Innu adjusted to these changes by focusing their economic activities on providing furs to European traders.

The Innu remained relatively isolated from European settlement until the 1830s when missionaries and traders began to set up permanent structures on Innu lands in Labrador. As well, more and more non-Innu hunters, trappers, and settlers began to encroach on Innu traditional hunting and fishing grounds. In 1916, the Hudson's Bay Company opened a permanent trading post at Davis Inlet and the Newfoundland government forcibly settled the Innu bands of Barren Ground and Davis Inlet there (Henriksen, 1981: 666).³³ Over time, these Innu members became dependent on European goods from the trading post (Backhouse and McRae, 2002: 12). In 1927, the border between Quebec and Labrador was created, dividing the Innu and their traditional lands in two. This action created two distinct Innu groups: the Innu in Quebec and the Innu in Labrador (Samson, Wilson, and Mazower, 1999: 15).

By the middle of the 20th century, the Innu were heavily involved in the fur trade and were becoming increasingly exposed to missionary activities and sustained contact with non-Aboriginal peoples. In 1941, the government built a military airbase on Innu lands in central Labrador, which eventually became the city of Happy Valley-Goose Bay. In 1949, Newfoundland and Labrador joined Confederation. Shortly thereafter, the federal and provincial governments negotiated an agreement in which the federal government agreed to assume two-thirds of the costs associated with capital expenditures (welfare, health, and education) for the Labrador Inuit and 100% of the costs for the Labrador Innu for a period of 10 years. They also agreed to cover all costs associated with Inuit and Innu hospital treatment and to fund an aggressive anti-tuberculosis campaign. In exchange, the provincial government agreed to "assume all other financial and administrative

³³ Innu members refer to this first settlement as "Davis Inlet I".

responsibilities for the Indian and Eskimo population of Labrador excluding such federal benefits as family allowances and old age pensions” (Backhouse and McRae, 2002: 13). In 1964, the federal and provincial governments renewed this agreement with regard to health care costs and included a new provision in which the federal government agreed to provide up to \$1 million per year for the provincial government’s Innu- and Inuit-related expenses. Subsequent agreements extended these previous agreements with some minor modifications relating to the amount of money provided, the range of things that the money could be spent on, and how the money was paid and accounted for (Backhouse and McRae, 2002: 13-14).

These federal-provincial spending arrangements had a dramatic effect on the Innu. Although historically the federal government provided most of the funding for programs and services for the Labrador Innu, the provincial government was largely responsible for spending those funds. Some analysts argue that the provincial government deliberately underfunded the Innu in the first two decades following Confederation. The provincial government’s failure to provide adequate funding and services to the Innu during the 1950s and 1960s is an example of mutual influence, where Innu domestic problems were aggravated by interactions with the Canadian state. Another example of mutual influence was the provincial government’s actions to settle the Innu in two permanent communities. In the late 1950s and the late 1960s respectively, the provincial government relocated the Innu to Sheshatshiu and to Davis Inlet II. Government officials forcibly settled the Innu in these two communities because caribou populations and fur prices had dropped dramatically during these decades; in the government’s view, the Innu could no longer survive solely on hunting and trapping. More importantly, the government saw

sedentarization (the settling of a nomadic culture) as a means to remove the Innu from lands that it believed had vast potential for economic development (Samson, Wilson, and Mazower, 1999: 16-17). The overall effect of government efforts to settle the Innu was to turn an Aboriginal group that had functioned quite well as a nomadic society into a dysfunctional, settled one. Observers and the Innu themselves agree that the many domestic problems that they currently face, such as alcoholism, drug abuse, greed, and unemployment, are a result of government actions to settle and “civilize” them during the latter half of the 20th century (Ben Andrew, 2006; Ashini, 2006; Innu Nation, 1995; Michel, 2006; Samon, Wilson, and Mazower, 1999; Wadden, 1991).

In December 2002, the federal government moved the Innu from Davis Inlet II to Natuashish, a new \$200 million community that had it built for them. Some have argued, however, that the problems that the Innu had experienced at Davis Inlet II have followed them to Natuashish. Staff reporters from the CBC (14 February 2005) have reported that alcohol and substance abuse, corruption, and social dysfunction have continued to plague the Innu at Natuashish.

Today, the majority of Innu live in Sheshatshiu (about an hour’s drive west of Happy Valley-Goose Bay) and Natuashish (on the coast of Labrador in Sango Bay just south of Nain), with some members living in Happy Valley-Goose Bay. The Labrador Innu are represented by the Innu Nation at the negotiating table. Innu Nation officials are elected to represent and serve the interests of members from both communities. A common practice has been for the Innu Nation President and the Vice President positions to be held by one member from each community. This practice is also true for comprehensive land

claims negotiations; both communities regularly send one negotiator to serve on the Innu Nation negotiating team.

Unfortunately, it is difficult to obtain information on the Innu Nation's size, staffing, and resources. For instance, when I visited the Innu Nation office in Natuashish, records and documents were scattered in boxes all over the place. They were not kept in any type of order such as by theme or date. The Innu Nation office at Sheshatshiu seemed to be in better order, but staff members were reluctant to release relevant information to me. My sense is that their reluctance probably stemmed from years of negative media coverage of Innu Nation and band council spending practices. My search for copies of Innu Nation annual reports and financial statements online and in print was unsuccessful.

*A Demographic Profile of the Innu*³⁴

According to Canadian census data, the Innu population grew from 1404 in 1996 to 1714 in 2001. By July 2004, the Innu population had grown to 2100, with 700 members in Natuashish and 1400 in Sheshatshiu (INAC 2004). Much like the Inuit, the Innu population is younger than provincial and national populations (60.7% of the Innu population were aged 0-24, 25.8% were aged 25-44, 10.6% were aged 45-64, and 2.9% were 65 and above). One significant difference between the Innu and the Inuit populations (and indeed the rest of Canada) is the language first learned and still understood. Whereas the majority of Inuit speak English, the majority of Innu (86.8%) speak Innuaimun, the Labrador Innu language. In terms of religion, most Innu are Catholic, with some adhering

³⁴ Unless otherwise noted, the data for this section are also drawn from the 2001 Statistics Canada census for the communities of Natuashish and Sheshatshiu.

to the Protestant faith (88.8% of Innu are Catholic, 9.1% are protestant, 0.6% are “other religion,” while 2.1% have no religious affiliation).

In terms of education, the Innu are generally less educated than national, provincial, and Inuit populations (65.7% of Innu lack a high school graduation certificate, 21.2% have completed high school and/or some postsecondary, 7% have a trades certificate or diploma, 4.7% have a college certificate or diploma and 3.8% have a university certificate, diploma, or degree). Moreover, these trends persist across age groups.

In terms of income, the average Innu person in Sheshatshiu and Davis Inlet earned \$16,734. This amount is about \$900 more than the average Labrador Inuk earned in 2000. However, fewer Innu worked full time in 2000 (5.5%) than Inuit (13.4%). In terms of sources of income, the average Innu received 71.4% of her income from employment earnings, 27.2% from government transfers, and 1.4% from other sources. In comparison, the average Inuk’s distribution of earned income was similar (employment income was 71.2%, government transfers were 26.5%, and other sources were 2.3%).

The Labrador Inuit Journey

In 1977, the Labrador Inuit Association (LIA), on behalf of the Inuit of Labrador, submitted their land claim, *Our Footprints Our Everywhere*, to the federal and provincial governments for active negotiations. The land claim detailed the Inuit’s use and occupation of their traditional lands since time immemorial. The federal government accepted the claim, praising it “as a model for other claim submissions by native peoples in Canada” (DIAND, 1990; see also Hawco, 2006). It was well-researched, accurate, and comprehensive in outlining the Inuit claim (Hawco, 2006). The province, however,

initially balked at the claim mainly because then Premier Frank Moores refused to acknowledge that Aboriginal peoples in his province were worthy of special recognition. According to Backhouse and McRae (2002), “The Province had historically taken the position that there was nothing to negotiate, that the Innu [and the Inuit] had no more claim to land than other Newfoundland residents” (Backhouse and McRae, 2002: 41).

In March 1979, Brian Peckford of the Progressive Conservative Party became Premier of Newfoundland and Labrador. His victory was important because he was much more open to recognizing Inuit and Innu land claims than his predecessor (Rowell, 2006). In 1980, he decided to accept the Inuit claim for negotiations subject to two preconditions: negotiations had to lead to extinguishment, and the federal and provincial governments had to come to an agreement about cost-sharing (Borlase, 1993: 310; Haysom, 2006; Haysom, 1990). These preconditions were problematic for two reasons. First, Labrador Inuit Association (LIA) leaders believed that a land claims agreement had to recognize Inuit rights, not extinguish them. Second, the issue of cost-sharing was highly contentious, as suggested by the lack of a resolution until 1997.

Despite significant interest from the LIA, no active negotiations occurred until 1985. The reason was that until 1990, the federal government had a policy of actively negotiating with no more than six claimant groups at one time (Haysom, 2006; Haysom, 1990; Rowell, 2006). In June 1984, the federal and Inuit negotiators in the western Arctic signed the Inuvialuit agreement, opening up a spot on the active negotiations list. In that same year, the federal officials invited the LIA to begin active comprehensive land claims negotiations. In 1985, however, the federal government announced it was suspending all CLC negotiations while it undertook a review of its comprehensive land claims policy. After the

publication of the Coolican report, the federal government made a number of important changes to its comprehensive land claims policy in 1986.³⁵ Shortly thereafter, the province announced that it was going to review the Coolican report and the new federal policy and generate its own in response (Haysom, 1990, 2006). After completing its response, the province announced in October 1988 that despite the failure to achieve a cost-sharing agreement with the federal government, it was willing to begin tripartite negotiations. Framework agreement negotiations finally began in January 1989 and were completed in March 1990 (Chesley Andersen, 2006; Haysom, 2006; Rowell, 2006).

Although the framework agreement was completed relatively quickly, agreement-in-principle (AIP) negotiations would drag on for approximately nine years. The first six years (1990-1996) of AIP negotiations were extremely slow and unproductive for a number of reasons. First, the federal and provincial governments were at an impasse over cost-sharing. The province's "position was that it would contribute to the negotiations what it had the capacity to contribute which were matters within provincial jurisdiction including land, renewable and non-renewable resources, etc." (Carter, 2006). The province also felt that it was under no obligation to contribute money to the agreement. The federal government, on the other hand, wanted the province to pay for some of the costs of the agreement because it did not want to set a precedent of exempting other provinces from cost-sharing. One interviewee mentioned that the outstanding claims in British Columbia were in the back of the federal government's mind throughout cost-sharing negotiations with the Newfoundland government.

³⁵ These changes are described in greater detail in chapter 2.

Second, the province was simply unprepared to negotiate an AIP because it had never done so before. It did not have the necessary experience and knowledge to properly negotiate an AIP. Third, there was a lack of political will at the provincial level. Although Liberal Premier Clyde Wells wanted a deal, it was not one of his main priorities (Marshall, 2006), partly because he did not believe in special recognition for collectivities (Innes, 2006). The result was that provincial negotiators did not have a clear mandate at the negotiating table (Marshall, 2006). Time and time again, they would have to go back to their superiors for instructions, resulting in slow progress at the negotiating table (Pain, 2006; Rowell, 2006). According to Veryan Haysom (2006), LIA Negotiator, “A large part of the problem was that provincial policy at the time was very limited and restrictive and the Inuit were negotiating despite that policy, not under it. It was largely this that forced provincial negotiators to seek mandate changes at the policy level.” Finally, the federal government adopted a passive stance at the negotiating table on the basis that most of the issues under negotiation involved provincial jurisdiction. Throughout much of the negotiations, it preferred to let the LIA and the province negotiate while it sat in the background. Only when the province and the LIA would come to an agreement on a particular issue, would the federal government take an active role. Federal negotiators would take the tentative LIA-provincial agreement to their superiors and return with demands that had to be accommodated through further negotiations (Haysom, 2006; Marshall, 2006; Pain, 2006; Rowell, 2006).

Voisey’s Bay and a New Premier

By 1996, six years of negotiations had generated one initialed chapter (eligibility and enrollment) and some progress on other matters (Carter, 2006; Pain, 2006). The pace of negotiations quickly changed as a result of two events. The first was the discovery of a massive nickel deposit in Voisey's Bay, a region in between Nain and Natuashish that both the Innu and the Inuit had previously claimed (Jararuse, 2006; Michel, 2006; Riche, 2006). The discovery of nickel created a huge mineral rush in Labrador and both levels of government were enthusiastic about accelerating land claims negotiations to clear the way for mineral exploration and extraction in the area (Haysom, 2006; Innes, 2006; Shafto, 2006). This enthusiasm was especially true for the provincial government, which saw the discovery as a crucial opportunity to increase its economic wealth.

The second event that had a significant impact on both sets of negotiations was the election of Brian Tobin as Premier of Newfoundland and Labrador in January 1996. Tobin brought his federal level experience to the table and made settling the claims a priority for his government. He set out clear parameters for each of the items under negotiation, ratified them in cabinet, and authorized provincial negotiators to get a deal done using those parameters (Marshall 2006). According to LIA and provincial officials, the election of Tobin was a real opportunity to make significant progress towards an AIP (Chesley Andersen, 2006; Barbour, 2006; Hawco, 2006; Haysom 2006; Marshall 2006; Warren 2006). Some officials have indicated, however, that although Tobin clearly energized the process, his interest in treaty negotiations was conditioned strongly by the economic potential of Voisey's Bay.

Initially, Voisey's Bay was an obstacle to Inuit negotiations. By the spring of 1996, Inuit negotiations had stalled and become strained (Carter, 2006; Pain, 2006). A number of

critical issues, such as the amount of total land to be included in the agreement, resource-revenue sharing, and self government, remained unresolved. The Inuit negotiating team had become frustrated with the federal negotiator and asked the federal government to bring in an external negotiator to represent the federal government. The federal government refused. The discovery of nickel in Voisey's Bay exacerbated this conflictual environment. Both the Inuit and the Innu had claimed the Voisey's Bay area prior to the nickel deposit discovery. Once nickel was discovered in the area, the federal and provincial governments pulled Voisey's Bay off the negotiating table and began to help Inco to initiate mining operations. In response, the Innu and the Inuit conducted joint protests in the area and applied for (and received on appeal) a court injunction to stop development.

Although LIA negotiations had stalled and become acrimonious by 1996, the pace and tone of negotiations changed after the court handed down its injunction. In the fall of 1996, the federal and provincial governments and the Inuit agreed for the first time in the history of their negotiations to fast-track negotiations through the use of intensive and frequent negotiation sessions. The federal government also acceded to the LIA's request for a new negotiator by appointing Jim Mackenzie, a law professor from Carleton University, as chief federal negotiator. Although the parties made substantial progress during fast-tracked negotiations, a number of critical issues remained unresolved. These issues were the amount of total land to be included in the agreement, resource revenue sharing, Inuit participation in economic development, financial compensation, self-government, and the nature and composition of the national park and settlement areas.

In October 1997, the three parties agreed to hold a three day senior officials' meeting in Ottawa to resolve these issues. On the federal side, the deputy minister of INAC,

Scott Serson, was brought in to sit beside the federal negotiator to ensure the critical issues were resolved. Although Serson did have a number of cabinet-established bottom lines that he could not cross, he had significant latitude to negotiate and create new and innovative policies to resolve the impasse. In short, he had the mandate to get a deal done, mainly because the general feeling within the federal bureaucracy and within cabinet was that there was a need to show that *Gathering Strength*³⁶ could successfully address the issues raised by the Royal Commission on Aboriginal Peoples (Serson, 2006). On the provincial side, Premier Brian Tobin appointed Harold Marshall, a senior provincial civil servant, and Bill Rowat, a former federal civil servant, to sit beside the provincial negotiators with a mandate to resolve the critical issues. Marshall's role was to act as the voice of the Premier at the table. Rowat provided his expertise and knowledge of the federal bureaucracy. To give added weight to the Premier's commitment to push LIA negotiations forward, Tobin and the Member of the Provincial House of Assembly for the riding encompassing the Inuit communities, Wally Andersen, stayed at the Chateau Laurier during the meetings to provide on-call advice and immediate decision making.

On the Inuit side, the Inuit negotiators, who had remained virtually the same since 1989, remained at the table with the addition of Chesley Andersen, a former Inuit Tapiriit Kanatami representative and employee who had previous experience working across the table from Scott Serson during the constitutional rounds. The LIA team also had immediate access to the LIA President, Vice President, and board members by phone anytime they needed to make immediate and crucial decisions. Three days of negotiations

³⁶ "Gathering Strength" refers to the policy created by the federal government in response to the RCAP report. See Abele, 1999: 450-453.

stretched into eleven and on 28 October 1997, the three parties signed a three page agreement resolving the major issues of contention (the amount of total land to be included in the agreement, resource revenue sharing, Inuit participation in development, financial compensation, self-government, cost-sharing, and the national park and settlement areas). From there, negotiations moved quickly to an initialed AIP in 1999 and a successful ratification vote of the AIP on 25 June 2001. On that day, 76% of eligible Inuit voted to ratify the AIP with a turnout of 85%.³⁷

With a completed AIP in hand, final agreement negotiations progressed relatively quickly but not without some significant problems. According to federal, provincial, and LIA negotiators, two issues were particularly difficult to resolve. The first was land selection, the process in which the parties decided the lands that the Aboriginal groups received formal ownership within the overall area covered by the land claims agreement. The Inuit were asked to provide a preliminary land selection proposal and present it to the governments for their consideration. The provincial reaction to the Inuit preliminary proposal was quite negative. Back in 1994, the province had offered seven small rectangular blocks of land to the Inuit. The Inuit, however, proposed to select a series of large “ribbons” along water ways and along much of the coastline of Labrador. According to one interviewee, then-Premier Brian Tobin remarked something to the effect that if he accepted the Inuit proposal, he would need a parachute to get into Labrador. Despite this initial reaction, the LIA and the province were able to come to an agreement through compromise and persistence. The Inuit ended up accepting some land that they were not

³⁷ Individuals who decided not to vote were counted as voting “no” to ratification. It is also important to note that holding a ratification vote for an AIP was unusual at the time. Today, the federal government insists that First Nations ratify their AIPs to help pave the way for successful Final Agreement ratification votes.

really interested in, and giving up some land that they originally wanted. The province eventually compromised by accepting the Inuit “ribbon” concept and giving up more of the coastline than it had originally wanted.

A second issue that caused some difficulty during final agreement negotiations was Voisey’s Bay. The initialed AIP had originally stated that the Voisey’s Bay chapter would be negotiated during final agreement negotiations. However, Inco was ready to proceed ahead of schedule and the governments were anxious to move the project forward. Inco and the governments began to pressure the Inuit to allow the project to proceed without a final agreement. The Inuit eventually agreed to let the project go forward, mainly because of their confidence in a suite of three Voisey’s Bay agreements that they had signed,³⁸ as well as an informal understanding between the LIA President, Premier, and Federal Minister of INAC that the land claims agreement would be completed if Voisey’s Bay moved forward.

The Final Agreement was initialed by the parties in 2004. Before the federal and provincial governments ratified the agreement in their respective legislatures, the LIA held a ratification referendum. On 26 May 2004, 76.4% of Inuit voters voted yes to ratification, with a voter turnout of 86.5%. Those who did not vote were counted as voting “no” to ratifying the agreement.³⁹ Of those who voted, support for the agreement was quite strong in the five coastal communities. In Nain, for instance, 96.6% of residents supported the final agreement, 97.9% in Hopedale, 92.2% in Makkovik, 95.9% in Postville, and 87.6% in

³⁸ The three agreements were an Impact and Benefits Agreement with Inco, an Interim Measures agreement with the federal and provincial government, and an Environmental Management agreement with the two levels of government.

³⁹ This fact was why overall Inuit support was only 76.4% despite the high levels of support reported in the subsequent sentences. The subsequent sentences report the results for only those Inuit who voted and do not include the automatic “no” votes from non-voters.

Rigolet. Support was less enthusiastic in the two main urban centres in the interior of Labrador. Only 76.6% of North West River residents and 77.9% of Happy Valley-Goose Bay residents supported the final agreement (LIA, 2004: 3). These results were probably weaker because their communities' lands were not included as part of the Labrador Inuit Lands or the Labrador Inuit Settlement Lands. Rather, they were designated as special areas to which the Inuit would have only limited rights (Labrador Inuit Land Claims Agreement, 2005; Hibbs, 2006).

Once the LIA completed its ratification of the agreement, the province and the federal government passed settlement legislation in their respective houses in 2004. Finally, after 28 years of negotiations, federal, provincial, and Inuit leaders formally signed the Labrador Inuit Final Agreement on 22 January 2005 in Nain, Labrador. It would come into effect shortly thereafter.

In terms of the treaty's contents, key provisions include:

- the creation of 72,520 square kilometers of land called "Labrador Inuit Settlement Lands", of which 15,799 is designated as "Labrador Inuit Lands": Labrador Inuit Settlement Lands are lands over which the federal, provincial, and Nunatsiavut governments share jurisdiction. Labrador Inuit Lands, on the other hand, are lands that the Labrador Inuit hold stronger interests in, including a 25% interest in subsurface resources.
- a cash settlement of \$140 million (1997 dollars) over 15 years plus a one time payment of \$156 million to assist with implementation.

- a 15 year repayment schedule for \$51 million in loans provided by the federal government to the LIA to negotiate the treaty
- water management and water usage rights.
- ocean management rights: Inuit have the right to be consulted before any ocean management plans are created.
- economic development: The Final Agreement requires the Nunatsiavut government and interested developers to negotiate an impact and benefits agreement for projects involving Labrador Inuit Lands and Labrador Inuit Settlement Lands.
- national parks: The agreement creates the Torngat Mountains National Park Reserve in Northern Labrador.
- land use planning: Land use planning for Labrador Inuit Settlement Lands is to be done bilaterally by the Nunatsiavut and the provincial governments.
- Voisey's Bay: Resource revenue sharing and each party's interests in the area are clarified - the Inuit are to receive 5% of provincial revenues derived from the subsurface resources extracted from the Voisey's Bay Area.
- environmental assessment: Federal and provincial laws are paramount over Nunatsiavut laws in cases of conflict over environmental assessment.
- Inuit harvesting rights in wildlife and plants: Inuit can harvest wildlife and plants for food, social, and ceremonial purposes. The agreement also calls for the creation of a co-management board for administering and protecting wildlife and plants in the settlement area.

- Inuit harvesting rights in fish and marine mammals: They can harvest these products for food, social, and ceremonial purposes. The agreement also calls for the creation of a fisheries co-management board.
- archaeological rights: sole control over archaeological activity in Labrador Inuit Lands belongs to the Nunatsiavut government while the federal government maintains control over archaeological activity in the Labrador Inuit Settlement Area.
- Labrador Inuit Self-Government: This includes provisions regarding an Inuit Constitution, community governments, Inuit courts, Inuit law enforcement officers, and jurisdiction over a variety of powers and programs.
- Fiscal Financing Arrangements: Labrador Inuit continue to be eligible for federal and provincial programs and services and can negotiate with the federal and provincial governments every five years regarding funding for agreed-upon Inuit programs and services.
- Taxation: Labrador Inuit remain subject to federal and provincial taxation laws. The Nunatsiavut government and its community governments may directly tax Labrador Inuit and can negotiate with the Crown to tax non-Inuit peoples on Inuit Lands.
- Dispute Resolution (Labrador Inuit Land Claims Agreement, 2005).

The Labrador Inuit Final Agreement is somewhat similar to agreements signed by other Aboriginal groups in Canada. In one sense, it is difficult to compare agreements because each agreement is designed to address the specific needs of each individual

Aboriginal group. Nonetheless, all comprehensive land claims agreements tend to cover the same types of issues such as permanently clarifying ownership of Settlement and non-Settlement Lands (certainty and finality), the amount of total land to be included in the agreement (land quantum), land use planning, fish and wildlife, migratory birds, water management and usage rights, ocean management, history/culture/archaeology, economic development, eligibility and enrollment, and fisheries, among others.

In terms of the Labrador Inuit Final Agreement, there are two minor differences worth pointing out. First, the certainty provision is different in that it states that the Labrador Inuit “cede and release” their Aboriginal rights to their lands, as opposed to “cede, release, and surrender.” This provision is described in greater detail below. Second, the Final Agreement includes a self-government chapter within its text. Most other comprehensive land claims agreements in Canada contained a self-government chapter that only set out the terms under which a separate self-government agreement would be negotiated. In this case, the Labrador Inuit have included their self-government agreement within the text of the Final Agreement, which they believe strengthens the constitutional status of their right to self-government.

