

**BETWEEN JUSTICE AND CERTAINTY: TREATY MAKING IN MODERN-DAY  
BRITISH COLUMBIA**

by

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## ABSTRACT

The British Columbia Treaty Process was established in 1992 with the aim of resolving the outstanding land claims of First Nations in B.C. Since that time, two discourses have been prevalent within the treaty negotiations taking place between First Nations and the governments of Canada and British Columbia. The first, that of justice, revolves around the question of how to remedy the past injustices that were imposed on B.C.'s First Nations so as to improve their current circumstances. The second, that of certainty, asks whether this historical repair can occur without significantly disrupting the social order, and whether it can be done in a manner that provides a better future for *all* British Columbians. Each discourse, as it unfolds in the negotiation process, is characterized by competing visions of what justice and certainty should mean. This thesis examines the interplay between Aboriginal and non-Aboriginal visions of justice and certainty and queries: is there a space between justice and certainty in which modern treaties can be made? On the basis of interviews, fieldwork, and a document analysis of treaty-related materials, I argue that the B.C. Treaty Process, as it currently stands, fails to provide a reliable means for the parties to negotiate 'between justice and certainty'. In particular, the procedural model on which the B.C. Treaty Process is built lacks clear substantive guidelines, leaving it susceptible to the manipulations and 'symbolic violence' of the more powerful parties – i.e. the provincial and federal governments. This has resulted in negotiations that are defined by the visions of justice and certainty forwarded by the non-Aboriginal governments, visions which prioritize the economic and political interests of business and government over a serious reckoning with the past. These 'affirmative reparations' render justice equivalent to achieving certainty in the form of clear and stable business and governance relations between Aboriginal and non-Aboriginal peoples. In opposition to this affirmative perspective, I argue that the

Aboriginal and non-Aboriginal peoples, which sharply contrasts with First Nations' demands that non-Aboriginal governments provide a forthright acknowledgement of and apology for infringement on Aboriginal rights and title, significant monetary compensation and land restitution, and recognition of broad powers of Aboriginal self-governance. However, these First Nation justice demands do not meet the economic and political imperatives of neoliberal globalization, and it is on the basis of these broader societal forces that the non-Aboriginal government vision of certainty rests. For them, 'rational' and certain settlements need to be forged through treaty-making to ensure the ability of governments and businesses to operate efficiently in the global marketplace. In opposition to this affirmative perspective, I argue that the negotiation process needs to be redesigned so that the symbolic and material justice demands of First Nations form the basis for treaty-making. Unless the B.C. Treaty Process opens itself to the possibility of transformative justice contained within these demands – that is, to a justice that reconfigures symbolic, political and economic relationships between Aboriginal and non-Aboriginal peoples – the certainty desired by non-Aboriginal governments and businesses is unlikely to prevail. Indeed, the economic and political assimilation that is attempted through affirmative repair is more likely to lead to future conflict than to the trust and mutual respect between Aboriginal and non-Aboriginal societies necessary for certainty to be realized.

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## CHAPTER 1: INTRODUCTION

In many nations tainted by an unsavory past, processes are being implemented to acknowledge long-denied narratives of injustice, punish the perpetrators of those injustices, encourage reconciliation between victims and offenders, and offer recompense to survivors and/or the descendants of victims (Adam, 2001; Barkan, 2000; Minnow, 1998). Through these processes governments, churches, and private enterprises are being compelled to address their past wrongdoings (Torpey, 2001). This seeming 'moral awakening' began in the latter half of the twentieth century, a century many commentators have described as the epitome of human cruelty (see, for example, Alvarez, 2001; Bauman, 1989; Mann, 1999; Minnow, 1998). In reaction to the horrors of World War II, the genocidal machinery of the Nazi regime, the political repression that accompanied the polarized politics of the Cold War, and other instances of mass violence and curtailed freedoms, various social movements have arisen to demand reparation for the crimes of the past.

However, not all movements locate the source of their suffering solely in the recent past. For some, such as the First Nations<sup>1</sup> of Canada, the injustices stretch back to the colonization of what is now called North America. Upon the initial injustice of the expropriation of their lands, further injustices have been heaped, culminating in present circumstances of poverty, dependency, and cultural collapse. The length of time over which injustices occurred, as well as their several and still developing forms, makes any simple calculus of reparation impossible. An actuarial equation of compensation for degree of injury suffered and resources lost cannot be formulated to repair this past. Nonetheless, the complexity of the circumstances of injustice, and the difficulty of compensation, should not be employed as convenient rationalizations for

inaction. The past cannot be erased by kind words, cash disbursements, or land distribution, but it can be addressed so as to assuage its negative influence on the future.

The question of dealing with the Canadian past is particularly problematic in British Columbia, where the injustices experienced by First Nations have taken a different shape than those experienced by Aboriginal groups elsewhere in Canada. Whereas the Canadian government signed treaties with many First Nations soon after contact, in British Columbia few treaties were signed, leaving First Nations of this region more susceptible to the whims of government and vulnerable to extensive expropriation of their lands.<sup>2</sup> It is this situation that the Governments of Canada and British Columbia, and the First Nations of the province, now wish to remedy.

The British Columbia Treaty process, which currently involves 50 First Nations engaged in various stages of negotiations with the provincial and federal governments, has been initiated to provide treaties for First Nations in British Columbia. This process is intended to achieve long-awaited agreements on issues ranging from land ownership to Native self-government. Arriving at this point required years of perseverance and activism on the part of Aboriginal groups and individuals, and still the process may not be a reliable route to change. Questions remain as to whether this process will be able to meet the Supreme Court of Canada's advisement that the governments of Canada and British Columbia have the "moral if not legal duty" (*Delgamuukw v. British Columbia*, 1997) to settle treaties with the First Nations of British Columbia in "good faith".

## 1.1 The Problem to be Addressed in this Thesis

The idea that the non-Aboriginal governments possess a “moral” and “legal duty” to negotiate in good faith speaks to only one dimension of the treaty-making process: the requirement that ‘justice’ be achieved through fair and open negotiations. However, in the global economic context of modern treaty-making, this goal of justice is more than ever tempered by another motivating factor: certainty. Discourses of certainty pervade the treaty-making process, and the form that the realization of certainty takes promises to have repercussions for the type of justice produced through the B.C. Treaty Process.

Certainty means, first and foremost, that conflicts between Aboriginal and Crown title be resolved so that there is clarity with regard to who owns and has jurisdiction over lands in British Columbia. It is a practical concept intended to effect tangible changes in the future socio-economic and legal relationship between Aboriginal and non-Aboriginal peoples in B.C. Yet, acceptance of these changes depends upon the general, more abstract, perception that ‘justice’ has been achieved through treaty settlement. ‘Justice’ can bestow legitimacy upon the end results of the treaty process if these results produce a general perception that the treaties are ‘fair’. Quite simply, if all parties feel that the terms of the treaty are fair, then no one party will be likely to challenge it at a later date. Therefore, justice can produce certainty by establishing secure relationships between the parties, thereby bringing about a form of reconciliation through which the formerly conflicting parties can establish trust. Without the reconciliation that derives from justice, the stability of certainty may be disrupted, as political and material disputes threaten to rekindle conflicts over rightful ownership and government jurisdiction.

But there is also a tension that exists between justice and certainty. Visions of what constitutes a ‘fair’ settlement differ widely amongst the parties involved in negotiations.

Similarly, visions of what treaty terminology and forms of agreement will best produce certainty are hotly contested. Thus, there is no obvious meeting point at which justice and certainty will combine to create improved future relationships between Aboriginal and non-Aboriginal communities in B.C.

The tension that exists between these foci of the treaty process is experienced on the interface between past and future. While reconciliation requires that ‘justice’ be established and that reparation and restitution be made,<sup>3</sup> certainty calls for the creation of new relationships reflective of current economic and political realities. Reconciliation appeals to our ideal sense of humanity—it calls for ethical negotiations in which the parties communicate with each other respectfully, and it demands consideration be given to the needs of the other. All of these things suggest forms of justice less calculable than certainty demands. Certainty, as it is most commonly understood, requires a detailed cataloguing of rights, a relationship defined to meet the vagaries of the future. The question I will deal with in this thesis is whether or not a future certainty of this nature is possible in the context of moral obligations shaped by the past. Stated differently, is there a space between justice and certainty in which modern treaties can be made?

This question will be addressed in the specific context of treaty-making in British Columbia. Although much of the research presented in this paper is drawn from negotiations and meetings conducted in the lower mainland of British Columbia – the area surrounding British Columbia’s largest urban centre, Vancouver – the interviews I conducted, and many of the meetings I attended, dealt with topics extending well beyond the limits of this geographical region. Moreover, urban treaty negotiations, such as those taking place in the lower mainland, present a stark example of the challenge of justice in the face of certainty. For many urban First Nations, the land and resources they could potentially claim have already been developed and

exploited, leaving them with little foundation on which to build a local economy. Furthermore, based on the *Memorandum of Understanding on Cost-Sharing* (hereinafter MOU, 1993) negotiated between Canada and B.C., any urban lands redistributed in treaty are to be valued at current market prices. In densely populated regions such as Vancouver, where the price of property is extremely high, the addition of a small parcel of land to a treaty settlement package could then account for a significant proportion of the final agreement.<sup>4</sup> Thus, urban First Nations often make stronger demands in their negotiations that ‘compensation’ for past infringements of Aboriginal title be paid to them to reflect the value of the land they lost.<sup>5</sup> However, the non-Aboriginal governments refuse to negotiate on the basis of compensation, fearing that this term implies legal liability, and that it could potentially open the government to future legal challenges of the sort that certainty is intended to prevent. Therefore, in urban negotiations there is a clear conflict between First Nations’ desire for symbolic acknowledgement of and monetary compensation for lands and resources lost and the non-Aboriginal governments’ objective that treaties create certainty.

In contrast, First Nations engaged in treaty negotiations in rural settings often emphasize the issue of interim measures at their tables. Interim measures were meant to be reached early in the negotiation process to ensure that the land and resources that First Nations claim through the B.C. Treaty process are not sold-off or depleted prior to final agreement. The parties agreed at the beginning of the treaty process that interim measures would be put in place to demonstrate the commitment of the non-Aboriginal governments to establishing “just” and “fair” treaties (British Columbia Claims Task Force, 1991). Thus far, however, interim measures of the sort First Nations desire – ones that protect traditional lands for future use – have been slow in coming; instead, First Nations have been provided with interim measures and ‘treaty related

measures' (see Chapter 6) that are designed primarily to build First Nations governance capacity.<sup>6</sup>

Aside from the distinct importance of compensation in the lower mainland, however, this region represents a microcosm of treaty-making issues that are evident across the province. First Nations in this area vary greatly in terms of size, ranging from the Squamish Nation that has a population of approximately 2910 (1941 of whom live on reserve) to the Tsleil-Waututh who have 335 members. First Nations in the lower mainland also differ in their approaches to treaty-making and their visions of justice. While some First Nations, such as the Squamish and the Tsawwassen, might be described as taking a more pragmatic approach to treaty-making (although this description is not intended to discount their commitment to justice), other First Nations in this region, such as the Musqueam, possess visions of justice that prevent them from moving beyond even the earliest stages of the treaty process until certain concessions are made by the two non-Aboriginal governments. Furthermore, although these urban First Nations are situated very close to Vancouver, some of them are adjacent to large tracts of land that hold valuable resources. These urban First Nations therefore hold some interests that are similar to those held by rural First Nations in that they are embroiled in a struggle to reach "interim measures" agreements with the non-Aboriginal governments.

Nonetheless, to some extent, the degree of emphasis placed on either interim measures or compensation represents a rural/urban divide within treaty-making. This divide, moreover, reflects the differential experiences of colonialism felt by First Nations across British Columbia. Indeed, given the diversity of First Nation cultures, their varying relations with their natural environments, and the multiple paths their interactions with European explorers, traders, politicians, and settlers have taken, it is difficult to make broad generalizations about the First

Nations of B.C with regard to the visions of justice they bring to the treaty tables. Thus, it is important to bear in mind the sheer scope of treaty negotiations in British Columbia. As it stands, the B.C. Treaty Process is comprised of 50 First Nations negotiating at 43 separate tables. While most of these tables share common issues and challenges, each also possesses its own particular qualities, including the specific visions of justice and certainty that motivate the actors engaged in negotiation. This said, the purpose of this thesis is not to catalogue all of the visions of justice forwarded by First Nations taking part in, or excluded from, the B.C. Treaty Process, but rather to demonstrate how what will be described as ‘transformative’ visions of justice (see Chapter 5) come into confrontation with non-Aboriginal government and business visions of certainty. Accordingly, the visions presented within this thesis represent only a sample of the possible visions of justice and certainty that arise through treaty-making in B.C.

## 1.2 Definition of Terms

Before carrying the analysis any further, it is necessary to first provide some basic definitions and descriptions of the terms that provide a framework for this thesis.<sup>7</sup>

### *a) Aboriginal Rights and Title*

The concept of Aboriginal rights is a distinct principle of Canadian law reflected in the 1982 Constitution under Section 35. Through the enshrinement of these rights, which include the practices, customs, traditions, and communal organization of First Nations, the governmental objective is to ensure the survival of the basic elements of Aboriginal societies in a manner compatible with Crown Sovereignty (Slade and Pearlman, 1998). Land rights, or Aboriginal title, is one element of these broader rights.

Initially, after contact, the Crown assumed that it held title to the land in Canada, and that Aboriginal title was merely a burden on the Crown (Stevenson, 2000). The Supreme Court of Canada confirmed this view, describing Aboriginal title as a lesser interest, or as a “personal or usufructory right” (see, for example, *St Catherine’s Milling and Lumber Co. v. The Queen*, 1888). Indeed, it was based on these principles that British Columbia was colonized and Aboriginal title was ignored and assumed extinguished. However, recent Supreme Court cases have challenged this colonial view, recognizing the existence of unextinguished, yet undefined, Aboriginal rights and title in British Columbia. One of most recent statements on Aboriginal rights, the *Delgamuukw* ruling (1997), affirms that Aboriginal title to the land does not exist on the basis of a declaration of the Crown, but instead accrues to First Nations on the basis of their historic occupancy of this region (Slade and Pearlman, 1998; Slatterly, 2000). Aboriginal title, based on *Delgamuukw*, is, therefore, an inalienable, communally held right to the land that arises from First Nations’ prior occupation of Canada (Slatterly, 2000). The *Delgamuukw* ruling empowers First Nations to enjoy exclusive use and occupation of the land in forms that go beyond traditional usage, but, at the same time, places inherent limits on this usage, requiring that First Nations do not use the land in a way that contradicts or makes meaningless the term ‘Aboriginal’ title; that is, First Nations cannot use the land in a manner that would destroy the Aboriginal nature of this title, such as by selling it outright to a third party.

The Court cases and political developments that have laid the basis for defining Aboriginal rights and title will be examined in more detail in Chapters 2 and 3. For now, it is important to note that Aboriginal rights and title remain largely undefined in B.C, and the primary means for defining them are either through legal decisions handed down by the courts or through treaty negotiations. Many First Nations in the province and the governments of B.C.

and Canada have selected the latter path for settling the land question in British Columbia. Their stated reason for taking this path is a belief that fair negotiations are the best vehicle for achieving both 'justice' and 'certainty' within the province.

*b) Justice*

Justice can be defined as a solution to a problem that offers "...a way out of a morass of conflicting claims" (Fisk, 1993: 1). Typically, a problem that requires a 'just' solution is referred to as an 'injustice'. This begs the question: how does one know when an injustice has been committed? Thus, to claim that justice is required, it is first necessary to establish what injustice(s) occurred. This latter task can be achieved by appealing to one of two senses of normative correctness in order to "frame" the injustice. The first normative frame is based on the formal legal codes of a particular social grouping. Injustice, from this perspective, is behavior that contravenes the prescriptions of an accepted legal code. The second sense of normative correctness appeals to a moral code that might be based upon philosophical reason, religious belief, or some other less tangible grounds. For those following this sense of justice, injustice is that which disrupts this higher order.

Justice claims made regarding the conflict over land claims in British Columbia have been based on both legal and moral understandings of justice. For example, the expropriation of First Nations lands in British Columbia has often been challenged on legal grounds. Justice claims of this sort typically refer back to the Royal Proclamation of 1763, in which the British Government declared that First Nations lands were to remain reserved for their indigenous inhabitants, unless they were ceded to the Crown. The formal text of the document states that the "Indian peoples" of the new Colonies

“...should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds -- We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida. or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments as described in their Commissions: as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them” (Royal Proclamation, 1763).

However, the applicability of this document to British Columbia has been contested. Soon after settlement on the West Coast took place, colonial government officials began to make the argument that the land was *terra nullius*<sup>8</sup> prior to colonization (Culhane, 1997; Slatterly, 1985). This argument took its most virulent form in the words of Premier Smithe who suggested to a Nisga'a and Tsimshian delegation seeking extended territories, “When the whites first came among you, you were little better than the wild beasts of the field.” (quoted in Raunet, 1996: 156 and Tennant 1990: 58). Based on this view, the Royal Proclamation did not apply to the lands that would become British Columbia since a nomadic lifestyle (in Eurocentric eyes) did not constitute “possession”. Of course, the assertion that the First Nations of the region were entirely nomadic and had no sense of property was patently false and ignored the well-established societies that thrived here long before contact (Raunet, 1996).

The argument against the applicability of the Royal Proclamation has in recent court cases (such as *Delgamuukw*) taken the form of denying that the drafters of the document intended it to apply to colonies beyond those existing at the time of its writing. Since British

Columbia was not officially a colony at this point of time, this argument suggests that the Proclamation does not apply to this geographic area.

Legal justice claims are also made based on more recent Canadian legal principles, such as the aforementioned *Canadian Constitution* of 1982. In the framing of the *Constitution*, the architects enshrined the treaty and Aboriginal rights of First Nations in Section 35, an unparalleled move in the history of post-colonial nation-states. According to Boldt and Long (1985: 3), “[t]he constitutional status of aboriginal people and the constitutional affirmation and recognition of aboriginal rights commit both present and future generations of Canadians to seek a resolution of the issue [of aboriginal rights]”. Aboriginal rights in B.C., however, remain largely undefined and can only be fleshed out through the courts or through negotiations. Many argue that, until this occurs, there will remain a question mark on Crown title and jurisdiction in B.C.

Not all appeals to legal justice claims, however, rely on interpretations of British or Canadian common law. Aboriginal arguments for legal justice are also made based on what is referred to as Aboriginal common law or “natural law” (Ahenakew, 1985: 24; Lyons, 1985: 19). This form of legal argument cannot be easily separated from moral justice claims since it rests on the supposition that Aboriginal rights are granted by the Creator and therefore are not under the jurisdiction of worldly governments. In other words, a sacred covenant is in place between Aboriginal peoples and the Creator that has made the former stewards of the land.<sup>9</sup>

This synthesis of moral and legal argumentation demonstrates that the two categories are not mutually exclusive. Indeed, in appeals made to legal justice the moral system underpinning these claims is often taken for granted or ignored. A goal within this thesis will be to deconstruct facile separations such as these; however, not before tapping their analytical

potential. As Latour (1993) has described in reference to artificial separations of culture and nature, it is our tendency to construct distinctions and then to act as though they really exist as a natural division. But before we dismiss the separation as a construction, it is first necessary to examine the impact this division has upon the way we view and experience the world.

Along these lines, those making moral claims for justice tend to base their arguments on precepts that intermingle with legal codes, but which, in their minds, transcend these codes and speak to a higher order. Such claims are offered both in support of and in opposition to treaty-making. In support, arguments are made concerning the dire conditions of many First Nations reserves, pointing out that the colonial past has contributed to, or caused, current First Nation hardships. Given that non-Aboriginal well-being is predicated on the resources and land taken from First Nations, this argument continues, it is only fair that redistribution and recognition be provided to right this historical wrong. Thus, from this perspective, it is determined that a clear-cut wrong has occurred (regardless of whether or not this wrong was codified legally) and reparation is in order. Furthermore, the long history of forced assimilation and the assault on Aboriginal cultures in British Columbia, in combination with the expropriation of lands, are viewed here as lending credence to the justice claim that changes need to be made. Poole (2000: 5) suggests that such a moral sense is inescapable: "I suspect that almost all the citizens of Canada... – even those who are most vehemently opposed to the claims of indigenous people – are uncomfortably aware of the immense injustice that lies at the core of their nation's history."

Poole's insight does appear to hold true for those who present justice claims against treaty-making, since these people rarely deny that great hardships have been placed on First Nations in B.C. However, instead of sympathizing with First Nation demands for reparation, these individuals lodge moral claims that emphasize the importance of cross-cultural 'equality'.

From this perspective, present generations should not be held liable for crimes committed by earlier generations. What is most important is that the past be left behind so that a better future can be constructed based upon the equality and liberty of all citizens. For those persuaded by this viewpoint, treaties threaten to re-enforce the distinctness and “special interests” of a particular ethnic group, which will lead to further differentiation between people rather than fulfilling a liberal ideal of uniform citizen rights and responsibilities.

The discourse of justice operationalized within the B.C. Treaty Process often attempts to balance these two perspectives. However, while the authors of the report that is the foundation of the BCTC Process – *The Report of the British Columbia Claims Task Force* (1991: 16) – agree that “...the relationship between First Nations and the Crown has been a troubled one”, they do not go so far as to make a strong moral claim about the need for treaties. Instead, the theme of the Report, as well as much of the tri-partite discussions about treaties (see, for example, BCTC, 2000, Federal Treaty Negotiation Office, 1996), concerns the need to build better “future” relationships between Aboriginal and non-Aboriginal groups within the province, thereby minimizing the issue of justice.

These issues, as well as the socio-historical project of certainty, will receive more attention in Chapters 2, 3, 4, 5 and 6. In these Chapters, I will provide examples of how ‘justice’ claims directed at unsettled Aboriginal rights and title have been framed by non-Aboriginal and Aboriginal persons from contact until the formation of the B.C. Claims Task Force and the B.C. Treaty Process. Specifically, Chapter 2 details some of the early discourses and processes mobilized by the non-Aboriginal governments to forward the justice claim that First Nation land claims had been adequately addressed. In contrast, Chapter 3 examines how First Nation groups and their supporters have succeeded in reframing this colonial perspective through direct action

and court cases, creating the general impression amongst the mainstream population that grave injustices were, and continue to be, committed in the province of British Columbia.