The Labrador Innu Journey

In 1977, the Naskapi Montagnais Innu Association on behalf of the Innu in Sheshatshiu and Davis Inlet submitted its land claim to the federal and provincial governments. The federal government conditionally accepted the claim in 1978, requiring that the Innu submit an acceptable (according to western standards of geography, anthropology, history, and archaeology) land use and occupancy study before negotiations

could begin. Unlike the Labrador Inuit whose claim was accepted for negotiations in 1979-1980, it would not be until 1991 when Innu Nation, the organization that replaced the Naskapi Montagnai Innu Association as the association representing the Labrador Innu, would submit a land use and occupancy study that was acceptable to the federal government (Innu Nation, 1998; Pelley, 2006). There were numerous reasons for the delay in submitting an acceptable study. One was that the Innu Nation lacked adequate expertise and resources to produce such a document (John-Pierre Ashini, 2006; Hawco, 2006; Nui, 2006; Pelley, 2006; Riche, 2006). Another was that during the 1980s, the Innu held a notion of sovereignty that was incompatible with Canadian notions (Hawco, 2006; Pelley, 2006). In essence (and explained in more detail below), government and Innu negotiators held opposing views regarding whether a land claims agreement should lead to the cession, release, and surrender of Aboriginal title. There was also a strong view in the community that protesting, litigation, and seeking international recognition were more effective strategies than negotiating for achieving Innu goals (Innes, 2006; Innu Nation 1995; Innu Nation 1998). This preference for confrontational tactics was partly the result of the Innu's interactions and experiences with state agencies (mutual influence). Specifically, government unilateral actions on Innu lands created intense hostility among Innu peoples towards both levels of government. Finally, the Innu communities were suffering from a wide range of social and economic problems that would paralyze any type of collective action toward negotiations (Backhouse and McRae, 2002).

From 1977 to 1991, the Innu communities and the Innu Nation focused on political lobbying and protests. In particular, they protested low-level flying over their lands and petitioned the United Nations to pressure the Canadian government to recognize their rights.

These tactics were supported by the Innu communities. In 1987, Innu Nation held community consultations on whether to begin negotiations under the CLC process but the communities decided to continue protesting rather than negotiate. At the same time, the Innu communities continued to suffer from a number of domestic ailments, including high unemployment, a low standard of living, lack of basic services and goods, and high levels of alcohol, drug, physical, and sexual abuse, much of which stemmed from their forced transition from nomadic to settled life beginning in the late 1950s (Hawco, 2006; Innu Nation, 1995; Innu Nation, 1998).

The 1990s would see their focus slowly shift from nothing but protests to a mixture of protests and negotiations. They continued to protest and lobby against low-level flying during this period, but leaders in Sheshatshiu started to become more interested in negotiating due to the mixed results of protesting. In 1991, Innu Nation decided on the basis of community consultations to begin negotiations with the federal government under the comprehensive land claims process. However, severe domestic, social, and economic problems in Sheshatshiu and Davis Inlet would force the Innu to shift their focus away from negotiations to generating solutions to these problems, all of which were highlighted by suddenly interested domestic and international media (Innu Nation, 1995; Innu Nation, 1998; Wadden, 1991).

Another factor delaying Innu negotiations was political turmoil. Leadership was constantly changing and rival factions were emerging along family lines. Since the early 1980s but especially in the 1990s, Innu leaders have held divergent views regarding whether to negotiate, with one faction focusing on negotiation and compromise within the Canadian framework, and the other on the recognition of Innu sovereignty on all of their

traditional lands (Hawco, 2006; Marshall, 2006; Michel, 2006; Paul Rich, 2006). Some have remarked that there is a clear divide between the younger more formally educated leaders, and the less educated and more traditional leaders, with the former being more interested in treaties and the latter more against it. This divergence may be the result of these leaders having different experiences and interactions with the agencies (i.e. the education system, DIAND) of the Canadian state.

Significant progress was made with the election of Peter Penashue as the President of Innu Nation, from 1990-1997.⁴⁰ Penashue, a pragmatist, was committed to negotiating an agreement that would empower the Innu to solve their internal problems, protect their traditional ways and practices, and allow them to reap the benefits of the economic development potential of their lands. Negotiations between Innu Nation, the federal government, and the province began in July 1991. Negotiations, however, progressed slowly as the Innu communities faced internal problems and further disputes with the federal and provincial governments over their illegal use of Innu traditional lands.

In 1994, as mentioned above, a large nickel deposit was found in Voisey's Bay, an area that the Innu had included in their original land claim. Both governments, but especially the province, became very interested in settling the Innu land claim to facilitate the development of the area. Framework agreement negotiations, which had been on and off from 1992 to 1995, resumed full time in May 1995. In October 1995, the three parties

⁴⁰ Penashue was also president from 1999-2004 before being ousted in an election by Ben Michel. In August of 2006, Michel died of a sudden heart attack and was replaced in the interim by Innu Nation Vice-President Daniel Benuen. In September 2006, Daniel Ashini, former Innu Nation land claims negotiator and cousin to Ben Michel, was elected Innu Nation President. Daniel Benuen remains Innu Nation Vice-President.

were able to initial a framework agreement, which was then ratified by the Innu in a community vote on 22 January 1996 (Indian and Northern Affairs Canada, 1996).⁴¹

Since then, however, AIP negotiations, which are always the most difficult in land claims negotiations, have been extremely slow with limited progress. In 1999, federal officials suspended negotiations with the Innu Nation due to what it saw as unreasonable Innu demands. According to federal officials, “The suspension of the negotiations in 2000 was necessary ... because the Innu claim was not in their [federal officials’] view a serious claim. It was simply made up of the best element[s] of every land claim negotiated by Aboriginal people across the country and was ‘out of the ball park’ (Backhouse and McRae, 2002: 41).⁴² In addition to suspending active negotiations, the federal government stopped providing Innu Nation with negotiation funding. Once negotiations resumed in 2001, the federal government restored negotiation funding to the Innu but in a significantly smaller amount (Backhouse and McRae, 2002: 41).

The federal government restarted negotiations in 2001 because Innu Nation had submitted a new land claims package which the federal government believed was much more reasonable than the Innu’s previous one. Since then, the parties have negotiated a memorandum of understanding and an impact and benefits agreement for the Voisey’s Bay

⁴¹ Unfortunately, I was unable to acquire detailed results.

⁴² Backhouse and McRae do not indicate why the Innu strategy of demanding the best element of previous treaties was unacceptable to government officials. Based on my research findings, I would speculate that government officials were reluctant because they had negative perceptions of the Innu group. Officials were probably afraid that the Innu did not have the capacity to succeed if they gave the Innu the “best element[s] of every land claim negotiated by Aboriginal peoples across the country”. The Innu communities have already generated a lot of negative publicity for both levels of government over the last twenty years and treaty implementation failure would only further harm the reputations of the federal and provincial governments.

area.⁴³ However, progress on the agreement-in-principle remains slow and a number of critical issues such as the amount of total land to be included in the agreement, the certainty provision, and self-government continue to paralyze negotiations (Nui, 2006; Riche, 2006).

Economic Development: A Necessary Condition?

Would the Inuit have completed their treaty if Voisey's Bay had not been discovered? The evidence suggests yes, although the timeline for completion would have been much longer than January 2005. Innu negotiations, on the other hand, have showed little promise for completion before, during, or after Voisey's Bay. Since the Innu began comprehensive land claim (CLC) negotiations in 1977, there has been little to indicate that a treaty has ever been forthcoming.

It was clear from the outset that federal and provincial officials were willing, albeit at a slower pace, to settle the Inuit claim. The Inuit statement of claim in 1977 was praised by the federal government and later the provincial government "as a model for other claim submissions by native peoples in Canada" (DIAND 1990; Hawco 2006). After submitting its claim, the LIA was one of the first Aboriginal groups to have its claim accepted for active negotiations when one of the initial six groups completed its agreement in 1984. Once active negotiations began in January 1989, the LIA was able to negotiate a framework agreement by March 1990. The period from 1990 to 1996 saw some progress with one chapter initialed and progress on other matters. Voisey's Bay did slow down negotiations

⁴³ Both the Innu and the Inuit have formally clarified their interests in the Voisey's Bay area. Inuit interests are codified in their Final Agreement while Innu interests are laid out in a memorandum of agreement and an impact and benefits agreement with the federal and provincial governments.

initially but a combination of factors unique to the Inuit resulted in negotiations accelerating, leading to a completed treaty in 2005.

On the other hand, Innu negotiations showed very little promise for completion before, during, or after Voisey's Bay. Despite submitting its claim around the same time as the Inuit, the Innu Nation statement of claim was not accepted until 1991 when it finally submitted a land use and occupancy study that was acceptable to the federal government. In 1996, the parties completed a framework agreement (mainly as a result of the efforts of Innu Nation President Peter Penashue and the fact that such agreements tend to be procedural rather than substantive) but since then, AIP negotiations have seen little progress, stalling over self-government, the total amount of land covered by the agreement, land selection, certainty and finality, economic development, hunting, fishing, and culture. Indeed, the federal and provincial governments have suspended negotiations several times in the hope that Innu negotiators would come to the table with more reasonable expectations and demands. Federal and provincial government officials have also preferred to work with the Innu on developing community healing and capacity building in advance of negotiating a land claims or self-government agreement (Backhouse and McRae, 2002). The narrative above makes it clear that explaining comprehensive land claims negotiation outcomes in Labrador requires going beyond the "presence of a major non-renewable resource development" explanation. The rest of this chapter applies the explanatory factors described in chapter 3 to the Innu and Inuit experiences.

Factors Affecting Outcomes

Compatibility of Goals

The compatibility of goals has a powerful effect on whether a treaty is completed. By compatible goals, I mean the matching of government and Aboriginal goals with respect to the purposes of a final agreement. Compatible goals were clearly present in the Labrador Inuit negotiations. For example, during final agreement negotiations over the certainty and finality provisions, federal officials were open to negotiating an alternative to the usual “cede, release, and surrender” provision, or using an alternative provision found in another agreement in Canada. LIA leaders and negotiators were unwilling to accept any provision that included the word “surrender,” while the province insisted on the usual “cede, release, and surrender” provision. Despite these differences, the parties were able to come to an agreement, partly because federal and provincial policies evolved over time to become more flexible and partly because Labrador Inuit leaders and culture value compromise and negotiation. The shared goal among the federal, provincial, and Inuit leaders and negotiators was to avoid future conflict, protests, and litigation by creating certainty in the lands that the Inuit had claimed. According to federal and Inuit sources, provincial officials benefited from federal and Inuit officials bringing their experiences and knowledge about treaties signed by other Aboriginal groups in Canada to the negotiating table. Specifically, the negotiating officials were able to draw upon experiences from other treaty negotiations to fashion a certainty provision that would be acceptable to all three parties. The key lesson from previous treaty negotiations was that flexibility in the certainty provision was possible.

In the end, the agreed-upon certainty provision satisfied all three parties. The Inuit were able to keep their Aboriginal rights in their Inuit Lands (their core lands), subject to the terms of the agreement. In exchange, they ceded and released (but not surrendered) their Aboriginal rights to Inuit Settlement Lands (lands to which all three parties have

extensive shared jurisdiction) and all lands previously claimed by the Inuit that were not included in the treaty. According to a number of anonymous sources, the province accepted the “cede and release” provision because in its view, the level of certainty generated by the words “cede” and “release” was sufficient for pursuing economic development in the lands affected by the treaty.

Contrast these experiences with the Innu. The Innu negotiators originally came to the table with the notion that any agreement had to recognize Innu sovereignty over their traditional lands. Both the federal and the provincial governments, however, have refused to recognize Innu sovereignty (Andrew, 2006; Innes, 2006; Wadden, 1991: 200; Innu Nation, 1995: 175; Pelley, 2006). By the early 1990s, the Innu negotiators’ use of the term “Innu sovereignty” during negotiations occurred much less frequently, culminating in a completed framework agreement in 1996.

Although the use of the concept of “Innu sovereignty” has largely disappeared at the negotiation table, it remains a powerful idea among some Innu leaders and community members. For instance, one community member has said “The Innu should have total control on Innu Lands – no sharing of control with government” (Innu Nation, 1998: 44). A former Davis Inlet chief has remarked “The Innu government should have full power in Innu lands” (Innu Nation, 1998: 44). Another member has said “On the core lands, how are we going to manage the land if the government can still overturn Innu Government decisions?” (Innu Nation, 1998: 45) The persistence of ideas about Innu sovereignty at the community level has hindered the ability of negotiators to complete an agreement-in-principle. This persistence is problematic because Innu negotiators feel an obligation to undertake extensive public consultations with community members before any agreement

can be signed. This obligation to negotiate stems from cultural norms, as opposed to being tied to the notion of Innu sovereignty. As a result, negotiators are constantly torn between satisfying federal and provincial demands that an agreement not recognize Innu sovereignty, and satisfying community demands for recognition and protection of Innu sovereignty. What makes the Innu case striking is the degree to which members and leaders are divided on whether to negotiate. Since formal negotiations began in 1990, two factions have emerged to support or oppose negotiations. These factions have, over time, become more conflictual with each other over land claims negotiations and other related issues. Some observers have mentioned that the conflicts have become intensely personal and extremely bitter. Just before his death, for instance, Innu Nation President Ben Michel spoke to me about how deeply divided Innu community leaders and members were over negotiations and other related spin-off benefits; others echoed his comments.

Tactics

In general, government officials prefer negotiations to other tactics because they perceive the costs (money, reputation, and political capital) of the alternatives (i.e. litigation, protests, and international lobbying) as being much higher. As such, governments are more likely to work towards agreements with those Aboriginal groups that show a commitment to negotiations and that limit the use of confrontational tactics. Conversely, governments are less likely to work towards final agreements with those Aboriginal groups with whom they have a long history of confrontation.

Since 1977, Inuit leaders and negotiators have consistently used a strategy of compromise and negotiation. The strategies of protest, litigation, media, and courting

recognition from international legal and political bodies were rarely considered or used by LIA presidents, vice presidents, or board members (Andersen III, 2006; Tony Andersen, 2006; Barbour, 2006; Hibbs, 2006; Pain, 2006). All of the LIA politicians, board members and negotiators that I interviewed indicated that leaders, negotiators and even community members were consistent over time in their desire for an agreement through negotiations as opposed to other tactics. For the Labrador Inuit, settling land claims and achieving self-government were central to empowering the Inuit to control their lives, their economy, and their health and cultural well-being (Andersen III, 2006; Tony Andersen, 2006; Barbour, 2006; Haysom, 1990). Their commitment to negotiations rather than using other tactics is partly a reflection of Inuit culture in general, which values consensus building and compromise over other tactics for resolving conflicts (see for instance, Alfred, 2005: 122; McPherson, 2003: 129). Government actors recognized the Inuit's commitment to negotiating and were willing to work with the Inuit towards a completed treaty, even during difficult times and through difficult issues.

Contrast this with the Innu, who have in general tended to favour protesting, media campaigns, litigation, and courting recognition from international bodies. In the words of the Innu Nation's Davis Inlet Inquiry Commission, "Protests are a good way to get our voices heard. We need to use strong tactics, vocal speaking out [sic] against unwanted developments and in support of our rights We need to do this to get their [white people] support to help us fight governments. If other people understand our position, it will be good. We also need to lobby foreign governments on our human rights" (Innu Nation, 1995: 179). For much of their involvement in the CLC process, Innu leaders, negotiators, and community members have engaged in confrontational strategies, fighting the federal

and provincial governments over hunting regulations, military flights over their land, poor administration of police and judicial services, lack of resources to combat domestic ills, unemployment, and poor housing, rather than negotiating (see for instance Nuke, 2006; Michel, 2006; CBC, 7 September 1999; CBC, 27 July 2000; CBC, 10 November 2000). Since 2001, however, negotiations have become the main tactic of choice for the Innu but they have moved very slowly with little indication that an agreement-in-principle or a Final Agreement is ever forthcoming.

It is difficult to say with any certainty why the Innu adopted more confrontational strategies and why the Inuit for the most part avoided them. One answer might be that Inuit culture is very much consensus-driven, only resorting to confrontation when there is no other choice. Geographer Robert McPherson has observed that “consensus building was the Inuit way [during Nunavut comprehensive land claims negotiations]” (McPherson, 2003: 140). Former Nisga’a federal negotiator Tom Molloy, quoted in McPherson, also noted that “unlike a great many Aboriginal peoples worldwide, the Inuit did not have to resort to litigation to have their rights acknowledged. That alone made the time and effort worthwhile” (McPherson, 2003: 270). My own interviews with federal, provincial, and Labrador Inuit officials indicated that in general the Labrador Inuit are perceived as preferring negotiated solutions to confrontation.

In term of the Innu, the literature and interview data suggest that their propensity for confrontation probably stemmed from the effects of mutual influence and state development. The provincial government has long engaged in disruptive actions on Innu lands. It has settled, under-serviced, and moved Innu communities throughout Labrador over the last 50 years. These actions have created Innu communities that are angry and in

crisis, suffering from intense political, social, and economic problems. The natural response to such actions is to engage in occupations, protests, and blockades that express one's frustration in immediate and direct ways.

Although this study acknowledges that mutual influence and state development effects can influence outcomes, it argues that they are not determinative. As I note in the subsequent chapter of this dissertation, the Kwanlin Dün First Nation was able to overcome state development and mutual influence effects partly because of its leaders. Kwanlin Dün leaders were able to overcome relocation and the illegal use of their lands along the river in Whitehorse to eliminate the use of confrontational tactics and to foster internal cohesion and positive government perceptions of the Aboriginal group. Therefore, although mutual influence and state developments effects can condition significantly the choices of Aboriginal groups during negotiations, Aboriginal groups still have some agency to break away from such effects to influence outcomes.

Aboriginal Group Cohesion

Another factor affecting whether a CLC outcome is obtained is the cohesiveness of the Aboriginal community (Backhouse and McRae, 2006: 42, 50; Shafto, 2006; Serson, 2006; Warren, 2006; Whittington, 2005). In general, the Innu are a people beset with divisive leadership, internal division, and strife, much of which has been generated by the disruptive and assimilative actions of the federal and provincial governments over the last 100 years. According to a Sheshatshiu elder, "I think a lot of good things could come out from the agreement if only all the Innu worked cooperatively, that is if Innu do not fight with each other. That is the biggest headache in this community today, because a lot of

people hate each other. They just don't get along" (Innu Nation, 1998: 23). According to an Innu Nation community consultation report: "Some people complain that the Band Council and the Innu Nation only help some people, like their relatives, and not others. They don't see some people as their responsibility, even if they really need help They [Innu respondents] say our leaders are money-chasing and become blindfolded by the dollar sign" (Innu Nation, 1995: 171). For instance, according to the late Innu Nation President, Ben Michel, some members on the Innu Nation board of directors had demanded preferential access to the business contracts that would eventually come out of the Churchill Falls hydroelectric project. Michel had opposed these directors, resulting in them organizing to push him out of office (CBC, 12 January 2006; CBC, 20 June 2006; Michel, 2006). These types of leadership conflicts are the norm in Innu Nation politics and in the politics of the Innu communities (see for instance, CBC, 19 November 2006; CBC 7 October 2004; CBC, 14 November 2006).

In addition to divisive leadership, the Innu also suffer from severe social and economic problems, much of which is related to alcohol and substance abuse (CBC, 7 July 2005). In the words of a Davis Inlet elder, "There are too many suicides, too much gas sniffing and overdosing, too much vandalism, too many people in jail. Young people especially are ruined" (Innu Nation, 1998: 21). Between 1965 to February 1992, for example, 71% of deaths in the community were alcohol-related; 49% of those deaths involved people under the age of 20, and 48% were under the age of 40. From 1989 to February 1992, there were 17 alcohol related deaths. From February 1991 to February 1992, 90% of provincial court cases involving Innu were a result of alcohol abuse. Finally,

in terms of children, there were 43 cases of solvent abuse in 1990 and 66 cases in 1991 (Innu Nation, 1995: 187).

The point here is that domestic problems and internal conflicts have overtaken any sustained community interest or effort to negotiate a CLC agreement. Indeed, Innu leaders and community members have been divided since 1977 on whether they should negotiate a CLC agreement at all. Some leaders and community members, such as Daniel Ashini and Ben Michel, believe that negotiations are moving too fast and that there should be more of a focus on solutions to community problems. Others, like Peter Penashue and Paul Rich, see a CLC as a solution to these problems (CBC, 19 November 2006; Paul Rich, 2006; Michel, 2006). The Innu communities have divided into these two factions, paralyzing progress not only on land claims, but also efforts to address social and economic issues in the communities.

Contrast this to Inuit who have not had the same divisions or domestic problems that the Innu have had. Federal and provincial interviewees have identified the Inuit's clear and consistent leadership, strong capacity, and relatively few internal problems as key factors for their completed agreement. Community support and cohesion have also been strong. All of the Inuit I interviewed mentioned that the communities have always supported negotiations throughout the entire process, reflecting a general Inuit trait of consensus-building rather than conflict. Inuit negotiators were able to come to the table with the knowledge that they had the support of the people. They were not distracted by severe community divisions or severe economic and social problems. Having a cohesive community allowed the Inuit negotiators to negotiate in confidence and with their full

attention and resources.⁴⁴ Community cohesion is also important because a negotiated agreement-in-principle and final agreement must be ratified by the entire population of each Aboriginal community usually through a referendum. Without community cohesion and support for the negotiating team, ratification of any initialed agreements becomes impossible.

Government Perceptions

Another factor affecting whether a CLC outcome is obtained is government perceptions of the Aboriginal group. As Peter Russell has pointed out to me in a personal email, government officials are not only interested in facilitating economic development; they also want to avoid international and domestic embarrassment. Simeon (2006: 13) makes a similar point when he says that government officials are highly cognizant of their audiences – the electorate and the legislature – when they engage in federal-provincial diplomacy. Government officials are aware of the negative publicity that can result if they devolve powers to a group that is not ready to take on the responsibilities of a land claims agreement. Government perceptions of the Aboriginal group determine the willingness of governments to devolve land management and self-government responsibilities to the Aboriginal group both on the long and short roads of negotiations. Perceptions are strongly influenced by the interactions between Aboriginal and government officials and agencies. Three government perceptions of Aboriginal groups matter: Aboriginal groups' capacity for

⁴⁴ In addition to all of the Inuit interviewees I spoke with mentioning strong community cohesion, see the interview with the LIA's Chief Land Claims Negotiator, Toby Andersen at Nunatsiavut Government, 2005. He says: "One of the things that I remember and appreciate is that we weren't hounded by our own people. They'd say 'you're doing well, continue on.'"

financial accountability, their capacity for negotiations and self-government, and their degree of acculturation. If an Aboriginal group is perceived poorly on these indicators, then it is unlikely that an agreement will get completed in either the long or short road term.

Governments are interested in negotiating agreements with those Aboriginal groups that have a demonstrated record of financial accountability and capacity for negotiations and self-government. The Inuit were able to demonstrate both of these attributes. LIA negotiators came to the table prepared and skilled at negotiating with government officials according to the terms and the procedures of the comprehensive land claims process (Haysom, 2006; Marshall, 2006; Rowell, 2006; Shafto, 2006; Warren, 2006). LIA leaders and negotiators also brought to the table a record of financial accountability and capacity for governing themselves (Shafto, 2006; Andersen III, 2006; Barbour, 2006; Marshall, 2006; Mike Samson, 2006; Shafto, 2006). According to former LIA President, William Barbour, for instance, government officials during a visit to Nain in the late 1990s remarked to him that the LIA “have the cleanest books in all of Atlantic Canada” (Barbour, 2006). This record of financial accountability is confirmed by the fact that they have never fallen under third party management. Others have admired the LIA’s administration of government services in Labrador Inuit communities. In the late 1980s, for instance, the LIA took control over post-secondary Inuit support programs from the province. Since 1987, the LIA-administered program has produced over 500 graduates, compared to the 7 or 8 graduates produced when the province ran the program (Andersen III, 2006; Tony Andersen, 2006; Barbour, 2006). In 1982, the LIA created the Labrador Inuit Alcohol and Drug Abuse Program and in 1985 it secured federal funding to hire an interpreter/translator and set up a community health representative program. Moreover, in 1989, the LIA

became one of only a few Aboriginal groups in Canada to take over the administration of the non-insured health benefits program for its communities (Baikie, 1990). Health Canada was so impressed with how the LIA administered this program that it informed the LIA that they were going to adopt some of the LIA practices and policies in the administration of their own non-insured health benefits program. Overall, the LIA demonstrated to the federal and provincial governments that they could deliver programs more effectively and at a lesser cost to Inuit communities than the province or federal government could (Andersen III, 2006; Tony Andersen, 2006; Barbour, 2006).

Contrast these positive perceptions with the negative perceptions that the governments have of the Innu. A number of interviewees have characterized government perceptions of the Innu as paternalistic – father to child (Andrew, 2006; Michel, 2006). The media and the federal government have all observed the difficulties that the Innu have had in managing their fiscal affairs (Backhouse and McRae, 2002; CBC, 27 November 2006; CBC, 1 March 2005; Nui, 2006; Shafto, 2006). Premier Brian Peckford, at the First Ministers Constitutional Conference on Aboriginal Rights in March 1987, told Innu participants that “I’m not sure you’re being as smart as you think you’re being” (quoted in Wadden, 1991: 117). In a meeting with then Minister of Indian Affairs Pierre Cadieux, Peter Penashue remarked “Could you get the mandate to treat us like adults? ... We have to find a way for the Canadian government to treat us like adults” (quoted in Wadden, 1991: 166). According to Backhouse and McRae (2002),

... it is not clear that the federal or provincial governments see self-government for the Innu in the foreseeable future. There is a strong sense among some officials that the Innu do not have the capacity to engage in self-government or to manage education or health services. Some [government officials] consider that a period of operating under the Indian Act will be a valuable “capacity-developing” experience

for the Innu. Under this view, self-government is postponed even further into the future, perhaps indefinitely (50).

Elsewhere, Backhouse and McRae (2002: 42) mention that some government officials believe that a land claim will cause more problems than it will solve. Other officials question the ability and capacity of the Innu to take on the responsibilities of land management under a CLC agreement.

Another government perception that seems to matter is the degree of acculturation of the Aboriginal community. In the context of CLC negotiations, the term refers to the level at which a group is familiar with western institutions, processes, ideas, culture, and languages. The government's perception of a group's level of acculturation may be a factor in the willingness of a government to negotiate towards a settlement (Paul Nadasdy 2003: 5). According to this argument, each Aboriginal group's familiarity with Canada's official languages and political processes affects how they are perceived by the participating governments and how successful they can be in navigating the CLC negotiation process.

In general, the Inuit are much more acculturated to Canadian society than the Innu, partly because they were influenced and settled by the Moravian missionaries several hundred years ago. A good example of Inuit acculturation is language. Most Inuit in Labrador have been educated in western schools and now only speak English. According to 2001 Census data for the five main Inuit communities on the coast of Labrador, English was the first learned and solely-understood language among 81.1% of the Inuit population, while 0.4% spoke French and 18.5% spoke Inuttut. Contrast this to the Innu, where according to 2001 Census data, only 13.2% of Innu members speak English and 86.8% speak Innuaimun, the Labrador Innu language, as their first languages. According to some

government observers, the Innu face a real capacity problem of few leaders who can successfully navigate Canadian institutions and negotiation processes. They also face a communication problem, as Innu leaders have at times found it difficult to explain the land claims process and land claims terminology such as “quantum” to community members. Many land claims concepts do not have an equivalent word in Innuaimun. Although the evidence is not as conclusive about the effect of acculturation on negotiations, several interviewees did mention that it did seem to play a role in the willingness of governments to negotiate a settlement.

It is hard to say whether acculturation is a problem of “perception” or a problem of “communication.” It was extremely difficult to ask government officials whether acculturation affected their perceptions of the Aboriginal groups. Most chose not to answer the question or they chose to give the obvious answer - of course acculturation does not matter. The literature, however, argues that it does matter. Paul Nadasdy (2003), for instance, argues that the level of acculturation determines whether governments will take Aboriginal group seriously at the negotiating table. Although the evidence regarding this assertion for the Labrador land claims is unclear, a number of interviewees indicated it may have had a role in shaping government perceptions.

Also important to mention here again is the potential “government as single actor” problem; governments are not monolithic actors. Rather, they are made up of a wide variety of individuals who may have different motives and perceptions. In the context of this study, however, the “government as single actor” issue is not a problem. For the most part, the Innu and the Inuit ended up interacting with the same set of federal and provincial government actors. Although they did negotiate with different government negotiators (the

impact of which is discussed below), these government negotiators still reported to the same deputy minister, elected minister, other department officials, cabinet, and the Premier/Prime Minister. Moreover, my interview data and the interviews done by Backhouse and McRae (2002) suggest that federal and provincial government perceptions of the Aboriginal groups tend to be more or less uniform across government actors. This uniformity exists because government officials rely on information from those officials who have direct experience with the Aboriginal groups. For instance, one deputy minister in Newfoundland and Labrador relied heavily on negotiators to keep him up-to-date on how negotiations were proceeding. He also relied on negotiators to advise him about what direction to take regarding certain Aboriginal proposals. Perceptions of Aboriginal groups, therefore, tended to funnel in one direction, with government negotiators and frontline bureaucrats influencing their colleagues in their departments and in other government departments.

In addition, focusing on the differences in the influence and knowledge of different government actors is not crucial for explaining the outcomes examined in this dissertation. It is not crucial because this dissertation argues that the actions of the Aboriginal actors are more important for affecting outcomes. Groups that want to complete treaties will find success by adopting compatible goals, minimizing confrontation tactics, forging internal group cohesion, and fostering positive government perceptions of the Aboriginal group. Although this dissertation cannot state *precisely* which government actors Aboriginal officials should target, it can say that they should target all government actors with particular attention paid to INAC and Aboriginal Affairs officials and other officials that they come into contact with. In terms of government perceptions, for instance, it is in the

interests of Aboriginal actors to foster positive government perceptions not only among elected politicians and deputy ministers, but more importantly among INAC and provincial/territorial Aboriginal Affairs negotiators and line officials. It is also in their interests to foster positive perceptions among officials from other ministries that come into contact with the Aboriginal communities. The Inuit were able to foster positive government perceptions through their interactions with negotiators, officials, and politicians from inside and outside federal and provincial Aboriginal Affairs ministries.

Factors Affecting Speed

Trust Relationships

Another important factor affecting speed is the ability of Aboriginal negotiators and officials to develop professional trust relationships with their federal and provincial counterparts. According to all of the negotiators, the trust built between negotiators post-1996 was an important factor for completing the Inuit agreement (Mackenzie, 2006; Serson, 2006; Warren, 2006; Pain, 2006; Haysom, 2006). Trust allowed the negotiators to propose ideas to each other outside of the formal negotiating process without fear that these proposals would be used against them in future formal negotiation sessions. The negotiators knew that their proposals and counter proposals were sincere and that each side would be willing to make an effort to be as clear as possible about their negotiating mandates and their flexibility regarding those mandates. There was also trust between Inuit leaders and federal and provincial executives at critical junctures. The success of the October 1997 meetings, for instance, was partly due to the strong relationships between Scott Serson, deputy minister of INAC, Chesley Andersen of the LIA and Harold Marshall

from Newfoundland and Labrador. In another instance, one negotiator mentioned the importance of an informal agreement between the LIA President, Premier, and federal Minister to complete the Final Agreement as quickly as possible if Inco suddenly became ready to begin mining in Voisey's Bay before the Inuit treaty was finished. Relationships between Innu negotiators and their counterparts, on the other hand, have not been as productive. According to government sources, some Innu negotiators have been confrontational and combative, with highly unreasonable expectations and demands.

Trust relationships affect speed as opposed to whether an outcome is obtained. If the Inuit had not built trust relationships with the federal and provincial governments, other factors would have resulted in a completed treaty. This is because government negotiators must report to senior civil servants and elected politicians, who, on the basis of compatible goals, the Aboriginal group's choice of strategies, the Aboriginal group's internal cohesiveness, and government perceptions of the Aboriginal group, can direct their negotiators to complete a deal (although without trust relationships, such negotiations would take longer to complete). Or, they can decide to simply replace the government negotiators. Moreover, as will be shown in the next chapter, the Kaska First Nations were unable to complete their treaties despite forging trust relationships with government negotiators. Instead, the Kaska had incompatible goals, weak internal cohesion, poor government perceptions, and frequent use of litigation, resulting in unsuccessful treaty negotiations despite strong trust relationships between the Kaska's chief negotiator, Dave Porter, and his federal and territorial counterparts. Therefore, trust relationships do not determine whether an outcome is obtained; rather, they are important for affecting the pace

of negotiations. The presence of trust can speed up negotiations, whereas its absence can make progress more difficult.

Government and External Negotiators

Government negotiators matter in two specific ways. First, a non-bureaucrat negotiator is important because she is usually not subject to the same hierarchical constraints as a bureaucratic negotiator (Haysom, 2006; Pain, 2006; Rowell, 2006; Warren, 2006; Whittington, 2005). In the fall of 1996, the federal government appointed Jim Mackenzie, a non-bureaucrat, as chief federal negotiator to sit beside the senior federal negotiator (a bureaucrat) at the Inuit table. Mackenzie was effective because he initially had direct access to the Minister of Indian Affairs and was not subject to the hierarchy that bureaucratic negotiators tend to face. Contrast this with the previous bureaucrat negotiator. During her tenure, little progress was made partly because she was trapped within the bureaucratic lines of authority. She constantly had to clear negotiation items with her superiors, which frequently delayed negotiations and annoyed Aboriginal negotiators. Although it is true that in theory a bureaucrat negotiator could enjoy the same leeway and access that a non-bureaucrat negotiator has, usually this does not happen. Rather, the minister usually replaces a bureaucrat negotiator with an external negotiator to speed up a set of negotiations that have been moving too slowly for the minister's liking.

The federal government did appoint an external chief federal negotiator for the Innu in the late 1990s. However, this negotiator has focused on other issues such as registration and reserve creation, policing, justice, and healing services. So far, he has had little to do

with the land claims negotiations, meaning that the Innu continue to deal solely with bureaucrat negotiators (Innes, 2006; Riche, 2006).

Second, the commitment and personality of the negotiator seems to matter. Provincial and LIA interviewees agreed that the provincial negotiator, Bob Warren, was extremely important in getting a deal done. Although Warren was a provincial bureaucrat, it was clear he believed in the LIA and was willing to “go the extra mile” within the provincial bureaucracy to get the deal. According to one anonymous observer, Warren was at one point seen by his colleagues in the provincial bureaucracy as being more committed to the Inuit than the province. Yet Warren had both the necessary expertise and the respect within the provincial bureaucracy to work effectively on behalf of Inuit concerns. This is not to say that Warren was not tough or mindful of provincial concerns at the negotiating table. However, it was clear that his commitment to the Inuit, and his expertise, energy and the respect he commanded in the bureaucracy were invaluable in moving Inuit negotiations forward during the critical period from Framework Agreement to AIP.

These two factors affect speed as opposed to whether an outcome is obtained because government negotiators, whether they are bureaucrats or third party negotiators, are subject to higher political authorities. If the deputy minister, Minister, Premier, or Prime Minister are not interested in a deal, then it does not matter if an external negotiator is present or if a provincial negotiator is committed to a deal. Moreover, an agreement could be reached without the presence of an external negotiator or a provincial negotiator who believed in the Aboriginal group. For instance, the October 1997 Inuit meeting would have taken place and resolved the critical issues delaying Inuit negotiations even if there were no third party negotiator or pro-Inuit provincial negotiator present.

Competition for Use of Claimed Lands and Development Pressure

In terms of development pressure, during the 1970s and 1980s, the federal and provincial governments issued property rights to third parties to develop those Aboriginal lands (mostly Innu in Labrador) that they knew or speculated had significant economic value. These property rights were important because third party interests (lands in which non-government groups have licenses and other interests) are excluded from land claims negotiations unless the parties agree to freeze such lands from development. As such, the governments were in no hurry to complete treaty negotiations with the Innu and the Inuit since they could immediately benefit from the exploitation of Labrador's valuable lands without treaties.

Things changed, however, with the discovery of Voisey's Bay. Negotiations for both the Innu and the Inuit accelerated after the discovery because the area was not subject to third party interests. The result was the rapid negotiation and completion of the Innu's and the Inuit's Voisey's Bay chapters and impact and benefit agreements, thus clearing the way for development. Yet only the Inuit were able to complete a CLC treaty. This dissertation argues that the Inuit's success can be attributed directly to their compatible goals, minimal use of confrontational tactics, strong internal cohesion, and positive government perceptions. Conversely, the Innu did not complete a treaty because they had incompatible goals, a history of confrontational tactics, weak internal cohesion, and negative government perceptions.

In terms of the effect of competition for land use, Michael Whittington, chief federal negotiator in the Yukon from 1987 to 1993, has argued that "the more remote FNs

[in the Yukon] settled earlier because their land selections were less constrained by competing uses” (Whittington, 2005). This dynamic was also in play for the Labrador groups. The Inuit claim involved mostly remote and homogenous regions in the province where the Inuit were by far the majority. As such, the provincial and federal governments had fewer third parties to accommodate in the final agreement. The Innu claim, on the other hand, involves land in central and southern Labrador where they are the minority, meaning that the federal and provincial governments are subject to substantial third party pressure. Since the Innu are a minority and any agreement will have an impact on the lives of the majority in the area, crafting a deal that satisfies the non-Aboriginal majority is important for both governments (Pelley, 2006; Warren, 2006).

Conclusion

This chapter has argued that four factors best explain variation in treaty negotiation outcomes for the Inuit and the Innu in Labrador. These factors are compatibility of goals, choice of tactics, Aboriginal group cohesion, and government perceptions of the Aboriginal group. None of these factors is a necessary condition by itself. Rather, they form a *conjunction* of factors whose presence indicates that an Aboriginal group is highly likely to complete a treaty. Other factors such as trust relationships, the attributes of individual government and external negotiators, competition for use of claimed lands, and the emergence of development pressures can accelerate negotiations, but these factors have little effect on whether negotiations will ever be completed.

Chapter 5: The Kwanlin Dün and the Kaska First Nations in the Yukon Territory

In contrast to other comprehensive land claims negotiations in Canada, the fourteen Yukon First Nations⁴⁵, which are very different from each other, jointly negotiated an Umbrella Final Agreement (UFA) with the federal and territorial governments in 1993. Once completed, each Yukon First Nation was to use the UFA as a template for negotiating an individual final agreement. As of April 2007, eleven Yukon First Nations completed final agreements with only the White River First Nation and the Kaska nations of Liard and Ross River having yet to complete one.

What follows is a description and analysis of two sets of comprehensive land claims negotiations in the Yukon Territory: the Kwanlin Dün First Nation (completed) and the Kaska nations of Ross River Dena Council and Liard First Nation (incomplete). The chapter begins with a brief description of the Kwanlin Dün and the Kaska nations. Next, it presents a narrative of the UFA negotiations before turning to the individual negotiation experiences of the two groups. Finally, the chapter ends by exploring the factors that best explain their divergent outcomes.

Who are the Kwanlin Dün and the Kaska?

Maps

Below are two maps that are relevant to the contents of this chapter. Map 5.1 illustrates the main cities, highways, and waterways of the Yukon Territory. Map 5.2 shows the traditional territories of the Kwanlin Dün First Nation and the Kaska Nation.

⁴⁵ Unlike other parts of Canada, there are no Métis groups in the Yukon.

Map 5.1: The Yukon Territory – taken from the Government of Canada, Natural Resources Canada website, www.atlas.gc.ca on 30 May 2007. This map has been removed due to copyright restrictions.

Map 5.2 – The Traditional Territories of the Kwanlin Dün and the Kaska – taken from the Yukon Territorial Government Website, <http://www.eco.gov.yk.ca/landclaims/index.html> on 30 May 2007. This map has been removed due to copyright restrictions

A Brief History of the Kwanlin Dün

Anthropologists (LegendSeekers Anthropological Research, 2000; Catherine McClellan, 1981) have classified Kwanlin Dün members as belonging to the broad Athapaskan language category and the Southern Tutchone cultural and linguistic sub-category. Its traditional territories are made up of the lands along the Yukon River from Lake Laberge to Marsh Lake and downriver to Hootalinqua. At the heart of its traditional territories are the lands in the city of Whitehorse and along the Yukon River. Its most important traditional lands are those at the Yukon River in Whitehorse. It is here that Kwanlin Dün members historically spent much of their time living in seasonal fish camps to harvest salmon (Kwanlin Dün First Nation, 2003). When not living along the Yukon River, members hunted and fished along the shores of the other lakes in their traditional territories, such as at Fish Lake, Bonneville Lakes, Marsh Lake (Kwanlin Dün First Nation, 1994: 11) and Lake Laberge (Kwanlin Dün First Nation, April 2003: 2; INAC, 2005). Kwanlin Dün members were not alone in traveling and using their traditional territories. In addition to welcoming visiting Aboriginal peoples from other Yukon First Nations (Kwanlin Dün First Nation, 2003: 3), they also shared significant parts of their territories with the ancestors of the Ta'an Kwäch'än First Nation. Ta'an members tended to spend most of their time in the northern part of Kwanlin Dün's territories, especially in the area around Lake Laberge. Members of the Kwanlin Dün and Ta'an Kwäch'än interacted with each other relatively freely, trading, traveling, and sometimes working together to hunt and fish.

Kwanlin Dün members made their living by hunting, fishing, and trading with other Aboriginal groups and later, European peoples. Hunters used snares, bows and arrows,

spears, and caribou fences, all of which were made from animal parts, plant resources, and some native copper. Fishers used leisters⁴⁶ and funnel and box traps placed in lakes, rivers, and streams. Prior to the arrival of Europeans to Kwanlin Dün lands, Kwanlin Dün members traded goods and food stuffs with other Aboriginal peoples. To acquire western goods, they relied on the Coastal Tlingit, who controlled a monopoly on western goods. This trading arrangement caused some feuding among Tutchone groups as leaders vied to secure trading monopolies for supplying Aboriginal peoples farther north with European goods. The Coastal Tlingit monopoly ended with the large influx of European gold rush prospectors in 1898 (McClellan, 1981: 494-496).

The seasonal round for Kwanlin Dün members was as follows. From May to October, members formed small groups to fish for salmon and other freshwater fish. Fishing catches were used to feed members during the summer, but more importantly they were dried and stored for consumption during the lean winter months. In August, smaller groups left the fishing camps to hunt for large and small game. Hunters dried their catches and stored them in scattered caches in various places throughout Kwanlin Dün lands. From November to February, the various small groups came together to share their stored foods gathered during the summer months. In March and April, which were the leanest months of the year, the groups dispersed to fish for spawning whitefish, and trap muskrats and beavers (McClellan, 1981: 496).

Throughout the seasonal round, the preferred method of travel was by foot. Some members did use boats but for the most part they avoided them because of fears about sudden winds and fierce rapids. In the winter, members mainly used snowshoes until the

⁴⁶ A fish leister is a type of spear that has a spear point encircled by two grips that help to ensnare a fish.

end of the 19th century when groups began to use dogsled teams. By 1975, members were using horses, skiffs, planes, and trucks to hunt, fish, and travel around Kwanlin Dün lands (McClellan, 1981: 498).

Kwanlin Dün social organization was matrilineal and members belonged to either the Crow or the Wolf clans. The smallest domestic group was usually made up of one able-bodied female and one able-bodied male while most groups tended to have two siblings, or an older couple with a daughter and a son-in-law. Sons-in-law were responsible for caring for their wives' parents until their deaths and were expected to avoid making any type of contact with mothers-in-law. They were also expected to interact with fathers-in-law using formal modes of communication. Memberships in these groups were fluid and leadership was very informal. Leaders who were good hunters or traders tended to assume more leadership roles. As Europeans became established in the Yukon Territory, leaders who were skilled at trade were more valued than skilled hunters (McClellan, 1981: 499-500).

First contact with the settler society occurred probably in 1842 when Robert Campbell came to the Yukon on behalf of the Hudson's Bay Company. In 1848, he founded Fort Selkirk at the mouth of the Pelly River. This settlement was a trading post for Northern and Southern Tutchone peoples to acquire European goods until 1852 when the Coastal Tlingit peoples drove Campbell and his followers out of Fort Selkirk. As mentioned above, prior to the arrival of Campbell, the Coastal Tlingit peoples were the sole providers of European goods to Northern and Southern Tutchone peoples. The next major European-Canadian settlement to emerge in the Yukon was in 1874 at Fort Reliance, just south of what is now known as Dawson City. In the 1880s and the 1890s, a number of

European-Canadian and European-American explorers came to the Yukon Territory searching for mineral resources and trading routes (McClellan, 1981: 493, 503).

The life of Kwanlin Dün members underwent dramatic change as a result of the gold rush in the late 1890s and the creation of the city of Whitehorse in the early 1900s. The gold rush brought large numbers of non-Aboriginal peoples to the Yukon Territory and through Kwanlin Dün lands. In addition to trade and disease, the large influx of prospectors reduced the amount of wildlife in the area, pushing Kwanlin Dün members 10 to 20 miles further inland to find game (Kwanlin Dün First Nation, April 2003: 6). As non-Aboriginal prospectors arrived to claim tracts of land, all Aboriginal peoples, including Kwanlin Dün members, were excluded from making claims to mining areas. Instead, they were hired as hunting guides or as low-wage labourers in mining camps (Coates, 1991).

In the early 1900s, the White Pass and Yukon Railway Company purchased and sold the land that was to become the downtown core of the city of Whitehorse. Kwanlin Dün members, who had previously spent most of their time along various parts of the Yukon River, were moved to the east bank, north of the current Whitehorse General Hospital site. In 1912, Kwanlin Dün members were again moved, but this time to the west side of the Yukon River (now known as the Robert Service Campground). As the city grew, so did the Aboriginal population as Aboriginal peoples flocked to Whitehorse to take advantage of the opportunities available in the city. In 1915, Indian superintendent John Hawsley asked the Department of Indian Affairs to set aside land for Kwanlin Dün members. The department did this in 1921, creating Lot 226, “the Old Village”, for Kwanlin Dün and Ta’an members to live on (INAC, 2005; Kwanlin Dün First Nation, April 2003: 6-7).

In the early 1940s, the American government began construction of the Alaska Highway, resulting in another influx of non-Aboriginal peoples to the Yukon Territory. As a result, Whitehorse's population expanded rapidly. Aboriginal peoples took advantage of this influx to again act as hunting guides, work as low-wage labourers, and to sell their traditional crafts. In 1953, the government of the Yukon Territory declared Whitehorse to be the territorial capital. In 1956, the Department of Indian Affairs amalgamated Kwanlin Dün and Ta'an Kwäch'än members to form the Whitehorse Indian Band (Kwanlin Dün First Nation, April 2003: 7-8). In addition to Kwanlin Dün and Ta'an Kwäch'än members, all other First Nations members living in Whitehorse became band members of the Whitehorse Indian Band. Government officials referred to these non-Kwanlin Dün and Ta'an Kwäch'än members as "come from aways" (Armour, 2006; Flynn, 2006; King, 2006; Koepke, 2006). The idea behind the creation of the Whitehorse Indian Band was to make it easier for the Department of Indian Affairs to administer programs and services to all Aboriginal peoples living in Whitehorse.

In 1962, the federal and territorial governments removed all remaining Whitehorse Indian band members from their riverfront lands in Whitehorse, except for those members living on Lot 226, the Old Village. After the *Calder* decision in 1973, a delegation of Yukon First Nations leaders traveled to Ottawa to initiate the comprehensive land claims process for Yukon First Nations. In 1984, the Whitehorse Indian Band changed its name to Kwanlin Dün First Nation. Around the same time, the government built the McIntyre subdivision to house workers for the construction of the proposed Alaska Highway pipeline project. However, this project never went ahead and in 1985 the government offered the McIntyre subdivision to the Kwanlin Dün. Kwanlin Dün's chief and council agreed to the

offer, and most band members moved from Lot 226 to the McIntyre subdivision. Today, the majority of Kwanlin Dün's members live in this subdivision, about a 10 minute drive from the banks of the Yukon River.

In 1993, the Kwanlin Dün and the Ta'an Kwäch'än communities signed the UFA as separate signatories and in 1998, INAC Minister Jane Stewart formally separated them into two First Nations. In 2002, the Ta'an Kwäch'än completed its treaty and in February 2005, the Kwanlin Dün negotiators completed theirs. As of 1 April 2005, the Kwanlin Dün First Nation has been governing itself and administering its lands according to the terms of its treaty agreements.

Under its Constitution, the Kwanlin Dün government is led by Chief and Council. The Council is made up of one elected chief, six elected councillors, one non-voting elder appointed by the Elders Council, and one non-voting youth member, appointed by the Youth Council. Chief and Council are supported by: i) the General Assembly, which is made up of all Kwanlin Dün citizens, ii) the Youth Council, which is made up of all citizens 14 to 19 years old, iii) the Elders Council, which is made up of all citizens 60 years or older, iv) and the Judicial Council, made up of five voting members, one of whom is appointed by Chief and Council, two by the Elders Council, two by the General Assembly, and one observer by the Youth Council. The job of the Youth and Elders Councils is to provide the Kwanlin Dün government with advice and direction as they relate to Kwanlin Dün youth and elders. The Judicial Council adjudicates appeals regarding citizenship, election rules, the validity of Kwanlin Dün laws, and all matters referred to it by Chief and Council. Revenues for the new government come from treaty compensation monies, federal and territorial taxation, programs and services transfer agreements, and First Nation

taxation powers over Settlement Lands and its citizens (Kwanlin Dün First Nation Self-Government Agreement, 2004; Kwanlin Dün First Nation, n.d.).

*A Demographic Profile of Kwanlin Dün First Nation*⁴⁷

According to the data provided by Indian and Northern Affairs Canada (Gour, 2006), Kwanlin Dün First Nation had 951 registered members in 2001, 957 members in 2003, and 959 members in 2005. In February 2007, INAC (2007) reported that Kwanlin Dün First Nation had 951 registered members. What is unclear from these data is how many of these registered members are beneficiaries (traditional Kwanlin Dün “citizens”) and how many are non-beneficiaries (citizens from other First Nations). The Kwanlin Dün First Nation has identified 634 beneficiaries (Kwanlin Dün First Nation, 2005: 3), but neither it nor INAC have stated how many of these beneficiaries are band members and how many are non-band members. The best educated guess is extrapolated from Kwanlin Dün Final Agreement ratification results in 2005. According to those results, 66.3% of Kwanlin Dün eligible voters were beneficiaries and band members, 9.2% were beneficiaries but not band members, while 24.5% were members but not beneficiaries. INAC (2005) reports that approximately half of Kwanlin Dün beneficiaries live in Whitehorse.