However, the widespread acceptance of a justice claim is not an end but rather a new beginning. Once such a frame has gained currency, it must then be put into effect in terms of establishing procedures directed toward producing substantive ends intended to 'repair' the injustice(s). Chapter 4 overviews the development of the B.C. Treaty Process, analyzing it as an example of the proceduralization of specific justice and certainty claims. Chapter 5 discusses and deconstructs the separation of procedural and substantive justice and explores potential problems that could arise in the B.C. Treaty Process on the basis of specific procedural preconceptions, as well as from interference stemming from the process's other dominant discourse, certainty. Chapter 6 examines empirical examples of justice claims issued by participants in the treaty process and argues that these discourses are increasingly being usurped by the discourse of certainty.

### *c) Certainty*

Certainty, like justice, is 'framed' in different, and sometimes contradictory, ways. Moreover, the manner in which certainty is framed can have a significant impact on the way in which justice is framed, the process of justice employed, and the end results of the justice process.

In contrast to the abstract quality of justice claims, appeals to certainty express a view of the 'real' world, of 'common-sense', of pragmatic actions that need to be taken in order to secure or enhance our situations under current global, political-economic circumstances. In Weber's (c1922-3 [1946]: 220, 298-9) terminology, certainty can be considered the formal rationality that

sits in contrast to substantive justice. Whereas the former is oriented toward norms rationally established in accordance with pre-defined ends, such as the maintenance of a particular political-economic system, the latter is "...oriented toward some concrete instance or person." In this sense, substantive justice addresses the specific needs called for by the injustice that has been experienced, while certainty asks that the present not be disrupted in repairing the past.

Technically, certainty refers to a "...legal technique that is intended to define with a high degree of specificity all of the rights and obligations that flow from a treaty and ensure that there remain no undefined rights outside of a treaty" (Stevenson, 2000: 114). Indeed, certainty is only one such legal technique, and it represents a significant shift from previous techniques used to achieve the same ends. Traditionally, Canada required a "blanket extinguishment" of Aboriginal rights in exchange for the rights defined in a treaty. This was accomplished by having the First Nation sign an agreement saying they "cede, surrender, and release" all undefined Aboriginal rights and hereafter will exercise only those rights delineated in the treaty.<sup>10</sup>

First Nations across the country find this phrasing offensive because it erases by act of government much that is essential to Aboriginal identity – their tie to the land and the rights bestowed on them by the Creator. There are also pragmatic reasons for First Nations to reject this wording. The absolute certainty sought through the language of extinguishment is not practical (B.C. Claims Task Force, 1991). The world is far too unstable a place for a single document to remain relevant over all time. Instead, the new concept of certainty aspired to through treaties, produces a "reasonable certainty" that includes "predictable procedures for revision and amendment" (BCTC, 2000: 24).

However, the language that will be used to establish this new concept of certainty is still an issue of considerable debate. In the Nisga'a Final Agreement, a modern day treaty settled in

B.C. outside of the B.C. Treaty Process, the text of the treaty states that the Aboriginal rights of the Nisga'a will be "modified" (Molloy, 2000; Nisga'a Final Agreement, 1998).<sup>11</sup> However, this reformulation of certainty has not decided the matter, as many First Nations feel that "modifying" Aboriginal rights is little different from "extinguishing" Aboriginal rights (see UBCIC, 1999: 16). In general, there are a range of perspectives on certainty that differ according to the emphasis they place on "finality" and the extent to which they recognize Aboriginal rights.

For those who stress the need for finality, their interests usually lie in establishing a particular form of certainty – economic certainty. The undefined nature of Aboriginal rights in B.C. has produced a situation of 'uncertainty' in which investors and developers are unsure of the security of projects taking place on Crown land in B.C. A survey of representatives from B.C.'s forest products, oil and gas, and mining industries conducted by Price Waterhouse (1990) suggests that the following factors continue to create uncertainty for their operations: the unsettled nature of who has rights and access to land and resources; the risk that production or shipment could be disrupted by court injunctions or blockades which will affect the company's reliability as a supplier; and the possibility that treaty settlements may redistribute land without providing satisfactory financial compensation to affected companies.

These factors have led some in the business community to support a model of certainty that emphasizes "finality" with respect to the nature and scope of Aboriginal rights and jurisdictional authority. The Business Council of British Columbia (1997), for example, recommends that the government employ the same language of certainty in all treaties signed through the B.C. Treaty Process, and suggests that the language of extinguishment is the most effective means for achieving the goal of finality. Both the provincial and federal governments

also see the need for finality, as this will, in their eyes, prevent future conflicts over Aboriginal rights and title and build a more stable environment for investment.

In contrast, some Aboriginal and justice-based perspectives on certainty claim that “finality” means greater uncertainty for First Nations. In effect, First Nations are asked to gamble the rights of future generations on treaty rights that are untested (Stevenson, 2000). In the words of Bill Wilson (1985: 62):

...no generation or special group has the right to sign away the rights of any future generation. Even if land claims are resolved today, the future descendants of the original occupiers of the land will be entitled to negotiate their own bargain in regard to aboriginal title and rights.

Here, the tension between justice and certainty becomes apparent. Wilson presents a view of certainty based upon principles of justice; arguing that it would be an injustice to the future generations to saddle them with a deal from which they cannot extricate themselves. From this perspective, there is no absolute truth to which the negotiators of treaties can attach themselves, and, therefore, there is no possibility of fixing relationships for all time; instead, treaties must reflect the contingency of life rather than imposing an absolute and final relationship (Macdonald, 2000).

Chapter 7 will provide a more extensive discussion of the topic of certainty, although the spectre of certainty will be present in preceding chapters. Modern conceptions of certainty will be located within the broader projects of neoliberalism and globalization. In particular, certainty will be conceptualized as a tool of neoliberal governmentality (Foucault, 1991; Rose, 1993; Burchell, 1993) through which the province and Canada seek to encourage First Nations to regulate and assimilate themselves according to the logic of global capitalism. Chapter 7 will

then analyze prevailing visions of certainty, discussing the options that exist for treaty-making between justice and certainty.

### 1.3 Some Notes on Methodology

The goal of my research was not to locate any discernible ‘truth’ about treaty-making; instead, I endeavored to ascertain a variety of ‘visions’ of justice and certainty from individuals participating directly in the BCTC process, as well as those outside of the process who are skeptical or critical of its promises. Given the breadth of this objective, it was necessary to employ a variety of research methods, and collect diverse forms of data, to gain perspectives on treaty-making that go beyond the ‘party-line’ as presented in First Nation, government, and BCTC-sponsored public documents. Over a four year period, I gathered together archival and other written materials, interview transcripts, and notes from treaty-related meetings, placing these materials in conversation with one another in order to create a broader dialogue on the issues of justice and certainty.<sup>12</sup>

In general, my research strategies can be divided into three forms: document analysis, qualitative fieldwork, and qualitative interviews.

#### *a) Document Analysis*

Documents related to treaty-making and the “land question” in B.C. were collected from all periods of the post-contact history of the province. Initially, this involved a literature review of academic writing on the topic of land claims and treaty-making in British Columbia and Canada, as well as documents that discuss similar matters in other former colonies such as Australia, New Zealand, and the United States. Through this literature, I sought to raise my

“theoretical sensitivity” (Strauss and Corbin, 1990) to the subtleties of meaning that may present themselves in my data. This research also served the purpose of stimulating the questions I would later ask of the historical documents and the interviewees.

Once this general basis of knowledge was gained, I began an overview of historical documents relating to land claims in B.C., including the text of earlier Commissions (such as the McKenna-McBride Royal Commission) and legal cases that set the contours of current questions of Aboriginal title. More recent historical documents relating to the formation and development of the BCTC process were also gathered and reviewed. These documents – such as the B.C. Claims Task Force Report, government documents on treaty making, signed agreements between the negotiating parties, First Nations reports on their views of treaty-making, BCTC reports, texts of agreements in principles (AIPs) and proposed AIP chapters, as well as many others – were an invaluable source for providing a sense of how participants in the process wanted to present the process to the public. It was through this literature that the prominence of the issues of ‘justice’ and ‘certainty’ became most apparent. Furthermore, media reports and other documents produced ‘outside’ the process since its inception were examined. These documents, as well, offered representations of what the BCTC process means or should mean within the context of modern-day British Columbia.

The importance of these documents to this project cannot be understated. As a whole, they represent a cultural fund from which researchers and participants in treaty-making draw information that they shape in order to help them organize and order the complexity of the B.C. Treaty Process. Of course, the paper trail documenting the history of treaty-making in B.C. is extensive (seemingly infinite), and is more than one dedicated researcher, let alone the average citizen, can digest in a reasonable time. Therefore, despite efforts to accumulate all relevant

information, the sources assembled in this thesis are partial and represent only a sampling of the resources that lay before any interested party. In this sense, the history presented here should be understood merely as a narrative, as a story told about how the issues of justice and certainty have come to present themselves in their modern forms.

*b) Qualitative Fieldwork*

The public nature of the treaty-related meetings I attended permitted me to avoid some of the challenges of access, or “getting in” (Shaffir and Stebbins, 1991), faced in projects where the researcher tries to enter a private setting. This said, it was still essential to establish trust in the different settings with people who would later be contacted for interviews. Early in my research I benefited from my supervisor’s connections, as he was able to assist me in getting permission to attend the meetings of the First Nations Summit. At these meetings, First Nations leaders from across the province convene to discuss pressing issues related to treaty-making and to devise strategies for addressing these issues. The sensitive nature of the topics discussed at these meetings can be a cause for a suspicion of outsiders; therefore, it was necessary that we conduct ourselves both respectfully and anonymously to guarantee our invitation would not be revoked. The other meetings I attended were open “main” table and “side” table treaty negotiations taking place in the lower mainland area, public information sessions designed to keep the public up-to-date on local treaty issues, Regional Advisory Committee (RAC) and Treaty Advisory Committee (TAC) meetings at which local sectoral representatives and members of municipal governments provide advice to and raise issues with provincial and federal negotiators, and local talks related to the issue of the B.C. Treaty Process. Nevertheless, there were some treaty-related conversations to which I was not privy. In particular, the parties occasionally elected to

hold closed negotiations if they were dealing with a matter they felt to be exploratory and therefore potentially controversial. Typically, the content of these talks were later made public after the parties had finished their 'brainstorming' and had decided on a clear direction.

It should also be noted that the work of treaty-making does not solely take place at formal negotiation tables. Quite often negotiation breakthroughs and other significant happenings take place through informal talks, for example over lunch or during a private phone conversation. These often impromptu conversations are not accessible to most researchers, making candid interviews with the parties essential for understanding what happens away from the formal tables.

At various treaty settings I became a familiar face, and this assisted me greatly in later seeking interviews. More importantly, at these meetings I was able to observe the different understandings of justice and certainty possessed by individuals directly and indirectly involved in treaty-making—watching these perspectives come into conflict or conversation with one another, and harden or change as more information became available, or as the person gained more experience in, or became more acclimatized to, the treaty-making process. These meetings also offered an opportunity to examine the forms and strategies of communication employed by different parties in the treaty process, and provided a sense of the different ways in which parties listen to (or ignore) and understand (or misunderstand) one another. Observations of this order were crucial for developing a sense of the challenges of procedural justice, which will be a topic of discussion in Chapters 4 and 5.

*c) Qualitative Interviews*

Both the documents analyzed and the meetings attended can be understood as forms of performance. In each, the author or the participants are presenting to the reader/observer a particular ideal, a vision of what they feel the treaty process is or should be (see Goffman, 1956). For this reason, the document analysis and qualitative fieldwork were complemented by 51 semi-structured interviews. The purpose of these interviews was not to access the hidden and underlying truth of the B.C. Treaty Process, but instead to understand how those involved in treaty-making interpret and cognitively organize the multiple messages about treaty-making they receive. Included in my sample of interviewees were several former and current Commissioners from the BCTC, all three of the Chief Commissioners who have guided the BCTC since its inception, as well as the BCTC's communications manager and one of their treaty analysts. Interviews were also conducted with chief negotiators, negotiators, high-ranking bureaucrats, and consultation managers working with the federal and provincial governments. Representatives from lower mainland First Nations (i.e. Musqueam, Tsawwassen, Tsleil-Waututh, and Squamish) were interviewed, along with representatives of the First Nations Summit and a representative from one of the First Nations groups opposed to the treaty-making process, the Union of B.C. Indian Chiefs. Furthermore, interviews were conducted with academics and lawyers who had long been involved in treaty-related issues. Finally, conversations were held with individuals involved in the B.C. Treaty Consultation Process, including members of the RACs, TACs, and the Treaty Negotiation Advisory Committee (TNAC). Many of the interviewees had been involved in the BCTC treaty process since its inception and provided me with personal narratives of their experiences in the process.

In conducting interviews, the goal was to gather crucial background information about the treaty process and individual interpretations of certain aspects of the process, in particular justice and certainty. In this sense, my interview style could be classified, following Kvale (1996: 5-6), as a "semi-structured life world interview", which is: "...an interview whose purpose is to obtain descriptions of the life world of the interviewee with respect to interpreting meaning of the described phenomena." To reach this goal, interview questions were prepared beforehand based on research about the particular individual's role in the treaty-making process and knowledge of his or her past treaty-related activities. These questions acted as guides to ensure that certain themes would be covered in the course of the interview. However, the questions did not follow any rigid order and instead I reorganized them throughout the course of the interview so follow-up questions would follow naturally on the interviewee's comments. In this regard, an attempt was made to conduct the interview in a conversational style so as to ensure the interviewee's comfort and encourage responses based on their personal understandings of the issues, and not entirely on how the issue is understood officially by the party they represent. Questions often took the form of an open request for the interviewee's interpretation of a topic related to issues of certainty or justice. Other questions were based upon information obtained from other interviewees, asking the current interviewee to respond to a particular criticism or comment.

In the end, the variety of visions of justice and certainty presented in the interviews was surprising. Furthermore, many interviewees strayed from the official visions of justice and certainty proffered by the parties they represent and gave, in contrast, their interpretations or criticisms of these visions. In particular, the interviews conducted were instructive in

demonstrating the challenges individuals involved in the process face in finding a space between justice and certainty.

The diverse research strategies employed in my methodology exposed me to a wide variety of ways in which meaning is constituted within the B.C. Treaty Process. Moreover, as a researcher observing the process, and interacting with those engaged in it, I was able to witness the ‘symbolic violence’ employed by those with greater power to shape the process and their attempts to make some visions of justice and certainty more prominent than others. This provided me with a sense of which visions of justice and certainty are excluded from the treaty negotiation process, and the remainder of this thesis represents an effort to explain how and why these visions have been excluded.

#### *d) Tools for Analysis*

The term “frame” is used within the social movements literature to describe “...an interpretive schemata that simplifies and condenses the ‘world out there’ by selectively punctuating and encoding objects, situations, events, experiences, and sequences of actions within one’s present or past environment” (Snow and Benford, 1992: 137). These frames are often derived from broader “master frames” (Snow et al, 1986; Snow and Benford, 1992; Carroll and Ratner, 1996a and 1996b), which are generic schemata of interpretation that serve as a touchstone for opinion and action formation. The term “frame” is borrowed from the ethnographic work of Erving Goffman (1974: 10) who viewed a “frame” as an organizer of experience which is used to build a definition of the situation. This concept has particular relevance to the field of social movements because it helps overcome a recurring question about collective mobilization, namely: why do people participate in social movement activity (Snow *et*

*al.*, 1986; Snow and Benford, 1995)? Prior to the development of frame analysis, social movement researchers lacked adequate tools for discerning the meanings and interpretations participants attach to specific agreements and the manner in which these meanings may change over time (Snow *et al.*, 1986).

However, the utility of frame analysis is not limited to the field of social movements. In negotiations concerning past injustices that have implications for a wide variety of people, frames are employed to orient the actions of the individuals involved; indeed, they are appealed to in attempts to produce or maintain a particular meaning or definition of the situation. In this sense, notions of certainty and justice are “framed” within specific discourses of treaty-making. Participants in and opponents of the B.C. Treaty Process operate within a field of contestation in which they attempt to forward particular visions, or frames, of justice and certainty. These frames are often drawn from or based upon overarching master frames such as a liberal ethos of equality, a capitalist ethic of fair competition, or an Aboriginal sense of sovereignty. Thus, actors involved in treaty-making both seek to frame the injustices that have occurred and the social visions of justice (and/or certainty) to which they aspire (Carroll and Ratner, 1996b).

The objective of this analysis, and the use of the concept of frames, is not simply to describe the various visions of injustice and treaty-making that are available in modern-day B.C. Rather, a normative intervention will be made into the field of frame contention, examining the possibility that particular justice and certainty frames present for a transformative reparation of past injustices. In this aspect, I follow the lead of Carroll and Ratner (1996a: 602) who, operating from a neo-Gramscian perspective, see framing as central to counter-hegemonic politics since it is through this device that alternative visions of the future are presented.

#### 1.4 Balancing Justice and Certainty

The project of treaty-making is that of finding a balance between justice and certainty; it is a matter of contending with the past so as to guarantee a better future. However, this project is confronted by many hazards. Parties to the treaty-making process each have different emphases, leading them to prioritize either justice or certainty, either the past or the future. This is not an uncommon phenomenon in conflict resolution, and it has been described by authors elsewhere as being a tension between “too much memory” and “too much forgetting” in South Africa (Minnow, 1999) or between “justice” as an ideal and “peace” as an immediate pragmatic requirement in the former Yugoslavia (Doubt, 2000). The challenge is to overcome the tendency to fall into an either/or bind and to recognize that certainty and justice need not be mutually exclusive.

However, it is also important to recognize the social context of British Columbia’s treaty negotiations and how this context can play a role in privileging discourses of certainty over discourses of justice. In the present neo-liberal political climate, economic discourses hold currency, and are seen as the prevailing “common-sense”. The ascendancy of this economic pragmatism does not bode well for the goal of justice since justice is difficult to ascertain and to agree upon. Under these conditions, it is possible that we may find ourselves in the ironic situation of trying to deal with the past without actually discussing it because justice seems too lofty a goal in the face of concrete market imperatives. The chapters that follow will make a case for the need for justice in British Columbia’s treaty-making, and demonstrate the risks of concentrating too heavily on achieving certainty, as well as the repercussions this may have for long-sought reconciliation.

## 1.5 What is to Follow

Chapter 2 presents an historical account of the relationship between justice and certainty in British Columbia. Prior to the second half of the twentieth century, the certainty of colonial land acquisition for settlement and economic development was achieved and maintained through the imposition of colonial justice on the First Nations peoples of British Columbia. First Nations' demands for recognition of their Aboriginal title to the lands were both ignored and prohibited during this early period, and mechanisms were installed by the non-Aboriginal governments to forcibly assimilate First Nations persons in order to put an end to these justice demands. However, the development of a neo-enlightenment liberal political rationality after World War Two contributed to a move away from control-based strategies for achieving certainty toward seeking First Nation consent for non-Aboriginal visions of justice and certainty.

This change in the non-Aboriginal governments' political strategy with regard to the land question in B.C. was in part motivated by the social movement and legal activity engaged in by First Nations at both the provincial and national levels. These attempts by First Nations to challenge and 'reframe' white visions of justice and certainty are described in Chapter 3. Indeed, First Nations in B.C. succeeded in creating a significant degree of 'uncertainty' for the non-Aboriginal governments and for businesses in B.C. through their legal victories and protest actions. The end result of their efforts was the establishment of the B.C. Treaty Process. No longer would justice simply be imposed on First Nations in B.C.; instead, they were to have a role in designing a process through which they would negotiate a resolution to the land question with the governments of Canada and British Columbia.

Chapter 4 details the procedural components of the B.C. Treaty Process. The emphasis in the chapter is on the limitations of this process; in particular, on the power imbalances that

exist between First Nation and non-Aboriginal government actors engaged in the process and the consequences these power imbalances have for the fair resolution of treaties. One important consequence that will be discussed is how the material and symbolic advantages possessed by the non-Aboriginal governments provide them with the opportunity to define the nature of the negotiations in a manner that privileges visions of certainty affirmative of the socio-economic and legal status quo over visions of justice that demand a serious moral reckoning with the past.

Chapter 5 will take a broader perspective on the question of procedural justice, arguing that procedural safeguards are insufficient for guaranteeing a just resolution to a long-standing conflict. It will be suggested that consideration of the substance of justice, of the ends the parties hope to achieve, needs to be made prior to negotiations and should be the basis for the justice procedure that is developed. Nancy Fraser's (1997) model of the 'dilemmas of justice' is recommended as a starting point. This model could serve as an heuristic tool for understanding both the symbolic and material justice demands of B.C.'s First Nations. It also allows for the examination of the potential consequences of pursuing reparative strategies that either affirm or transform the social context in which the injustices initially occurred. This evaluative aspect of Fraser's theory is utilized to develop the concept of 'affirmative reparations', a term I use to describe the likely substantive results of the B.C. Treaty Process.

Chapter 6 outlines how the affirmative thrust of treaty negotiations is manifested in the discourses employed by actors engaged in the B.C. Treaty Process. In this chapter, I demonstrate how certain visions of justice are made inadmissible to the treaty process. Indeed, only those visions of justice compatible with a particular vision of certainty – one that reaffirms and solidifies the political, economic and legal interests of the non-Aboriginal governments and industry – are perceived as being 'sensible' or 'realistic'. Thus, the B.C. Treaty negotiations are

characterized as being directed by the 'symbolic violence' (Bourdieu, 1991) of non-Aboriginal government visions of justice and certainty.