In general, the Kwanlin Dün population is quite young (50.6% of members in 2001 were aged 0-24, 33% were 25-44, 13.4% were 45-64, and 3% were 65 and above). Most

⁴⁷ Unless otherwise noted, the information presented in this section is based on 2001 Canadian Census data (Statistics Canada, 2001) for Aboriginal peoples identifying themselves as belonging to a First Nation, Inuit group, or Métis group, living in the city of Whitehorse. Unfortunately, there is no demographic information available on Kwanlin Dün members only. Nonetheless, the data presented here are still useful for providing a very general demographic picture of Kwanlin Dün members because a majority of them live in Whitehorse.

Kwanlin Dün members have knowledge of English only (83.7%, while 6% speak French, 9% speak Aboriginal languages, and 1.3% speak other languages). A third of members have less than a high school education and two fifths have trades, college, or university certificates or diplomas (30.6% had less than a high school certificate; 3.7% had only a high school certificate; 17.5% had some postsecondary education; 40.4% had a trades, college, or university certificate or diploma; and 7.8% had a university degree). In terms of earnings, the average Kwanlin Dün member earned \$24,264 in 2000 while 36.2% reported that they worked full time. In comparison, average territorial earnings were lower⁴⁸ (\$21,992) as were those who reported working full time (33%). On the other hand, national earnings were higher (\$31,757) while the percentage of those who worked full time was lower (28.9%). Kwanlin Dun members earned most of their income from employment (81.2%), but also from government transfers (16%) and other sources (2.8%). In comparison, territorial residents derived less of their income from earnings (78.3%) and more from government transfers (20.8%). At the national level, Canadians earned less of their income from employment (77.1%) and government transfers (11.6%), but more from other sources (11.3%).

A Brief History of the Kaska

Anthropologists (LegendSeekers Anthropological Research, 2000; Honigmann, 1964) have classified the Kaska as a distinct cultural and linguistic group within the broad Athapaskan language category. The Kaska's traditional lands are in the southeastern part

⁴⁸ The fact that Kwanlin Dün earnings were higher than the territorial average probably is the result of Kwanlin Dun members living mostly in Whitehorse. Living in the territorial capital gives them access to greater opportunities to achieve higher earning levels.

of the Yukon Territory and in northern British Columbia. Although the Kaska used to have numerous settlements throughout their traditional lands, today most Kaska members in the Yukon Territory live in Ross River, Upper Liard, and Watson Lake. Upper Liard and Watson Lake are governed by Liard First Nation whereas Ross River and its surrounding areas are controlled by Ross River Dena Council. Kaska leaders in the Yukon Territory and in British Columbia collectively claim as their traditional lands approximately 25% of the southeastern part of the Yukon Territory and 10% of B.C. Kaska lands in the Yukon are some of the richest in the territory in terms of forests, minerals, and fish and wildlife resources.

Pre-contact, most Kaska groups and individuals relied heavily on hunting and trading with other Aboriginal groups as their main sources of income. After contact, many Kaska groups and individuals took up the fur trade to make their living, frequently traveling to the Hudson's Bay Company's posts in Upper Liard (near Watson Lake, YT), Fort Frances (near Ross River, YT), and Lower Post (in northern B.C.) to trade their furs for European goods. Prior to contact, they relied heavily on rocks and bones to construct axes, scrapers, knives, needles, and other hunting, fishing, and domestic tools. They used wood for canoes, drinking vessels, and storage vessels, and used animal pelts for clothing, lines, and storage bags. Almost immediately after contact, the Kaska abandoned many of their traditional tools in favour of European goods. The typical Kaska group after contact owned European axes, snare wires, metal pots, kettles, a washtub, needles, scissors, knives, a carpenter's drill, nails, and other similar items (Honigmann, 1981: 443).

The Kaska's seasonal round was as follows. During the spring and summer months, Kaska groups focused on hunting game and gathering fruits and vegetables. They

undertook these activities so that they could trade with Aboriginal and non-Aboriginal peoples, and to feed their members during the warm and cold months. The men hunted mostly for goats, sheep, woodland caribou, moose, groundhogs, and gophers using snares, deadfalls, spears, gaff hooks, slings, and clubs. For herds of game, they drove the animals to ambushes and used decoys to hunt birds. The women collected berries, fern roots, mushrooms, apples, onions, and rhubarb. Both men and women fished every day because fish was their standard food throughout the year. According to some oral accounts, the Kaska sometimes engaged in cannibalism during times of famine, or after a war as part of a ceremony celebrating their victories. As the winter months approached, the men focused on building winter gear like snow shoes, toboggans, and walking staves. The women dried meat and fish for the lean winter months. During the winter months, Kaska families gathered at various fish lakes in the southeastern parts of the Yukon and in northern B.C. to live off fresh fish and dried game and fish from the spring and summer months (Honigmann, 1981: 443-444).

In terms of social organization, local Kaska groups or bands were made up of extended family members plus “unrelated hangers-on and adopted children” (Honigmann, 1981: 446). Property rights were generally fluid, except for beaver creeks which were owned exclusively by certain families. When a husband died, half of his possessions went to his brother and the other half were divided among his children. When a wife died, all of her possessions went to her husband. However, it was customary for the husband to give half of his deceased wife’s possession to his brother’s wife. Lineage was matrilineal and members tended to belong to either the Wolf or the Crow clans (LegendSeekers Anthropological Research, 2000; Honigmann, 1964). In terms of crime and punishment,

community members punished criminals with unfavourable public opinion, exile, indemnities, or blood revenge. Sometimes, Kaska groups engaged in war against each other in retaliation for a transgression committed by one group or by one of its members. Once the retaliation was completed, the recipient group usually responded with a revenge-driven war. These types of conflict usually resulted in the groups engaging in a cycle of revenge-driven warfare (Honigmann, 1981: 446).

The first sustained contact with non-Aboriginal peoples occurred in the 1820s when the Hudson's Bay Company opened a trading post at Fort Halkett on the Liard River in northern British Columbia. In 1843, the Hudson's Bay Company opened another trading post on Kaska lands right on the shores of Frances Lake, near present day Ross River. This post was closed by the Hudson's Bay Company in 1852 only to be reopened in 1880. In addition to traders, European trappers came to the area in search of fur. In 1873, small groups of non-Aboriginal prospectors came looking for gold in Kaska lands and then in 1898, large groups of prospectors came through Kaska lands on their way to the Klondike gold fields (Honigmann, 1981: 442; Coates, 1991).

Once the gold rush ended, many of the non-Aboriginal prospectors left the Yukon. In their place were Protestant and Catholic missionaries who set up temporary missions to serve the Kaska peoples. In 1926, Father Allard of the Catholic Church opened a permanent mission on the banks of the Dease River to educate and convert Kaska peoples. Sustained contact with the settler society came in 1942, when the U.S. government began construction of the Alaska Highway. This highway was built right beside the Kaska communities of Lower Post, B.C. and Upper Liard in the Yukon Territory (Coates, 1991; McClellan, 1987). The proximity of the highway to these Kaska communities increased the

frequency of sexual contact between Kaska women and non-Aboriginal men, as well as introducing alcohol to these Kaska communities (Honigmann, 1981: 442-443). It also facilitated the construction of the Canadian community of Watson Lake, just outside of Upper Liard. Once the highway was completed, many Kaska members used it and its subsidiary roads to travel about their lands to hunt, fish, and trade with their Aboriginal and non-Aboriginal neighbours. In 1966, the Canadian government helped the Cyprus Anvil Mining Corporation to open a mine approximately 67 kilometres west of the Kaska village of Ross River. Although the mine generated substantial revenues for the Crown, it had a profoundly negative impact on the Kaska. In addition to interfering with the Kaska's use of their lands around the mine, very few Kaska were employed by the mine. Moreover, the opening of the mine led to the founding of the town of Faro, where the miners lived. The proximity of Faro to Ross River ensured that alcohol was easily introduced and readily available to Kaska members in Ross River. Today, alcoholism remains a major problem among Kaska members in Ross River (Barichello, 2006; Koepke, 2006; Sterriah, 2006; Van Bibber, 2006).

In 1973, the Kaska nations of Ross River Dena Council and Liard First Nation joined together with the other Yukon First Nations to begin comprehensive land claims negotiations with the federal government. In the mid to late 1980s, the Kaska communities decided to strengthen their ties with each other by recognizing the existence of "one Kaska Nation." In 1991, the Kaska created the Kaska Tribal Council (KTC) to coordinate their activities as one-Kaska Nation. Specifically, KTC was to act on their behalf to negotiate one comprehensive land claims agreement for all Kaska. However, the federal government refused to recognize the Kaska Nation at the negotiating table until 1998. As of 2007,

Kaska negotiations in the Yukon are suspended as a result of the federal mandate expiring in June 2002 (further details are provided below).

KTC, which is headquartered in Watson Lake, is governed by a democratically elected board of directors and a Tribal Chief. The only Tribal Chief that KTC has ever had is Hammond Dick and the KTC's chief negotiator has always been Dave Porter. Although KTC does provide some minor program and monetary support to the Kaska band councils, the main purpose of KTC is to facilitate and coordinate Kaska comprehensive land claims negotiations in the Yukon Territory (Dick, 2006; McMillan, 2006; Porter, 2006).

Much like other First Nations in Canada, the Kaska communities in the Yukon are governed by *Indian Act* band councils. Ross River Dena Council is governed by one chief, one deputy chief, and three councillors. Liard First Nation is run by one chief, four councillors, and one non-voting hereditary chief. Both band councils administer a number of programs, including community infrastructure, capital projects, education, social assistance, social support, economic development, and housing. In the 2005-2006 fiscal year, the federal government provided \$6,369,381 to Liard First Nation (Pike, 2006) and \$3,041,492 to Ross River Dena Council (McIntyre, 2006).

*Basic Demographic Data for the Kaska nations.*⁴⁹

According to data provided by Indian and Northern Affairs Canada (Gour, 2006), in 2001 Liard First Nation had 983 registered members, 1005 members in 2003, and 1032

⁴⁹ Unless otherwise noted, the information presented in this section is based on 2001 Canadian Census data (Statistics Canada, 2001) for Aboriginal peoples living in Ross River and Watson Lake. Unfortunately, there is no demographic information available on Kaska members only. However, the majority of Aboriginal peoples living in Ross River and Watson Lake are Kaska members and thus the following information is useful for giving readers a very general idea of the demographic composition of Kaska members.

members in 2005. Ross River Dena Council had 419 members in 2001, 432 members in 2003, and 459 members in 2005. In February 2007 (INAC, 2007), Liard First Nation had 1057 members and Ross River Dena Council had 468 members. Although Kaska members are the clear majority in Ross River, a significant number of non-Aboriginal peoples live in and around Liard First Nation in Watson Lake.

In general, the Kaska population is quite young (47.7% of members in 2001 were aged 0-24, 33% were aged 25-44, 15.6% were aged 45-64, and 3.7% were aged 65 and above). Over two thirds of Kaska members speak English and approximately a quarter of members speak Aboriginal languages (73% of Kaska members had knowledge of English only, 25.2% spoke Aboriginal languages, and 1.8% spoke English and French only). In terms of education, most members have less than a high school certificate while almost a third have a trades, college, or university certificate or diploma (42.1% had less than a high school certificate; 7% had a high school certificate; 19.3% had some postsecondary education; 28.1% had a trades, college, or university certificate or diploma; and 3.5% had a university degree). In terms of earnings, the average member earned \$17,872, which is much lower than the provincial and national averages, while a third of earners reported that they worked full time in 2000. Income mainly came from employment (79.3%), but also from government transfers (19.2%) and other sources (1.5%).

Yukon First Nations: A Collective Approach to Comprehensive Land Claims Negotiations

In contrast to other regions in Canada, almost all Aboriginal peoples in the Yukon Territory never signed treaties with the Crown⁵⁰ nor did they ever receive reserve lands. After the *Calder* decision in 1973, the Yukon First Nations were one of the first Aboriginal groups in Canada to begin comprehensive land claims negotiations with the federal government. The federal government was highly motivated to negotiate with the Yukon First Nations for two main reasons. First, throughout the 1970s, the federal government was very interested in developing the rich, largely untapped resources of the Canadian North; settling the Yukon claims was an important first step for developing the Yukon Territory. Second, the Yukon First Nations showed significant promise in terms of their likelihood to complete an agreement quickly and in accordance with the preferences of the federal government. The government thought it could quickly complete a deal with the Yukon First Nations so that it could turn its attention to other more difficult claims (Joe, 2006; Mitander, 2006).

The Yukon First Nations' statement of intent, *Together Today for Our Children Tomorrow*, submitted to the federal government in 1973, signaled the group's desire to complete a treaty quickly. Yukon First Nations leaders described how their peoples became impoverished after the arrival of non-Aboriginal peoples to their lands (Yukon Indian Brotherhood, 1973: 7-13). As a result, they wanted to negotiate a treaty settlement that lifted their peoples out of this poverty (Yukon Indian Brotherhood, 1973: 15-25). In particular, a treaty had to give Yukon Indian peoples the necessary tools to survive and prosper as Aboriginal peoples within modern Canadian society. According to Part IV of

⁵⁰ The exception is Treaty 8 which included a small portion of Yukon lands in the southeastern part of the Territory.

the document, a settlement “will help us and our children learn to live in a changing world. We want to take part in the development of the Yukon and Canada, not stop it. But we can only participate as Indians. We will not sell our heritage for a quick buck or a temporary job” (Yukon Indian Brotherhood, 1973: 29). Moreover, “we have been accused of opposing the development of the North. If you are able to understand this final section of our paper, you will learn that we are strong supporters of development” as long as “we” could control the direction and pace of that development” (Yukon Indian Brotherhood, 1973: 48). In addition to Aboriginal control over development, a settlement had to lead to the creation of programs specifically for Indian peoples; it had to support Yukon Indian elders, recognize and protect Indian cultures and identities, and foster community development, education, economic development, media, and allow for Indian-focused research (Yukon Indian Brotherhood, 1973: Part IV). The document ends by arguing that Yukon Indians prefer to negotiate a treaty as quickly as possible to avoid the costly delays that can arise from other settlement strategies. “We are asking that you agree with us on a quick Settlement to avoid a long fight in the Courts and in Parliament” (Yukon Indian Brotherhood, 1973: 73).

Together Today for Our Children Tomorrow was a clear signal to the federal government that a “good” deal was possible with the Yukon Indians. The fact that the Yukon Indian leaders had filed a joint statement of intent indicated that they might be willing to adopt a collective approach to negotiating their comprehensive land claims. The Yukon Indian leaders also seemed to be pro-development and wanted to enter into negotiations rather than seek potentially more expensive and damaging actions through Canadian courts and Parliament (Mitander, 2006; Joe, 2006; McArthur, 2006; Nadasdy,

2003: 55; Penikett, 2006). As such, federal officials saw the Yukon Indians as ideal candidates for active negotiations.

The Yukon Indians were represented at the negotiating table by the Yukon Native Brotherhood (representing status-Indians in the Yukon) and the Yukon Association of Non-Status Indians (DIAND, 2002; Huggard, August 1987; McClellan, 1987: 99-104). In late 1973, the federal government initiated negotiations by making “a unilateral, public offer of settlement” to the two organizations (Frideres, 1986: 289). Both groups quickly rejected the offer, forcing the federal government to change its offer into a working offer open for negotiations. Formal negotiations began in early 1974 between the Yukon Native Brotherhood (YNB), the Yukon Association of Non-Status Indians (YANSI), and the federal government. At this point, the Yukon territorial government (YTG) did not have its own seat at the negotiating table. Rather, negotiations were bilateral and YTG officials sat as part of the federal negotiating team. To signal its displeasure with this situation, YTG published *Meaningful Government for all Yukoners*. It was a blueprint for transforming the Yukon Territory into a province. Among other things, this document stressed the need for a “one-government system” (a provincial government) rather than a two government system (a non-Aboriginal government co-existing with a Yukon Indian government) in the Yukon (Frideres, 1986: 289-290).

In 1975, the YNB, the YANSI and the federal government agreed to “freeze” 12,000 square miles of Yukon land until a land claims agreement could be reached. Comprehensive land claims negotiations continued through to 1979, stopping briefly in 1977 and 1978 because of Yukon Indian opposition to the YTG’s “one-government” policy. In 1979, the federal government invited YTG to join the negotiating table as a separate and

equal negotiating party, much to the dismay of Yukon Indian leaders. At the same time, however, the parties agreed to “develop a Yukon constitutional development process to be correlated with the native claims process” (Frideres, 1986: 294). All four negotiating parties realized that land claims negotiations were very much tied to the political evolution of the territory

In February 1980, the Yukon Native Brotherhood and the Yukon Association of Non-Status Indians decided to merge to form the Council for Yukon Indians (CYI) to represent all Yukon Aboriginal peoples at the negotiating table (McClellan, 1987: 103). With the territorial government at the table and the Yukon Indian organizations amalgamated into one umbrella organization, comprehensive land claims negotiations moved forward relatively quickly. Later that same year, negotiators Dave Joe (CYI), Dennis O’Connor (DIAND), and Willard Phelps (YTG) reached an agreement on the issues of eligibility, wildlife use and management, and land use planning. In 1981, the negotiators came to an agreement on provisions relating to education, social programs, health, harvesting, hunting, and fishing. At the same time, the Carcross, Pelly, Teslin, Champagne/Aishihik, and Burwash First Nations completed their land selections, thus creating optimism among the negotiators and the public that an agreement-in-principle was close at hand (Council for Yukon First Nations, n.d.; DIAND, 2002; Huggard, August 1987; Joe, 2006; Mitander, 2006). In December 1982, the territorial government withdrew from the negotiating table due to a dispute with the federal government over the issues of costs, non-native land use, non-resident claimants, and the possible negative effects of a land claims agreement on the constitutional development of the territory. Nonetheless, negotiations between the CYI and the federal government continued with significant

progress being made. In light of this progress, the YTG returned to the table in April 1983. In that year, the three parties reached an agreement on boundary definitions, training, beneficiary programs, financial compensation, and corporate structures (Huggard, August 1987; Joe, 2006; Mitander, 2006).

In early 1984, the four parties completed negotiations and signed an Agreement-in-Principle (AIP). The main provisions of the AIP were:

- 20,000 square kilometers to be distributed among all Yukon First Nations; out of that 20,000 square kilometers, Old Crow First Nation would receive 7,500 square kilometers because their lands were located in the most isolated areas of the Yukon.
- \$130 million in financial compensation over 20 years.
- \$53.69 million over 20 years in exchange for giving up access to federal programs for status Indians.
- special programs and powers for housing, education, health care, social services, and the administration of justice
- Yukon Indians agreed to extinguish their Aboriginal title to all lands in Canada (Frideres, 1986: 296-298).

The federal government decided that the AIP needed to be ratified by nine of the twelve Yukon First Nations before the end of the year. In December 1984, at its general assembly in Tagish, the CYI failed to reach this threshold; specifically, the Mayo, the Carcross, and the two Kaska First Nations (Ross River Dena Council and Liard First Nation) voted against ratification. Their main issues of concern were extinguishment, self-government, equality rights between status and non-status Indians, and amount of land to be transferred

(Council of Yukon First Nations, n.d.; Joe, 2006; Koepke, 2006). Some First Nations, especially the Kaska First Nations, were concerned that the negotiations were conducted far too secretly. Negotiations at this stage were very much conducted in the classical “executive federalism” style with little public input and transparency (Dick, 2006; Koepke, 2006; Mitander, 2006; Porter, 2006; Raider, 2006; Van Bibber, 2006).

As a result of the CYI failing to ratify the AIP, the federal government immediately suspended formal negotiations and cut its funding to the CYI (Abele, 1986: 170). Nonetheless, informal negotiations continued over how to restart negotiations. In November 1985, the three parties signed a memorandum of understanding (MOU) to restart negotiations. The MOU set out a new negotiating process for ensuring that the next AIP would be successfully ratified. In January 1986, the federal government restored funding to the CYI and in March 1986, the Coolican report, described in chapter 2, was released. In December 1986, the federal government responded to the Coolican report by redesigning its comprehensive land claims policy. As mentioned in previous chapters, the key change to its policy was the deletion of the word “extinguishment” (Abele, 1986: 171). At the same time that these events were occurring, the Kaska nations began to file the first of a dozen lawsuits over a twenty year period against the federal government over the government’s failure to abide by its fiduciary duty to resolve Kaska land claims (Huggard, August 1987; Council of Yukon First Nations, n.d.; Joe, 2006; Mitander; 2006; Walsh, 2006).

In June 1987, the federal government, the YTG, and the CYI resumed land claims negotiations under the new federal comprehensive land claims policy. The negotiators made swift progress because the new federal policy gave the negotiating parties sufficient

flexibility to address the problems that had led to the defeat of the 1984 AIP (Joe, 2006; Mitander, 2006; Koepke, 2006). In 1989, the three parties signed a new agreement-in-principle. Among other things, the new AIP increased the land quantum to 41,595.21 square kilometres, raised the financial compensation to \$242.6 million, and called for the “cede, release, and surrender” but not the extinguishment of Aboriginal title. With a completed AIP in hand, negotiations turned to drafting an Umbrella Final Agreement. Again, negotiations proceeded quickly and in early 1993, the CYI, the federal government, and the YTG completed and signed the Umbrella Final Agreement, which transformed the AIP into a final treaty. This time around, the federal government decided to allow the CYI to determine its own ratification process. In March 1993, the CYI at its usual quarterly board meeting ratified the Umbrella Final Agreement despite the vigorous opposition of the Kaska nations. There was never any formal ratification vote held among all of the Yukon Indians (Dick, 2006; Joe, 2006; Mitander, 2006; Porter, 2006; Raider, 2006; Sterriah, 2006; Van Bibber; 2006; Walsh, 2006). The federal government officially recognized that the CYI had ratified the agreement despite the Kaska’s opposition, arguing that the CYI represented all Yukon First Nations in the comprehensive land claims process. In 1994, Parliament passed settlement legislation officially bringing the Umbrella Final Agreement and the first four Yukon First Nation Final and Self-Government Agreements into effect.

The Umbrella Final Agreement (UFA) is essential for understanding the Kwanlin Dün and Kaska claims because the UFA is the framework that each Yukon First Nation must use to negotiate its individual final agreement. The UFA specifies the amount of land quantum and financial compensation that each Yukon First Nation will receive upon completing its individual final agreement. It also sets out the range of powers that each

Yukon First Nation can negotiate. These powers include: eligibility and enrollment, reserves and lands set aside, tenure and management of settlement lands, access, expropriation, surface rights board, settlement land amount, special management areas, land use planning, development assessment, heritage, water management, boundaries and measurements, fish and wildlife, forest resources, non-renewable resources, financial compensation, taxation, taxation of settlement land, economic development measures, resource royalty sharing, Yukon Indian self-government, transboundary agreements, dispute resolution, and implementation.

In essence, the UFA requires that all Yukon First Nations adopt its text as the basis for their own final agreements. Each First Nation can, however, negotiate “specific provisions” that clarify or slightly modify the original text according to the unique circumstances of the First Nation. For instance, provision 13.8.3 of the Kwanlin Dün Final Agreement states that the “Government and the affected Yukon First Nation shall institute a permit system for research at any site which may contain Moveable Heritage Resources” (Kwanlin Dün First Nation Final Agreement, 2004: 186). This phrase is taken word for word from the UFA. Following this provision in the Kwanlin Dün Agreement is a specific provision that states that the government and the Kwanlin Dün First Nation shall consult each other during the development and drafting of this permit system. It also describes the principles that must guide the government and the Kwanlin Dün in their construction of that permit system.

Two other points need to be mentioned about the UFA. First, the UFA was important because instead of the Whitehorse Indian Band signing the UFA, the Ta’an Kwäch’än First Nation and the Kwanlin Dün First Nation signed the treaty as separate First

Nations. In 1998, INAC Minister Jane Stewart officially separated these two First Nations by ministerial order, thus allowing them to negotiate their own individual final agreements under the UFA. Second, the Kaska were opposed to the UFA on both substantive and procedural grounds. In terms of the former, the Kaska had serious issues with the transboundary, taxation, trapping, extinguishment, land quantum, and repayment of loans chapters in the UFA. In terms of the latter, the Kaska felt that CYI did not properly ratify the UFA according to the UFA ratification provisions. Since the UFA ratification provisions were not properly followed, the Kaska maintain that the UFA was never officially ratified and therefore does not apply to their land claims negotiations (Dick, 2006; Porter, 2006; Raider, 2006; Walsh, 2006).

During the final stages of the UFA negotiations in the early 1990s, some federal, territorial, and Yukon First Nations officials were becoming impatient with the land claims process. They felt that the process had been going on for far too long without producing any results. Therefore, the parties agreed to allow the CYI to identify four Yukon First Nations to begin negotiating individual agreements concurrently with the UFA negotiations (Joe, 2006; Koepke, 2006; McArthur, 2006; Mitander, 2006). The four that were chosen were Champagne/Aishihik, Nacho Nyak Dün, Teslin Tlingit, and Vuntut Gwitchin. Kwanlin Dün and the Kaska Nations were excluded from this initial list because they were seen as being potentially the most difficult negotiations in light of their complexities (described below). The first four Yukon First Nations to complete final agreements did so in 1995.

Also in 1995, the CYI decided to rewrite its constitution and rename itself the Council of Yukon First Nations (CYFN). Of the fourteen Yukon First Nations that

belonged to the CYI, only 11 signed the new constitution. The three Yukon First Nations that refused to sign were the Kwanlin Dün First Nation, the Liard First Nation, and the Ross River Dena Council, meaning that these three First Nations were no longer members of the CYFN. The Kaska pulled out of the CYFN because they opposed the CYI's handling of the UFA negotiations and ratification, while the Kwanlin Dün First Nation pulled out because it disagreed with the visible centralizing tendencies of the CYFN. Kwanlin Dün leaders also decided not to join the CYFN because of their past disagreements with CYI leaders over land claims issues and the CYI's position on the devolution of powers to the territorial government (Joe, 2006; Small, 17 September 2004).

After 1995, the federal and territorial governments began negotiating with all of the Yukon First Nations at separate tables. Kwanlin Dün and Kaska negotiators initially made little progress as a result of the complex nature of their claims, described in greater detail below. Negotiations with all Yukon First Nations would speed up, however, as a result of the appointment of Bob Nault as Minister of Indian and Northern Affairs Canada in 1999. In April 2000, Nault announced that all Yukon comprehensive land claims negotiations had to be completed by March 31, 2002. Kwanlin Dün leaders and negotiators responded to the deadline with renewed vigour, eventually signing a memorandum of understanding with the federal and territorial governments to extend their negotiations beyond the deadline. In contrast, the Kaska negotiators failed to reach a memorandum of understanding before the deadline. As a result, they are currently without Final Agreements and their negotiations have been suspended since June 2002. The next section of this chapter looks at the Kwanlin Dün and Kaska negotiations in more detail before turning to an analysis of their divergent outcomes

Kwanlin Dün First Nation

Little Progress: 1995 to 1999

Kwanlin Dün negotiations commenced in late 1995, but very little progress was made until 1999. During these four years, negotiations were hampered or delayed by three factors. First, government officials knew that Kwanlin Dün negotiations would be very difficult and complex; as a result, they decided to focus most of their efforts on those claims that they believed could be completed relatively quickly (Flynn, 2006; Armour, 2006; McCullough, 2006; King, 2006; Koepke, 2006; Beaudoin, 2006; Brown, 2006). Second, a number of anonymous sources have mentioned that a major obstacle to Kwanlin Dün negotiations during this period was a particular negotiator on the Kwanlin Dün team; informants described this negotiator as belligerent, hostile, and confrontational, making it impossible for negotiations to move forward beyond preliminary land selections. Finally, negotiations were hampered by the election of Joe Jack in 1996 as Chief of Kwanlin Dün First Nation. One of his first moves as Chief was to fire the entire staff of the land claims department, which in essence ended land claims negotiations with the federal and territorial governments. Moreover, Chief Jack's action sparked a series of intense and highly publicized confrontations between Jack's supporters and the supporters of the fired land claims staff, paralyzing the First Nation for three years (McNeely, 6 October 1998;

Northern Native Broadcasting Yukon,⁵¹ 1998; Northern Native Broadcasting Yukon, 1996; Parker, 27 January 1999).

Towards an Agreement: 1999 to 2002

The election of Rick O'Brien as Chief of Kwanlin Dün First Nation in March 1999 was an important turning point because he was able to quell the political infighting that had plagued Kwanlin Dün since the mid 1990s. Moreover, Rick O'Brien resurrected the land claims department and appointed a new department head, Tom Beaudoin, to restart land claims negotiations with the federal and territorial governments. In the eyes of federal and territorial officials, Beaudoin was a welcome relief from the previous team. He immediately put together a new negotiating team to restart negotiations. Members of his team included lawyer Keith Brown, consultant Lindsay Staples, and Kwanlin Dün citizen and lawyer, Mike Smith, who had been chair of the CYI in the late 1980s and would later become Chief of Kwanlin Dün First Nation in 2003.

By 1999, three Yukon First Nations (Little Salmon/Carmacks First Nation, Selkirk First Nation, and Tr'ondëk Hwëch'in First Nation) in addition to the original four, had completed individual Final Agreements. By the time Beaudoin's team was ready to restart negotiations in 1999, government negotiators felt they had completed enough of the other claims to begin focusing on the Kwanlin Dün. Rather than building on the work that the previous Kwanlin Dün negotiating team had accomplished during the mid 1990s, Beaudoin's team wanted to restart negotiations from scratch. To speed up the process, his

⁵¹ The Northern Native Broadcasting, Yukon (NNBY), provides radio (CHON-FM 98.1) and television (NEDAA) programming on issues affecting Indians living in the Yukon. The NNBY is owned and operated by the fourteen Yukon First Nations.

team identified a number of crucial issues that the three negotiating parties had to resolve before a treaty could be completed. These issues were: the inclusion of waterfront lands in Whitehorse as Settlement Lands, clarification of the First Nation's self-government powers in the city (i.e. land use planning), property taxation exemptions (because all land transferred under a treaty would immediately become taxable and would probably bankrupt Kwanlin Dün), and the development of more robust economic measures (because Kwanlin Dün lands had limited fish, wildlife, and resource opportunities to generate economic development) (Beaudoin, 2006; Brown, 2006; Flynn, 2006; Koepke, 2006; King, 2006).

Although negotiators made decent progress during the first year of negotiations with Beaudoin's team, two events helped negotiations move forward. The first was the appointment of Bob Nault (August 1999 to December 2003) as Minister of Indian and Northern Affairs Canada. In April 2000, Nault announced that the federal mandate to negotiate with the remaining Yukon First Nations would end on 31 March 2002 unless each of the tables could come to a memorandum of understanding to continue negotiations past the deadline (Tobin, 4 April 2000). Kwanlin Dün leaders and negotiators embraced the deadline as an opportunity to create pressure on themselves and on their government counterparts to complete a treaty.

The second event was the election of a progressive Whitehorse municipal council, led by Ernie Bourassa, mayor from 2000 to 2006. Throughout the course of Kwanlin Dün's negotiations, the City of Whitehorse had virtually no role in the negotiations. Although the city was allowed to send occasional representatives to observe negotiation sessions, it did not formally participate in negotiations. Rather, it was forced to rely on the territorial government to represent its interests (Armour, 2006; Bourassa, 2006; Flynn,

2006; McCullough, 2006; Stockdale, 2006). The city, however, still had an important influence on YTG because a majority of the territory's population lived in Whitehorse. Indeed, the city was very important once negotiations were close to completion. One of the key issues for Kwanlin Dün leaders and negotiators was the inclusion of waterfront property as part of its Settlement Lands. Historically, as described earlier in the chapter, Kwanlin Dün members had spent significant amounts of time living on the banks of the Yukon River in Whitehorse. Unfortunately, the only available waterfront land in the city was owned by the municipal government, which had purchased the former "Motorways trucking yard" property several years earlier. Previous city councils had been generally hostile to a Kwanlin Dün land claims agreement. However, the newly elected city council, led by Mayor Ernie Bourassa, was more receptive and was willing to dispose of the Motorways property as long as it was developed by the band to foster tourism. City officials liked Kwanlin Dün's plan to build a commercial office, a retail building, a restaurant, a small hotel, and a cultural centre on the Motorways property. Therefore, the city agreed to sell the Motorways property to the territorial government so that it could then include it in the Kwanlin Dün treaty (Armour, 2006; Bourassa, 2006; Stockdale, 2006; Tobin, 11 December 2002; Waddell, 18 June 2003).

A Final Agreement in Sight: 2002 to 2005

Several days before the 31 March 2002 deadline, Kwanlin Dün negotiators signed a memorandum of understanding (MOU) with their government counterparts, thus settling all of the major issues that the team had originally identified in 1999 (Beaudoin, 2006; Brown, 2006; Tobin, 1 April 2002). With a completed MOU in hand, the negotiators spent the next

year and half finalizing and initialing the documents that would make up the Kwanlin Dün treaty. These documents included the Final Agreement, the self-government agreement, the implementation plans, and the ancillary agreements (Kwanlin Dün Programs and Services Transfer Agreements, Financial Transfer Agreement and Kwanlin Dün Collateral Agreement).

In 2004, the Kwanlin Dün First Nation undertook an eight month ratification process beginning in March and ending with a referendum in November. The ratification vote involved two ballots, both of which had to be passed by a majority in order for the entire package to be ratified. Ballot one asked eligible beneficiaries aged 18 years and over: “do you approve of the Kwanlin Dün First Nation Final Agreement and the Memorandum Regarding Certain Financial and Other Arrangements?” Ballot two asked all eligible beneficiaries (18 and over) and all eligible members (18 and over) if they approved of the Kwanlin Dün First Nation self-government agreement, the dissolution of the Kwanlin Dün First Nation Band and the transferring of all its liabilities and assets to the Kwanlin Dün First Nation, the Kwanlin Dün First Nation Constitution, the Collateral Agreement, and the release of Kwanlin Dün’s interest in two portions of Lot 226, a piece of the Range Road and a piece of the Takhini Trailer Park (Ratification Committee, 2004: iii-v). The two ballots were necessary because the Kwanlin Dün Final Agreement only affected Kwanlin Dün beneficiaries (“traditional” members of Kwanlin Dün) while the other agreements (self-government, the constitution, collateral agreement, etc) affected both beneficiaries (see above) and band members (who could be beneficiaries or “come from aways”).

The results were as follows. On ballot one, 415 votes were cast out of a possible 468 (88.7% turnout). Of those 415 ballots, 254 voted yes (61.2%), 160 voted no (38.6%),

and one ballot was rejected (0.02%). On ballot two, two sets of ballots were counted separately. One set of ballots involved individuals who were beneficiaries and band members plus individuals who were beneficiaries but not band members. These were the same individuals who voted on ballot 1. Among these individuals, 414 votes were cast out of a possible 468 (88.5% turnout); 247 voted yes (59.7%), 161 voted no (38.8%), and 6 ballots were rejected (1.5%). The second set of ballots involved individuals who were beneficiaries and members plus individuals who were members but not beneficiaries. Among these individuals, 488 votes were cast out of a possible 563 (86.7% turnout); 292 voted yes (59.8%), 188 voted no (38.5%), and 8 ballots were rejected (1.6%). The “no” vote was relatively high, especially when compared to the Inuit ratification vote reported earlier in chapter 4. A possible explanation for the high “no” vote is presented below.

With a majority vote achieved on both ballots, the three negotiating parties formally signed the Kwanlin Dün treaty in a ceremony at Kwanlin Dün First Nation offices on 19 February 2005. At that signing ceremony, INAC Minister Andy Scott and Grand Chief Ed Schultz of the Council of Yukon First Nations agreed that “To have a first nation of indigenous people with ownership of and control over significant parcels of land inside and outside a municipal boundary – nonetheless a capital city – is unique” (Tobin, 21 February 2005). Highlights of the Kwanlin Dün First Nation treaty include:

- 647.5 square kilometres of Category “A” Settlement Land – Kwanlin Dün owns both the surface and sub-surface of these lands.
- 395.29 square kilometres of Category “B” Settlement Land – Kwanlin Dün First Nation owns only the surface of these lands.

- Lot 226, the Old Village is designated Category “A” Settlement Land but also keeps its Indian reserve status.
- Kwanlin Dün First Nation retains Aboriginal rights and titles to Category “A” and Category “B” Settlement Lands. It “cedes, releases, and surrenders” its rights and title to all Non-Settlement Lands and Fee Simple Settlement Land.
- 0.09 square kilometres of Fee Simple Settlement Land in Whitehorse
- \$46,974,502 in financial compensation over a period of 15 years, tax free, plus a one time payment of \$6,391,381 to adjust the Kwanlin Dün First Nation compensation amount listed in the UFA for inflation
- \$24,171,070 in loans to be repaid by Kwanlin Dün First Nation to the federal government over 15 years.
- Kwanlin Dün members continue to have access to Crown lands and can restrict access on Settlement Land subject to some exceptions.
- Government can expropriate Settlement Land for public purposes but must: i) try to avoid doing so as much as possible; ii) provide land or monetary compensation.
- Creation of Special Management Areas – Kusawa Park and Lewes Marsh Habitat Protection Area
- Joint Land Use Planning between Kwanlin Dün and the territorial government
- Heritage rights – specific provisions include money for a cultural centre, a waterfront heritage working group and plan, language and oral history promotion, and development of the Canyon City Historic Site.
- Water Management Rights

- Fish and Wildlife Rights
- Forest Resources Rights
- Rights to Non-Renewable Resources
- Taxation Rights – s. 87 of the *Indian Act* will no longer exempt Kwanlin Dün members with income associated with reserve lands from paying income taxes⁵²
- Taxation of Settlement Land – specific provisions – Kwanlin Dün Settlement Lands operate under a set of different rules in light of the high value of their land selections.
- Economic measures – specific provisions – in light of the lack of fish and wildlife on Kwanlin Dün lands, the First Nation enjoys much stronger economic developments rights than what are found in the other Yukon agreements.
- the right to negotiate a self-government agreement, which they did concurrently.
- Dispute Resolution process (Kwanlin Dün First Nation Final Agreement, 2004).

In general, the Kwanlin Dün Final Agreement is noteworthy on a number of fronts. First, although Kwanlin Dün received the smallest amount of Settlement Lands among the Yukon First Nations which concluded Agreements, its lands have the potential to be the most valuable by virtue of being located in the territorial capital. Second, chapter 21 of the treaty on taxation of Settlement Lands is quite different from other Yukon agreements in that it allows Kwanlin Dün Settlement Lands to remain tax free until the lands are developed or if certain time periods (usually between 15 to 20 years) are reached (Flynn, 2006; Kwanlin Dün First Nation Final Agreement, 2004: 345). Third, the economic

⁵² To clarify, Kwanlin Dün members who lived off-reserve lands were subject to taxation and had income tax deduced from non-Kwanlin Dün First Nation employers at source.

measures chapter gives the Kwanlin Dün government additional powers in light of the few fish and wildlife resources on its lands. These powers include a strategic economic development investment fund, the right to acquire up to a 25% interest in resource and energy products, control over quarry leases, a plan to increase the number of Aboriginal government employees on Kwanlin Dün lands, the first right to acquire certain lands if the government decides to dispose of them, and the first right to acquire commercial freshwater fishing licenses, commercial wilderness travel licenses, game farming licenses, fur farming licenses, and outfitting concessions, among other powers (Kwanlin Dün First Nation Final Agreement, 2004).

The Kaska Nations

Despite their cultural, linguistic, and historical ties, Liard First Nation and Ross River Dena Council negotiated at separate land claims tables until 1999. In 1987, members from these two communities and from the Kaska communities in Northern B.C. held their annual General Assembly at Campbell River along the Robert Campbell Highway in the Yukon Territory, where they decided to recognize and give birth to the Kaska Nation (Dick, 2006; Dixon, 2006; McMillan, 2006; Van Bibber, 2006). To give expression to their new identity as one Kaska Nation, they created Kaska Tribal Council in 1991 to conduct their treaty negotiations with the federal, territorial, and provincial governments. KTC's first and only Hereditary Chief thus far has been Hammond Dick and its only chief negotiator Dave Porter. Both men became the main land claims negotiators at the various Kaska tables in B.C. and the Yukon. Ideally, KTC wanted to negotiate one agreement for all of

the Kaska claims. The federal government, however, refused (Dick, 2006; McMillan, 2006; Porter, 2006; Raider, 2006; Walsh, 2006).

After the ratification of the UFA in 1993 and the completion of the first four individual final agreements in 1995, negotiations with Liard First Nation and Ross River Dena Council began in late 1995. However, much like Kwanlin Dün negotiations, Kaska negotiations moved very slowly as a result of the federal government's focus on those negotiations that it believed it could complete quickly. Government reluctance to negotiate with the Kaska stemmed from the Kaska's opposition to the UFA prior to the passing of federal settlement legislation in 1994, and the Kaska's insistence that the governments negotiate one Kaska deal at one table. In 1998, the federal government and the Kaska came to a compromise, agreeing to negotiate at one table for the Yukon Kaska First Nations, and at one table for the British Columbia Kaska First Nations. This change in federal position was probably the result of Bob Nault, who had just been appointed Minister of INAC in 1999; Nault was determined to conclude the Yukon claims as quickly as possible (Hanson, 2006; King, 2006).

The Kaska negotiators identified a number of key issues that needed to be addressed. The first was the transboundary issue, the result of the Kaska claiming lands in the southeastern part of the Yukon and in the northern part of British Columbia. A second issue was the UFA's taxation chapter, which would require the Kaska to surrender their tax exemption status once they signed a treaty. Third, the Kaska wanted a commercial right to trap rather than just a subsistence right. Fourth, their treaty could not result in the "cede, release, and surrender" of their Aboriginal title. Fifth, Kaska negotiators wanted all negotiation loans forgiven because the amount of money they had borrowed was almost

equal to the amount of financial compensation they were supposed to receive through their treaty. Finally, the Kaska wanted to re-negotiate the amount of land quantum they were supposed to receive under the UFA. The UFA stated that Liard First Nation was to receive 930 square miles of Category “A” Settlement Land and 900 square miles of Fee Simple and Category “B” Settlement Land. Ross River Dena Council was to receive 920 square miles of “A” land and 900 square miles of Fee Simple and Category “B” land. The Yukon Kaska, however, wanted title to all of their traditional lands, which amounted to approximately 19,000 square miles of land in the Yukon and in B.C. (Dick, 2006; Dixon, 2006; McMillan, 2006; Dennis Porter, 2006; Porter, 2006; Raider, 2006; Van Bibber, 2006; Walsh, 2006).

Negotiations with the Kaska progressed relatively quickly once the federal government accepted the idea of a “Kaska Nation.” In April 2000, as described previously, the federal government announced that its mandate to negotiate in the Yukon expired on 31 March 2002. In contrast to the Kwanlin Dün, the Kaska responded quite negatively. Indeed, they would later sue the federal government, arguing that the imposition of a two year deadline was a breach of the federal government’s duty to negotiate in good faith (Walsh, 2006).

A couple of days before the 31 March 2002 deadline, Kaska negotiator Dave Porter’s mother died. Out of respect for Dave Porter, the federal Minister extended the mandate of his negotiators until 21 June 2002. Late in the evening on that day, the federal, territorial, and Kaska negotiators were able to agree to a tentative deal. Several days later, the KTC negotiating team presented the offer to Liard First Nation and Ross River Dena Council community members in a meeting in Watson Lake. At that meeting, the tentative deal was forcefully rejected by community leaders, members, and especially the elders for

reasons described in greater detail below. One of the KTC officials suggested holding a referendum but this was also rejected. According to federal and territorial officials, their governments have never received a formal response from the Kaska regarding the tentative deal. However, government officials know from media reports and from informal conversations with Kaska leaders that the deal was rejected by the membership. As a result, negotiations were formally ended in June 2002 and the Kaska immediately began a series of court cases against the federal government over the Crown's refusal to negotiate in good faith.

Very little is known about the tentative deal that was negotiated by the Kaska and the governments in June 2002. All of the officials involved politely refused to give me a copy of that tentative deal. Anonymous government officials did mention that the deal was similar to all of the previously completed final agreements. News media reports seem to confirm this. A CBC online news report in August 2002 reported that the Kaska deal involved approximately 3800 square miles and \$75 million in compensation and economic development funds (CBC, 1 August 2002). These numbers are similar to what the Liard First Nation and the Ross River Dena Council were supposed to receive under the UFA (3650 square miles, \$40 million). Moreover, some officials indicated that the "cede, release, and surrender" provision was part of the tentative deal, as were the repayment of loans and the elimination of the *Indian Act* taxation exemption.

According to Kaska leaders and elders, the deal was rejected because it did not resolve the issues that the Kaska had raised in the early 1990s. Moreover, some Kaska informants maintained that the KTC negotiators had no right to agree to the tentative deal; by doing so, the negotiators had willfully ignored the wishes of community leaders, elders,

and members. Another leader claimed that the KTC officials have always been interested in negotiating because of the financial perks that they were receiving as negotiators.⁵³

Today, some Kaska leaders remain interested in reopening negotiations. However, the majority of community leaders and members seem reluctant to reopen negotiations even if the federal government was willing to renew its negotiating mandate. After their land claims negotiations ended in June 2002, for instance, the Kaska initiated a number of lawsuits against the federal government. Furthermore, they negotiated two bilateral forestry agreements with the territorial government to facilitate resource development in their traditional territories. These agreements, in essence, gave the Kaska a veto over the co-management of forest resources in their traditional territories. Although these agreements have since lapsed, the Kaska maintain that the principles on which they were negotiated – a Kaska veto on Kaska traditional lands – continue to exist. Territorial government officials, disagree, arguing that the veto died when the agreement lapsed. Current Liard First Nation leaders are very much interested in pursuing further bilateral agreements with the territorial government outside of the land claims process (McMillan, 2006; Dixon, 2006).

Explaining Divergent Outcomes

What explains the divergent outcomes of the Kwanlin Dün and the Kaska First Nations negotiations? The following section, as in the Labrador chapter, argues that four factors together determine whether a comprehensive land claims agreement will be

⁵³ According to several Kaska interviewees, KTC negotiators were very much enamoured with the “rich” lifestyle involved in comprehensive land claims negotiations. This included expensive meals and staying at fancy hotels.

obtained. These factors are: compatibility of goals, choice of tactics, Aboriginal group cohesion, and government perceptions of the Aboriginal group.

Compatibility of Goals

“Compatible goals” refers to the extent to which an Aboriginal group is willing to negotiate an agreement that is similar to federal and provincial/territorial goals. In particular, it refers to the willingness of the Aboriginal groups to accept a final agreement that operates within the political, economic, social and legal contexts of the Canadian federation. As mentioned in chapter 2 and reiterated in chapter 3, compatible goals matter because the federal and the sub-national governments enjoy a significant advantage over Aboriginal participants in comprehensive land claims negotiations. As such, an Aboriginal group will only be able to complete a treaty if it is willing to accept a final agreement that situates its administrative and self-governing institutions within the Canadian constitutional order.

Compatible versus incompatible goals were clearly important to the outcomes of the Kwanlin Dün and Kaska negotiations. First, Kwanlin Dün leaders and negotiators were willing to work within the terms of the UFA to negotiate a final agreement whereas Kaska leaders were not. Second, Kwanlin Dün leaders and negotiators were willing to share jurisdiction in Whitehorse and to accept a land quantum that was much less than the amount of land they had claimed in the past. Kaska leaders and community members, on the other hand, are generally opposed to the permanent sharing or surrendering of any their traditional lands.

A key driver of comprehensive land claims negotiations in the Yukon Territory was the federal government's desire to come to an agreement with *all* Yukon First Nations through some sort of collective process. As mentioned earlier in this chapter, one of the reasons why the Yukon First Nations' claims were the first to be accepted for active negotiations in 1975 was because of their willingness to work together with the federal government to negotiate a deal. This "one deal for all Yukon First Nations" approach has permeated negotiations since they began and came to fruition through the signing and ratification of the Umbrella Final Agreement (UFA) in 1993. For the federal and territorial governments, the UFA was a key step in Yukon land claims negotiations and is the only framework that can be used to negotiate individual final agreements (Koepke, 2006; Brown, 2006; Flynn, 2006; McCullough, 2006; Armour, 2006; Joe, 2006). In theoretical terms, the UFA is the only available framework for negotiating individual final agreements because of the "sunk costs" and "lock-in effects" that it has generated since 1993.⁵⁴ The federal and territorial governments are opposed to reopening the UFA because doing so would require renegotiating signed treaties. As such, the willingness of Aboriginal groups to work within the substantive framework of the UFA is a key factor in determining whether they can complete their final agreements.

Kwanlin Dün leaders have a long history of wanting to negotiate under some sort of Umbrella Agreement. In 1902, Jim Boss, a hereditary chief representing a variety of Indians from the Lake LaBerge area, submitted to the federal government a proposal to begin land claims negotiations (McClellan, 1987: 99). This proposal was the first known attempt in the Yukon by an Aboriginal group to pursue some sort of land claims treaty with

⁵⁴ For a discussion of sunk costs and lock-in effects, see Knill and Lenschow (2001: 201).

the federal government (Coates, 1991: 163). In 1973, the Yukon First Nations statement of intent, *Together Today for Our Children Tomorrow*, was drafted and presented to the federal government by a number of Aboriginal leaders, the most prominent of whom was Whitehorse Indian Band chief Elijah Smith (McClellan, 1987: 95-96).⁵⁵ During more contemporary times, Kwanlin Dün members, such as Judy Gingell, former Commissioner of the Yukon and also former chair of the Council for Yukon Indians, and Kwanlin Dün chiefs Pat Joe, Joe Jack, Rick O'Brien, and Mike Smith, have all been interested in negotiating a Final Agreement within the framework of the UFA. Tom Beaudoin, who has been land claims director for the Kwanlin Dün since 1999, says that there was never any talk of scrapping or working outside the UFA (Beaudoin, 2006). Successive chiefs, councillors, and members of his negotiating team believed that although the UFA was not ideal, it was the best option they had since there was no alternative to it. Moreover, they felt that there was enough flexibility in the UFA to negotiate a Final Agreement that would meet the particular needs of the Kwanlin Dün. For instance, the key issues of waterfront lands, self-government powers in Whitehorse, property taxation, and stronger economic powers, were all capable of being addressed within the UFA in a way that satisfied Kwanlin Dün leaders and negotiators. Moreover, although the band's land quantum was among the smallest among the Yukon First Nations, the amount was acceptable since its lands were located in Whitehorse, making them potentially the most valuable lands in the territory (Beaudoin, 2006; Brown, 2006).