But what does certainty really mean in the context of the B.C. Treaty Process? Chapter 7 seeks to address this question by exploring the divide between Aboriginal and non-Aboriginal visions of certainty that are presented at the treaty negotiation tables. Here, I characterize the specific forms of political, economic, and legal certainty sought by the non-Aboriginal governments as responses to broader social processes of globalization and neoliberalism. It is in this context, I argue, that visions of justice are limited to those congruent with visions of certainty that affirm rather than transform existing social and economic relationships within British Columbia.

Chapter 8 applies the arguments developed in the preceding chapters to the most recent development in the B.C. Treaty Process, the B.C. Liberal's referendum on their negotiation mandate. Through the referendum, the B.C. Liberals hope to gain public support and approval for a series of controversial negotiation positions. This quasi-democratic exercise has caused great offense amongst First Nations in British Columbia, and I argue it removes the province even further from realizing the goal of justice.

### Endnotes

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<sup>1</sup> The terms First Nation, Aboriginal Nation, and Indigenous Nation will be used interchangeably throughout this dissertation.

<sup>2</sup> B.C.'s First Nations are not alone in having to wait for treaties. First Nations in the Yukon and Quebec did not arrive at treaty settlements with the federal government until the latter half of the twentieth century.

<sup>3</sup> It is not accurate to portray First Nations land claims in British Columbia solely as a movement for 'reparation' given the legal basis of their claims. Therefore, the term restitution is added here to reflect B.C. First Nations demand for the return of lands illegally taken from them. However, there is still a reparative element to the treaty negotiations since, in the eyes of many involved, the purpose of these negotiations is to 'repair' a past that has left First Nations in a marginalized and culturally-dependent position.

<sup>4</sup> This is because the federal and provincial governments have established a per capita amount in land, cash and resources that they are willing to distribute to First Nations through treaties. High land values, therefore, mean that land distributed will account for a large proportion of the final settlement.

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<sup>5</sup> The issue of compensation is certainly not limited to urban First Nations, but it receives its most support from these groups.

<sup>6</sup> The non-Aboriginal governments argue that capacity-building interim measures are needed in order to allow First Nations to develop better systems of government that will enable them to handle 'real' interim measures. This paternalistic rationale, however, likely combines with non-Aboriginal government – in particular provincial government – economic concerns that the protection of lands and resources for interim measures agreements could lead to a reduction in the government revenues received from resource extraction.

<sup>7</sup> See Appendix B for a glossary of terms.

<sup>8</sup> That is, unowned or unoccupied land.

<sup>9</sup> Notions of the 'sacred' and of 'sacred land' are difficult to translate into non-Aboriginal terms. Too often Aboriginal notions of the 'sacred' are equated with the western meaning of this term. In fact, this conflation of Aboriginal concepts of the sacred with the western understanding of the term is often a necessary political maneuver for First Nations seeking to protect sites of cultural importance. For example, at the Tseil-Waututh negotiations the negotiators for the First Nation made strenuous efforts to draw parallels between major events in their cultural development and those that occurred in Europe. Activities such as these exemplify how First Nations are forced to prove their humanity, and their prior existence, in accordance with European norms. In this regard, 'sacred sites' that may not have been fixed geographic points are often defined as such so that recognition of their existence can be gained within the system of European property ownership (see Brody, 2001).

<sup>10</sup> For examples of the language of extinguishment as used in treaty, see Éditeur Officiel du Québec, 1976 *James Bay and Northern Quebec Agreement*, clause 2.1; see also Department of Indian and Northern Affairs, 1984, *Inuvialut Final Agreement* Ottawa, clause 3(4).

<sup>11</sup> Aboriginal rights are 'modified' in the sense that they are transformed into constitutionally-protected rights under Section 35 of the Canadian Constitution. Aboriginal rights that are not defined through the treaty are subsequently 'released' rather than 'extinguished'.

<sup>12</sup> In some respects, the conversation created amongst the documents of my study, can be likened to Habermas's 'ideal speech situation', which is discussed in Chapter 5. My objective was to open the dialogue to all visions and to provide each with equal voice within my research project. However, as I will argue later, the ideal speech situation faces its own limitations, such as the need to translate our understandings of the world into a common language, and the performances that individuals employ in communication in an effort to present a specific impression or 'face' (Goffman, 1967). Therefore, it was necessary that I deconstruct these performances and impositions of meaning in order to understand what can and cannot be said in the context of treaty-making; that is, in order to understand why the treaty process itself is not truly an open dialogue.

## CHAPTER 2: THE IMPOSITION OF COLONIAL VISIONS OF JUSTICE

“Canadians had acquired complete control over the land in a manner consistent with British colonial policy – by some negotiation but chiefly by occupation, by settlement, and by reserving lands for the Indians. In their conception the title to the province of British Columbia was acquired in a moral manner, legally, and in accordance with their ideas of justice even though a treaty was never negotiated, as in other provinces” (La Violette, 1961: 11)

La Violette’s statement captures the thrust of colonial visions of justice in B.C.<sup>1</sup> For the most part, they felt that the First Nations of this region were being treated in both a fair and just manner. Although the ‘land question’ was a central issue of governance from the time of contact onward, it is rare to find instances of public officials questioning the correctness of applying European moral precepts to the ‘Indians’.<sup>2</sup> Indeed, these officials saw their role as one of ‘elevating’ the Indians of British Columbia to the ‘civilized standards’ of the white man. This vision of white benevolence in the early dealings with the First Nations of British Columbia has become deeply entrenched in the Western Canadian mindset (Furniss, 1997/98), despite the publication of contrary narratives that retell the history of the province as one of the subjugation and attempted assimilation of First Nations peoples. Moreover, this view of benevolence is what Tennant (1990) refers to as the “white founding myth of British Columbia” – a view that portrays First Nations as too primitive at the time of contact to have formed organized societies, and which portrays colonial policy toward them as being ‘liberal’ – which appears to be a crucial element of a Western Canadian non-Aboriginal identity built upon an image of the ‘peaceful’ and ‘cooperative’ expansion of the Dominion.

Although it has not fully penetrated the collective consciousness of the province, the history of the injustices visited upon First Nations during the colonization of British Columbia is quite familiar in academic circles, and has been retold using various interpretive lenses (see, for

example, Clayton, 2000; Culhane, 1997; Duff, 1964; Fisher, 1977; Knight, 1978; La Violette, 1961; Menzies, 1999; and Tennant, 1990). While some are accused of moralizing and being 'presentist'<sup>3</sup> in their assessments of the past, others claim to operate from a perspective of historical objectivity as they recount the history of non-Aboriginal/Aboriginal relations in the province. Given the focus of my research on current processes directed toward repairing the past, it is unavoidable that I venture into areas that some would argue are better left to historians. However, the 'frames' drawn upon to present particular visions of justice within the current context of treaty-making have deep roots within the political-historical development of British Columbia. To bypass historical discussion would be to overlook crucial stages in the formation of modern views on land claims.

In contrast, however, to more comprehensive historical narratives of B.C.'s past, my intent in this chapter is more limited. It is not my objective to present a definitive or authoritative version of the history of Aboriginal/non-Aboriginal relations in British Columbia; instead, I hope to abide by the tenets of historical sociology, which according to Abrams (1982),

“...is not ...a matter of imposing grand schemes of evolutionary development on the relationship of the past to the present. Nor is it merely a matter of recognizing the historical background to the present. It is the attempt to understand the relationship of personal activity and experience on the one hand and social organization on the other as something that is continuously constructed in time. It makes the continuous process of construction the focal point of social analysis.”

This line of historical questioning has much in common with “genealogical” approaches to history that are based on the work of Michel Foucault. According to Foucault (1980: 117), genealogy is “...a form of history which can account for the constitution of knowledges, discourses, domains or objects etc, without having to make reference to a subject which is either transcendental in relation to the field of events or runs its empty sameness throughout the course

of history.” However, although I am sympathetic to this and other approaches that encourage a break with “meta-narratives” of history (see also Lyotard, 1984), I do not situate my own approach within the field of postmodern historiography because of concerns about the tendency of its practitioners to disregard the effects of structural processes on recurring patterns in historical construction. My approach, therefore, will be to show the interconnection between structural processes and individual agency, demonstrating both the continuity and discontinuity between past constructions of justice and certainty with regard to First Nations and present attempts to resolve the land claims issue in British Columbia.

### 2.1 Before Settlement

The justice frames that presently serve as the basis for contesting claims to Aboriginal title precede the establishment of British Columbia as a colony, and, in fact, precede contact with the First Nations of this region by several years. It is beyond the scope of this thesis to trace the ideological formulation of the doctrines of ‘discovery’ and ‘conquest’ that conditioned British policy in the ‘new’ lands; however, it is possible to pinpoint the date they were officially defined in British Common Law. In 1722, a memorandum of the Privy Council stated that ‘discovery’, or occupation, could be declared if the land was unoccupied, while ‘conquest’ occurred when land was won from its indigenous inhabitants (Culhane, 1997). These broad legal definitions left much room for interpretation on the part of those charged with carrying forth the mission of the British Empire. Especially with regard to the doctrine of ‘discovery’, ethnocentric standards of judgement and a utilitarian desire to acquire lands and resources held by indigenous persons prevented colonial officials from making accurate assessments of whether or not the land was ‘occupied’. Later government arguments against Aboriginal land claims in B.C. would

invariably return to these early doctrines, suggesting that the First Nations of B.C. did not truly 'occupy' the lands they claim, or that they were implicitly 'conquered' given the length of colonial domination over the region.

By 1763, a third frame of reference for defining Aboriginal/non-Aboriginal relations in the 'new' world was made available, demonstrating the limited nature of either the 'discovery' or 'conquest' distinction. In October of that year, following the capture of Quebec, King George III gave official sanction to the practice of treaty-making in his Royal Proclamation (Duff, 1964). This document, which had the force of a statute in the colony, established a new policy with regard to Indian lands. In particular, the Proclamation advised that the Indians of the already established colonies, as well as in areas as yet to be established, be left 'unmolested' in the possession of their lands, and that any new lands acquired be voluntarily ceded to the Dominion through treaty rather than arbitrarily claimed, or privately purchased.<sup>4</sup> Tennant (1990) has suggested that the motivation for this policy change was the desire to maintain good relations with the Indians along riverways that were important both for controlling the fur trade and for purposes of military defense (see also Dyck, 1991). Nevertheless, with its acknowledgement of pre-existing Indian occupation and ownership of lands hitherto viewed as under British sovereignty, the Royal Proclamation legitimated in British and Canadian law the land claims of those groups who did not cede their lands to the Crown through treaties. In this sense, the Royal Proclamation has fueled a counter-discourse within the B.C. land claims debate since First Nations and their supporters read it as an unfulfilled promise.

More will be said on these debates below and in Chapter 3. For now, it is important to note that despite the existence of these formal statements on Aboriginal/non-Aboriginal relations in the colonies, those involved in the colonization of British Columbia from the late eighteenth to

the mid-nineteenth century seldom found it necessary to reference these documents to support their actions. At the point of first contact between Europeans and the First Nations who inhabited the western coast and the interior of what is now British Columbia, the parties operated in accordance with their own normative systems of regulation, and the contrasting systems only occasionally came into conflict with one another. Up until the mid-1800s, before there were many settlers in this region, European 'justice' was imposed on First Nations only in circumstances where the latter threatened or attacked fur traders or prospectors, or disrupted other Hudson Bay Company (HBC) activities. In these situations, the justice that was meted out was swift, brutal, and often arbitrary.<sup>5</sup>

For example, as Knight (1977) reports, after the Hudson Bay Company absorbed the North West Company in 1821 it gained a direct interest in the region that was then called New Caledonia (now modern day B.C.). The HBC operated as the colonial government in this area under the authority of the British Crown, but in the early days of fulfilling this role it did little to impact the political autonomy of First Nations in B.C. The company was moved to interfere with First Nation's affairs only in situations where a particular First Nation threatened the trading peace. Such was the case when it was presumed in 1828 that members of the Klallam Nation in the Puget Sound murdered Factor Alexander Mackenzie and his party as they were returning from Fort Langley. In response, the HBC sent a regiment of 60 men who burned and shelled Clallem villages, killing at least 25 people without any assurance as to whether they had singled out those actually responsible for the attack on Mackenzie.

Other than brief encounters such as these, each cultural group was able to function independently of the other. Since trade, rather than settlement, was the main focus of the British presence in the region, it appeared unnecessary to displace the First Nations from their lands. On

the contrary, as Fisher (1977) has made apparent in his analysis of both the maritime and land-based fur trade in the early nineteenth century, the First Nations were important trade partners with the Europeans, and both parties benefited, in some ways, from their economic relationship. The greatest impacts felt by these First Nations were through the introduction of new wealth and regional disparities based on First Nation trade successes (Fisher, 1977), the aforementioned HBC-imposed trading peace that interrupted the inter-tribal skirmishes that were not previously uncommon (Knight, 1996), and the spread of diseases, such as small pox (Duff, 1964).

## 2.2 Paternal Justice: Certainty Through Denial

It was not until the mid 1800s that conflicts within the new relationship began to arise. At this time, the HBC saw the utility of encouraging greater settlement in areas where trading posts had been established. This decision came not as a result of a need to contend with overcrowding in Britain, which was the motivation for settlement in other colonized regions, but rather was based on the decline in the profitability of the fur trade and the sense that colonial activity in the region should be shifted to agriculture and resource development (Fisher, 1977). For this reason, the Indian "land question" became a pressing concern for the HBC. It was at this point that colonial policies toward First Nations shifted toward a politics of exclusion. The centrality of the First Nations to the fur trade was replaced by efforts to discipline First Nations and encourage them to become a subservient workforce in the emerging resource economy (Menzies, 1999).

By 1846, Indians were perceived to have come under British Sovereignty (Fisher, 1977). Accordingly, the HBC felt it was in its colonial purview to decree which lands the Indians actually possessed; namely, those lands that the Indians had either cultivated or built upon.

Based on these European derived standards, the rest of the region was deemed open for settlement and economic development.

In 1849, Vancouver Island was established as a colony with Richard Blanshard as its first governor. Blanshard had no previous connection with the HBC, and soon became frustrated with the slow transition the colony was making from fur-trading post to colonial settlement. After 18 months, he was replaced by the chief factor of the HBC, James Douglas, who truly wielded power in the region.<sup>6</sup> The policies implemented by Douglas with regard to Aboriginal title are of foundational importance in the B.C. land claims debate since these policies set the parameters for arguments that continue today.

*a) The Douglas Treaties and Reserves*

Douglas initiated two very different forms of relationship between the Aboriginal and non-Aboriginal inhabitants of B.C. First, Douglas briefly engaged in treaty-making, following the standards set forth in the Royal Proclamation. Even prior to becoming governor, Douglas realized that First Nations lands presented a difficult challenge for the HBC. In 1849, he alerted the parent company of the need to purchase Indian lands. The HBC home office responded, basing their evaluation on a recent report of a House of Commons committee struck to examine the New Zealand Company, by suggesting that First Nations possessed only a “qualified Dominion” over Colonial lands. According to the committee, this consisted of the right to occupy lands, not title. Since British dominion over the region was considered to be in place from 1846 onward, Douglas was advised that Indians should only be considered in possession of lands built upon or cultivated prior to this date (Duff, 1964; Fisher, 1977).

When Douglas became Governor of Vancouver Island in 1851 he proceeded over the next eight years to sign treaties with fourteen First Nations in areas where settlement had begun or was expected to spread (Knight, 1996). These treaties were often nothing more than blank pieces of paper to which text adapted from that used by the New Zealand Company was later added (Coates, 1998a; Fisher, 1977; Tennant, 1990). In their final form, however, the treaties conveyed First Nations lands to the HBC in the person of James Douglas “forever” (British Columbia, 1875). First Nation village sites and enclosed fields were kept for the Indians’ own use, and Indians were also provided with the right to hunt on occupied lands and to carry out fisheries as before. In exchange for ceding lands, the First Nations received payments totaling between 27 and 86 pounds, and blankets and other goods from the HBC stocks.<sup>7</sup>

For what they surrendered to the HBC, the payments received by the First Nation signatories to these treaties seem, in retrospect, trifling. As well, a historical question mark remains around the issue of whether or not the First Nations were fully apprised of the meaning of the documents they signed. Therefore, it is surprising that the issue of who would pay for treaty settlements became a major stumbling block after the *British Columbia Act* of 1858 transformed “New Caledonia” into the colony of British Columbia. At this time, the HBC trading license on Vancouver Island expired and Douglas left his position as the chief factor of the HBC and became the governor of B.C. as well as Vancouver Island. But the fledgling colonies had great difficulty raising the funds necessary to pay for treaty settlements, or so Douglas claimed. Douglas appealed to the British government, but to no avail (Tennant, 1990).

Around the same time, the gold rush began in B.C. In 1858, approximately 20,000 miners entered the mouth of the Fraser River (Harris, 1997), and within a year the European and American population of B.C. increased ten to twenty fold (Knight, 1996). The potential for

conflict between miners and First Nations was great since the miners, in their search for riches, often ventured into regions controlled by First Nations. Moreover, the miner's sense of 'frontier justice' often drew them into violent confrontations with First Nations. Policing these encounters became a problem for Douglas's colonial government, and European 'justice' encroached deeper into First Nation lifeworlds.

These encounters also demonstrated the need for establishing a system by which Aboriginal lands could be identified and distinguished from those open to pre-emption. With funds scarce, and the treaty process all but over, Douglas created what are now referred to as the "Douglas reserves". It was Douglas's view that these reserves should be set out for Indians in a manner that included their traditional sites of habitation and whatever fields they had cultivated, just as his earlier treaties had. His reasoning for this was that he did not wish to institute a policy similar to that used in the U.S., where Indians were forcibly removed from their traditional lands, and much violence and bloodshed ensued (Fisher, 1977). Nonetheless, he was reminded by E.B. Lytton, Secretary of State for the Colonies, that, although First Nations desires should be fulfilled to the extent that they allow First Nations to be self-sufficient, their connection to specific lands should not be permitted to impede European progress (British Columbia, 1875).

In general, the Douglas reserves were set out not by legislative act, but rather according to executive decisions made by Douglas himself (UBCIC, 1998). As for the size and dimension of these reserves, there are conflicting reports with regard to Douglas's intentions. Several surveyors and other colonial officials (as well as Douglas himself) are recorded as saying the policy was to let First Nations set the reserves themselves, according to their needs. However, for the most part, these reserves were laid out to be no more than 10 acres per family, allowing future Chief Commissioner of Lands and Works, Joseph Trutch, and others to later claim that

these are the reserve dimensions Douglas truly intended (British Columbia, 1875). Regardless of the size specifications, other features of the Douglas reserve system were the encouragement of missionary activity on reserves and policies permitting Indians to pre-empt lands off reserve (Tennant, 1990).

Although the reserve system was being implemented, Douglas did not give up entirely on trying to forge treaties with First Nations. However, the British Imperial government remained adamant that agreements should be funded entirely by the colony. When Douglas wrote to the Secretary of State for the Colonies in 1861 requesting money for purposes of treaty-making he was told, "...the acquisition of title is a purely colonial interest, and the legislature must not entertain any expectation that the British taxpayer will be bothered to supply the funds..." (British Columbia, 1875).

In sum, in the early stages of settlement in British Columbia we see both a confirmation of First Nation title to lands through a treaty process that asked them to 'cede' these lands to the HBC, and a denial of this possession through the designation of reserves. As we will see, the former eventually became idealized as a liberal policy worthy of revitalization in the form of the B.C. Treaty Process, while the latter came to be viewed as part of an assemblage of injustices imposed upon First Nations.

#### *b) Joseph Trutch*

Douglas left office in 1864 and was replaced by Frederick Seymour in the colony of B.C. and Arthur Kennedy on Vancouver Island. However, neither of these individuals would play as prominent a role as Joseph William Trutch (who in the same year was appointed Chief Commissioner of Land and Works and Chief Surveyor) in shaping colonial land claims policy.

Whereas Douglas is often forgiven his colonial impositions on First Nations (see, for example, Fisher, 1977 and Coates, 1998), Trutch is portrayed as the antithesis to Douglas's liberality. Certainly, Trutch was more blatantly hostile in his policies concerning First Nation's lands, stating outright the priority of European interests, and, in doing so, he did not hide his distaste for First Nations cultures and societies. Nonetheless, Trutch operated in a period when European hegemony was becoming well-established, and the former partnerships between Aboriginal and non-Aboriginal cultures were a distant memory. Years of missionary activity, disease, and incursions by settlers had made the First Nations less of a military threat, and the shift in economic activity away from the fur trade had made them less integral to economic production. Although Trutch cannot be forgiven his colonial excesses, one should understand that this context of increased non-Aboriginal control provided him with the opportunity to develop a more authoritarian and paternal policy toward First Nations than that established by Douglas.

Trutch saw a need for reserves to be more clearly defined than they had been under Douglas. In his mind, many of the reserves were either too large, or lacked clear boundaries, leading to problems as settlers and resource industries attempted to move into these areas. For example, with regard to the reserves situated along the Lower Fraser river, Trutch argued that the boundary lines be surveyed and marked "...so that the uncertainty now existing as to what lands are to be permanently held by the Indians may be terminated, and the risk of disputes and collisions between the white settlers and Indians as to their respective land rights be as far as practicable removed" (British Columbia, 1875). In cases where he felt the reserve was too large, Trutch believed he had two options as to how these boundary issues could be resolved. First, he could disavow the authority of the surveyor who had set the boundaries, and the reserve could be "surveyed afresh" to 10 acres per family. Second, the colonial government could negotiate with

the Indians for the relinquishment of these lands and compensation could be provided. Trutch viewed the former option as the superior one since, in his view, “[t]he Indians have really no right to the lands they claim...”. At the same time, he recommended that “firmness and discretion” be used in order to convince the Indians that the government desired to deal fairly with them (British Columbia, 1875).

In 1866, the colonies of Vancouver Island and British Columbia were merged as one. By 1871, the union of colonies, under the name of British Columbia, entered the Canadian confederation. Under the *Constitution Act* of 1867 s.91(24), Canada was made responsible for Indians and lands reserved for the Indians. However, the *British North America Act* (1870 s.92) placed control over Crown lands in the hands of the provinces. With these *Acts* a debate arose between Canada and B.C. since Canada’s policy with regard to setting reserve sizes conflicted with that practiced by B.C. Whereas Canada used a formula of 80 acres per family to set its reserves, B.C. was still in the practice of assigning only 10 acres per family. Moreover, B.C. had made one of its conditions of entry into the confederation that Canada continue to hold a policy with regard to Indians and their reserves as “liberal” as that previously exercised by B.C. (British Columbia, 1867). This ironic designation of liberality disguised the fact that B.C. land policy was a limit on the more liberal policy of the Dominion.

Joseph Trutch, at this point, became Lieutenant Governor of the province, and was vocal in the debates with the Dominion regarding reserve policy. In response to John A. Macdonald’s concerns about reserve size in B.C., Trutch argued:

“The Canadian treaty system as I understand it will hardly work here (B.C.) – we have never bought out any Indian claims to the lands nor do we expect we should – but we reserve for their aid and benefit from time to time tracts of sufficient extent to fulfill all their reasonable requirements for cultivation or grazing. If you now commence to buy out Indian title to the lands of British Columbia – you would go back on all that has been done here for 30 years past and would be

equitably bound to compensate the tribes who inhabited the district now settled and farmed by white people equally with those in more remote and uncultivated portions. Our Indians are sufficiently satisfied and had better be left alone as far as a new system toward them is concerned” (quoted in Coates, 1998: 13).

Despite Trutch’s assurance that the Indians were “sufficiently satisfied”, this issue would occupy the Dominion and provincial governments over the next 50 years. Over this time, different formulae would be devised to try to reach agreement between the two governments on appropriate reserve size.

*c) The Joint Review Committee*

After Confederation, the Dominion government appointed I. W. Powell and James Lenihan as its two Indian Superintendents in B.C. Neither man possessed extensive experience in dealing with First Nations peoples, and Lenihan proved to be incapable of engaging in discussions with First Nations leaders without offending them.<sup>8</sup> The Dominion government initially hoped to establish a board for managing Indian affairs in the province that would consist of these two men and the Lieutenant Governor for B.C, who, at this time, was Joseph Trutch. However, Trutch was not interested in serving on such a board unless he was empowered to control its activities since he, in his mind, was the only member who had sufficient knowledge about the Indians of B.C. (Fisher, 1977: 180-183).

The government of Canada was reluctant to hand over this power to Trutch because an awareness was forming amongst Canadian officials that there was great discontent in B.C. with regard to Indian land policy. Powell became convinced that if the furor over the land question was not addressed it would prove to be troublesome for both the Dominion and provincial governments. He managed at one point to negotiate an agreement between Canada and B.C. that

would have seen reserves increased to 20 acres per family, but B.C. backed out of this arrangement before it could be implemented.

As the conflict between the two governments grew, William Duncan, a respected missionary in the northwest of the province who was regaled for 'civilizing' a group of Tsimshian, recommended that the two governments form a commission to allocate reserves based not on any pre-defined acreage but rather on the particular needs of the First Nation in question. The Dominion and provincial governments agreed to Duncan's plan and appointed A.C. Anderson and Archibald McKinlay respectively to represent each government on the Joint Indian Reserve Commission. A third commissioner, Gilbert Sproat, was appointed jointly by the two governments (Fisher, 1977: 183).

In his instructions to McKinlay, the Deputy Provincial Secretary, Charles Good, speaks of the "...anxious desire of local government to deal justly and reasonably with them [the Indians], and to see them raised both morally and physically until they are in a position to enjoy all the privileges and advantages belonging to their white brethren" (Memorandum of Instructions to Archibald McKinlay, 1876). While this statement suggests that provincial motivations for endorsing the Commission were located within a liberal discourse of equality (no matter that this was an extremely ethnocentric conception of equality),<sup>9</sup> Good, later in his instructions, betrays just how limited this notion of equality was. He stresses to McKinlay that every indulgence should be shown in creating the reserves—so long as these concessions are "compatible with the welfare and advancement of the rest of the community". Moreover, Good tells McKinlay to avoid apportioning any "...unnecessarily large reserves such as would interfere with the progress of white settlement" (Memorandum of Instructions to Archibald McKinlay, 1876). Thus, the discourse of equality that prefaced these instructions is exposed as

contradictory, if not a sham. In effect, Good asks McKinlay to act in the best interests of both First Nations and Euro-Canadians, a feat that could not realistically be accomplished if the Commission truly accepted the best interests of First Nations to be those presented by the Indians themselves – namely, the return of their lands. Indeed, colonial justice proceeded to address the land question by making First Nations a peripheral participant in policy discussions, ignoring Aboriginal understandings and interpretations of their ‘needs’.

This said, commissioner Sproat did demonstrate some respect for the Indian peoples he spoke with during the Joint Indian Reserve Commission hearings. He remarks after his meeting with the Mission band of the Burrard Inlet that they appear “...a vigorous, intelligent race, capable of considerable improvement if they are judiciously encouraged in the efforts they seem willing to make to overcome many of their old habits” (B.C. Provincial Secretary, Records Relating to Indian Affairs, 1876-1878). His is more the liberal perspective described by Cairns (2000) as representing, in that historical period, an antidote to the harsher racism possessed by Trutch and others who viewed Aboriginal peoples as inherently inferior. In fact, Sproat went further in his liberalism than many of his contemporaries, contending that the province had committed a great injustice against its First Nations and that more needed to be done to understand Aboriginal ways of life before reserves were simply imposed on Aboriginal peoples.

Neither of the non-Aboriginal governments were prepared to engage in the sort of mutual understanding recommended by Sproat. If their views were liberal at all, they reflected a type of liberalism that Samson (1999: 5) describes as a “magical, yet ethnocidal, tool of colonization and land appropriation”. Liberalism, according to Samson, achieves these ends by abstracting from the historical reality of the other and by refusing to engage in meaningful discourse with the

other, instead motioning toward a general equality that denies the worldview and previous existence of the other.<sup>10</sup>

Thus, despite some of the progressive beliefs of Sproat, the justice sought through the Commission's hearings was one that tended toward the pre-defined justice standards of European universalism. The meetings to determine the reserve size took the form of Chiefs and band members presenting their needs to enlightened commissioners who translated these needs into terms understandable to European sensibilities, and who decided whether, in the end, First Nations requests were meritorious or not. In this sense, the justice pursued through the Commission is what might be described as "monological" rather than "dialogical"; that is, justice was to be administered and meted out to First Nations by virtue of a singular Eurocentric cultural rationality rather than constructed in concert by the differing parties.

The Joint Indian Reserve Commission was short-lived. The provincial government lobbied vigorously for its dissolution because there was little public support for the commission and many inland settlers felt that the Commission was too generous with regard to the land it distributed to the Indians. By 1878, the Commission no longer existed as a three member body. In its place, Sproat continued on as the lone commissioner (Fisher, 1977; UBCIC, 1998). In 1880, Trutch's brother-in-law, Peter O'Reilly, replaced Sproat, who resigned under great pressure from both the provincial and federal governments.

#### *d) The McKenna-McBride Royal Commission*

By the mid to late 1880s, colonial interests had eclipsed those of First Nations in the minds of both Dominion and provincial government representatives. In B.C., Trutch and O'Reilly together worked toward eliminating the Indian land question. By 1884, a resolution

was passed in the Canadian legislature recommending that Indian reserves be rearranged so that unused agricultural and resource-rich lands could be pre-empted by Euro-Canadians (Fisher, 1977: 200). Then in 1886, the Trans-Canada railway was completed and included land from First Nations reserves that were taken without compensation. In general, the hopes of First Nations with regard to having their title recognized appeared to be lost.

Optimism regarding First Nation land claims was renewed, however, when in 1910 Prime Minister Wilfred Laurier toured British Columbia. During his travels he was approached by many First Nations delegations who complained about the manner in which their land claims had been addressed. Laurier became concerned about this discontent amongst B.C.'s First Nations, and the Dominion began once again to place pressure on B.C. to allot larger reserves. This debate raged anew until Laurier was defeated by Robert Borden and Borden's conservative government appointed J.A.J McKenna as the Special Commissioner of Indian Affairs. By September of 1912, McKenna reached an agreement with Premier McBride of B.C. on a procedure to settle the conflict between the Dominion and the province. This agreement called for the formation of a five member commission to address the 'reserve' situation in B.C. However, no mention was made of Aboriginal title or treaties; in effect, the issues of prime importance to First Nations were disregarded (Tennant, 1990: 88-89).

Thus began the Royal Commission on Indian Affairs for the Province of British Columbia, which became known as the McKenna-McBride Commission. Its role was to assess the reserves laid out by the Indian Reserve Commission, to allot new reserves where deemed necessary, to add to existing reserves where land was insufficient, and to reduce or cut-off land from reserves if it was felt a First Nation had more land than it could use (Coates, 1998; UBCIC,

1997). The agreement that launched the McKenna-McBride Commission also stated that any change made would require the permission of the First Nation affected (Tennant, 1990: 88)

Over three years, from 1913 to 1915, the McKenna-McBride Commission held hearings with First Nations in B.C. In the lower mainland, the bands in the region welcomed the commissioners. Although some were clearly anxious that the Commission might take land away from their already small reserves, they were, at the same time, pleased to finally receive an opportunity to discuss with government officials their grievances with regard to the expropriation of their lands. For example, on April 28, 1914 Chief Harry Joe of the Tsawwassen First Nation told the Commission:

“...Indeed I have a grievance—I have been speaking to the men appointed to look after our interests in British Columbia but all of our words seem to go unheard; therefore I shall repeat the same words that I have spoken in former days. ...I am going to speak to you gentlemen and to tell you that we have been in this place from time immemorial and I am going to explain to you gentlemen how our ancestors were created in this place right over at the high land there known as ‘Scale Up’ or English Bluff” (Royal Commission on Indian Affairs for the Province of British Columbia, 1913-16).

In response, the commissioners deftly side-stepped the moral argument concerning the Tsawwassen’s rightful ownership of the land granted to them by the Creator and shifted the focus of the ‘hearing’ toward gathering the bureaucratic data on which the commissioners would base their recommendations. This data included issues of population size, reserve land used for farming purposes, stock owned by Tsawwassen members, and other information the commission felt necessary to determine the band’s ‘needs’. When Tsawwassen representatives pressed the issue of title, the commissioners questioned them on why they were interested in possessing title and inquired whether they intended to sell some of their land. However, after showing this brief interest in the Tsawwassen desire to possess title to their lands, the Commission concluded, as it

often did, by telling the Chief and band members that they would take the grievances they heard that day back to Victoria for further consideration.

The text of the McKenna-McBride hearings with the First Nations of British Columbia reveals that the Commission represented less a dialogical conversation between First Nations and government representatives directed toward resolving the land question, and more a fact gathering mission through which information deemed relevant for assessing First Nation's needs was obtained to be considered later. During the hearings, when First Nations expressed their needs as they saw them, they were met with paternalistic admonitions about how the world is changing (see Tennant, 1990: 97) or vague promises that the First Nation's concern would be presented to officials in Victoria. The latter was the case when Chief George of the Inlailawatash Sqaumish Indian Reserve stated to the Commission that he wanted clear title to the land on his reserve and presented the problem his reserve was having in getting permission to sell timber they had cut on their land. The Chairman responded with a statement typical of McKenna-McBride commissioners: "All we can do, if we think anybody has been unfair to the Indians, is to make recommendations to the Government in the hope that our recommendations will be carried out" (Royal Commission on Indian Affairs for the Province of British Columbia, 1913-1916).

In this manner, First Nations only received the semblance of being heard by the commissioners in the manner that Chief Harry Joe of the Tsawwassen had hoped. They could raise concerns, but there was no way for them to be certain that these concerns would actually be addressed. No system of accountability was in place to ensure that the Commission would give adequate consideration to all concerns. Moreover, the First Nations received little opportunity to convince the governments of the justice of their demands, or to even broach the issue of title in a

meaningful fashion. Instead, they were required to put their faith in the McKenna-McBride Final Report.

This report was made public in June of 1916. Although the report recommended that 87,291 acres be added to reserves and that 47,058 be cut, many First Nations were displeased with these changes since the land added was valued at only \$5.10 per acre in contrast to the \$26.52 per acre price tag on the land that was cut (Tennant, 1990: 98).

These recommendations, however, were not immediately implemented. Premier McBride retired in 1915 and his replacement, H. C. Brewster, was unfamiliar with Indian concerns in the province and, therefore, felt no urgency to put the recommendations into effect. Brewster died in 1918, but the Dominion and provincial government continued to disagree on the implementation of the McKenna-McBride Final Report. To resolve this impasse it was decided that a two-person review should be made of the information collected by the McKenna-McBride Commission. W.E. Ditchburn was appointed by the Dominion, and J.W. Clark was appointed by the province to carry out this review. Between 1920 and 1923 they examined all of the McKenna-McBride transcripts and Final Report, and, in the end, accepted the report's recommendations.

In sum, during the early stages of British Columbia's colonial existence various strategies were implemented to try to obtain more certain access to valuable lands and resources for European settlers and the emerging resource industries. However, First Nations never simply accepted these paternal policies, and government officials were forced to devise new ways to try to legitimate the expropriation of First Nations lands. To counteract First Nation discontent, the governments sought to concoct new strategies geared toward controlling and reshaping Aboriginal identities.

### 2.3 Regulating Certainty: From Control to the Manufacture of Consent

The government land policies and commissions on which the expropriation of Aboriginal territory was legitimated cannot be separated from other colonial policies directed toward regulating Aboriginal people in B.C. In addition to land policies that denied the societal status of First Nations and their occupation of the lands on which they based their livelihood, policies were developed that effectively denied the humanity and devalued the culture of Aboriginal peoples. In particular, the administrative control of Aboriginal persons through the *Indian Act* served to destroy traditional structures of Aboriginal governance, deny Aboriginal peoples the right to mount effective political action (especially with regard to land claims), and prevent economic development within Aboriginal communities. At the same time, assimilative policies were put in place that portrayed Aboriginal lifeworlds as savage and profane. This assault on Aboriginal identity took the form of residential schools which sought to teach the 'savage' out of the Indian, rewarded those who renounced their Indian identity, and cultivated a broad disrespect for the customs and practices of Aboriginal cultures. The effects of such administrative and assimilative control on the Aboriginal psyche has been discussed elsewhere (Adams, 1995; Duran, 1995, Fanon, 1963), but it is worth noting that these actions remain a great source of bitterness in the collective memory of the First Nations of B.C., and, combined with the anger over the long denial of Aboriginal title, produce a sense of injustice in the modern Aboriginal consciousness that cannot be easily placated.

a) *Administrative Control*

The first act of controlling a population is to define them. From the time of Columbus's 'discovery' of North America and his mis-identification of the peoples he encountered as 'Indians', Europeans, and later, North Americans, have engaged in a project of imagining, naming, and characterizing the Indigenous peoples of the 'new world' (Stevenson, 1992). In British Columbia; the racial classification 'Indian' preceded the activities of the colonial government and served as an already established basis for creating targeted policy to manage this imagined grouping. Early colonial and provincial policy directed at Indians centred upon removing First Nations from lands viewed as desirable for resource exploitation and settlement (Coates, 1998b; Knight, 1996). In this vein, the *Land Ordinance Act* of 1860 acknowledged Indian villages and the lands they had cultivated, but did not recognize their hunting and fishing grounds, thus opening these lands to pre-emption. Initially, Indians were permitted to pre-empt this land; however, this aspect of the *Act* changed in 1865 with the passing of *An Ordinance for Regulating the Acquisition of Land in B.C.* With this later ordinance, Aboriginal persons were only permitted to pre-empt land with the special permission of the Lieutenant Governor—permission that was rarely granted (Knight, 1996; UBCIC, 1998).

After confederation, Indian 'affairs' in the province became the responsibility of the Dominion government. In 1876, the *Indian Act* was passed and officially codified the definition of who was Indian and who was non-Indian (Manuel and Posluns, 1974: 22). This piece of legislation, despite its many revisions, is still in place and applies to Aboriginal persons in Canada today. Section 6 of the *Act* defines a person of "Indian status" as one who is registered as such in the federal registry and belongs to a group declared to be a band by the Governor in Council (*Indian Act*, R.S.C. 1985, Chap. I-5, S. 6). Thus, through this legislative instrument the

government of Canada identifies a population to regulate. Perhaps even more telling of this regulatory naming is the fact that, until the 1951 revisions of the *Indian Act*, a legal person in Canadian Law was defined as an "individual other than an Indian".

Alluded to in this definition of Indian status is the fact that the *Indian Act* empowers the Canadian government to define Aboriginal communities according to their own perceptions, rather than in accordance with Tribal or other self-selected criteria. However, the creation of bands actually preceded the *Indian Act*, as the Canadian government's 1871 *Annual Report* created the 'band council' system of political control to replace traditional forms of Aboriginal governance which were perceived to be irresponsible (Dyck, 1991). For the most part, the non-Aboriginal governments used local Aboriginal communities as the basis for forming band councils, although there were also instances where communities were merged (Tennant, 1990: 9). These councils were charged with attending to matters of public health, maintaining order and decorum at assemblies, preventing the trespass of cattle, caring for roads, bridges, fences and public buildings such as schoolhouses, and establishing pounds and supplying pound keepers (La Violette, 1961: 32-33). In effect, this severe limitation of the powers of Aboriginal governments transferred much of the control over daily affairs to Indian Agents working on behalf of the Canadian government.

The *Indian Act* regulates the lives of First Nations individuals and communities in their near entirety (Calliou & Voyageur 1998; Culhane, 1997). The *Act* restricts the commercial usage of much of a First Nation's property; for example, in the case of land which is open to commercial development, the Canadian Governor in Council holds the power to determine whether or not the monies gained from this development are being used in the best interests of the First Nation's members (Mathias, 1986). Indian persons can step out of the provisions of this

*Act* by surrendering their special status, but this would also mean stepping away from the basic protection of Indian rights and lands provided by the *Act* (Manuel and Posluns, 1974). Thus, Aboriginal persons are in a “Catch-22” situation with regard to the *Act* and their lands: they could only protect their land by remaining under the powers of a piece of legislation that restricted their ability to use these lands.

Two of the most infamous provisions of the *Indian Act* are the 1884 ban on the Potlatch and the 1927 prohibition of Aboriginal groups organizing in pursuit of land claims. With regard to the former, prior to 1884, missionaries in B.C. had fought against the “heathenism” of the Potlatch. In European eyes, this ritualistic redistribution of goods was perceived to be horribly wasteful and was associated with a number of other vices such as drunkenness and prostitution. Indian Agents also became involved in discouraging the Potlatch, which they saw as a barrier to Indian progress and civilization. However, both of these parties were powerless to stop a practice that was kept alive by Aboriginal traditionalists and encouraged by traders who saw an opportunity to profit by selling the goods to be given away during the Potlatch. In the words of La Violette (1961:37):

“The potlatch was more than immoral; it had come to be defined as the grossest of obstacles to the Christian development of the Indians. Opinions, which were also explanations and conclusions, emerged to the effect that if European ideas of progress were to be imposed upon the aboriginals, then much more forceful action would have to be taken. A profound problem of morality had become defined as significant to Indian administration as well as to churches. Legislation had come to be considered the only means for solving the moral problem of the religionists and the administrative difficulties of Indian officials.”

On April 19, 1884, the *Indian Act* was amended. Potlatching was prohibited in Section 3, and those found guilty of participating in a potlatch, or of encouraging others to take part, were to be

sentenced to two to six months in jail. This amendment would remain in place for nearly 70 years (until 1951) imposing a European morality on First Nations persons.

The prospect of a sudden cessation of potlatches alarmed many in Aboriginal communities. They feared that debts would not be repaid and honour would be lost.<sup>11</sup> The architects of the potlatch ban had failed to consider the complexity of this Indian social institution; what they perceived to be an excessive waste was in fact a method of investing in the future whereby gift-giving today could ensure one of receiving gifts tomorrow. Moreover, the potlatch, according to Manuel and Posluns (1974: 49) is a "...system of kinship, of the inter-relatedness of all people present, that is being celebrated." For these reasons, the potlatch proved to be more persistent than officials had expected. Government agents lacked the resources to properly enforce the ban, and could do nothing more than turn a blind eye to the continuation of the potlatch. As well, Aboriginal groups found ways to hide potlatching activity from the gaze of government agents, such as by holding these events in hard-to-reach places (Cole and Chaikin, 1990).

The potlatch ban went virtually unenforced for almost 30 years. But, in 1914, Indian Agents began to make a concerted effort to put a stop to illegal potlatching. It was felt, at this time, that potlatches were becoming increasingly competitive and were part of the reason why Indians were perceived to have made so little 'progress' since contact. With Indian Agent William Halliday leading the charge amongst the Kwakiutl on Vancouver Island, arrests began to be a more frequent occurrence (La Violette, 1961). In actuality, many First Nations experienced little disruption to their potlatching practices; however, this is not to say that the symbolism of the potlatching law did not have a general effect. The ban on the potlatch designated an entire way of life "intolerable to the Christian Conscience" (Manuel and Posluns,

1974: 46). In this sense, it not only disrupted important cultural practices that had implications for Aboriginal governance and wealth distribution; it also constructed a vision of Aboriginal cultural inferiority.

In 1927, The *Indian Act* was further amended to prohibit Aboriginal peoples from hiring legal council to pursue their rights and title. In Section 141 of the revised *Indian Act* it was stated:

141. Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits, or requests from an Indian any payment or contribution or promise of any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence and liable upon summary conviction for each such offence to a penalty not exceeding two hundred and not less than fifty dollars or to imprisonment for any term not exceeding two months (quoted in Mathias, 1986).

This amendment made it impossible for organizations such as the Allied Indian Tribes of B.C. and the Nisga'a Land Committee, both of whom were mobilizing around the land claims issue at the time, to continue on in their activities (Tennant, 1990: 112). Thus, the government had found a new and effective way to silence the Indians and to avoid hearing that which they did not want to hear.