⁵⁵ Even in death, Elijah Smith remains a respected and influential figure among Yukon First Nations. Indeed, one Liard First Nation elder, who is a staunch opponent of land claims, says that if Elijah Smith were alive today, the Kaska would have probably signed a final agreement by now.

The Kaska, on the other hand, have been much more hostile towards the UFA.⁵⁶ In general, Kaska leaders and community members believe that the UFA has failed to address the issues that are unique and are of utmost importance to them. In particular, they take issue with the fact that chapter 25 of the UFA gives the territorial government a veto over negotiations that involve transboundary issues. They are also opposed to chapter 20.6 which states that the tax exemption provisions in the *Indian Act* no longer apply once a final agreement is completed. Chapter 16, regarding the right to trap, is in their view insufficient because it allows signatory members to only trap for subsistence; the Kaska believe that they have a right to trap for commercial purposes. They are also opposed to the “cede, release, and surrender” clauses in chapters 4 and 5, the repayment of comprehensive land claim negotiation loans, and the amount of land quantum they are supposed to receive under the UFA (McMillan, 2006; Dennis Porter, 2006; Dave Porter, 2006; Raider, 2006; Van Bibber 2006; Walsh, 2006).

These final two issues are particular sore points for Kaska leaders and band members. In terms of the first issue, the amount of money that the federal government has loaned to the Kaska for land claims negotiations will soon match the amount of compensation monies that they were supposed to receive in a Final Agreement. This situation means that even if Kaska negotiators and leaders were able to complete a treaty, they would face a shortage in financial resources to successfully engage in economic development, the provision of services, and the construction of community projects,

⁵⁶ The exceptions to this rule are Dave Porter, Kaska chief negotiator and to a lesser extent, Hammond Dick, Kaska Tribal Leader Chief. Indeed, observers from all three parties have mentioned that Porter is very much interested in negotiating a deal through the Umbrella Agreement. However, the rest of the Kaska leadership and band members are much more reluctant and suspicious of the Umbrella Agreement.

infrastructure, and housing (Dixon, 2006; Porter, 2006; Sterriah, 2006; Walsh, 2006). The second issue of land quantum is clearly the most important among the majority of Kaska members. Having spoken to a number of community members, leaders, and elders in Ross River and Liard First Nation, I conclude that guaranteed ownership of a substantial percentage of their traditional lands is needed before Kaska members will agree to any deal. According to Steve Walsh (2006), Kaska Nation lawyer and honorary member, the Umbrella Agreement simply does not offer enough land, especially in light of what other Aboriginal groups across Canada have received. For instance, the federal government offered 14 square miles per person in the Inuvialuit Agreement; it offered the Deh Cho 7 square miles per person, while the Yukon First Nations got 2 square miles per person (Walsh, 2006). According to Norman Sterriah (2006), former chief of Ross River and a land claims negotiator, the Kaska must have control over the majority of their traditional territories, including the valuable mineral and forest resources. Liard First Nation elder Eileen Van Bibber (2006) argues that all of the Kaska's traditional lands are important. The Kaska are one of the most traditional groups in the Yukon, with many community members spending significant amounts of time out on the land. In Van Bibber's view, the UFA does not provide enough land to match the cultural needs of the Kaska. According to Van Bibber and a number of other Kaska elders, the land offered by the federal government could be traversed in a day by dogsled, an amount which is simply unacceptable in light of the cultural needs of the Kaska.

Kaska concerns with the UFA are not limited to its contents. Leaders, members, and the negotiators also challenge the validity of its ratification, arguing that it was never properly ratified according to UFA provisions (Porter 2006; Raider, 2006; Sterriah, 2006;

Walsh 2006). Chapter 2.2.8 of the Umbrella Agreement reads: “The parties to the Umbrella Final Agreement shall negotiate the processes for ratification of the Umbrella Final Agreement and the ratification of those processes shall be sought at the same time as ratification of the Umbrella Final Agreement.” According to Kaska informants, however, this ratification process was never followed. Rather, on 31 March 1993, the Council of Yukon Indians held its usual quarterly board meeting and at that meeting, the representatives of the various Yukon First Nations passed a motion to ratify the Umbrella Final Agreement. At that meeting, the representatives from Ross River and Liard First Nation protested the ratification process and voted against ratification; however, the motion carried. The position of the Kaska, therefore, is that since proper procedures for ratifying the UFA were never carried out, and since the Kaska voted no to ratification, the UFA does not apply to them (Dick, 2006; Raider, 2006; Walsh, 2006; Porter, 2006). According to several Aboriginal and government officials who were involved in the negotiation and ratification of the Umbrella Final Agreement, Yukon First Nation leaders were not concerned about the UFA’s ratification procedure since they thought all of the Yukon First Nations would eventually sign Final Agreements anyway, making the issue moot.⁵⁷ The Kaska reject the UFA and have been demanding a new negotiating process that allows them to negotiate a Final Agreement that substantially deviates from the UFA. The federal and the territorial governments, however, have refused to negotiate under any other framework.

⁵⁷ According to one anonymous source, the federal government may have known that the ratification process was not undertaken correctly. The evidence for this is a memo that the source thinks informs federal government officials that the UFA ratification was not done properly. This memo apparently was filed by a government lawyer prior to the passage of the federal legislation enacting the Umbrella Agreement in 1994.

Another example of the role that compatible goals versus incompatible goals plays relates to the willingness of Kwanlin Dün and Kaska leaders, negotiators, and community members to share permanent jurisdiction over some of their lands with the federal, territorial, and municipal governments. One of the reasons why Kwanlin Dün negotiations took so long was because its proposed settlement lands were located within the municipal boundaries of Whitehorse. There was tension between Kwanlin Dün interests, on the one hand, and city interests, on the other. City officials were very much concerned about the possibility of a patchwork of Kwanlin Dün and municipal by-laws operating within municipal boundaries. Some non-Aboriginal Whitehorse residents were apprehensive about being subject to Kwanlin Dün laws and Kwanlin Dün law enforcement officers. In response to these concerns, Kwanlin Dün negotiators agreed to adopt territorial and city laws of general application on their settlement lands within the municipal boundaries of Whitehorse. Moreover, they agreed to allow city officials to enforce those laws. The negotiating parties also cooperated with regard to zoning, planning, and land use regulations. For land use designations, for instance, the parties agreed to negotiate jointly designations for each parcel of settlement land (approximately 80 parcels) that came into contact with municipal property. If Kwanlin Dün owned a parcel of land that was located next to a city residential parcel, then the parties could agree to designate the Kwanlin Dün parcel as “residential.” Therefore, Kwanlin Dün could do what it pleased with the parcel as long as the use of the land fit into the broad category of “residential.” (Flynn, 2006; Kwanlin Dün First National Final Agreement, 2004: Chapter 11).

In short, Kwanlin Dün negotiations were facilitated by the willingness of its leaders and negotiators to negotiate an agreement that was compatible with government goals.

Further evidence of the importance of compatible goals is clear in the willingness of Kwanlin Dün negotiators to accept the 1036 square kilometers of land quantum listed in the UFA (Kwanlin Dün First Nation Final Agreement, 2004: 100). According to government and First Nation participants in the negotiations, there was never any mention of renegotiating this amount. There was also never any discussion of asserting Kwanlin Dün First Nation sovereignty or renegotiating the certainty/surrender provisions outlined in the UFA (Beaudoin, 2006; Brown, 2006; Koepke, 2006)

Contrast these views and experiences with the Kaska. Kaska leaders and community members in Liard First Nation and especially in Ross River have very strong feelings about Kaska sovereignty and Kaska nationhood (Bi-Lateral Agreement Between the Kaska and the Yukon Government, 2003; Tobin, 16 January 2003). Hammond Dick (2006), Kaska Tribal Council Chief, has stated that “cede, release, and surrender” of their traditional lands is not an option and is a major barrier to negotiations proceeding. He argues that it is unfair that the Kaska must adopt this clause when the bands in British Columbia do not have to do so. According to Eileen Van Bibber (2006), an influential Kaska elder, in 1973 the Kaska originally asked for 19,000 square miles of land. When the Yukon First Nations leaders returned from Ottawa, they brought back an offer of 16,000 square miles to be shared among *all* of the Yukon First Nations. For her, nothing short of a substantial amount of their original demand of 19,000 square miles will be acceptable for the completion of their land claim. Others, such as Kaska lawyer Steve Walsh (2006), Chief Liard McMillan (2006), and former Chief Norman Sterriah (2006), agree that nothing short of formal recognition of their title to most, if not all of their traditional lands, will be

acceptable. The Kaska's strong opposition to surrender is confirmed by federal and territorial officials (Armour, 2006; Hanson, 2006; Koepke, 2006; McCullough, 2006).

This is not to say that the Kaska are completely unwilling to share their lands and their jurisdictions with the federal and territorial governments. In the past, they have been willing to temporarily share their traditional lands with the territorial government for the purposes of economic development. However, the Kaska have made it clear that their consent is needed for any developments on their lands; they maintain sovereignty over all of their lands until a land claims agreement is negotiated (Dave Porter, 2006; Walsh, 2006; Sterriah, 2006). For instance, in May 2003, the Kaska and the Yukon government negotiated a bilateral agreement separate from land claims negotiations that allowed the territorial government to undertake economic development on Kaska lands for a two year period (Barichello, 2006). The preamble of this bilateral agreement states that "whereas: Yukon acknowledged, in agreements entered into with the Kaska in January 1997, that the Kaska have Aboriginal rights, titles and interest in and to the Kaska Traditional Territory in the Yukon" (Bi-Lateral Agreement, 2003: 1). Section 3 of this agreement, entitled "Kaska Consent," states that any dispositions of interests in lands or resources in Kaska Traditional Territory cannot be given "without consulting and obtaining the consent of the Kaska." (Bi-Lateral Agreement, 2003: 4). The point here is that the Kaska are willing to share jurisdiction of their land but only on a temporary basis; a final agreement must recognize their Aboriginal title, not extinguish it. They maintain this position because of their experiences in the past where the federal and territorial governments engaged in development on their lands (like the mine in Faro) without their consent.

Tactics

In addition to compatible goals, the choice of tactics during negotiations affects whether a land claim will be completed. In essence, those groups that focus on negotiations tend to complete land claims agreements. Those groups that mix negotiating with confrontational tactics such as protests and litigation tend not to complete land claims agreements. Moreover, the frequency with which the Kwanlin Dün and the Kaska negotiators engaged in community consultations also mattered.

The Kwanlin Dün First Nation has a long history of focusing on negotiations, from Jim Boss in 1902 until the present. It has rarely used confrontational tactics especially since Tom Beaudoin's team took over the land claims department in 1999 (Beaudoin, 2006; Brown, 2006; King, 2006; Hanson, 2006). The only litigation that the Kwanlin Dün First Nation has engaged in since 1973 was the court case over whether Lot 226, the Old Village, qualified as an Indian reserve. This court case, however, was completely separate from land claims negotiations and had no impact on negotiations (Flynn, 2006; McCullough, 2006; Armour, 2006; Beaudoin, 2006; King, 2006). Indeed, according to a number of anonymous interviewees, the Kwanlin Dün sued the government over Lot 226 only because it was counseled to do so by a lawyer who has a reputation for advocating litigation.

The Kwanlin Dün First Nation did hold some protests during its negotiations, but this was prior to 1999 under a different lands claims director. Moreover, according to a former employee, under that director, the protests were more like "celebrations." The idea was to invite community members from Kwanlin Dün and Whitehorse to a fish fry or barbecue on lands that Kwanlin Dün was interested in including in its treaty. Kwanlin Dün "protests" were basically informational campaigns designed to create positive feelings

among Whitehorse citizens towards Kwanlin Dün land claims. They were not the type of protests that the Innu in Labrador, for instance, have undertaken.

The Kaska, on the other hand, have used a mix of negotiations and litigation. Dave Porter, their chief negotiator, has always been interested in negotiating a land claim. At the same time, however, the Kaska have a long history of suing the federal government over land claims-related issues. Since 1986, they have sued the federal government eight times (see for instance Small, 21 June 2002; Whitehorse Daily Star Staff Writers, 12 April 2001; Tobin, 10 April 2003; Tobin, 14 January 2003; O’Grady, 18 August 2005).⁵⁸ One of the many cases they have against the federal government has to do with the 1870 British “Order in Council Transferring Rupert’s Land and the North-Western Territories to Canada.” This order formally brought the Yukon Territory into the Canadian federation. Of particular note is Schedule A, which was a letter “from the Senate and House of Commons of the Dominion of Canada” to the Queen of England. Schedule A states “And furthermore, that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines” (Cameron and Gomme, 1991: 35). In essence, Schedule A of the 1870 Order commits the federal government to use equitable principles to consider, settle, and compensate Yukon

⁵⁸ The following is a list of Kaska litigation against the federal, provincial, and territorial governments regarding their land claims. In brackets is the current status of each court case as of November 2006: i) Stone et al v. Her Majesty the Queen ("HMQ") Federal Court No. T-2828-86 (in abeyance since the fall of '03); ii) Kaska Dena Council ("KDC") v. HMQ, FC No. T-1209-99 (in abeyance since the fall of '03); iii) Ross River Dena Council ("RRDC") and Liard First Nation v. HMQ FC No. T-1749-99 (ongoing); iv) KDC v. HMQ FC No. T-138-01, (in abeyance since the fall of '03); v) KDC v. British Columbia BCSC No. L043150 (awaiting judgment); vi) RRDC v HMQ Supreme Court of Yukon ("SCY") No.05-A0043 (ongoing); vii) KDC v. HMQ, BCSC No. S-061757 (ongoing); viii) RRDC v. HMQ, SCY No. 06-A009 (ongoing);

First Nations for any lands the government uses for settlement. The Kaska have read this schedule to mean that the federal government must not only negotiate with them in good faith using equitable principles, but they must also provide compensation to the Kaska for any use of their traditional lands. In particular, the Kaska want the federal government to pay them monetary compensation for what they see as illegal mining and forestry activities on their lands since 1870 (Porter, 2006; Sterriah, 2006; Walsh, 2006).

Other litigation has argued that the federal government has breached its duty to negotiate in good faith when it imposed the 31 March 2002 deadline on land claims negotiations in the Yukon. The Kaska lawyer argues that the 1870 Order is the only constitutional document in Canada that requires the federal government to sign treaties with the First Nations before their lands can be settled and developed. The Kaska have also sued the federal government over the illegal ratification of the UFA (Walsh, 2006). The constant stream of Kaska litigation has greatly hampered negotiations by fostering negative relations between negotiators and leaders and confusing band members who see their negotiators negotiating a treaty but also litigating on and off at the same time.

In contrast to the Labrador cases, one tactical difference that emerged in the Yukon cases was the frequency with which the two Yukon groups undertook community consultations. Prior to 1999, the Kwanlin Dün First Nation land claims team held negotiations in Kwanlin Dün government offices, opening them up to any band members who wished to attend. Moreover, the land claims department held frequent consultations with community members on the progress of its negotiations. According to a number of those who participated in negotiations during this time period, negotiations tended to proceed slowly, as a direct result of community participation. Holding negotiations in

Kwanlin Dün government offices and inviting community members to attend negotiation sessions created a lot of distractions for the negotiating teams. In 1997, the Kwanlin Dün land claims department was closed down due to political infighting. After the election of Chief Rick O'Brien in March 1999, the department was reopened with Tom Beaudoin as head of the land claims department. One of the first things that Beaudoin did was reduce the number of community consultation exercises. More importantly, he moved the site of negotiations from Kwanlin Dün offices to territorial government offices in Whitehorse. The idea was to reduce the distractions that the previous negotiators had faced when negotiations were held in Kwanlin Dün government offices (Beaudoin, 2006). According to Kwanlin Dün and territorial officials, holding negotiations in Yukon territorial offices had a positive effect on the speed and direction of Kwanlin Dün Final Agreement negotiations (Beaudoin, 2006; Flynn, 2006; McCullough, 2006; Armour, 2006; Brown, 2006; King, 2006). Kwanlin Dün's successful decision to limit consultations during negotiations can be explained by the difficulty of negotiating when mass input is required (see Lustig, 1994). This is not to say that community consultations did not occur. In fact, during the Kwanlin Dün Final Agreement ratification process, the land claims department undertook a massive information campaign, distributing information leaflets, holding community meetings, doing radio interviews, and engaging in other informational activities. The First Nation also took more time to ratify the Agreement to ensure that the membership fully understood its provisions (Beaudoin, 2006; Brown, 2006; Tobin, 11 May 2004). The point here is that the land claims department limited community involvement and the distribution of information until the ratification period started. Adopting this strategy allowed the Kwanlin Dün to negotiate a deal relatively free from distractions. Moreover,

increasing the time period and the level of community involvement during the ratification process allowed Kwanlin Dün leaders to build enough support to ratify the treaty (Beaudoin, 2006; Brown, 2006).

The Kaska, on the other hand, have always had and still maintain substantial community involvement in negotiations. According to former Liard First Nation Chief Ann Maje Raider (2006), and others (Dick, 2006; Dennis Porter, 2006; Sterriah, 2006; Van Bibber, 2006), Kaska members are very vocal about being at the table during negotiations. There is a strong feeling among the grassroots that Kaska leaders cannot agree to anything unless they have a clear mandate from the membership and have a substantial number of grassroots members in attendance at negotiation meetings. Moreover, public meetings are always well attended, although some members, especially the elders, have difficulty understanding key issues and concepts. For instance, many Kaska elders and members tend to link “cede, release, and surrender” to monetary compensation; in other words, they believe that a land claim is simply an exchange of their lands for money (Dick, 2006; Dixon, 2006; Dennis Porter, 2006; Van Bibber, 2006).

In many ways, these Kaska elders and members are correct to think that treaties are basically an exchange of their traditional lands for money. Recall in chapter 2 where the historical treaties are described as instances in which Aboriginal groups “agreed” to cede ownership of their traditional lands in exchange for monies and goods in perpetuity. Moreover, members from other Yukon groups have told Kaska citizens that CLC treaties are essentially “lands for cash” agreements that bring little to no improvement to the lives of their Aboriginal signatories.

According to territorial officials (Armour, 2006; McCullough, 2006), when negotiations are held in Ross River or Watson Lake, sometimes meetings end up addressing issues that have nothing to do with land claims. For instance, during negotiation sessions in Ross River, some Kaska members have asked questions that relate to their immediate social, economic, and political problems. At one meeting on fish and wildlife, a Kaska member asked a question about his current problems with housing. For the Kaska, their tradition of intense public involvement has tended to hinder land claims negotiations.

It is unclear whether “community consultation” is a key component of the tactics factor. The Innu and the Inuit case studies in Labrador did not indicate that “community consultations” was an important aspect of tactics that affected their outcomes. Rather, in all four case studies, the key aspect of tactics was the degree to which the Aboriginal group minimized or maximized the use of confrontational strategies. The Inuit and the Kwanlin Dün minimized their use of confrontational tactics and were able to complete their agreements. The Innu and the Kaska nations, on the other hand, made sustained use of confrontational tactics and were unable to complete their agreements. Although it is useful to be aware of “community consultations” as part of the tactics factor (and indeed something that Aboriginal leaders can use to affect negotiations), the real explanatory weight of the tactics factor lies in the “frequency of use of confrontational tactics.”

Internal Cohesion

Much like the Labrador cases, internal cohesion was a factor for the Yukon cases. Similarly, internal cohesion dynamics for the Kwanlin Dün and the Kaska were affected by their historical interactions with federal and territorial agencies (mutual influence). Internal

cohesion affected Kwanlin Dün and Kaska land claims negotiations in two ways. First, the way in which the two groups dealt with the dynamics of internal group competition affected the way that their respective negotiation paths progressed. Second, although both groups suffered from significant internal social, economic, and political problems, they differed in how they addressed them in terms of their impact on their comprehensive land claims negotiations.

One of the reasons why the Kwanlin Dün was one of the last groups to complete a deal was the internal dynamics of the First Nation. Historically, as described earlier in the chapter, the Kwanlin Dün First Nation was the Whitehorse Indian Band, created by Indian and Northern Affairs Canada in 1956 (Whitehorse Daily Star Staff Writers, 15 January 1998). As such, the Whitehorse Indian Band was in fact an amalgam of traditional Kwanlin Dün and Ta'an Kwäch'än peoples, as well as any status Indians who had decided to relocate and live in Whitehorse. These "come from aways" were not traditional members of the Whitehorse Indian Band, but were considered band members for the purposes of delivering Indian Affairs programs and services (INAC, 2005; Koepke, 2006; Beaudoin, 2006; Brown, 2006).

As a result of this diversity, created by the federal government, comprehensive land claims negotiations have always been complex for the Kwanlin Dün. The traditional members from Kwanlin Dün generally have different interests and traditions than the members from Ta'an Kwäch'än, despite several decades of living together under the Whitehorse Indian Band designation. More importantly, "come from aways" have traditionally had little interest in the band's comprehensive land claims negotiations

because many of them are beneficiaries of other Yukon First Nations.⁵⁹ These divisions made it difficult for the Kwanlin Dün's land claims department prior to Tom Beaudoin, to present clear and representative positions at the negotiating table. Prospects for completing a final agreement improved in mid 1993 when the Ta'an Kwäch'än and the Kwanlin Dün First Nations were listed as separate First Nation signatories to the Umbrella Final Agreement. In 1998, the Ta'an Kwäch'än First Nation formally separated from the Kwanlin Dün under a ministerial order by then-Indian Affairs minister Jane Stewart (Whitehorse Daily Star Staff Writers, 23 January, 1998; Northern Native Broadcasting Yukon, 1998). By removing Ta'an Kwäch'än members from the Kwanlin Dün table, Kwanlin Dün officials now only had to deal with the "come from aways" who were largely indifferent to whether Kwanlin Dün completed a deal. As a result, the prospects for completing a Kwanlin Dün treaty dramatically improved.

The Kaska, on the other hand, took the opposite approach. At the outset of negotiations, Liard First Nation and Ross River Dena Council negotiated separately. That situation changed after 1987. In that year, the Kaska communities of Ross River (Yukon Territory), Liard First Nation (Yukon Territory), Dease River First Nation (British Columbia), Lower Post First Nation (British Columbia), and Fort Ware Band (British Columbia), gathered at Campbell River in between Ross River and Watson Lake in the Yukon Territory to form the Kaska Nation. The governing body of the Kaska Nation was the Kaska Tribal Council (KTC), a not-for-profit organization and B.C.-

⁵⁹ To clarify, an Aboriginal person can be a beneficiary of one First Nation, and a member of another. In practical terms, only beneficiaries can vote on and benefit from a CLC agreement.

registered society that served as a de facto government representing all Kaska at the negotiating table (Dick, 2006; McMillan, 2006; Van Bibber, 2006).

Negotiating at one table has proved to be a problematic strategy for the Kaska. The federal and territorial governments have refused to negotiate one deal for the Kaska Nation. As well, each community has different interests in completing a treaty. At different times, some groups have been more interested; at other times, they have lost interest (Armour, 2006; Barichello, 2006). Tim Koepke (2006), chief federal negotiator, agrees that the one Kaska Nation approach has sometimes made it difficult to get a deal done. It is unclear to government negotiators which communities are being represented at the table, and which are not. It is unclear which communities support certain provisions, and which do not. Moreover, individual Kaska communities seem to have mixed feelings about the Kaska Tribal Council; sometimes, a community will demand individual consultation on certain negotiation issues, whereas at other times it will defer to KTC. From 1995-1998, for instance, Liard First Nation informally pulled away from KTC to undertake its own land claims negotiations with the two governments (Sterriah, 2006). The band adopted this strategy on the advice of an external negotiator who recommended that the band negotiate on its own, separate from KTC. When this negotiator left Liard First Nation, and the federal and territorial governments agreed to negotiate a deal with KTC at two tables (one for the Yukon and one for B.C.), Liard First Nation returned to the KTC umbrella.

Two other aspects of internal cohesion, community social problems and political infighting, affected negotiations. In general, both Aboriginal groups suffer from substance abuse and unemployment problems. However, the Kaska face more significant problems than the Kwanlin Dün, probably because Kwanlin Dün members have access to greater

economic opportunities in Whitehorse.⁶⁰ According to the “Community Wellbeing Index” generated by Indian and Northern Affairs Canada's Research and Analysis Directorate, both Kaska Nations were among the poorest among Yukon First Nations in terms of income, education, labour force activity, and housing conditions (INAC, 2007). Interviewees confirmed these findings. Former Yukon Premier Tony Penikett (2006) mentioned that the Kaska suffer from severe poverty and rampant substance abuse, and rely heavily on a subsistence economy. Norman Barichello (2006), a land claims negotiator who worked for the Kaska, describes Ross River as having a notorious reputation both inside and outside the community for significant alcohol and drug abuse problems. Former Ross River chief and land claims negotiator, Norman Sterriah (2006), agrees that both Yukon Kaska communities but especially Ross River, suffer from significant social and economic problems. Others, like former federal regional director of INAC in the Yukon, Elizabeth Hanson (2006), Yukon government officials Karyn Armour (2006) and Lesley McCullough (2006), Kaska Tribal Council Chief Hammond Dick (2006), Liard First Nation Chief Liard McMillan (2006), and Kaska negotiator Steve Walsh (2006) all confirm that the Kaska suffer from greater social and economic problems than the Kwanlin Dün (see also Tobin, 17 March 2004). These problems have distracted the Kaska from maintaining focus on land claims negotiations. According to Yukon government officials, meetings held in Ross River to discuss land claims issues had a tendency to shift from land claims discussions to

⁶⁰ I think that the Kaska, especially those in Ross River, are also struggling with more severe economic and social problems because of the mine in nearby Faro, which opened during the 1960s. This mine brought the Kaska in Ross River into sustained contact with non-Aboriginal peoples for the first time and introduced a permanent and easily accessible supply of alcohol and drugs to the community. Compared to Liard First Nation, Ross River is clearly having a harder time with social and economic problems stemming mainly from significant alcohol and drug abuse. These socio-economic problems, therefore, are partly the result of state development and mutual influence effects.

proposals for addressing the social and economic problems of the community (Armour, 2006; McCullough, 2006). Current Ross River Chief Jack Caesar and Liard First Nation Chief Liard McMillan (2006) both were elected on platforms that stressed community healing and self-reliance as opposed to land claims negotiations. Previous chiefs like Norman Sterriah (2006) and Anne Raider (2006) also found themselves constantly trying to juggle land claims negotiations and non-land claims solutions to the significant social problems of both communities.

In addition to social and economic problems at the community level, both Aboriginal groups have a history of political infighting. Of the two, the Kwanlin Dün First Nation has had to deal with more intense rivalries and politicking for most of its history, especially from 1956 onwards after the creation of the Whitehorse Indian Band (Northern Native Broadcasting Yukon, 1998; Tobin, 9 March 1999). Infighting was at its highest during the 1980s and 1990s as political squabbles emerged along family lines. In 1985, three councillors tried to oust Chief Johnny Smith because of allegations of corruption regarding his administration of the band's development corporation, election fixing, and the appointment of band employees on the basis of family connections. In the late 1980s, Chief Ann Smith was accused of corruption due to the presence of illegal ballots. Her successor, Lena Johns, also faced allegations of corruption; Johns also had to deal with the defeat of her proposed band constitution and faced a divisive re-election campaign. In 1996, Joe Jack was elected chief of Kwanlin Dün and immediately fired Pat Joe from her job as land claims director. In response, Pat Joe allied with two band councillors to try to oust Joe Jack for illegally firing her (McNeely, 6 October 1998; Northern Native Broadcasting Yukon, 1996). This dispute evolved into a larger political struggle between

Pat Joe's minority faction and Chief Jack's majority faction on the council, paralyzing the First Nation. In 1997 the Bank of Nova Scotia informed the band that it would not be releasing any of the band's money to the council because it was unsure which faction had legitimate signing authority (Northern Native Broadcasting, Yukon, 1998; Parker, 27 January 1999). The dispute was eventually resolved with the election of Rick O'Brien as chief in March 1999 (Tobin, 23 March 1999).

Although both groups suffered from social and economic problems and political infighting, only the Kaska negotiations were hampered significantly by them. The fact that Kaska negotiations were the only ones hampered by these problems is surprising since the Kwanlin Dün have a long history of intense political dysfunction. The key difference between the divergent experiences for these two groups was leadership. Kaska leaders have historically been divided on whether to negotiate a land claims agreement. Kaska Tribal Council leaders like Chief negotiator Dave Porter and to a lesser extent, Kaska Tribal Council Chief Hammond Dick, have been interested in negotiating a deal. However, community leaders have been less enthusiastic. Dixon Lutz, the hereditary chief of Liard First Nation, has long been reluctant about a land claims deal (Van Bibber, 2006). Current chiefs Jack Caesar and Liard McMillan have both stated they are not interested in land claims negotiations. Many Kaska members have mentioned that elders have been the most vocal in opposing a land claims agreement. The opinions of Kaska elders are especially significant since the Kaska are one of the most traditional groups in the Yukon; they continue to venerate elders as their primary sources of knowledge, leadership, and influence.

Disagreement among leaders regarding land claims is best illustrated by an event in June 2002, when Dave Porter brought a tentative deal with the governments to a Kaska

community meeting in Watson Lake. At that meeting, Dave Porter and Hammond Dick tried to push the community to accept the deal, or at least put it up to a vote. Local leaders, community members, and most of the elders, however, were very much opposed to the deal and as a result, the deal was rejected without a vote being held (Barichello, 2006; McMillan, 2006; Porter, 2006; Sterriah, 2006; Van Bibber, 2006; Walsh, 2006).

In sum, internal cohesion with respect to whether leaders and community members want a deal can have a great effect on whether a land claims agreement is completed. Lack of internal cohesion on this issue indicates that leaders may be working at cross purposes, with community leaders (like band councillors and band chiefs) focusing on community problems outside of land claims negotiations, and Kaska Tribal Council leaders focusing on land claims as the solution to community problems. Disagreement effects are also felt at the negotiating table where government negotiators question whether Kaska negotiators have a mandate to negotiate. They also wonder which communities are opposed and which are supportive of certain negotiated provisions and positions.

Contrast these experiences with the Kwanlin Dün. As mentioned above, the Kwanlin Dün First Nation has a long history of political infighting, especially during the mid 1980s to the late 1990s with very little getting done. Despite these internal cohesion problems, the KDFN was able to complete its treaty for two reasons. First, the political infighting that plagued the First Nation in the 1980s and 1990s was not over whether to engage in land claims negotiations. Rather, the disputes were between certain families struggling for control over the band council. All of these leaders, however, supported land claims negotiations. As I mentioned earlier in this chapter and in previous chapters, the Kwanlin Dün has a long history of leaders who have supported negotiating a land claims

agreement. Second, the election of Rick O'Brien as Chief of Kwanlin Dün on 23 March 1999 was a turning point because he was able to bridge the rival factions. His campaign platform was to promote "unity among Kwanlin Dün members who've been divided by political differences over the last three years and longer." Moreover, he believed that "reigniting Kwanlin Dün's land claim negotiations is also of the utmost importance" (Tobin, 23 March 1999). Under his leadership, the political rivalries that had plagued the band were subdued. Chuck Tobin (18 February 2002), for instance, observed that "while the Whitehorse first nation has had its share of internal division in years gone by, O'Brien's first term has been without any visible strife among the membership." In addition to ending the political infighting, O'Brien revived Kwanlin Dün's land claims department by hiring a new director (Tom Beaudoin) to form a new negotiating team. He also gave the department a mandate and the necessary political support to actively negotiate a completed agreement (Beaudoin, 2006; Brown, 2006). Rick O'Brien was replaced by Mike Smith in 2003 (Small, 9 July 2003).

Government Perceptions of the Aboriginal groups

Government perceptions also had a role in determining the divergent outcomes that the Kaska and the Kwanlin Dün First Nations experienced in their negotiations. In general, federal and territorial officials have negative perceptions of the Kaska and more positive perceptions of the Kwanlin Dün. As in the above analysis on internal cohesion, leadership was important for helping the Kwanlin Dün establish positive government perceptions despite the group's history of political discord.

In general, government officials have doubts regarding whether the Kaska First Nations can be financially accountable. For instance, both Kaska communities have been at various times under remedial management (in which the federal government oversees the activities of the band council) due to their difficulties in managing their financial affairs (Koepke, 2006). Under former Chief Daniel Morris, Liard First Nation was investigated for illegally lending band money to band members, failing to maintain proper bookkeeping practices, and refusing to remit \$1.5 million in income taxes to the federal government (Brown, 10 October 2003; CBC, 19 April 2006; Tobin, 15 March 2005). Current Chief Liard McMillan, who succeeded Daniel Morris, has faced protests from community members who have charged that his administration is not transparent and accountable. In particular, he has been criticized for failing to hold regular band council meetings, for not giving full disclosure of the band's program spending, and for not informing members of the capital plans of a new corporation that the band created (CBC, 19 April 2006). At the same time, his band council has struggled with what it describes as a "significant cash-flow problem", which resulted in layoffs and cutbacks in March 2005. The Department of Indian and Northern Affairs closely monitored the situation to ensure that federal programs and services continued to be offered to Kaska community members (Tobin, 15 March 2005). The point here is that federal and territorial officials have concerns regarding the ability of the Kaska groups to govern under a final agreement.

In addition, as mentioned above, federal and territorial governments today are unsure as to whether the Kaska people are indeed interested in a deal (Armour, 2006; Flynn, 2006; Hanson, 2006; McArthur, 2006; McCullough, 2006). Although the Kaska negotiating team, led by Dave Porter, is very much interested in negotiating a deal, band

council leaders, elders, and community members seem to be reluctant to do so. Band council leaders have historically shown more interest in dealing with community level issues. Elders and community members, as time has moved forward, have become less and less interested in a land claims agreement. Once elders and members understood that a final agreement would lead to the extinguishment of their title, public opinion within the Kaska communities quickly shifted to passive opposition. Also influencing local leaders and members were the experiences of members from other Yukon First Nations that had completed Final Agreements. Most of the Kaska members I spoke to mentioned how these other members were telling them not to sign an agreement. The result is that federal and provincial officials are unsure of the Kaska's position on land claims because there seems to be disunity between Kaska Tribal Council leaders like Dave Porter and Hammond Dick, and local leaders like chiefs, band council members and elders.

Kwanlin Dün also initially suffered from negative government perceptions that stemmed from Kwanlin Dün's long history of political dysfunction, as discussed above (Beaudoin, 2006; King, 2006; Northern Native Broadcasting Yukon, 1996; Northern Native Broadcasting Yukon, 1997). Kwanlin Dün disputes have long been highly publicized and consistently reported in territorial newspapers and television newscasts (see for instance, McNeely, 6 October 1998; Northern Native Broadcasting Yukon, 1997; Parker, 25 January 1999; Tobin, 11 January 1999). These disputes sometimes spilled into federal jurisdiction, with various factions calling on the Minister of Indian and Northern Affairs to resolve their disputes. For instance, the dispute between Pat Joe and Joe Jack involved an appeal to Minister Jane Stewart in 1998 to step in and adjudicate their dispute (Northern Native Broadcasting Yukon, 1998).

Kwanlin Dün leaders realized that their disputes had a negative effect on how their First Nation was perceived by the federal and territorial governments. Chief Joe Jack in January 1999 observed that the Kwanlin Dün First Nation “can’t expect to be taken seriously as a government by other governments if it spends 99 per cent of its time fighting amongst each other” (Tobin, 11 January 1999). A key turning point for the Kwanlin Dün negotiations was the election of Rick O’Brien as Chief in March 1999. Under his leadership, the band council’s administration of its finances was transparent and the political infighting was subdued to the point that it was no longer reported in the media. O’Brien also revived land claims negotiations and established a new negotiating team led by Tom Beaudoin. According to federal and territorial negotiators, bureaucrats, and lawyers, the negotiating team of Tom Beaudoin, Lindsay Staples, Keith Brown, and Mike Smith was highly respected and motivated towards completing a land claims agreement. The combination of the calming effect of Rick O’Brien on Kwanlin Dün politics and the creation of a highly skilled and respected negotiating team did much to change government perceptions of Kwanlin Dün’s capacity to negotiate and later on run its own government under a Final Agreement (Armour, 2006; Beaudoin, 2006; Brown, 2006; Flynn, 2006; King, 2006; Koepke, 2006; McCullough, 2006; McArthur, 2006).

In terms of possible acculturation effect (those Aboriginal groups that are more westernized will be more likely to complete a CLC treaty), only a few interviewees mentioned that it mattered. Interviewees did recognize that the Kaska Nations were two of the most traditional Aboriginal groups in the Yukon Territory, with many members continuing to speak the Kaska language and regularly going out onto the land for extended periods of time. Kwanlin Dün members, on the other hand, were characterized as being

more integrated as a result of their history as the Whitehorse Indian Band and as a result of being located in Whitehorse. Furthermore, although elders are extremely important and prominent among the Kaska, they are less so among the Kwanlin Dün. In terms of the effect of acculturation on negotiations, a number of interviewees mentioned that negotiations in Kaska communities frequently relied on interpreters to communicate information to Kaska members. Others noted that the Kaska are very much wedded to a subsistence economy and have very little understanding of how a modern economy works. In contrast, there was no mention of Kwanlin Dün's need for interpreters or about Kwanlin Dün members not understanding how a modern economy works. Despite these observations, it is unclear to what extent acculturation variables affected the Kwanlin Dün and Kaska claims. I would still suggest, however, that acculturation did in some ways condition government perceptions of the two Aboriginal groups.

Trust Relationships

Trust relationships were present in both sets of negotiations but in different degrees. For the Kwanlin Dün, the negotiating team prior to Tom Beaudoin had a very negative relationship with federal and territorial officials. Some have described it as 'poisonous,' 'abusive' and 'mistrustful.' Very little was accomplished because of the posturing and politicking of the Kwanlin Dün team. In contrast, Tom Beaudoin's team was able to create a positive working relationship with government negotiators. All of the government officials that I spoke to mentioned that their relationship with Beaudoin and his team were positive, indicating that trust relationships had been built over the course of negotiations

from 1999-2005. These trust relationships helped the Kwanlin Dün First Nation quickly complete its treaty in a span of six years.

The Kaska, on the other hand, developed a love-hate relationship with government negotiators as a result of the influence of two different Kaska negotiators working on the same team. On the one hand, Kaska chief negotiator Dave Porter was able to build strong working relationships with federal and territorial negotiators. Government negotiators spoke highly of Dave Porter, commending his abilities as a skilled negotiator and for demonstrating a strong commitment to negotiating a deal. On the other hand, a number of anonymous interviewees mentioned that a different member of the Kaska negotiating team was a highly negative force with a strong preference towards litigation and highly contentious language and strategies during negotiations. The mention of this individual's name during interviews generally elicited negative reactions regarding his influence among the Kaska. Indeed, even federal, territorial, and Aboriginal interviewees outside of the Kaska process knew of this individual and his reputation for litigation and confrontation. According to one Aboriginal observer, this individual was someone a First Nation should approach only if it wanted to litigate. If a First Nation wanted to negotiate, then it should avoid this individual.

Regardless of these dynamics, in both cases trust relationships did have an effect on the speed of negotiations. The Kwanlin Dün team basically started from scratch in 1999 and was able to complete a deal by 2005. One reason why the deal was completed so quickly was the trust relationships built between Kwanlin Dün and government negotiators (Armour, 2006; Beaudoin, 2006; Brown, 2006; Flynn, 2006; Koepke, 2006; McCullough, 2006). For the Kaska, the trust relationship between government negotiators and Dave

Porter certainly helped negotiators complete a tentative deal in the summer of 2002. Indeed, this relationship helped cancel out the negative force exerted by one of the members of the Kaska negotiating team. Yet, the Kaska were unable to complete their treaty because they lacked internal cohesion and compatible goals between community level leaders and members and government officials. The Kaska experience confirms that trust relationships can affect the speed at which a deal is completed, but they do not determine whether a land claims deal will be completed.

Government and External Negotiators

“Government and external negotiator” effects were also not present in the Yukon claims. The federal government did hire an external negotiator, Tim Koepke, for all of the Yukon claims. However, by the time he began negotiating with the Kwanlin Dün and the Kaska in the mid 1990s, he was no longer an external negotiator because he had been negotiating for the federal government since the late 1980s. On the territorial side, the negotiators were all career bureaucrats either from within the land claims secretariat, or transferred to the secretariat from other government departments. Whereas in the Labrador claims particular mention was made of the positive effect of an external negotiator and certain government negotiators on the completion of the Inuit treaty, none of the Aboriginal interviewees made any special mention of government officials except to say that for the most part, government negotiators competently represented their governments’ interests during negotiations.

Competition for Use of Claimed Lands and Development Pressure

In Chapter 4, I cited Michael Whittington's argument that the first four Yukon claims were completed in 1995 partly because they were located in relatively remote areas of the territory and thus were subject to low land use competition. The level of land use competition also had an effect on the speed of negotiations for the Kwanlin Dün and the Kaska. For the Kwanlin Dün, the key complicating factor was that its claim involved lands located within the city of Whitehorse. Territorial officials mentioned that this was one of the main reasons why Kwanlin Dün's negotiations were left to the end (Armour, 2006; Flynn, 2006; McCullough, 2006). Once negotiations began, land selection, land use planning, and taxation negotiations were all very difficult (Armour, 2006; Beaudoin, 2006; Brown, 2006; Flynn, 2006; McCullough, 2006).

In terms of the Kaska, their traditional lands encompass some of the most mineral rich and thickly forested areas in the Yukon and most of these resource-rich areas have been licensed to third party interests. However, the key land issue complicating their negotiations is the transboundary issue. Not only do they claim approximately 25% of the Yukon Territory, but they also claim about 10% of northern British Columbia. Moreover, the Kaska now claim to be "one Kaska Nation" with member groups residing in the Yukon Territory and in northern British Columbia. These competition dynamics make it more likely that their claims will take longer to complete than others elsewhere.

Yet it was partly development pressures that accelerated both claims in the late 1990s. For the Kwanlin Dün, the city's acquisition of the Motorways waterfront property in the late 1990s and its desire to see those lands developed helped facilitate the transfer of those lands to the Kwanlin Dün to complete the treaty. At the time, city officials were in

the midst of creating an economic revitalization plan that centred on revitalizing the waterfront to attract tourism. The Kwanlin Dün First Nation was a potential obstacle to that plan, but also a potential facilitator depending on its plans for the lands. According to mayor Ernie Bourassa (2006), the Kwanlin Dün First Nation ended up being an ideal developer for the city's waterfront lands, since Kwanlin Dün's plan involved building a commercial office, a retail building, a restaurant, a small hotel, and a cultural centre on the Motorways property.

The deadline imposed by INAC Minister Nault was also the result of development pressures. As previously mentioned, negotiations in the Yukon had been the longest outstanding set of negotiations in Canada, dating back to the early 1970s. With most of the claims in the Yukon completed, and with most of the valuable natural resources located in Kaska lands, the deadline was a tool to facilitate development on those lands. The Kaska and the governments had negotiated a freeze on development on Kaska lands that was supposed to last only as long as negotiations. Some interviewees suggested that the deadline was a tool to expedite development, regardless of the outcome: completed treaties would facilitate development by defining what the Kaska had jurisdiction over, but failed treaty negotiations would also facilitate development since the agreement to freeze development on Kaska lands would expire.

Conclusion

This chapter confirms that four factors best explain the divergent outcomes that the Kwanlin Dün and the Kaska First Nations experienced. Specifically, compatible government-Aboriginal goals, choice of Aboriginal tactics, Aboriginal group cohesion, and

government perceptions of the Aboriginal group were all important factors in determining completion and non-completion. The ability of the groups to adopt the necessary goals and strategies to complete treaties was conditioned by their historical interactions with the Canadian state and particular attributes of their Aboriginal cultures. Specifically, government efforts to relocate and amalgamate the Kwanlin Dün First Nation with the Ta'an Kwäch'än First Nation and the "come from aways" in Whitehorse made it difficult for the Kwanlin Dün to forge internal cohesion and foster positive government perceptions. For the Kaska, the opening of a mine in Faro weakened the Kaska's internal cohesion. In terms of cultural effects, the Kwanlin Dün was less traditional and more integrated into western society than the Kaska, which in turn affected things like the compatibility of goals and perhaps government perceptions. In the end, the Kwanlin Dün First Nation was able to break away from these conditioning influences to choose the conjunction of factors described above that allows an Aboriginal group to complete a treaty. Crucial to the group's agency was Aboriginal leadership. In contrast, the Kaska were unable to break away from the historical legacies of their interactions with the Canadian State and the particular norms and values of their Aboriginal culture.

Chapter 6: To Negotiate a Treaty Or Not?

This dissertation's main argument is that in the presence of a conjunction of four factors (compatible goals with governments, minimal confrontational tactics, Aboriginal group cohesion, and positive government perceptions of the Aboriginal group), an Aboriginal group is highly likely to complete a comprehensive land claims agreement. In contrast, a different combination of factors (incompatible goals, a history of confrontational tactics, Aboriginal group division, and negative government perceptions of the Aboriginal group) will likely prevent an Aboriginal group from completing a modern treaty. The ability of Aboriginal groups to attain either conjunction of factors is conditioned by factors such as history, culture, and the power of the Canadian state. Yet Aboriginal groups can influence which conjunction of factors is present during negotiations as a result of the actions of particular leaders. Nonetheless, Aboriginal agency during negotiations remains circumscribed.

What follows in this chapter is a discussion of some of the broader implications of this dissertation's findings. The chapter begins by briefly discussing some of the limitations to this study. It then argues that the findings are nonetheless useful for explaining an important issue in Canadian politics. Next, the chapter describes how practitioners can use the findings of this dissertation to complete CLC treaties. Finally, it ends by discussing several normative implications before arguing that Aboriginal groups currently negotiating modern treaties should explore alternatives to the treaty process for achieving their goals.

Contributions and Limitations

This study does make an important contribution to the fields of Aboriginal and Canadian politics. In particular, it builds on the existing literature by confirming that institutions and government actors are important, but that we also need to take into account Aboriginal group factors when trying to explain CLC negotiation outcomes for the Innu, the Inuit, the Kaska, and the Kwanlin Dün. The dissertation also provides a theoretically- and empirically-grounded framework for studying other *similar* cases beyond these four. For instance, the Kwanlin Dün case is useful for studying Aboriginal groups that are negotiating treaties involving lands located in major municipalities. The Kaska and the Innu cases are relevant for examining Aboriginal groups that adhere to more traditional forms of governance and culture. The Labrador Inuit case is helpful for understanding other Inuit claims in Canada.

Beyond these particular types of cases, my findings are also helpful for building a larger research project that explores variation in outcomes for *all* Aboriginal groups currently participating in the comprehensive land claims process. The treaty process used in Newfoundland and Labrador, for instance, is similar to the one currently being used in British Columbia. Aboriginal groups in B.C. must submit acceptable statements of intent to the federal and provincial governments before negotiating framework agreements, agreements-in-principle, and final agreements. The groups need to borrow money from the federal government to negotiate, and they must ratify their agreements using referenda before their treaties can be legislated into operation. Furthermore, the types of actors involved in the B.C. process are basically the same as the ones in Labrador and in the Yukon Territory.

Another contribution of this project is that it provides an analytical framework that allows us to look at a set of CLC negotiations at any moment in time and assess the likelihood of completion. Doing so requires us to clarify the preferences and incentives of the negotiating actors and to determine the presence of compatible Aboriginal-government goals, Aboriginal use of confrontational tactics, Aboriginal group cohesion, and government perceptions of the Aboriginal group.

One limitation of this dissertation is that its analytical framework may have limited generalizability. I can only explain with any confidence the CLC negotiation outcomes for the Kwanlin Dün and the Kaska Nations in the Yukon Territory, and the Innu and the Inuit in Labrador.

A second limitation is that I cannot state with any precision the relative strength of each of the explanatory factors. According to George and Bennett (2005: 25),

A limitation of case studies is that they can make only tentative conclusions on *how much* gradations of a particular variable affect the outcome in a particular case or how much they generally contribute to the outcomes in a class or type of classes [C]ase studies remain much stronger at assessing *whether* and *how* a variable mattered to the outcome than at assessing *how much* it mattered.

In light of these considerations, the most that this study can do is to identify those factors that mattered and to explain how they mattered for four cases.

A third limitation is that I use a binary measure of “yes/no” for determining the presence of compatible goals, internal cohesion, and the like. In real life, however, these factors are more continuous, thus making it difficult to identify with precision exactly when

compatible goals, for instance, is achieved. This limitation is a result of the nature of the factors and data gathered for this study.

Finally, although this dissertation does acknowledge that the evolution of federal policy has affected the compatibility of goals, it does not explain why federal policy changed over time. Future research will need to delve more deeply into this question.

In sum, the main contributions of this project are to account for comprehensive land claims negotiation outcomes in four cases and to provide a theoretical and empirical basis for studying variation in other similar cases and perhaps a broader universe of cases. Variation in outcomes can be explained by understanding the institutional framework governing negotiations on the one hand, and the goals, strategies, and tactics of the participating actors on the other. In particular, a combination of four factors determines treaty completion and treaty incompleteness. Although the ability of Aboriginal groups to achieve the “correct” conjunction of factors is conditioned significantly by history, culture, and the power of the Canadian state, they nonetheless enjoy some agency as a result of the actions of their individual leaders.

An unanticipated factor was the frequency with which Yukon First Nation negotiators engaged in community consultations. Kwanlin Dün negotiators were successful partly because they limited community consultations until the ratification stage whereas Kaska negotiators were less successful due to more frequent consultations. This variable, however, was not present for the Labrador cases and thus has not been incorporated into the explanatory schema of this study.

Suggestions for Completing Treaties

Previous commentators have focused on a variety of reasons for why comprehensive land claims negotiations have been so uncertain and variable. In chapter 3, I listed a number of alternative explanations, all of which I found to have some effect on CLC negotiation outcomes. Resource development pressures, for instance, do accelerate the pace of treaty negotiations. The evolution of federal policy has allowed some Aboriginal groups to achieve more compatible goals with government actors, especially with regard to the certainty provision. Canadian judicial decisions have at times been leveraged into accelerated negotiations, yet provide no guarantee by themselves that negotiations will indeed be accelerated. Different understandings of the treaty process have at times hindered negotiations by creating incompatible goals. Inflexible mandates, lack of political will, and insufficient incentives for negotiators to complete agreements have resulted in federal, provincial, and territorial actors who are reluctant to negotiate treaties with Aboriginal peoples. The legacies of historic indigenous cultures and state development effects have hindered the ability of some Aboriginal actors to foster internal cohesion and positive government perceptions. Finally, Aboriginal group contact histories with Euro-Canadian governments and peoples have affected government perceptions of some Aboriginal groups, especially in terms of acculturation effects.