#### *b) Control through Assimilation*

Since the 'advantages' available to Indians for renouncing their Indian status were insufficient to transform the Aboriginal individual into a model Canadian citizen, the answer to the 'savagery' of traditional Aboriginal life was thought to be education. Around 1876, government officials singled out education as "the primary vehicle in the civilization and

advancement of the Indian Race” (Canadian Department of the Interior, quoted in Redford, 1979-80: 41). Catholic schools<sup>12</sup> were already present in many regions of the province, and their number and enrollment increased in the 1880s when the Department of Indian Affairs assumed part of their operating costs (Knight, 1996). These schools got hold of the Indian children when they were young, and therefore, it was believed that they would have better success in ‘civilizing the Indian’. However, up until the early 1890s, most of the schools were day schools, which meant that after the school day and during holidays Indian children would return to their families and communities and be exposed to all of the customs that their schoolmasters were attempting to have them leave behind (Redford, 1979-80).

In 1895, residential schools housed 1300 pupils, approximately one third of Indian children of school age (Knight, 1996: 101). At these schools, Indian children were beaten for speaking their own languages, dancing, and for acting in any way deemed inappropriate for proper ‘civilized’ children. Meanwhile, some of the authority figures who were meant to be icons of ‘civilization’ were not above sexually and mentally abusing a number of the children.

By 1920, attendance at the schools was made mandatory for children under the age of 14, exposing an even broader array of Aboriginal children to these institutions (Knight, 1996: 101). As well, the day schools were transformed into boarding schools, meaning Aboriginal children were removed from their families for nine to ten months of the year, denying an entire generation of Aboriginal children familiarity with their traditional practices. Often hardest for these children was the experience of coming home to their communities and being received as strangers, as ‘white’, yet feeling no identification with their tormentors at the schools (Haig-Brown, 1988).

Residential schools continued to be used into the 1960s. Their impact on First Nations peoples across Canada has been drastic and various processes are in place to try to rectify this historic wrong and to begin a 'healing process' for those Aboriginal persons who experienced suffering at the hands of these schools.<sup>13</sup> This injustice is not unrelated to the injustices associated with the denial of Aboriginal title because the schools exacted a toll on First Nations communities, leaving many disconnected from their cultures and traditions, and therefore distanced from a strong sense of their Aboriginal rights. Indeed, it is not uncommon in the modern context of treaty-making for the First Nations involved to raise issues about the legacy of residential schools as a grave historic wrong from which their communities still need time to heal.

*c) Seeking Consent*

By 1938 there are signs that government officials began to question the logic of trying to police First Nations communities through the prohibition of activities. Individuals within government circles argued that trying to prevent potlatching was costly and ineffective and that Indians would be better directed through "wise council" and other less prohibitive policies (La Violette, 1961: 94). These discussions eventually manifested in the 1951 amendments to the *Indian Act*, when the bans on the potlatch and on hiring legal council for land claims were removed. Sanders (1995) suggests that the effort of Indian fighters during World War II may have been part of the reason why these changes were made, as Indians had the highest enlistment rate of any group in the country. This factor, as well as the eye-opening realization about the danger of race-based policies brought forward by the German atrocities against the Jews and other minorities, quite likely played a role. However, it should also be recognized that these

policy shifts coincided with a post-World War II transformation in the logic of governance. The hegemony of liberal democracy had become solidified to the point where it no longer seemed as necessary to rule by force; instead, more effective political control could be wrought through winning the consent of the subjugated. In this atmosphere, policies designed to prohibit activities seemed anachronistic and ineffective.

The greatest challenge faced by this triumphant liberalism in the Canadian context was the *Indian Act* itself. This restrictive document seemed to fix Indians in a particular social status, as 'wards' of the state rather than as willing participants in the liberal capitalist enterprise. In a move that would prove disastrous, Indian Affairs Minister Jean Chretien of Pierre Trudeau's Liberal government, released in 1969 the "Statement of the Government of Canada on Indian Policy" which came to be known as the "white paper". This policy document was an attempt by the federal government to repeal the *Indian Act*, transfer Indian services to the provinces, transform reserve lands into fee simple property, and redefine Aboriginal persons as Canadian citizens, equal to all others in the eyes of the law (Armitage, 1995). Although these changes appeared common sense to the liberal mindset, they were viewed as an assault on Aboriginal rights by First Nations across the country, particularly since the government completely disregarded the consultation process that had preceded the "white paper" and had acted unilaterally. This development motivated the formation of several large pan-First Nation organizations that had been in embryonic form until that point. These groups successfully convinced the Liberal government to reconsider its policies (see Chapter 3).

Thus, the liberal attempt to transform its relations of rule from control to consent failed when Aboriginal peoples refused to exchange their rights for 'equality'. This forced the

government to devise new approaches to try to deal with the pressing Aboriginal issues in the country, in particular, the rising clamor over land claims in British Columbia.

#### 2.4 Defining Certainty: From Liberal Universalism to Identity Politics

The discourses of Aboriginal rights and title, as legal concepts, were marginalized until the early 1960s. The aforementioned policies of denial and control allowed the government to circumvent these challenges up to this point. For example, in the St. Catherine's Milling and Lumber case (1885), which would be a precedent setting case for Canadian Aboriginal law for years to follow, First Nations concerns were not represented even though the case had great impact on the notion of Aboriginal legal title. Instead, the Federal government and the government of Ontario were viewed to be the parties in conflict because the former wished to lease a parcel of Ojibway land to a timber company. The Federal government argued that the land had been ceded by the Ojibway to Canada through Treaty Three, and therefore, it was not transferred to Ontario through the signing of the *British North America Act* (Culhane, 1997). The judicial Committee of the Privy Council disagreed, stating that in accordance with the doctrine of discovery the Ojibway did not possess 'ownership' of the land in a manner consistent with the European conception of the term. Furthermore, the Committee added "...that the tenure of the Indians was a personal and usufructory right, dependent upon the good will of the sovereign" (quoted in Indian Claims Commission Research Resource Centre, 1975).

Thus, Aboriginal persons had little voice in determining the extent of their rights and title. However, after the Canadian government made a shift toward liberal strategies of winning consent, which were designed to enfranchise and co-opt Indians, a portal of opportunity was opened for Aboriginal groups to advance an alternative vision to that of assimilation. Indeed, as

Canada pursued greater inclusion of Aboriginal persons by providing them with voting and citizenship rights, as well as legal personhood, these tools were employed by Aboriginal movements to pursue recognition of their uniqueness. As Peter Kulchynski (1995: 60) has noted, the discourse of Aboriginal rights “marks a shift... in the universalist discourse of human rights toward culturally specific rights.”<sup>14</sup> Chapter 3 will explore in greater detail the mobilization of Aboriginal movements and their creation of a new frame of Aboriginal rights and title. In the present chapter, I will continue to concentrate on governmental strategies for dealing with the land question, which from the 1970s onward moved slowly away from the ideology of liberal universalism toward a limited identity politics directed toward the full definition of Aboriginal rights in order to secure ‘certainty’.

The first modern Aboriginal rights case was *R. v. White and Bob* (1963). In this case, two Indians were charged with violating provincial hunting laws. White and Bob argued that hunting and fishing rights were guaranteed in the Douglas treaties. Their claim was rejected in the B.C Supreme Court, but upheld upon appeal to the Supreme Court of Canada in 1965. The Supreme Court of Canada ruled on the basis of Section 87 of the *Indian Act* that the treaty did indeed provide hunting and fishing rights, therefore, affirming the pre-existence and continuation of Aboriginal rights (see Culhane, 1997: 84).

This case was not as significant, however, as the Calder case in which the Nisga’a took the Government of British Columbia to court, arguing that Nisga’a title to their lands preceded British Sovereignty, that this title had never been extinguished, and that such title continued to exist as a legal right (Culhane, 1997: 78-82). In the B.C. Supreme Court, the argument put forward by the province was accepted by the majority of justices, who agreed that the Royal Proclamation did not apply to First Nations in B.C., that the actions of the Crown since contact

demonstrated that there was no legal recognition of the Nisga'a, and that, according to Mr. Justice Charles Tysoe, the Nisga'a were too primitive at the time of contact to have had proprietary rights (*Calder v. The Attorney General of British Columbia*, 1970). The Nisga'a appealed this decision to the Supreme Court of Canada, and in 1973 the court delivered a technical defeat to the Nisga'a case, but a moral victory for First Nations across Canada (Sanders, 1990). Here, the court justices divided evenly on the issue of whether or not Nisga'a title had been extinguished, some agreeing with the assessment of the B.C. Supreme Court, while others acknowledged a continuing Aboriginal interest in lands, arguing that this interest could only be extinguished through formal legislative enactment, and not merely through ignoring Aboriginal claims (*Calder v. The Attorney General of British Columbia*, 1973). However, the case was, in the end, dismissed because the Chief Justice with the deciding vote ruled against the Nisga'a on the basis of a technicality, claiming they had not followed the provincial Crown's *Procedure Act*, which required them first to obtain the permission of the provincial government prior to bringing an action against the provincial Crown (Tennant, 1990: 220).

This ruling did, however, mark a major change in Canadian policy toward First Nations, and in the Supreme Court's attitudes toward land claims. In response to *Calder*, the Trudeau government saw a need to address Aboriginal land claims in a manner that provided some certainty to governments, protecting them from the increasing unpredictability of the Courts. Until this time, Trudeau had remained unconvinced of the need for 'special rights' (Sanders, 1995: 8), as his views were firmly entrenched in a liberal worldview. But, only six months after the decision in *Calder*, the federal government announced its plans to negotiate land claims across Canada. For First Nations without treaties, such as those in B.C., the federal government devised what is referred to as their "Comprehensive Claims" policy.<sup>15</sup> This policy, outlined in

the document *In All Fairness* (1981), recognizes that Aboriginal peoples possess inherent interests in their traditional lands and acknowledges that claims can be negotiated in areas where those interests had been left unsettled (Boldt and Long, 1985). As Trudeau (1985: 150) would himself later state, “[t]he treaty-making process and the land claims settlement process in which we are now engaged have the same goal: the transformation of uncertain, ill-defined aboriginal rights that have proved to be difficult to enforce into clearly stated, justiciable, written rights.”

The Comprehensive Claims policy began a trend toward a new regulatory ethos of governance with regard to Aboriginal persons, a stage in which the government of Canada returns to the historic policy of treaty-making, once again with the goal of obtaining consensual extinguishment of Aboriginal title from First Nations. It did not, however, fully embrace the conciliatory strategy described by Weaver (1990) as a “new paradigm” approach to relationships with First Nations. This “new paradigm” found its expression in government-sponsored, but largely ignored, reports such as the Penner Report and the Coolican Report, both of which stressed the need to create permanent, yet flexible, relationships with First Nations in which Aboriginal and non-Aboriginal governments work cooperatively with one another in a direct, honest and honourable fashion. In contrast, the Comprehensive Claims policy imposes a liberal universalism on First Nations, constructing negotiations as political rather than legal, and thereby continuing to deny the legal basis of Aboriginal claims. In doing so, it uses the language of ‘extinguishment’, requiring Aboriginal groups to ‘cede, surrender, and release’ their Aboriginal title in exchange for well-defined treaty rights and title, thus seeking finality rather than promoting an ongoing and flexible relationship. As well, this negotiation policy places several preconditions upon Aboriginals, such as requiring Aboriginal groups to accept the existing rights of non-Aboriginal Canadians, including permitting rights of access through settlement areas for

Canadian citizens, rights of way for government purposes, and ensuring rights of access for those possessing subsurface rights in the region (thus not acknowledging tribal nationhood) (Dacks, 1985: 255).

In contrast to the federal government, the province of B.C. was not ready for this brave new world of seeking consent. They remained firmly located in the politics of denial and determined to continue the legal battle against Aboriginal land claims in the province.<sup>16</sup> The Social Credit government that held power in B.C. from 1975 until 1991 was resolute in fear mongering about the comprehensive claims process, which through the 1970s and 1980s produced agreements in Quebec, Inuvialut, and the Yukon. Ignoring the fact that in these treaties Aboriginal peoples ceded the majority of their traditional lands, members of this government argued that if such a process were to be instituted in B.C., First Nations would try to claim ownership to the entire province and would demand a sum of money well beyond any reasonable amount (Tennant, 1990). Vaughn Palmer of the *Vancouver Sun* has succinctly summarized the position of the Socred government on Aboriginal title during this period:

“Its first position is that aboriginal title never existed. The second holds that if it ever existed, it was extinguished. Then government will argue that even if title still exists it has little meaning in terms of compensation... The next fallback is that even if the natives are entitled to substantial compensation, the federal government must provide it under the terms that brought B.C. into Confederation. And the fifth and final position, though seldom articulated, is that the public will never stand for the level of compensation expected by native leaders, and therefore little risk attaches to the effort to defeat the claim in court” (Palmer, quoted in Tennant, 1990: 232-233).

Thus, the provincial government believed that the courts would eventually rule in B.C.’s favour and therefore elected not to join the federal government when the latter began negotiations with the Nisga’a in 1976.

The next major development in terms of Canadian Aboriginal policy came in the form of Section 35 of the 1982 Charter of Rights and Freedoms which was part of the Canadian *Constitution Act*. In this section, it is stated that the "...existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed". A further clarification adds that treaty rights in this section refer to already existing treaty rights, or those that may be acquired through land claims (Canadian Charter of Rights and Freedoms, 1982). This section was initially dropped from the draft constitution, with B.C. as one of the provinces pressing to have it removed; however, it was re-inserted in response to public pressure by native organisations (Slatterly, 1985: 116; Tennant, 1990: 225). While this legal recognition of Aboriginal rights set Canada apart from other settler societies that do not possess constitutional acknowledgement of Aboriginal rights, as Sanders (1990: 125) has argued, the "box" of rights defined by S. 35 is really an "empty box" since these rights were not legally defined. Indeed, these rights are qualified in the Charter as "existing" Aboriginal rights, a restriction specified at the suggestion of Premier Lougheed of Alberta and others to prevent the expansion of rights that had already been legally terminated (Sanders, 1990). Thus, while S. 35 is clear in its protection of Aboriginal rights, the question remains as to how these Aboriginal rights will be defined.

In terms of Aboriginal title, one of the legal tests for determining whether or not Aboriginal title exists was set out in the case of *Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development* (1980). Here, Justice Mahoney of the Supreme Court laid out a four part test for Aboriginal Title, which included the need to demonstrate that the Aboriginal groups claiming title were organised societies and made exclusive use of the territory prior to British Sovereignty (Culhane, 1997: 92-96). This test was further defined in the Bear Island Case, in which the Crown was claiming unencumbered title to 4000 square miles of territory in

Northern Ontario. Requirements were added specifying that Aboriginal groups arguing for title had to submit proof of the nature of rights possessed prior to the date that British Sovereignty was declared, alongside evidence that some form of land-holding system was in place from this period up until the first day of the court action. With such tests, the appearance of attending to Aboriginal rights was given, yet the bureaucratic complexity of pursuing these rights made them an arduous challenge.

In the British Columbia context a number of cases advanced the land claims of First Nations in this province. In *Guerin v. the Department of Indian Affairs and Northern Development* (1984) the Musqueam First Nation brought the federal government to court for the mismanagement of surrendered reserve lands. In 1957, the Musqueam surrendered 162 acres of reserve land to the federal government on the assumption that the lands would be leased to a golf club on terms and conditions that had been agreed to by the band. Instead, the federal government leased the land on terms less favourable to the Musqueam, and later kept the documentation of the transaction from the Musqueam, delaying their ability to launch court action. The federal government argued in its defence that there could be no federal trust responsibility in this case because the property at issue belonged to the government and not to the First Nation, and that any trust that did exist was purely political and therefore could not be enforced in the higher courts (Sanders, 1995). This case became significant to the broader issue of Aboriginal title because Justice Dickson's ruling presented Aboriginal title as being based upon pre-existing occupation and control of the land, and not solely upon the pleasure of the Crown.

In *R. v. Sparrow* (1990) the defendant was charged under the *Fisheries Act* with using a drift net larger than that permitted under Canadian law. The defendant responded that the right

to fish was an unextinguished Aboriginal right. Canada argued that the Aboriginal right to fish had been extinguished by the comprehensive system of regulations, permits and licenses instituted under the *Fisheries Act*; that is, that the creation of Canadian law had nullified the Aboriginal right to fish (Sanders, 1995: 16). The Supreme Court, however, rejected the idea that extinguishment could occur through the act of regulation and ruled that if an Aboriginal right were to be extinguished it would have to be through “clear and plain” means whereby the Crown explicitly shows its intention to extinguish the Aboriginal right (*R. v. Sparrow*, 1990; Culhane, 1997: 28).

At the time that the Sparrow decision was being handed down, one of the most important cases in Canadian Aboriginal law was being decided in the B.C. Supreme Court. In *Delgamuukw v British Columbia* (1989), the Gitskan and Wet’suwet’en originally had claimed ownership to portions of 58,000 square kilometres of land in B.C. In the course of the trial, the claim was changed into one for Aboriginal title over this area. British Columbia argued firstly that the Aboriginal groups had no legitimate claim to title over this region, and that if they had any claim whatsoever, it was for compensation from the federal government (thus following the path of argument laid out by Palmer). The Gitskan and Wet’suwet’en position was rejected by Chief Justice McEachern based on his assessment that Aboriginal title existed at the “pleasure of the Crown” (see Culhane, 1997 for a thorough overview of this case). Also of import in this trial was the Chief Justice’s dismissal of the oral evidence presented by the First Nation plaintiffs on the grounds that it was not a reliable source of historical information.

The Gitskan and Wet’suwet’en appealed McEachern’s decision to the Supreme Court. In the higher Court, Chief Justice Antonio Lamer ruled that McEachern had erred in rejecting the oral histories of the Gitskan and Wet’suwet’en and ordered that a re-trial should be held to take

this information into account. Lamer also went on to clarify the test for identifying Aboriginal title, specifying that Aboriginal title is a pre-existing right to the land based on occupancy, but which does not directly correspond to conceptions of ownership held in British common or French civil law. According to Lamer, to understand it correctly we need to view it from both an Aboriginal and a non-Aboriginal perspective. First, Lamer suggested that this title is inalienable and therefore only surrenderable to the Crown. Second, in contrast to positions that present Aboriginal title as something transferred to First Nations by the Royal Proclamation, Lamer argued that Aboriginal title arises from the prior occupation of Canada by Aboriginal peoples. Finally, Lamer identified Aboriginal title as a communally held right and therefore held collectively rather than individually. Based on these principles, the *Delgamuukw* ruling connects Aboriginal title to Aboriginal people's historic occupation of traditional lands, but also suggests that limits exist on the use of these lands (Slatterly, 2000). In doing so, the clarity provided by this court was minimal since the content of Aboriginal title remained undefined and further Court cases would be required to delineate this title. However, Lamer stressed negotiations as the best route available for attending to these complex and potentially divisive issues.

In sum, recent court cases on Aboriginal rights and title have challenged the logic of liberal universalism, forcing it to find a way to admit the particularity of specific Aboriginal rights. This realization has come slowest to the province of British Columbia, which has tried in some of these court cases to continue to challenge the existence of Aboriginal title and to fend off Aboriginal land claims in general. This approach has at last proven itself bankrupt and has forced the province to join the federal government in the pursuit of treaties with the First Nations of British Columbia.

## 2.5 Conclusion

In this brief historical overview, several trajectories of justice frame construction can be identified. In the early days of the colony, the need to protect the certainty of the fur trade gave way to a desire to administer a clear and orderly process of colonization. This move led to the development of justice frames employed by the non-Aboriginal governments to characterize their relationships with the Aboriginal peoples of B.C., which permitted them to manage Indian affairs with the goal of assimilating First Nations and preventing them from disrupting colonial intentions for the region. Initially, this paternal management consisted of strategies intended to control First Nations, which served to prevent broad challenges to Euro-Canadian moral hegemony in B.C. In this manner, bourgeois European visions of correctness were enforced and legitimated a certainty based primarily upon a denial of First Nations land claims. When procedures of justice were implemented to address First Nation complaints, these took a 'monological' form that imposed colonial visions of justice, rather than a 'dialogical' form that engaged in a mutual discourse with First Nations.

Gradually, however, strategies of control were replaced by those of consent, yet with the protection of control always looming in the background. As First Nations became more organized and more vociferous in their claims, and seemed more resistant to leaving behind the 'Indian lifestyle', strategies of control became less effective and a drain on the resources of government. The first manoeuvre attempted by the non-Aboriginal governments was to seek consent by offering First Nations enfranchisement in the Western liberal project through the mechanism of the White Paper. When this assimilatory offer was resoundingly rejected, the non-Aboriginal governments began to seek consent by extending minor concessions to First

Nations through mechanisms such as the federal comprehensive claims policy. At the same time, however, both provincial and federal governments continued to present arguments in courts that denied Aboriginal claims to the land in B.C. This vision of justice would need to face the challenge of First Nation counter-visions before the land claims of First Nations in B.C. would be squarely addressed.

In the next chapter, an examination is provided of the role played by First Nations in contesting the justice frames that legitimized the historical expropriation of First Nations' lands in B.C. and the assault on their cultures. It will be argued that the legal and protest activities undertaken by First Nations in British Columbia contributed to a heightened sense of 'uncertainty' within the province, forcing the governments of Canada and British Columbia to take First Nation justice claims more seriously.

### Endnotes

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<sup>1</sup> It is important to differentiate between the various groups of Europeans (e.g., traders, politicians, settlers, missionaries and explorers) who had contact with First Nations (Clayton, 2000). Each of these groups held distinctive visions of justice and had varying impacts on First Nations' communities. This chapter primarily focuses on the visions of justice imposed by the colonial governments of B.C. and Canada, which sought to control and assimilate First Nations in order to secure political stability and economic development.

<sup>2</sup> The use of the term 'Indians' in this thesis is not intended in the same vein as the derogatory misrecognition placed upon the indigenous peoples of Western Hemisphere by colonizing peoples.

<sup>3</sup> The charge of 'presentism' suggests that an author is judging the actions of a previous generation based upon today's moral standards.

<sup>4</sup> See Chapter 1 for a quotation from the text of the Royal Proclamation.

<sup>5</sup> Clayton (2000) reinforces that relations between First Nations and Europeans in this early period after contact were not entirely peaceful. As well, he notes that First Nations gained a capitalist spirit of competition from this early interaction

<sup>6</sup> 'Chief Factor' was the title bestowed on the head of HBC operations in a colony. The HBC initially hoped to present the colony as being more than just a fur-trading post by placing Blanshard in the position of Governor. However, the colony was still largely organized around the fur trade, despite its recent decline, therefore, Douglas was the individual who clearly held most sway with regard to the colony's affairs. Douglas continued to carry out the dual roles of chief factor and governor until 1859, when he was offered the position as governor of New Caledonia on the condition that he resign as chief factor (Fisher, 1977).

<sup>7</sup> The treaty signed between the Songhees of Vancouver Island and Douglas has recently become a subject of controversy. The Songhees have launched a case in the B.C. Supreme Court, arguing that the land currently occupied by the B.C. Parliament building was in fact designated as treaty land by the Douglas Treaty. The Songhees contend that this land was arbitrarily taken from them and that they should be compensated for their loss (Lunman, 2001).

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<sup>8</sup> Lenihan was soon discharged from this position due to his inadequacies, and Powell became the sole Indian superintendent.

<sup>9</sup> Menno Boldt (1993) refers to this form of 'equality' as an attempt to destroy Indians as Indians.

<sup>10</sup> The literature of 'postcolonialism' emphasizes the exclusionary character of liberal colonial policies. See, for example, Said (1979).

<sup>11</sup> The connection between gift-giving and debts is clarified in Mauss's (1967) discussion of the moral economy of the 'gift' which carries with it an obligation of later repayment.

<sup>12</sup> A number of Protestant-based schools were also introduced later.

<sup>13</sup> Processes include civil lawsuits against the churches that ran the schools, demands for apologies from the government, such as the one delivered to the Nuu-chah-nulth on December 9, 2000 by the Canadian government, and even a proposed South African 'Truth Commission' -like process that would allow Aboriginal persons to express their suffering and have it publicly acknowledged.

<sup>14</sup> It will be argued later in this dissertation that scholars such as Kulchynski (1995) and Weaver (1985) tend to overemphasize the struggle for Aboriginal rights as an instance of identity politics that is completely absent of any notion of 'sameness'. This ignores the extent to which the demand for recognition of Aboriginal title, an element of Aboriginal rights, contains a notion of resource redistribution which would create conditions under which First Nations would have the opportunity to pursue economic equality. In this sense, Aboriginal politics might be better considered as 'bivalent' (Fraser, 1997), attending simultaneously to goals of 'sameness' and 'difference'.

<sup>15</sup> The Comprehensive Claims procedure is a multi-staged procedure, similar to that employed in the BCTC Process. In the first stage, the First Nation presents a statement of its claim and DIAND determines on the basis of this claim whether it accepts the claim as negotiable. Therefore, power in this process is firmly located in the hands of the federal government, which has the power to determine the merit of the claim prior to any negotiation. In the second stage, if the claim is accepted, the First Nation researches its land claim, acquiring further evidence to serve as a basis for negotiations. Then, the parties begin to negotiate. If negotiations are successful, this brings the parties to a third stage, Agreement in Principle (AIP) negotiations. These negotiations flesh out the specifics of the treaty and, once agreed to, ends in legislation (Dacks, 1985: 255).

<sup>16</sup> In some ways, the B.C. government feels it has more at stake in the treaty negotiations, fearing the loss of revenues of lands signed over to the First Nations.

## CHAPTER 3: FIRST NATIONS JUSTICE FRAMES

Thus far, my analysis of justice frames in B.C. has focused primarily on those frames employed by the governments of British Columbia and Canada to disregard or dismiss the land claims forwarded by First Nations. In the past 20 years, these settler justice frames have increasingly come under attack in political discourse, in the courts, and in the media. In opposition, First Nation justice frames have been mobilized by Aboriginal social movements to forward the cause of land claims. This chapter will outline the emergence and development of the First Nations land claims movement in British Columbia, identifying both the political and discursive openings that have created a space for First Nations persons to counter non-Aboriginal justice frames and the forms First Nation justice frames have taken. I argue that First Nation justice frames should not be regarded solely as an expression of identity politics (or a politics of recognition); instead, these frames most often combine concerns with protecting and revitalizing First Nations cultures with demands for material equality.

### 3.1 The Land Claims Movement as a Social Movement

In this section, a distinction will be drawn between the First Nations ‘movement’ and First Nations social movement organizations (SMOs). Moreover, a particular subsection of First Nations SMOs—the First Nation band or tribe-based bodies directed with pursuing a particular land claim—will be highlighted as key actors in the land claims struggle. The terminology used here is borrowed from both Resource Mobilization Theory (RMT) and the New Social Movements (NSM) literature; however, this analysis should not be interpreted as an unqualified application of either approach. Instead, my objective is to conceptualize ‘social movements’ in a

manner that is amenable to both of these approaches since neither, by itself, is adequate for understanding the First Nations movement.

Resource mobilization theory arose in response to the limitations of the 'collective behavior' perspective, which until the 1970s dominated the American literature on social movements. According to Turner and Killian (1987), the main exponents of the collective behavior approach, informal group activity often emerges in situations where norms are poorly defined, leaving those within the group to navigate this confused normative terrain. Given this normative uncertainty, individual behavior is less rigidly defined than it would be in a more organized, formal group setting. However, 'social movements' often arise in such circumstances to provide individuals with direction and to attempt a reconfiguration of the normative order.

The heightened social movement activity of the 1960s soon demonstrated the insufficiencies of the collective behavior approach. First and foremost, the 'psychologism' of the collective behavior understanding of social movement formation suggested that movements were 'irrational' and poorly planned affairs that emerged in response to conditions that lay beyond participants' collective understanding (Donati, 1992; Gamson, 1990). In contrast, resource mobilization theorists sought to portray social movements as rationally motivated collective action directed toward defined goals (McCarthy and Zald, 1973; Zald and McCarthy, 1987). Proponents of RMT argue that social movements do not simply arise in response to a particular grievance or social uncertainty since these two factors are ubiquitous in any societal period; instead, they suggest that social movements develop when the resources necessary for mobilization (e.g. human, economic, and political resources) become available (Tilly, 1978).

While RMT has made a valuable contribution to the social movements literature by demonstrating the importance of the more mundane requirements of collective action, its focus

on the instrumental rationality of collective actors (Scott, 1990:118) is inappropriate in the context of this study on two counts. First, although rational calculations are obviously made by First Nations actors about whether or not to participate in the First Nations movement, in a movement that touches on a number of emotionally-charged and symbolic issues it is unlikely that constituents are attracted to this cause solely by virtue of a measured cost-benefits analysis. Second, some would argue that the 'instrumental rationality' RMT identifies is a European precept. First Nations groups often claim adherence to a rationality contrary to this 'Western' rationality which dominates Canadian society. Boldt (1993:176-7) describes this other rationality as a traditional cultural philosophy that stresses concerns with mutuality, community, and equality rather than the 'selective incentives' usually seen to characterize movement participation. While it would be naïve to assume all First Nations actors participate on the basis of such a traditional cultural philosophy, it is important not to close off the possibility that alternate rationalities may exist to motivate First Nations collective actors.

RMT has also been criticized for focusing on the 'how' rather than the 'why' of social movements (Melucci, 1989); that is, for ignoring the reasons why actors construct and attach themselves to a collective identity in favor of questions about resource acquisition. In contrast, NSM theorists do not take the existence of the collective identity of a movement for granted and instead seek to explain how the movement constructs itself symbolically (see Cohen, 1985; Eyerman and Jamison; 1991); that is, in the words of Melucci (1996: 16), to understand "...how a 'we' can become a we". The modern breed of social movement is said to operate in an environment where issues of group specificity and identity politics are of primary importance. As Habermas (1981) states, for NSMs "...the question is how to defend or reinstate endangered

life styles, or how to put reformed life styles into practice. In short, the new conflicts are not sparked by *problems of distribution*, but concern the *grammar of forms of life*.”

The application of the term ‘new social movement’ to First Nations collective actors who have carried out their struggle for centuries would amount to a misidentification, however, since this terminology erases First Nations collective action that has been present from the time that Europeans arrived in North America. Furthermore, the tendency amongst NSM theorists to minimize the political aspects of social movements by locating the activities of these movements primarily in the sphere of ‘civil society’ (Scott, 1990:16-7) is problematic when addressing the First Nations movement. Although there is a strong desire for cultural revitalization that motivates different First Nations collectivities, this is a desire that can only be met by directly challenging the Canadian state, by achieving a redistribution of resources, and by amassing political power in order to determine their futures.<sup>1</sup>

Given the problems with both RMT and NSM approaches as applied to First Nations movements, I will attempt to arrive at a definition of the First Nations movement by borrowing ideas from both approaches.

#### *a) Defining the First Nations Movement*

First Nations collectivities often engage in activities that would lead to them being defined as part of a ‘social movement’—that is, they mobilize their supporters in order to effect social change or, in some cases, to prevent social change. However, there are some difficulties in applying this label to First Nations groups and organizations. Although it has become somewhat commonplace to speak of a First Nations ‘movement’ or even of an “international indigenous movement” (see Barsh, 1991), there have been few attempts to clarify the use of this

terminology. First and foremost, it is necessary to clarify what is meant by the term 'social movement'. Often this term is used to refer to specific organizations such as Greenpeace or the Sierra Club (Marx and McAdam, 1994:2); however, this becomes confusing when the same label is also applied to a broad array of groups that have formed around a particular issue or set of issues, such as the environmental movement. This same confusion exists in the study of First Nations collectivities where one may use the term 'movement' to refer to both specific organizations such as the Union of British Columbia Indian Chiefs (UBCIC) and as a general label under which all First Nations groups can be placed.

To avoid this conceptual confusion the term 'social movement' is not used here to refer to individual organizations. Instead, it refers to a broader, structural organizing principle under which any number of groups may be placed (Diani, 1992:14). In this sense, a social movement is

a network of informal interactions between a plurality of individuals, groups and/or organizations, engaged in political or cultural conflict on the basis of a shared collective identity (Diani, 1992:13).

Thus, a 'movement' is constituted by various individual and collective actors who engage in activities that are cultural and/or political. Collective identity can be understood here as an "interactive and shared definition produced by several interacting individuals who are concerned with the orientations of their actions as well as the field of opportunities and constraints in which their action takes place" (Melucci, 1989: 34). The production of a collective identity is a continuing process, often marked by conflict amongst actors within the social movement, through which a group must actively construct and reproduce itself as a collectivity. Diani (1992:8-9) adds that external definitions play a role in the construction of collective identity. Johnston *et al.*(1994:18) use the term "public identity" to refer to the influence public

perceptions of and attitudes about a particular group have on the group's self-definition and on the options that are made available to resolve a particular grievance. The 'public definition' of First Nations movements is particularly relevant to the land claims conflict in B.C., where the state and other groups have sought to minimize First Nations' claims to nationhood and, instead, represent them as either ethnic groups or communities (see Chapter 5).

Given that the formation of collective identity is a process, to speak of a First Nations "movement" we must not assume that a primordial homogeneity exists amongst the First peoples of this continent, or even in the province of B.C. Instead, we must look at how their collective identity is constructed by referencing a common history. Even the most stable of groups needs to engage in a process of self-definition and redefinition. In the case of First Nations groups in British Columbia, their existence as 'nations' prior to 1849 was no guarantee of the maintenance of this identity. Gradually the nationhood of various First Nations peoples was challenged by the colonial government and they found themselves isolated on small reserves, separated from their larger nations and from 'mainstream' society (see Fisher, 1977:49-72 or McKee, 1996:11-9 for a description of this process). In turn, the eventual attempts to redefine themselves as 'nations' has led to the construction of a broader collective identity based not only on the histories of particular cultural units, but on shared 'pan-Indian' experiences as First Nations peoples. Thus, although these were originally "culturally diverse" (McKee, 1996:3) groups, I concur with Long (1997:151) that it is not surprising that there are similarities between different First Nations groups given their common historical experiences. Furthermore, the First Nations movement operates to highlight these similarities and construct a 'pan-Indian' identity that can serve as a basis for a common conception of selfhood. As Boldt (quoted in Frideres, 1988:272) writes of the First Nations movement in Canada,

[t]his pan-Indian concept and the emergent political and cultural movement with which it is associated is serving to identify new boundaries and to create new over-arching Indian loyalties at the national level. It is a movement to enhance a sense of commonality and group consciousness which goes beyond mere political organizations to include recognition of a shared history of oppression, cultural attitudes, common interests, and hopes for the future.

In this sense, the First Nations movement provides what may be referred to as a “collective action frame” (Snow et al. 1986; Snow and Benford, 1988, 1992) since it calls attention to certain injustices, assigns responsibility for these injustices to certain parties, and unites a variety of experiences under a particular theme or “frame”. However, the collective action frame does not serve to homogenize the ideas and orientations of the various collective actors comprising the movement. Rather, a wide variety of preferences exist within a particular “frame”, and this can lead to conflict amongst various SMOs. Therefore, the process of collective identity formation requires constant negotiation amongst the plurality of movement actors (Diani, 1992:9)

In sum, we can understand the multitude of First Nations groups positioning themselves on the issue of land claims as part of a social movement—be they bands, lobby groups, or other First Nations associations—since there is a shared collective identity that has been formed and which allows members of these various groups to understand themselves as part of a larger collectivity. A particular group of actors acting in concert over a sustained period of time may more appropriately be termed a Social Movement Organization (SMO). That is, it can be understood as “a complex, or formal, organization which identifies its goals with the preferences of a social movement or a countermovement and attempts to implement those goals” (McCarthy and Zald, 1977:1218). Therefore, such a group falls under the aegis of the larger movement that “frames” the issues and preferences with which the SMO identifies.

*b) First Nations SMOs<sup>2</sup>*

Within the broader First Nations 'movement' there exists an array of First Nations SMOs concerned with both general and specific First Nations grievances. Aside from the bands and tribal groupings directly involved in relationships with the Federal and Provincial governments, there are many other First Nations SMOs active in voicing their concerns. Such groups include: national lobby organizations, such as the Assembly of First Nations, which are bureaucratic in their organizational structure and represent a diversity of cultural groups; 'Red Power' (or radical) organizations, such as the Union of British Columbia Indian Chiefs and the Native Youth Movement, who are most concerned that First Nations cultural groups be viewed as nations and are accorded the rights of nations; multi-ethnic organizations, which are temporary coalitions of bands and/or groups which link together to advance a common grievance or to resolve a perceived problem; and finally, local organizations, such as the First Nations Summit and organizations for urban First Nations persons (e.g., the United Native Nations), First Nations women (e.g., the Native Women's Association of Canada), or groups dealing directly with First Nations health issues (e.g., Healing Our Spirit), that have formed around and are focussed on specific grievances (Frideres, 1988:270-5). All of the groups listed above are involved either directly or indirectly in the land claims struggle.

First Nations SMOs frame their justice visions with respect to the larger movement. These preferences can be roughly identified as fitting one of four ideal-typical categories. First, groups that aim for political independence from, and nation-state status in relation to, the Canadian government hold "nationalistic preferences". Second, "autonomous preferences" are expressed by groups also seeking to establish an independent Aboriginal state, but within

Canadian political structures rather than outside of them. Third, “departmentalist preferences” are shown by groups who wish to retain the existing structures of Aboriginal administration, but with more input from Aboriginal groups. Finally, “integrationist preferences” are exhibited by groups who desire the full and equal assimilation of First Nations peoples into Canadian society.<sup>3</sup> The rest of this chapter will be devoted to examining the different justice frames presented by various First Nation SMOs in B.C. which eventually culminated in the establishment of the B.C. Treaty Process.

### 3.2 The Emergent Movement: Colonization and Social Change<sup>4</sup>

Following Turner and Killian (1987), Marx and McAdam (1994) argue that social movements typically emerge in response to broader societal changes. One could hardly imagine a more dramatic social change than the arrival of a new people who impose an entirely different way of life. Although First Nations initially adapted to the spread of the fur trade and incorporated this activity into their traditional practices, the colonization of B.C. placed First Nations peoples in direct competition with Europeans over the lands on which First Nations cultural practices were based. Moreover, First Nations increasingly found themselves and their cultures socially derided as ‘savage’, ‘uncivilized’, and ‘heathen’. In response to these public imaginings of Indians and Indian society, many First Nations sought to counteract this portrayal and to combat its effects – the legitimized theft of First Nations lands. At times, they rose up to contest the expropriation of their lands; however, the brutal reprisals organized by the early Colonial government demonstrated the futility of any single First Nation or Tribal grouping attempting to use physical force to displace settlers from traditional lands or to chase off surveyors. As well, geographical isolation and linguistic differences prevented First Nations

from banding together in a multi-nation body to respond to aggressive settlement. This left First Nations with few options for reacting to colonial encroachment on their traditional lands. Given these circumstances, the primary avenues of protest in the early days of colonization were through the band councils established by the settler society and through the missionaries who had placed themselves within First Nation societies in attempts to bring 'religion' to the Indians.

In this sense, although there existed an implicit pan-Indian justice frame – since nearly all saw the increased settler encroachment on Indian land as an injustice – this vision was only articulated in a fragmentary form. As Melucci (1994) reminds us, grievances may remain submerged in the everyday lives of groups before they are articulated; therefore, one should not assume that there exists no common grievance simply because no movement has formed to articulate it. Moreover, implicit resistances employed at the local level to combat perceived injustices often demarcate a submerged justice frame. For example, an implicit resistance in the history of B.C. First Nations, and First Nations across Canada, was their general refusal to accept the offer of the Enfranchisement Act (1869) which encouraged them to exchange their Indian status for the rights of citizenship. Similarly, First Nations practiced implicit resistance to assimilation by continuing to speak their Aboriginal languages and by carrying out potlatches, despite the legal and religious prohibitions against doing so (Kulchynski, 1995). Although these implicit resistances helped preserve a sense of injustice that eventually animated a broader justice frame, they were, at this early stage of movement development, largely defensive in character and therefore carried little political force.

A First Nation social movement and justice frame began to emerge more coherently in the late 1800s/early 1900s . Prior to 1909, the year when two pan-Indian movements formed in B.C., protest actions were typically organized by a single band or tribal group and were directed

locally toward Indian agents, although occasionally petitions were made or delegations were sent to higher-ranking officials in Victoria, Ottawa, or London. For example, one of the most influential multi-party petitions was sent to Indian Commissioner Powell in 1874 by the Chiefs from First Nations on and around the Bute Inlet. In this petition they stated:

“For many years we have been complaining of the land left us being too small. We have laid our complaints before the government officials near to us. They sent some others; so we had no redress up to the present; and we have felt like men trampled on, and are commencing to believe that the aim of the white men is to exterminate us as soon as they can, although we have been always quiet, obedient, kind and friendly to the whites” (quoted in LaViolette, 1961: 115-116).

The Chiefs also pointed out in this letter that they required 80 acres per family – the amount typically allotted by the federal government – in order to survive. As well, they attempted to counter the settler caricature of Indians as being “lazy and roaming-about people”, citing their dedication to societal improvements and to starting the path toward “civilization”. However, the petition does not formulate First Nations’ grievances in the terms that would later come to define protests – title, treaties, and self-government – nor do they locate their complaints in the broader discourse of Aboriginal rights. These notions were all present in embryonic form, and were touched upon in many First Nation statements, but they had not as yet achieved the currency they soon would.

A more thorough historical analysis would be needed than that provided here to trace the genealogy of the First Nations use of such terms as Aboriginal rights and title; however, it is evident that in the 1880s, First Nations began to develop a clearer set of demands that centred upon the issues of title, treaty, and self-government that were ignored in the 1874 petition. Slowly a discourse was emerging with which First Nation grievances could be framed in a manner comprehensible to non-Aboriginal governments – even if these governments made only

symbolic gestures toward addressing these issues.<sup>5</sup> For example, the Nisga'a and Tsimshian of the Northwest Coast were two of the most active groups in the emerging land claims movement. Together both groups sent a delegation to Victoria in 1887 who told Premier Smithe, "[w]e want you to cut out a bigger reserve for us, and what we want after that is a treaty" (quoted in Raunet, 1996: 95). Furthermore, the delegation was clear about their ownership of traditional lands, although they did not state this precisely as a claim to title.

To gain any measure of success in their actions, First Nations were from early on required to translate their traditional sense of ownership and possession into terms understandable to white officials, and to make their presentations in a manner that, in the minds of white officials, appeared 'civilized'. The political and legal rationality of European civilization had become universalized on the basis of white hegemony in this region, leaving any alternative rationality particularized beyond communication. As Bourdieu (1998: 45) states, "[c]ulture is unifying: the state contributes to the unification of the cultural market by unifying all codes, linguistic and juridical, and by effecting a homogenization of all forms of communication...". In this manner, the framing tools available to the emerging land claims movement were prescribed by the dominant European culture, and carried the threat of an initial totalization, imposing European forms of rationality on First Nations seeking the return of their traditional lands. This said, totalization is never complete, and even within the restrictive discourses of European legality, First Nations in B.C. were able to devise resistive frames that served to turn European discourses of justification upon themselves and point out their contradictions.

In 1909, the First Nations movement started to take a more organized shape. The Nisga'a had already formed the Nisga'a Land Committee to pursue their land claims, and they

encouraged other Coastal First Nations in B.C. to meet with them in Victoria in December of 1909 to discuss their common cause. Through their discussions, the Coastal First Nations agreed to form the Indian Rights Association. Similarly, the Interior Salish tribes had met in the summer of 1909 and had created the Interior Tribes of British Columbia to address their grievances. Unfortunately, neither of these pan-Indian bodies had the resources or the organizational structure to allow them to present a serious challenge to government views on the land claims issue. They would hold assemblies to develop policy statements and to approve delegations to be sent to meet with non-Aboriginal government representatives, but they were unable to achieve much in terms of concrete successes. In all fairness, these bodies were developing their agendas during a period when anti-land claims policies were firmly entrenched and government officials such as Joseph Trutch were adamant in imposing colonial justice.