Although this dissertation confirms that all of these explanations do have some effect on negotiation outcomes, none on its own provides a full account of the outcomes or pace of CLC negotiations in Canada. Instead, my project modifies and incorporates these alternative explanations into its analytical framework, constructed in chapters 3, 4, 5. Specifically, I argue that in light of the institutional framework governing CLC negotiations in Canada, which privileges government actors over Aboriginal ones, it is the attributes of

Aboriginal groups themselves that end up being most important for the fate of CLC negotiations.

What can policymakers and practitioners learn from the findings of this dissertation? First, Aboriginal groups must be willing and able to accept treaty provisions that are compatible with the goals of the Canadian governments. In particular, Aboriginal groups must accept some version of “cede, release, and surrender” with regard to their claims to all lands not included in their treaties. Despite Aboriginal legal victories in Canadian courts, governments still maintain a dominant position within the Canadian legal framework. Accordingly, Aboriginal groups that want to complete treaties must modify their goals so that they are compatible with those of governments.

Second, government actors generally react negatively to non-negotiating tactics because such tactics tend to embarrass their governments. Specifically, actions like protests, litigation, seeking media coverage, and the like can generate significant negative publicity that can harm government reputations during election times. Aboriginal groups that minimize their use of confrontational tactics to focus on negotiating are highly likely to complete treaties. Therefore, those Aboriginal groups that want to complete a treaty and have a history of confrontational tactics should immediately abandon them in favour of focusing solely on negotiating.

Third, Aboriginal groups need to minimize internal group divisions so that they do not distract leaders and negotiators from completing treaty negotiations. One way to mitigate internal divisions is to elect a charismatic and unifying leader. Chief Rick O’Brien of the Kwanlin Dün First Nation, for instance, was able to heal the wounds caused by divisive leadership battles that had plagued the First Nation throughout the 1990s. His

election as Chief of Kwanlin Dün in 1999 was a key factor in paving the way for Kwanlin Dün leaders and negotiators to complete their treaty.

Another way to mitigate the problems caused by internal divisions is for Aboriginal groups to minimize their use of community consultations during negotiations, and to maximize their use during a prolonged ratification process. This recommendation is derived from the experiences of the Kwanlin Dün First Nation. In 1999, Kwanlin Dün officials asked government negotiators if negotiations could be held in government offices in downtown Whitehorse. Doing so, they argued, would minimize community disruptions and distractions and allow the negotiators to focus on completing a deal. KDFN officials did undertake some community consultations, such as community meetings and a community advisory council that worked directly with the negotiating team, but these efforts were used sparingly compared to the efforts of other Yukon First Nations. Once KDFN negotiations were completed, KDFN leaders and negotiators undertook a prolonged ratification process and an intensive informational campaign to convince their members to vote for the treaty.⁶¹ They adopted this ratification strategy based on the experiences of their neighbours, the Carcross/Tagish First Nation. In 2003, Carcross/Tagish leaders had initially failed to ratify their final agreement because their members had very little knowledge about what the treaty entailed and did not have enough time to learn about it.

Another way of addressing internal division problems is to strengthen the links between Aboriginal negotiators and Aboriginal local leaders. Kaska officials, for instance,

⁶¹ Peter Kulchyski (2005: 252) quotes Inuit leader John Amagoalik as saying: “Speaking from experience, we found that when we first started talking about land claims in the seventies our own people were an obstacle. They couldn’t support something they couldn’t understand. We had to spend a lot of time explaining land claims. Our problem was our own people”

were unable to complete their treaty because Kaska Tribal Council leaders and negotiators were disconnected from local leaders in Ross River Dena Council and Liard First Nation. Kwanlin Dün officials, in contrast, were more successful in creating cohesive links between their negotiating team, land claims department, and chief and council and subsequently were able to complete their treaty. Similarly, Labrador Inuit Association (LIA) officials were able to complete their treaty because they were able to establish strong links between their community leaders, LIA leaders, and negotiators. Innu officials, however, did not complete their treaty in part because they were distracted by highly divisive relationships between their leaders, negotiators, and members from their two communities.

Finally, Aboriginal groups wanting to complete treaties must foster positive government perceptions of their Aboriginal groups. If government officials have poor perceptions of an Aboriginal group, then it is highly unlikely that government officials will be willing to complete a treaty with that group. The task of Aboriginal leaders and negotiators, therefore, is to alter how government officials perceive their groups.

Aboriginal groups can demonstrate competency by creating a strong record of financial management and accountability. They can show capacity by successfully assuming control over the provision of certain government programs and services. Finally, they can elect leaders and appoint Aboriginal and non-Aboriginal negotiators that are highly skilled and respected by government officials.

It bears emphasizing here the crucial role that Aboriginal leaders can sometimes have in negotiation outcomes. Although Aboriginal leaders were important for all four groups studied in this dissertation, the case in which leadership had the most profound effect was the Kwanlin Dün First Nation. This First Nation during the 1980s and 1990s

struggled with negative government perceptions and divisive internal cohesion. Yet the election of Rick O'Brien in 1998 had a powerful effect on these two factors. Chief O'Brien was quickly able to unite a politically divisive First Nation and bring a level of expertise to the negotiating table and in government that fostered positive government perceptions. The most important lesson for Aboriginal groups that want to complete treaties is to find or generate leadership that can achieve the necessary conjunction of factors despite the influence of history, culture, and mutual influence.

Normative Implications

In addition to providing an explanatory framework for CLC negotiation outcomes in Canada, this project has generated a number of normative implications relevant to the practice of Aboriginal politics. In particular, it confirms that the comprehensive land claims process is a colonialist one and that the requirements to complete treaties can entail significant costs to Aboriginal peoples. Aboriginal groups have very little influence in the design of the process, the types of evidence allowed, and the powers and jurisdictions involved. To complete negotiations, they must adopt the goals of the government. They must work within government negotiating processes and avoid confrontational tactics. They must mould themselves into entities that satisfy government expectations regarding their governance capacities, structures, and financial practices. Moreover, they must hire "experts" from outside of their communities to give them legal advice, to provide "acceptable" and "legitimate" evidence and maps, and to help them communicate with government negotiators in the language of western law. If culture, history and mutual influence have left Aboriginal peoples unable to meet these requirements, then they must

rely on their leaders to push them to violate their cultures, histories, and perhaps their core beliefs, such as their relationship with their traditional lands.

Participating in the comprehensive land claims process can also be normatively problematic because the process and the treaties produced can have significant negative effects on the signatory Aboriginal communities. The fact that the Kwanlin Dün team chose to hold negotiations in territorial government offices is problematic in that the negotiators physically separated themselves and perhaps the contents of their treaty from those affected the most: the beneficiaries and band members. Instead, Kwanlin Dün and government elites crafted the treaty according to their preferences. It was not until negotiations were concluded that they sought broad, substantial input from community members during the ratification process.

The comprehensive land claims process is also problematic in that it can create significant divisions within Aboriginal societies. According to several interviewees, some Kaska negotiators strongly supported comprehensive land claims negotiations because they were receiving significant material and monetary benefits from working on the claims. As a result, these negotiators had no incentive to complete negotiations, until the negotiations had dragged on for far too long. At that point, the negotiators pushed hard for a settlement to prove to their constituents that their efforts over the many years were not in vain.⁶²

Taiaiake Alfred (2005) opposes the treaty process for a similar reason. He believes that the comprehensive land claims process is a colonialist tool that ultimately undermines

⁶² Tony Penikett (2006) makes a similar claim about professional negotiators involved in the BCTC process.

the true path towards Aboriginal self-determination⁶³: an identify rooted in *Onkwehonwe*.⁶⁴ According to Alfred, “Fundamentally different relationships between Onkwehonwe and Settlers will emerge not from negotiations in state-sponsored and government-regulated processes, but only after successful Onkwehonwe resurgences against white society’s entrenched privileges and the unreformed structure of the colonial state” (Alfred, 2005: 21). The comprehensive land claims process, in his view, entrenches white society’s norms, values, and structures within Onkwehonwe communities. In his book, he quotes an Aboriginal woman from a band in B.C. as saying “Ah, but then again, look at the age of our leaders. They’re all in their fifties and early sixties; they’re all from the Old School and believe you have to do Indian politics in a certain way [I]f you are somebody in your late fifties with a high school education getting paid \$200 a day to sit at conferences and meetings, and if this is your only income, you’re not going to change” (Alfred, 2005: 124-125).

In sum, the treaty process is steeped in the values, norms, and historical legacies of European and Canadian colonialism. To achieve a treaty requires Aboriginal groups to pander to government expectations regarding capacity, goals, negotiation techniques, and the management of internal cohesion dynamics. Even then, there is no guarantee that an agreement will be completed quickly. The longer the negotiations go on, the more expensive it becomes for the Aboriginal groups because they must borrow money from the federal government to negotiate their claims.

⁶³ Patricia Monture-Angus (1999) criticizes the use of the words “Aboriginal self-determination.” She argues that the phrase does little to further the cause of Aboriginal peoples since it is a term wrapped up in the colonial history of Aboriginal-European relations in Canada. Rather, she prefers the term “Aboriginal independence.”

⁶⁴ Alfred (2005: 288) defines this term as: “ONKWEHONWE: “the original people” (Kaniienkeha: oon-gway-hoon-way), referring to the First Peoples of North America.”

Alternatives to the Treaty Process

In light of the normative implications described above, this section argues that Aboriginal groups should consider exploring alternatives to the treaty process for achieving their goals. It is clear from this dissertation's findings what Aboriginal groups must do if they want to complete comprehensive land claims agreements. It is also clear that the social, cultural, and political costs of completing such agreements are steep. Some Aboriginal groups have decided that the treaty process is not worth the costs and have withdrawn from the process to pursue other means of self-determination. One recent example is the Carrier Sekani First Nations in British Columbia, who have withdrawn from the treaty process to pursue bilateral land-use agreements with the provincial government and with interested businesses. Another example is the Kaska Nations in the Yukon Territory. Community leaders in Ross River and in Liard First Nation have indicated that they are no longer interested in a treaty even if the federal government were to renew its mandate to restart negotiations.

The decision to pursue alternatives to the treaty process makes a lot of sense in light of the normative implications discussed above. Previously, Aboriginal groups had only the comprehensive land claims process to achieve their preferences and even then, as I argue in the introductory chapter of this dissertation, the outcomes of that process did not guarantee Aboriginal economic prosperity or meaningful self-determination. Relatively recently, a number of alternative mechanisms have emerged that, if pursued, can give Aboriginal peoples significant control and power over their lives. In addition to these mechanisms, a series of judicial victories have bolstered the rights of Aboriginal peoples in their traditional territories. The rest of this chapter discusses these developments and argues that those

groups that have yet to complete treaties should consider exiting the process to pursue a number of alternative policy mechanisms.

Two Judicial Decisions

In November 2004, the Supreme Court of Canada handed down two crucial decisions that had important implications for the nature of Aboriginal rights and title in Canada: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550. In both cases, the First Nations sought the court's help to clarify the Crown's duty to consult and accommodate them prior to the Crown's development of their traditional lands. The court ruled that prior to developing these lands, the Crown must engage in meaningful consultation with the Aboriginal groups, and if appropriate, accommodate their concerns. In *Taku River*, the court ruled that "The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation" (para 25). In *Haida Nation*, the court ruled that the government's duty to consult should be "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (para 39). Yet, consultation and accommodation does not mean a duty to reach agreement with an Aboriginal group. In *Taku River*, the court ruled that "the Province was not under a duty to reach agreement with

the TRTFN [Taku River Tlingit First Nation] and its failure to do so did not breach the obligations of good faith that it owed to TRTFN” (para 22).

In essence, these rulings give Aboriginal groups greater leverage to affect the ability of governments and private companies to use their traditional lands, even if their rights have yet to be clarified through litigation or a treaty. At a minimum, the federal and provincial governments must consult and/or accommodate any Aboriginal groups that have some claim to the affected lands. The level of consultation and accommodation must be proportionate to the strength of the group’s case for Aboriginal title. One way of assessing strength, according to the court in *Taku River* (para 32), is whether an Aboriginal group has been accepted into treaty negotiations. If so, the government’s duty to consult and accommodate is quite strong.

These two court decisions are important because Aboriginal groups no longer have to rely solely on a CLC agreement to protect their interests in their traditional lands. Now, Aboriginal groups involved in the CLC process can explore alternative options that may cost less and are more effective in providing immediate and preferable results. The rest of this paper discusses three alternatives to the treaty process that Aboriginal groups should consider pursuing. They are: self-government agreements, bilateral agreements, and the *First Nations Land Management Act*.

Self-Government Agreements

Strictly speaking, comprehensive land claims agreements are usually and can be completely separate agreements from self-government agreements. When Kwanlin Dün leaders and negotiators completed their treaty with the federal government in 2005, they in

fact signed two separate documents: the Kwanlin Dün First Nation Final Agreement and the Kwanlin Dün First Nation Self-Government Agreement. Although some Aboriginal groups like the Labrador Inuit, the Labrador Innu, the Tlicho, and several Yukon First Nations negotiated both agreements concurrently, they were not required to do so and could have chosen to negotiate only a self-government agreement or a comprehensive land claims agreement.

Based on the experiences of the Kwanlin Dün, the Kaska, the Inuit, and the Innu, it is clear that the most difficult and complicated negotiation issues tend to be those that relate to comprehensive land claims agreements. For instance, the major issues for the four Aboriginal groups studied in this dissertation were land quantum, the “cede, release, and surrender” provision, resource development, hunting and fishing rights, water and waterfront management, taxation of settlement lands, and other related land issues. Self-government issues, while important, tended to be less controversial.

Groups that have become frustrated with comprehensive land claims negotiations should seriously consider withdrawing from those negotiations to focus their efforts on self-government agreements. One advantage of adopting this strategy is that it simplifies negotiations since only the Aboriginal group and the federal government are the signatory parties to these agreements. One less actor decreases the complexities that come from the involvement of an additional sub-national government. Second, these agreements allow Aboriginal groups to replace the band council structures that were imposed on them by the *Indian Act*, with institutions that are specifically designed to meet their political, cultural, social, and economic needs. At Kwanlin Dün, for instance, the old band council structures have been replaced with a Chief and Council supported by the Elders Council, the Youth

Council, the General Assembly, and the Judicial Council (Kwanlin Dün First Nation Self-Government Agreement, 2004; Kwanlin Dün First Nation, n.d.). Third, self-government agreements provide Aboriginal groups with a variety of important and useful powers. For instance, the Kwanlin Dün's self-government agreement recognizes the First Nation as a legal entity for the purposes of borrowing, lending, and transacting. The new Kwanlin Dün government can pass laws affecting language, culture, health care, training, adoption, education, inheritance and wills, solemnization of marriage, administration of its lands, administration of justice, and taxation of its citizens, among other things. For those Aboriginal groups that do not sign a comprehensive land claims agreement, these powers are only applicable to the lands that they control under the *Indian Act*. Moreover, such lands remain reserve lands rather than treaty Settlement Lands or Fee Simple Lands. Nonetheless, these powers are more extensive and are a clear improvement on the powers available to Aboriginal groups under the *Indian Act*.

One example of a First Nation that signed a self-government agreement prior to a comprehensive land claims agreement was Westbank First Nation, located near Kelowna, British Columbia. Westbank First Nation entered into the British Columbia Treaty Commission process in 1994, completing a Framework Agreement in 1997. Since then, however, the First Nation has made little progress in negotiating an agreement-in-principle with the federal and provincial governments. According to Tim Raybould, Westbank's chief negotiator:

Treaty negotiations have not been "negotiations" for many years. Governments come to the table with poorly thought out take-it-or-leave-it positions that serve neither the province nor Canada well, nor, indeed, first nations. Treaties have

become way too complicated. They are not designed to be living documents but rather "full and final settlements," a dangerous approach that may result in future conflict. If B.C. and Canada truly want economic certainty, they had better realize who actually needs the treaties (Raybould, 2007).

Negotiations on a self-government agreement, however, have been much more fruitful. On 6 July 2000, Westbank and federal negotiators initialed the Westbank First Nation Self-Government Agreement. Westbank community members ratified this agreement on 24 May 2003, and officials signed it on 3 October 2003. Under the agreement, the First Nation can create its own governing institutions and has jurisdiction over a number of important powers. It can and has passed laws governing wills and estates, taxation, management of reserve lands, resource management, agriculture, environmental protection, culture and language, education, health services, law enforcement, traffic enforcement, public order, and public works, among other things. Self-government agreements, therefore, are powerful instruments for building "tribal sovereignty," which a number of scholars have argued is necessary for successful economic development on Canadian Indian reserves (see for instance Cornell and Kalt, 1992; Alcantara, 2007b).

Bilateral Agreements

A second option that Aboriginal groups should consider exploring is the use of bilateral agreements, also known as accommodation or interim agreements. These documents are used by governments, Aboriginal groups, and third party interests to seek agreement on particular issues relating to Aboriginal lands. In 2003, for instance, the Kaska signed a bilateral agreement with the Yukon Territorial government to co-manage

the forest resources on their traditional lands (Bi-Lateral Agreement Between the Kaska and the Yukon Government, 2003). The Carrier Sekani First Nations in British Columbia withdrew from the treaty process in March 2007 to pursue bilateral agreements with private companies such as the Canfor Corporation to develop the natural resources on their lands (Brethour, 2007: A2).

Besides the time and monetary advantages that come from negotiating specific agreements between two parties, bilateral agreements give Aboriginal groups a number of other advantages. First, they allow Aboriginal groups to get involved immediately in those lands that are being developed by governments and businesses while treaty negotiations are occurring. According to Tribal Chief David Luggi, “While they keep us talking at the [comprehensive land claims negotiating] table, resource extraction continues” (Brethour, 2007: A2). By withdrawing from the process and pursuing bilateral agreements, however, Aboriginal groups can gain immediate control over the development of their lands. Private companies will seek bilateral agreements with Aboriginal groups even if they have acquired licenses from the provincial government because the *Taku River* and the *Haida* decisions require governments and other interests to consult and/or accommodate affected First Nations before their lands can be developed.

A second advantage of bilateral agreements is that governments may be willing to be more flexible. For instance, although the Yukon territorial government long opposed the idea of a Kaska veto over all Kaska lands during treaty negotiations, it accepted this veto in a bilateral co-management of forestry resources agreement negotiated outside of the claims process. The preamble of this bilateral agreement states: “WHEREAS: [the] Yukon [territorial government] acknowledges, in agreements entered into with the Kaska in

January 1997, that the Kaska have Aboriginal rights, titles, and interest in and to the Kaska Traditional Territory in the Yukon” (Bi-Lateral Agreement Between the Kaska and the Yukon Government, 2003: 1). Moreover, under Section 3.0, entitled “Kaska Consent”, the agreement states that the “Yukon [territorial government] shall not agree to any significant or major dispositions of interests in lands or resources or significant or major authorizations for exploration work and resource development in the Kaska Traditional Territory without consulting and obtaining the consent of the Kaska” (Bi-Lateral Agreement Between the Kaska and the Yukon Government, 2003: 4).

According to a number of interviewees, Yukon territorial officials were willing to accept a Kaska veto in the bilateral agreement because the agreement was not a constitutional treaty. Moreover, the government was strongly interested in developing the rich forest resources on Kaska lands and was cognizant of its duty to consult and/or accommodate Kaska interests before it could extract those resources. Finally, the bilateral agreement had an expiry date of two years, at which time either party could terminate the agreement with 60 days notice. Soon after the two years expired, the territorial government terminated the agreement since it was satisfied with the amount of resources extracted from the affected lands. Kaska officials believe that the rights they gained in the bilateral agreement have set a precedent for all subsequent agreements, including modern treaties, with the territorial government. Territorial officials, however, disagree stating that the expiry of the bilateral agreement means that their government no longer has to recognize a Kaska veto over Kaska traditional lands.

In sum, bilateral agreements show promise, albeit within limits, in giving Aboriginal peoples immediate and significant control over resource developments on their

lands. Moreover, bilateral agreement negotiations tend to be quicker, more cost effective, and focused, since the stakes are lower and considerably less complex. Governments, at least in the case of the Kaska, have shown a willingness to be more flexible in recognizing Aboriginal rights and title, than they are during comprehensive land claims negotiations. There are, however, several important limitations to bilateral agreements. They tend to be used only for resource development projects and not for other purposes like fishing and hunting rights. Moreover, they tend to last for a specific period of time, meaning that the rights that Aboriginal groups may gain through bilateral agreements may not transfer to future agreements. Nonetheless, bilateral agreements, also known as interim or accommodation agreements, are becoming more common in Canada. Many Aboriginal groups are pursuing these types of agreements with the federal, provincial, and territorial governments of Canada.

First Nations Land Management Act

For those groups reluctant to take on the responsibilities that flow from a self-government agreement, another option is the *First Nations Land Management Act* (FNLMA), passed by the federal government in 1999. In essence, the FNLMA allows an Aboriginal group to opt out of the land management provisions of the *Indian Act* to develop its own land code for managing its reserve lands. To do so requires First Nations to apply to INAC to become signatories to the FNLMA. In 1999, only 14 First Nations were allowed to participate. Since then, 41 bands have opted into the FNLMA, 90 have inquired about doing so, and 18 have had their land codes in operation (Alcantara, 2007b).

The FNLMA provides Aboriginal groups, like the Labrador Innu and other registered Indian Bands in Canada, with a number of advantages. First, there is very little negotiating involved. Rather, a First Nation develops and drafts a land code, submits it to a jointly appointed verifier, negotiates a funding agreement with Indian and Northern Affairs Canada, and then holds a community vote on both the land code and the funding agreement. Once approved, the verifier certifies the land code and the First Nation takes over all land management responsibilities from the Crown. The average time to complete a land code is 1068 days (Isaac, 2005).

Second, much like the self-government agreements, registered Indian Bands operating under the FNLMA would benefit from capacity building and increased tribal sovereignty. The Labrador Innu, for instance, would have the freedom to design a land management regime and pass laws according to their local customs and needs. Their land code could address individual property rights, collective property rights, leases and licenses, matrimonial property rules, dispute resolution processes involving band lands, and other law making jurisdictions related to the management of their lands. Some groups have designed land management regimes that mimic off-reserve regimes, while others have combined the efficiency of off-reserve property rights with rules that allow for the expropriation of individual interests depending on the needs of the community. At a minimum, land codes reduce transaction costs by eliminating the involvement of the federal government in the management of collective and individual interests in reserve lands (Alcantara, 2007b; Alcantara 2008a).

Conclusion

In sum, bilateral agreements, the FNLMA, and self-government agreements can be placed on a continuum of alternatives. At the one end, bilateral agreements provide Aboriginal groups with immediate but possibly short-lived control over specific uses of their traditional lands. In the middle, the FNLMA provides Aboriginal groups with comprehensive land management control over their reserves, much more so than bilateral agreements. At the other end of the continuum are self-government agreements, which combine the FNLMA's land management powers with the power to construct community-driven governing institutions and laws that regulate land use and citizen behaviour. For the latter two options, however, the land management and governance powers that Aboriginal groups can gain are limited to the reserve base that the band controls under the *Indian Act*. Comprehensive land claims, on the other hand, allow Aboriginal groups to increase and make permanent the amount of land that they can control. To complete such treaties, however, requires Aboriginal groups to engage in activities that some observers like Taiaiake Alfred (2005) find completely unacceptable.

It is clear that the treaty federalism model envisioned by Henderson, Ladner, RCAP, and others is not being carried out in the federal comprehensive land claims process. Although the treaty process and the policy alternatives discussed above may be appropriate for some Aboriginal groups, for others these options are still unacceptable. The result may be future and more frequent confrontation between Aboriginal peoples and the Canadian state.

In the meantime, future research needs to examine the applicability of this project's findings to other Aboriginal CLC negotiations in Canada. Scholars should also examine in more detail the possible causal relationship between Aboriginal occupations and blockades

and government policy change. Specifically, under what conditions can confrontational tactics lead to positive Aboriginal policy reform?⁶⁵ Finally, further research is needed to compare the options available to Canada's Indigenous peoples versus the options available to Indigenous peoples in other settler societies, like the United States, Australia, and New Zealand. Indigenous peoples have long struggled to create new avenues for positive change in these societies and it would be useful to situate the options available to Canada's Aboriginal peoples against the options available to their counterparts in other settler societies.

⁶⁵ Indeed, Yale Belanger and Whitney Lackenbauer are currently putting together an edited volume for UBC Press that examines this exact topic. Contributors to this volume include Doug West on Anishinabe Park, J.R. Miller and Whitney Lackenbauer on the Oka crisis, Ken Coates on Burnt Church, David Newhouse on Caledonia, Tom Flanagan on the Lubicon Cree, and Christopher Alcantara on the Labrador Innu's occupation of the Goose Bay Military Base, among others.

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