Nevertheless, in contrast to these pan-Indian bodies and their growing pains, the Nisga'a Land Committee continued to make minor gains. In 1913, the Nisga'a Land Committee sent a petition to authorities in London, stating outright the issues of title, treaty, and self-governance. Furthermore, in their letter they pointed to the 1763 Royal Proclamation issued by King George, a document that was to become of fundamental importance to First Nations in B.C. since it would offer a legal loophole through which they could pursue their land claims.

### 3.3 Seeking Political and Discursive Openings

It is not enough for an emerging movement to construct a collective identity for potential constituents or to begin fashioning an interpretive frame for directing the actions of these constituents, there is also a need for political opportunities for collective action to arise (Tarrow, 1994; Tilly, 1978) and for ample resources to be available to make sustained action possible

(Gamson, 1990; Jenkins, 1993). As well, a discursive opening that provides a new political “nodal point” around which a movement can articulate its justice frame is needed (Laclau and Mouffe, 1984; see also Eyerman and Jamison, 1991). Thus, although the nascent land claims movement was beginning to establish itself in a rudimentary way, the channels available to the movement were limited and the predominant discourses of title, treaties, and self-government were yet to resonate with the larger Aboriginal and non-Aboriginal population.

The Nisga’a petition signaled an important shift in the justice framing of the land claims issue employed by First Nations in B.C. Up until this time, few First Nations in the province were aware of the Royal Proclamation and fewer still were using it as a basis to pursue their Aboriginal title. As Tennant (1990: 90) states, “[k]nowledge of the proclamation gave a powerful boost to pan-Indian sentiments. Each Indian could see his or her tribal group as one of the ‘nations or tribes’ recognized and promised justice by the proclamation but denied it by the actions of provincial officials.” The Nisga’a, through their petition to London, fully expected that the Privy Council would right this historic wrong once they became aware of the Dominion’s oversight.

Around the time of the Nisga’a petition, the McKenna-McBride Royal Commission was beginning to hold hearings with First Nations across B.C. The Nisga’a sought assurance from government authorities that their appearance before the commission would not be interpreted as a discontinuation of their claim to ownership of their lands. Many other First Nations impressed upon the commission their feelings that the issue of Aboriginal title was of foremost importance to them. This includes many of the First Nations of the lower mainland, such as the Tsleil Waututh, Musqueam, Squamish, and Tsawwassen, all of whom told the commissioners that they desired title to their lands. The McKenna-McBride Commission, however, was not prepared to

deal with this issue and steered First Nations representatives away from discussing these issues and instead toward providing demographic information about the band (see Chapter 2).

Dissatisfaction with the Commission's reluctance to tackle issues such as Aboriginal title resulted in a renewed interest in pan-Indian organizing in B.C., as First Nation leaders were pessimistic that the Commission's report would address their concerns. This dissatisfaction found its voice in two individuals, Andrew Paull and Peter Kelly. Paull was a member of the Squamish Nation and had served as an interpreter for the McKenna-McBride Commission. One can only suppose that this position exposed him to a broad array of First Nation grievances and made him sensitive to the general issues confronting First Nations in B.C. as a whole. Kelly was a Haida and was an ordained Minister (initially with the Methodist Church, but later with the United Church). In 1916, these two men organized a conference at Paull's Squamish reserve which was attended by leaders from 16 tribal groupings, with representatives from all geographical areas of the province. The end product of this meeting was the formation of the Allied Tribes of British Columbia (hereinafter 'Allied Tribes'), a province-wide political organization designated with the task of forwarding land claims.

Within days of the formation of the Allied Tribes, the McKenna-McBride Commission released its final report. First Nations in B.C. were angered by the recommendations put forward by the commissioners. Fortunately for them, these recommendations were not immediately implemented due to the retirement of Premier McBride, and the unfamiliarity of his replacement, H.C. Brewster, with Indian matters. Brewster died in 1918 and John Oliver became premier. Oliver took an interest in settling issues regarding Indian reserves with the federal government and looked toward implementing the recommendations of the commission's report. He decided in 1919 to consult the First Nations of the province with regard to their feelings about the report,

since the mandate for the Commission had provided First Nations with veto power over any land cut-offs. This was not a popular decision with his federal counterpart, Superintendent of Indian Affairs Duncan Campbell Scott, who felt that the Indians should not have a say in the implementation of the Commission's report.

The group Oliver selected to hold his consultation with was the recently formed Allied Tribes. To formulate a response to the McKenna-McBride report, the Allied Tribes held a general meeting at Spences Bridge in June of 1919. Until this point, the leaders of the Allied Tribes, Paull and Kelly, had been busy lobbying against the proposed cut-offs, but the larger Allied Tribes body had undertaken few projects in concert. However, given this opportunity to present their views, the Allied Tribes responded by organizing consultations with First Nations across the province. By December of 1919 they had assembled this information in a 6000 word report that made a strong claim to Aboriginal title and rejected the final McKenna-McBride report on the basis that it ignored the issue of Aboriginal title.

This political opening was short-lived, however, as the Federal government chose to deal with these complaints by rescinding the veto power it had promised the Indians. Indeed, the federal government was becoming increasingly frustrated that those amongst the Indians who had received a western education often chose to apply this education toward the pursuit of land claims. The federal government's assimilationist policies had clearly failed, as these new Indian leaders refused to trade in their Indian identity for the rights of British subjects. In reaction, the federal government stepped up its efforts to repress First Nations cultures. In 1920, they passed Bill 14 which allowed the government to enfranchise any Indian person, with or without his or her consent. They also strengthened the laws requiring Indian children to attend residential schools and became more persistent in their efforts to enforce the potlatch ban (Tennant, 1990).

During this period, the Allied Tribes were prevented from accessing information necessary to the pursuit of land claims, such as the *Papers Connected with the Indian Land Question, 1850-1875*, which contained evidence of Douglas's acknowledgement of Aboriginal title, and of Trutch's efforts to counter this acknowledgement (Tennant, 1990). Furthermore, the Allied Tribes lacked sufficient economic resources to carry out their objectives (LaViolette, 1961). In effect, their ability to force a discursive opening to allow for the broad articulation of their grievances had been closed by the lack of a complementary political opening which would provide them channels through which they could pursue their land claims. For this reason, the Allied Tribes began to crumble from internal dissension in 1922.

A slight improvement in this situation developed when Mackenzie King's Liberals replaced the Conservatives in Ottawa. Bill 14 was repealed soon after the change in government, and in 1923 new hope was brought to Coastal First Nations when Indians were given the right to possess commercial ocean fishing licenses, which provided them with an opportunity to raise much needed funds for organizations like the Allied Tribes.

But in 1924, the McKenna-McBride cut-offs were implemented, forcing the Allied Tribes to change their strategy. They elected to pursue their case for land claims with the Privy Council in London. When they pressed vigorously for permission from the government of Canada to bring their case to the Privy Council,<sup>6</sup> the federal government decided that it would be preferable to establish a special joint committee to attend to land claims issues in B.C. rather than allowing these matters to be brought to the Privy Council. In 1927, this newly formed committee heard from both the representatives of the Allied Tribes and two leaders representing the tribes from B.C.'s interior. Paul, Kelly and Arthur O'Meara spoke on behalf of the Allied Tribes, laying out for the committee the principles of the Royal Proclamation and stressing the

need for treaties and compensation for lost lands. In this sense, they appealed to European legal rationality as they pointed to the contradictions apparent in British/Canadian policy. Kelly summed up this challenge nicely: "Why not keep unblemished the record of British fair dealing with native races? Why refuse to recognize the claim of certain tribes of Indians in one corner of the British Dominion, when it has been accorded to others of the same Dominion?" (quoted in Tennant, 1990: 106)

The representatives from the tribes of the interior, in contrast, appealed more directly to traditional arguments, providing the committee with oral-history recountings of the promises they had received from the Queen.<sup>7</sup> However, neither approach was successful in moving the committee to address First Nation grievances. The committee rejected the arguments of the First Nations representatives, claiming that title had been extinguished by the exertion of sovereignty by the British Crown, that the activities of the Hudson Bay Company constituted a form of conquest, that there were contradictions between the claims made by First Nations from the Coast and those of the Interior (demonstrating that there was no unified position on these matters), that white agitators such as O'Meara were responsible for leading the Indians astray and building their hopes, and that the Indians were not deserving of serious consideration since they had declined the conditions offered to them in the 1914 order-in-council and yet still persisted in wasting government time with these "irrelevant issues" (Tennant, 1990: 109).

The committee concluded the proceedings by making two recommendations: 1) that an annual allotment be made to B.C. First Nations since they do not receive treaty payments, and 2) that land claim agitation should be prevented by prohibiting Indians from paying lawyers or other agents to pursue land claims without government approval. Both recommendations were implemented, with the latter making the organization of land claims impossible. Thus, another

brief opening of political opportunity was again abruptly closed, and the Allied Tribes were forced to discontinue their activities.

With the banning of land claims in 1927, the Nisga'a Land Committee became the only active First Nations organization in the province. However, in 1931 the Native Brotherhood of B.C. formed to reinvigorate the ideals of the Allied Tribes, except without explicitly using the language of land claims. Both organizations were quiescent throughout the 1930s as the depression, in combination with the land claims prohibition (which was part of what Joe Mathias [1982] describes as a "conspiracy of legislation"), made all but the smallest efforts difficult. The 1940s, in contrast, provided more opportunity for First Nations to pressure the government with regard to their grievances.

With the onset of World War Two, First Nations individuals enlisted at a rate surpassing that of any other group in Canada. Furthermore, as the horrors of Nazi policy toward the Jews became more widely known, a more critical gaze was cast internationally upon race-based policies that limited the rights of certain groups within national borders. Finally, Keynesian welfare policies began to filter more state funds toward economically marginalized groups in western societies, and these funds created new opportunities for financing political action (Hirsch, 1988). At this pivotal juncture, significant political and discursive openings revitalized the heretofore-frustrated land claims movement.

### 3.4 Master Frames and Land Claims

In 1951, the federal government repealed both its ban on the potlatch and its restrictions on land claims organizing. The fact that in 1949 the Privy Council in London had ceased to be the highest court in Canada, made this decision seem more politically palatable to the federal

government since they felt there would be less uncertainty faced if Indians brought their land claims before Canadian courts. But at this stage, so soon after the harnessing of the emergent land claims movement, the First Nations were not yet ready to bring their land claims to court. Before this could happen, they had to face the difficult project of re-establishing their collective identity and developing a new collective action frame to correspond to recent political changes.

In the mid to late 1950s, Native leaders began to reappear on the scene to continue the pursuit of the goals of the Allied Tribes. One such leader was George Manuel, who hailed from the interior of the province, but dedicated himself to promoting coastal-interior co-operation amongst First Nations in B.C. Manuel was a tireless organizer who was known to hitchhike his way around the province to consult with and mobilize various First Nations groups. In 1959, Manuel represented his fledgling group, the Aboriginal Rights Committee, at a convention of the Native Brotherhood, which was under the leadership of Peter Kelly. Also present at this meeting was Frank Calder, who was becoming a prominent figure in B.C. land claims politics as the leader of the Nisga'a Land Committee. Calder and Manuel both saw this convention as an opportunity to forge province-wide unity amongst First Nations in B.C. with regard to land claims, but they were opposed by Peter Kelly, who seemed uninterested in leading the Native Brotherhood in a renewed quest for land claims (Tennant, 1990).

Disappointment with the results of this convention led Calder and Manuel to focus their energies elsewhere: Calder and the Nisga'a stepped away from seriously dedicating themselves to province-wide coalitions and concentrated instead on their own independent land claim, while Manuel formed a new political organization based amongst the interior First Nations which he called the North American Indian Brotherhood. As Tennant (1990) has documented, the land claims social movement was once again divided along traditional lines with coastal and interior

First Nations finding it difficult to coordinate their activities. However, events in the 1960s would eventually lead them to recognize their common ideational goals.

In 1960, status Indians were given the right to vote in federal elections, making them one of the last minority groups in the democratic world to receive enfranchisement (Kulchynski, 1995). This belated inclusion of Aboriginal persons brought some hope to First Nations groups in B.C. that their land claims would soon be addressed. Indeed, in 1963 the newly elected Liberals, led by Lester Pearson, promised that they would form a land claims commission to address First Nation grievances. They followed through on this promise in 1965 when Bill C-123 established the Indian Claims Commission and provided funding to Aboriginal groups to aid them in preparing and presenting their claims. However, many First Nations in British Columbia did not like the idea of negotiating with an appointed government body and instead wanted negotiations to take place directly with the government.

This proposition was put forth by the Confederation of the Native Indians Of British Columbia (CNIBC), a newly formed body that did not intend to replace any of the already existing bodies, such as the Native Brotherhood, but instead hoped to better coordinate their activities. The Indian Affairs Minister, Arthur Laing, said he would accept this provision if the CNIBC could clearly demonstrate that it represented 75% of status Indians in B.C. The assumption made by both parties in this arrangement was that the negotiations would cover the entirety of the province in contrast to the nation-by-nation negotiations that are currently taking place through the B.C. Treaty Process. However, given that the membership of the CNIBC was predominantly made up of Salish from Vancouver Island, the mainland coast and the interior, it was difficult for them to establish that they in fact did represent a clear majority of First Nations in the province.

In the following years, Frank Calder would also attempt to promote unity amongst First Nations in the province by trying to form a new organization, the Indian Land Claims Committee. But Calder's efforts faced resistance from the CNIBC, who were more and more behaving like an independent, rather than a coordinating body, and who felt Calder and his associates were acting in too unilateral a fashion.

Infighting and schisms such as these are not uncommon in situations where a broad movement is forming across several interest groups. While the First Nations of B.C. shared many common interests, these interests had not yet been articulated in a resonant justice frame (Carroll and Ratner, 1996a) that could articulate a common interpretive schema for the First Nations of B.C. and that would allow them to act in a coordinated fashion without impinging on their cultural and political distinctiveness.<sup>8</sup> Indeed, infighting of this nature is often part of the "meaning-work" (Snow and Benford, 1992: 136) that is involved in the struggle to produce and maintain new meanings contrary to those professed by dominant societal institutions. What was required was a broader grammar of protest that could punctuate the seriousness of First Nations grievances in a manner that would resonate with both potential Aboriginal constituents and non-Aboriginal policy-makers; however, a discursive opening as such, through which the justice frame of Aboriginal title could be advanced, was not yet available.

Indeed, rather than address the First Nation demand for the consideration of their group rights, the Canadian government tabled the 'White Paper' in 1969, which attempted to impose the individual rights of Canadian citizens upon Aboriginal persons. This policy decision, taken by the Pierre Trudeau Liberal government, seemed so contrary to statements made by First Nations leaders in the consultations prior to the release of the document, it immediately galvanized Aboriginal persons in B.C. and across the country. Most saw this policy as

equivalent to a form of cultural assimilationism intended to destroy the Indian way of life. Thus, forced into a defensive position, First Nation groups saw little option but to band together in pursuit of their common cause.

After the release of the White Paper, Dennis Alphonse, the Chief of the Cowichan band, proposed a province-wide conference. While not all of the major First Nations organizations in B.C. responded to Alphonse's suggestion – groups such as the Native Brotherhood, the Nisga'a and Nuu-chah-nuulth did not reply – the Southern Vancouver Island Tribal Federation, the Indian Homemakers, and the North American Indian Brotherhood immediately took up his idea and managed to secure provincial and federal funding to hold a conference in Kamloops from November 17 to 22. The Chiefs of individual bands within the province also responded and sent representatives to the conference. In what would prove to be the most broadly attended assembly of First Nations in the history of the province to this point, the First Nation representatives made speeches about the need for unity in pursuing their Aboriginal rights to the land. As Tennant (1990: 153) summarizes, "...the speakers believed that the white paper's promise of equality meant simply the denial of aboriginal rights and the right to legislative protection."

The reinvigorated First Nations movement took organizational form in British Columbia when the conference concluded with the establishment of the Union of British Columbia Indian Chiefs, which was chaired by Don Moses, although its structure was designed so that decision-making would be the collective endeavor of the Chiefs rather than the prerogative of a single leader. After the chiefs had decided on a particular resolution it would be the role of the Chiefs' Council, a group of Chiefs representative of the various regions of the province, to direct the Executive Committee to carry it out. In this sense, an institutional structure was developed to try

to overcome the infighting that usually resulted when a single leader was in charge of decision-making. Furthermore, the new organization became more adept at finding government sources of funding to maintain the activities of the UBCIC, a problem that plagued previous attempts to unite First Nations in B.C.

On a broader level, however, the UBCIC was emerging at a point of intense social movement activity. Decolonization movements in other parts of the world had spread the discourse of the injustice of colonialism and its impact on indigenous peoples (Barkan, 2000). In the U.S., the civil rights movement had made advances for African Americans, and throughout the western world, women, gays and lesbians, ethnic minorities, and other 'identity' groups were mobilizing in pursuit of their 'rights'. But these rights were not necessarily the same as the individual rights offered to Aboriginal people in Canada through the white paper. Instead, they often reflected what Barkan (2000: 161) terms the "neo-Enlightenment," which refers to

“...the universalization of the Enlightenment tradition of individual rights and its expansion to include group rights, as well as to the tension created by the frequent collision of each of these categories. ...[I]n their efforts to survive in the modern world, indigenous peoples have turned to advocacy of Enlightenment principles as both a political agenda and a strategy.”

In essence, a new master frame was becoming available to the land claims movement in British Columbia through which the First Nations of the province could articulate their demands for Aboriginal title in a manner comprehensible to the broader liberal society.

### 3.5 The First Nations Tactical Repertoire: Legal and Direct Action

Alongside the pan-Indian mobilization in response to the white paper, the Nisga'a launched a landmark legal case to pursue their land claims. As mentioned in Chapter 2, although the decision in *Calder v. R.* (1973) did not technically favour the Nisga'a, the reasons for

judgement given by the Supreme Court Justices did recognize that Aboriginal title is not something granted by the Crown but rather pre-exists European settlement. This amounted to a symbolic victory for First Nations involved in the land claims struggle in B.C., and it further solidified the coalescence of First Nations groups around the justice frames of Aboriginal rights and title.

Following Calder and the white paper, and throughout the 1970s, First Nations in B.C. carried out a heightened level of political organization and activity, inspired by the success gained through both legal and direct action. First Nations also continued their traditional protest activities of lobbying and petitioning the federal and provincial governments, but there is little doubt that their major successes were the result of battles fought in the courts or through collective action. Indeed, they even began to influence Prime Minister Trudeau to back away from his staunch individualistic and universalistic conception of equality, moving him to consider the importance of group rights (an accomplishment all the more surprising given Trudeau's virulent opposition to the protest activity of Quebec separatists).

The increase in legal challenges and direct action on the part of B.C. First Nations can be in part attributed to the funding that became available at this time. The provincial First Citizen's Fund and the Federal Department of the Secretary of State, Department of Indian Affairs, and the Canadian Mortgage and Housing Corporation supplied B.C. First Nations social movement organizations such as the UBCIC and the B.C. Association of Non-Status Indians with core funds (Tennant, 1990).<sup>9</sup> In this sense, we see in the 1970s a convergence of factors contributing to the greater visibility and potency of the land claims movement in B.C. These include: a greater availability of resources for and an improvement in communication networks amongst B.C. First Nations; the solidification of Aboriginal rights and title as justice frames for

articulating a pan-Indian collective identity; political and discursive openings that permitted these justice frames to reach beyond the movement's Aboriginal constituency; and, a resonant master frame of group rights that emanated from the burgeoning social movement activity of identity groups in liberal-democratic nations.

With these factors in place, the 1970s and 1980s would prove to be a time of major accomplishments for First Nations both across Canada and in B.C. specifically. At the national level, First Nations received an important form of recognition when existing Aboriginal and treaty rights were affirmed and recognized in the 1982 *Constitution Act*. With this development, the justice frame of Aboriginal rights received broader legitimacy than it had previously enjoyed, even if the Constitution was silent on the nature of these rights. With this acknowledgement in hand, First Nations could now present their land claims as congruent with the foundational codification of the rights and liberties of citizens of the Canadian state. Moreover, the Constitution Act required that a series of four First Minister's Conferences be held to discuss the issue of Aboriginal rights. In the first of these meetings, First Nations organizations in B.C. made the argument that Aboriginal title is a crucial element of their Aboriginal rights and should also be entrenched within the Constitution. However, they did not succeed in convincing the federal government on this point, in part, because the government of B.C. opposed this notion.

The Federal government also initiated its comprehensive claims policy to address outstanding land claims in Canada. According to Trudeau, the Calder decision was one of the factors that influenced him to direct his government toward this policy. However, the comprehensive claims policy requires a First Nation to invest an exorbitant amount of time and money since the policy obliges them to perform extensive research to justify their claim. Furthermore, as the Nisga'a soon discovered after their land claims negotiations began in 1976,

there was only so far that a First Nation in B.C. could go in negotiations with the federal government so long as the province continued to refuse to recognize Aboriginal title. In maintaining its traditional attitude toward land claims, the provincial government – the body responsible for Crown lands in B.C. – refused to be a party to any land claims negotiations, making it difficult for First Nations to negotiate for a treaty land settlement. Thus, instead of participating in negotiations, the provincial government selected to battle with First Nations in the courts and on the highways and roads of the province.

This said, the land claims movement in B.C. did achieve one minor success in its struggles with the provincial government. In 1981, the Social Credit government agreed that lands cut-off by the McKenna-McBride Royal Commission should either be returned to First Nation reserves if undeveloped, or that First Nations should be compensated monetarily if these lands had since been developed. Although this change in policy righted a longstanding injustice, it failed to satiate First Nations' desires to have their land claims settled. The reluctance of the provincial government to address the land claims issue was interpreted on the part of First Nations organizations as a willful denial of both history and Canadian law, and these organizations were motivated to direct their protest and legal challenges directly at Victoria.

One protest tactic, the blockade, which had, since the 1970s, been part of the First Nation protest repertoire in B.C., was perfected during this period. Whereas previous blockades were directed at disrupting the everyday activities of white citizens, the modern leadership employed the blockade as a tool of economic disruption. Now the activities of resource-based industries and railway and highway developers were the primary targets. In particular, forest companies were singled out for blockades since this industry was so crucial to the economy of B.C. and frequently required access through reserves and to nearby logging roads to get to timber stands

deep within First Nation traditional territories (see Blomley, 1996). In addition to hurting the provincial economy through the interruption of forest activity and creating an uncertain business environment, these blockades also found for First Nations a new ally in the growing environmental movement, which often acted as an advocate for First Nations stewardship over traditional lands.

In the courts, cases such as *Sparrow* and *Delgamuukw* (see Chapter 2) pressed forward the legal claim to Aboriginal title. In the Supreme Court of Canada, both *Sparrow* and *Delgamuukw*, like *Calder* before them, signaled a shift in the attitude of the Chief Justices toward the legal status of Aboriginal title. The argument that explicit or implicit extinguishment had occurred, or that Aboriginal title was provided to First Nations at the 'pleasure of the Crown,' began to lose its force.

Thus, with the economic effects of blockades hampering the B.C. economy, with Court judgements increasingly unfavourable, and with public opinion shifting increasingly toward support for government being responsive to the claims of First Nations, the provincial government had little option but to move away from its refusal to negotiate. The key word for the provincial government in making this transition became 'certainty' – the desire to negotiate clear and final arrangements with First Nations to put an end once and for all to the court battles and civil unrest in B.C. In Chapter 7, I will argue that this shift in thinking about Aboriginal title was not just a result of these pragmatic pressures, but was also enabled by a change in the logic of governance (from a liberal to a neo-liberal approach) which permitted the provincial government to adapt to these pressures and to enter into land claims negotiations. For now, I would like to focus on how the efforts of the land claims movement contributed to the formation of the B.C. Claims Task Force.

### 3.6 Movement Success? The Formation of the B.C. Claims Task Force

Alan Scott (1990) argues that movement success can be measured by the extent to which the collective actor is incorporated into the system from which it has heretofore been excluded. In other words, movement success means no longer needing to exist as a movement, but rather becoming an integrated member of the political system. In these terms, the activism of the land claims movement of the 1970s and 1980s achieved a modicum of success when the B.C. and Canadian governments agreed to form the B.C. Claims Task Force, and agreed to the subsequent recommendations of this task force, which served as the basis for the B.C. Treaty Process (see Chapter 4 for a description of the formation of the B.C. Treaty Process and the BCTC).

In the aftermath of the 1983 First Ministers' Conference, the First Nations of British Columbia formed the Aboriginal Peoples Constitutional Conference (APCC). This body continued to meet regularly, even after the First Ministers' Conferences failed to address the issue of Aboriginal title in a manner satisfactory to First Nations in B.C. However, Joe Mathias and other members of the APCC felt that a new coordinating body was needed to carry the land claims struggle further. It was proposed that a 'parliament' of sorts be developed that would be comprised of representatives from First Nations throughout the province. At the 1988 meeting of the APCC this proposal was put into effect; however, the name of the body under which the First Nations were to gather was changed to the First Nations Congress (FNC) to denote the equality of all of the nations comprising this group.

One of the most important actions undertaken by the FNC was the organization of two conferences in 1989 at which First Nations met privately with representatives from B.C.'s largest resource industries. At these meetings, First Nation leaders, such as Bill Wilson, impressed upon

the business representatives that land claims negotiations were imperative, and, in the end, many business people came to agree with this view and advised the province that negotiations should begin as soon as possible so that certainty could be achieved. This, in fact, was the same message that the courts had been giving to the provincial government, warning them that political negotiations rather than litigated rights were the most promising means for dealing with the land question.

At last, the Social Credit government relented and Premier Bill Vander Zalm established a native affairs advisory council. The Premier and the council together toured the province, visiting the major tribal groupings to consult with them on the land claims issue. These meetings energized the Premier with the idea that the land claims issue could be resolved. Now motivated to bring about changes, the Premier agreed to meet with Prime Minister Mulroney and the FNC later in 1989 to discuss the establishment of a treaty process. At these meetings, the three parties agreed to form a task force comprised of representatives from the province, Canada and the FNC that would be charged with devising a treaty-making process. This was the beginning of the B.C. Claims Task Force and a step toward fulfillment of the promise that First Nations would at last be included in deciding the fate of the land claims question.

### 3.7 Conclusion

As the treaty process began to unfold, several First Nations refused to participate or later withdrew, upset with some of the compromises that were made by First Nations leaders to get the process underway. In particular, nations under the aegis of the UBCIC felt that the province should not be part of the negotiations since it was the federal government that had responsibility for First Nations and these negotiations, they argued, should take place on a nation-to-nation

basis. As well, they disagreed with the 'political' nature of the process, which to them meant that the two non-Aboriginal governments did not have to admit to or acknowledge the existence of Aboriginal title in order to engage in negotiations. Finally, they felt that the B.C. treaty Process, despite the involvement of First Nations representatives in its creation, was too similar to the federal comprehensive claims process and shared its focus on extinguishment.

Thus, the pan-Indianism that seemed to be developing in the land claims movement again proved to be fragile. In this sense, the success of the land claims movement was a limited one. The justice frame uniting the movement was beginning to tear apart as those First Nations with nationalist preferences began to show clear signs of disagreement with those who simply sought a degree of autonomy from the non-Aboriginal governments. Whereas the former hold out for a process that will do more to recognize their nationhood and to provide them with commensurate governmental powers, the latter view the treaty process as a pragmatic opportunity for rescuing their communities from poverty and dependency.

But, in either case, the parties are necessarily embroiled in a relationship with the state in order to achieve their desired ends, since they are reliant on the state for funding and only the state can provide them with the powers of self-government and self-determination that they require. This fact often leads both groups to formulate their visions of justice within what Carroll and Ratner (1996a) refer to as a "liberal justice frame". In their view:

"The fulcrum of contemporary Aboriginal politics is the conjoint struggle for land claims and self-government: the project is one of resisting an oppression that has been maintained in great part through state practices around the Indian Act, and (developing?) ostensibly new states under Aboriginal control. It is not surprising that a liberal justice frame – with its emphasis upon state-centred politics – might be a useful interpretive resource for Aboriginal activists engaged in this struggle" (Carroll and Ratner, 1996a: 420).

However, the potential hazard presented by this frame is the tendency to present the individual First Nation as being in direct relationship to the state in attempt to negotiate powers of government for that First Nation, thus fragmenting the hard fought coalition of the land claims movement even further. Indeed, as the B.C. Treaty Process has developed, the First Nation Summit (the body that evolved out of the FNC) has become more and more of a loose confederation than a unified and coordinated coalition. Within these negotiations, band and tribal social movement organizations have become the primary units of activity, making it increasingly difficult for the general body to orchestrate broad-based collective action.

The importance of the state to the First Nation land claims movement in B.C. prevents any simple characterization of this movement as based solely in 'identity politics'.<sup>10</sup> Indeed, the political aims of the land claims movement include objectives that would typically be associated with identity movements; such as a demand for recognition of a previously disvalued identity and the right to cultural survival in the face of the totalizing and universalizing tendencies of western capitalism, as well as objectives that reflect a concern with the need for economic redistribution, such as a desire to repossess valuable resources in order to bring an end to economic marginalization and to fund a greater degree of cultural autonomy. In this sense, the land claims movement is less an instance of a New Social Movement, as defined by Habermas, Melucci, and others, and is better described by Nancy Fraser's (1997) terminology, as a "bivalent community" with interest both in gaining redistribution and recognition (this will be discussed in greater detail in Chapter 5).

In sum, the First Nations land claims movement made major gains in the latter half of the 20<sup>th</sup> Century, now embodied in the formation of the B.C. Treaty Process. In the next chapter, I explore the formation and operation of the B.C. Treaty Process, arguing that the procedural

guidelines instituted with this process do not succeed in laying the basis for fair and equal negotiations between Aboriginal and non-Aboriginal governments.

### Endnotes

<sup>1</sup> For approaches that try to overcome these deficiencies in NSM theory, see Adam, 1993; Boggs, 1986; Carroll and Ratner, 1994; and Epstein, 1990.

<sup>2</sup> One of the dangers of examining First Nations collective action around the issue of land claims solely through a social movement framework is that, in categorizing the groups involved as 'SMOs' and as part of a 'social movement', one risks inadvertently minimizing their claim to nationhood. While 'nationalistic preferences' may be only one of the four preferences listed in this chapter, it would be wrong to dismiss this option from the beginning with the very terms of our analysis. That is, by subsuming First Nations collective action under the label of 'social movement' and 'SMOs' they may become associated with movements whose aims are to gain recognition and/or the redistribution of resources *within* a particular society. However, some First Nations would see themselves as legitimately outside the present social order (those holding 'nationalistic preferences') and their collective action as that of an occupied population rather than that of an identity group seeking to gain recognition.

It may even be questionable to paint their forms of collective action with the same brush used for other movements. Consider, for example, the use of blockades by First Nations to advance their concerns in British Columbia. Examination of this tactic does allow for comparisons to be made between these groups and social movements that use similar tactics, such as the picket lines used by unions and the road blockades occasionally used by environmental groups. However, one crucial difference that must be kept in mind is that the blockade is not always an act of civil disobedience or protest—it is often a legitimate denial of trespass onto First Nations lands (Blomley, 1996:19). Roads blocked most often run through reserves. Thus the right of way on this property, in law, may be considered to be at the discretion of the band. Therefore, although these actions may operate on similar principles as the blockades used by other movements—blocking the movement of people and/or commodities—different meanings may be the basis for such action since First Nations blockades tend to revolve around the issue of proprietorship.

Furthermore, the label 'SMO', if left unqualified, may wrongly limit the scope of options available to such a group. If Aboriginal SMOs are too facilely placed in the same category as other (non-First Nations) SMOs, both new and old, one risks precluding their claim to nationhood. While this focus on definition may seem to be 'hair-splitting' one should keep in mind that

...the distinction between [North] American Indians being identified as members of *peoples* understood to constitute *nations* in [their] own rights, and being cast as members of groups commonly perceived as comprising something less—a community, say, or a family, a clan, a "minority group", or a "tribe"—incurs a decisive meaning (Churchill, 1994:293).

Therefore, when using the tools of social movement theory, whether NSM or RMT, it is crucial to qualify our definition of First Nations groups as part of a 'social movement'.

For this reason, I will follow Jenson (1993:337) in arguing that there is an affinity between national movements and social movements; that is, SMOs are required at the initial stages of national movements in order to promote and self-define the group as a nation. At the basis of this perspective is the understanding that any nation is an 'imagined community' (Anderson, 1991) that is the product of a collective construction of nationhood. Social movements are part of this process in that they often play a role in the imagining of new or previously unrecognized communities as 'nations'. In this imagining, the act of self-naming is crucial since it is the foundational act in strategizing the boundaries, formation, and resources of the new nation. That is, the act of naming defines not only who the potential constituents of the social movement will be, but also the goals of this movement, and the relations the movement should expect to have with social institutions and government.

<sup>3</sup> These terms are adapted from concepts used in Menno Boldt's unpublished dissertation, "Indian Leaders in Canada: Attitudes Toward Equality, Identity, and Political Status" (1973, Yale University) as cited in Frideres, 1988.

<sup>4</sup> Much of the work that follows owes a major debt to Paul Tennant's (1990) comprehensive study of Aboriginal politics in British Columbia.

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<sup>5</sup> By 'symbolic gesture' I am referring to the Joint Reserve and McKenna-McBride commissions discussed in Chapter 2, which only provided the appearance of redress.

<sup>6</sup> First Nations were not able to bring an issue before the Privy Council unless the government of Canada permitted them to do so.

<sup>7</sup> One of the challenges faced by traditionalist/ nationalist groups such as the UBCIC is that they often refuse to employ the discourse of European rationality to forward their claims. While this provides them with the legitimacy of maintaining a moral connection with First Nation practices and traditions, it also results in them being dismissed, misrecognized and misunderstood by non-Aboriginal governments.

<sup>8</sup> Snow and Benford (1992) refer to such a master frame as an 'elaborated' one since it allows for a greater degree of ideational amplification to take place across seemingly different movement groups.

<sup>9</sup> A 'status Indian' is a First Nations person who is registered under the Indian Act as an Indian. If a First Nation person is a 'non-status Indian' it is likely because his or her ancestors were never registered or lost their status for one of various reasons.

<sup>10</sup> Kulchynski (1995) and Weaver (1990) both locate First Nations movements under this designation.

## CHAPTER 4: THE BCTC PROCESS

It is commonplace in the theory of negotiations to suggest that the substance of justice – the achieved end we intend as a resolution of an injustice – is predicated on the means, or procedure, developed to reach this end. It is the procedure selected as a means of redress that sets the parameters of justice: What issues will be discussed? What resources will be redistributed? What forms of recognition will be made available to the maligned party? Moreover, it is argued that the means to justice must meet the requirements of procedural fairness to ensure that the parties in conflict are provided the opportunity for equitable communication and that power imbalances are minimized to prevent any party or parties from resorting to forms of what Bourdieu (1991) refers to as ‘symbolic violence’ whereby they can mobilize various forms of capital (e.g. economic, cultural, linguistic, etc.) to the disadvantage of the other parties involved in the conflict.

In this chapter I will outline the formal elements of the B.C. Treaty Process and their contribution to a system of procedural fairness, while also considering some of the informal elements of the negotiations that impact the perceived fairness of the process. I will also examine some of the changes being made to expedite and improve the B.C. Treaty Process. However, it will be argued that, in contrast to the philosophy of procedural fairness, these procedural changes may not have their desired effect until more is done to clarify the substantive goals of the B.C. Treaty Process.

#### 4.1 The Report of the BC Claims Task Force

The advent of the British Columbia Claims Task Force was motivated by the concerns discussed in Chapter 3: the activism of First Nations in British Columbia, the court cases favourable, or somewhat favourable, to First Nation land claim arguments, and growing public support for First Nations issues. All of these factors arose in a period during which changing philosophies of governance and increased economic globalization made Canada's and British Columbia's former policies appear cumbersome and untenable.<sup>1</sup> The requests of First Nations were at last heeded by the federal and provincial governments and a tri-partite (Canada, BC, and First Nations) task force was established to develop a process through which land claim negotiations could be pursued. The British Columbia Claims Task Force came into being on December 3, 1990.

The Progressive Conservative government of Prime Minister Brian Mulroney and the Social Credit government of Premier Bill Vander Zalm were the two governments that responded to the request made by the First Nations Congress that a tripartite process be initiated. Each party selected representatives to serve on the committee. The federal government appointed Murray Coolican, who had earlier chaired a task force to review Canada's land claims policy, and Audrey Stewart, who had experience negotiating specific claims as an official with the Department of Indian Affairs and Northern Development. The province selected Tony Sheriden, who was the deputy minister of Native affairs, and Allan Williams, a former minister of labour and attorney general in British Columbia (McKee, 1996). The First Nations chose three representatives:<sup>2</sup> Joe Mathias, a later member of the First Nations Summit Task Force and a hereditary chief of the Squamish First Nation; Ed John, a hereditary chief of the Tl'azt'en First Nation who would also become a member of the First Nations Summit Task Force; and Miles

Richardson, currently the Chief Commissioner of the BCTC and former president of the Council of the Haida Nation. These representatives also received advice and information from Gary Yabsley, a Vancouver lawyer who had represented several First Nations in their land claims, and Paul Tennant, a professor of political science at the University of British Columbia and an expert in First Nations politics in British Columbia (British Columbia Claims Task Force, 1991).

The Task Force began meeting on January 1, 1991. Much of the initial meetings consisted of reaching agreement as to the nature of the problem they were setting out to resolve. This included coming to a common understanding of the historical record of provincial and federal governments in B.C. and their shared failure to fully address issues of Aboriginal rights and title. However, the Task Force was careful not to politicize the historical record and risk alienating the two non-Aboriginal governments. Instead, they thematized their report around the issue of "creating future relationships" as a means to acknowledge that the past relationships between Aboriginal and non-Aboriginal peoples had been unacceptable and that new relationships would need to be forged to repair these historic wrongs. However, although the federal and provincial representatives on the Task Force accepted the historical record as it was laid out in the report, the final report did not require the federal or provincial governments to agree to or confirm its historical retelling of injustices against First Nations in B.C. The two non-Aboriginal governments simply needed to accept the 19 recommendations put forward by the Task Force (see Appendix A), and these recommendations did not require them to recognize the existence of Aboriginal title nor the detrimental effects ignoring Aboriginal title has had on First Nations in B.C.<sup>3</sup>

Within six months of its formation, the Task Force produced its report outlining the strategy for treaty negotiations in British Columbia. This was a remarkable accomplishment

given that this was the first time First Nations, provincial, and federal representatives had worked in concert to address the land question in B.C.; thus, at last, resembling a dialogical rather than monological approach to dealing with First Nation land claims (see Chapter 2). The work of the Task Force was aided by the fact that there were pre-existing linkages between some of its members – for example, Joe Mathias had worked previously with Murray Coolican on the Coolican Report and was also familiar with Allan Williams and Tony Sheridan. Indeed, at only one point during their discussions did a party get up and leave the table. This occurred when the First Nations representatives left the meetings one afternoon because they were unhappy with the extent to which the federal Department of Justice would be involved in influencing Canada's negotiation strategy.<sup>4</sup> Over the weekend, the First Nations representatives engaged in private discussions with the government of Canada, and the following week they returned to the Task Force.<sup>5</sup>

In interviews conducted with people involved in the BCTC process, the report issued by the Task Force on June 28, 1991 was referred to both as the 'bible' of the BCTC process and as a politically motivated paper with little grounding in the actualities of negotiations. In all fairness, the report is neither of these things. The members of the task force discussed amongst themselves and consulted with interested individuals and parties with regard to the process through which land claims negotiations would be carried out, the issues to be discussed within this framework of negotiations (i.e. governance, land, resources, certainty, etc.), and the importance of interim measures and public education for ensuring the success of the treaty process (British Columbia Claims Task Force, 1990). In a short time period, they produced the groundwork for the development of the British Columbia Treaty Commission (BCTC), the organization that was to serve as the "keeper of the process", as well as nineteen

recommendations that were eventually agreed to by all three parties and which provided the “rules of the process”, so to speak. In this sense, the Task Force succeeded in envisioning a process whereby treaty negotiations could be conducted in a manner acceptable to all parties and they provided this process with some basic, yet flexible, rules.

However, the vision of the Task Force underestimated four key factors that would later contribute to difficulties experienced by the BCTC in trying maintain the treaty process. First, the Task Force was limited by the political necessity of getting the process started. For this reason, it was unable to be more definite in its 19 recommendations, leaving many of these open to self-interested interpretation. This became problematic as the parties came to take contrary interpretations on recommendations such as recommendation 16 – that the parties agree to interim measures sometime during the negotiations – and recommendation 2 – that the parties be permitted to introduce any issue at the negotiation table (British Columbia Claims Task Force, 1991: 36).

Second, the Task Force misjudged the number of First Nations that would join the BCTC process. It was thought, based on the number of First Nations that had filed land claims under the existing federal comprehensive claims policy, that there would be “as many as thirty separate negotiations throughout the province” in the initial stages (British Columbia Claims Task Force, 1991: 36). However, given the very permissive definition of what constitutes a ‘First Nation’ established in the Task force report,<sup>6</sup> the BCTC received 41 statements of intent within the first six months, many coming from smaller units than initially expected (including a rejected submission from the two-member New Westminster First Nation).

Third, the Task Force merely stated that all parties in the process should be adequately funded without clarifying the form this funding would take. This matter was left to the

judgement of the provincial and federal governments who, in their Memorandum of Understanding (MOU), determined that the majority of funds would be distributed through loans (80%) rather than grants (20%).

Finally, the Task Force provided the BCTC with no powers other than moral suasion for enforcing the nineteen recommendations. In effect, the recommendations were the rules of the game, but the referee was left without any strong means for ensuring fair play. These matters and others will be elaborated further in this chapter.

All of these decisions were made out of political necessity. Without them, it would have been difficult to get the process underway. However, these political compromises would present some major challenges to the workability of the process, and, currently, participants in the process are hoping that the initial framework designed by the B.C. Task Force will prove to be flexible enough to allow these issues to be addressed.

#### 4.2 The British Columbia Treaty Commission

On the basis of the Task Force report, the British Columbia Treaty Commission Agreement was signed at the Squamish longhouse on September 21, 1992. Legislation to support this agreement was passed by the provincial government in 1993 through the *Treaty Commission Act* and by the federal government in 1995 through the *British Columbia Treaty Commission Act* (1995, c. 45).<sup>7</sup> All three parties, Canada, B.C., and the First Nations Summit jointly proclaimed the *B.C. Treaty Commission Act* (RSBC 1996, c. 46) on March 1, 1996. The main purpose of the BCTC, according to the 1996 *B.C. Treaty Commission Act*, is to facilitate negotiations. This purpose consists of assessing the readiness of First Nations in B.C. to begin negotiations, allocating funds to First Nations to enable their participation in the treaty process,

encouraging timely negotiations, assisting in the provision of dispute resolution services where all parties agree to their necessity, preparing and maintaining a public record of the treaty negotiations, and performing any other tasks perceived to be consistent with the purposes of the *Act*.

All of the aforementioned *Acts* provide legislative support for the establishment of a committee of five commissioners responsible for the operation of the BCTC. One of the five commissioners is the Chief Commissioner, who is appointed jointly by Canada, B.C., and the First Nations Summit. Of the remaining commissioners, one is appointed by Canada, one by B.C., and two by the First Nations Summit. A Chief Commissioner can only be removed from office by the agreement of the three parties whereas the individually appointed commissioners can be removed at any time by the appointing party. Other than this basic information about the structure of the Commission, however, the *Acts* provide little detail as to how the BCTC is to meet its purpose. In terms of direct guidance, the *Acts* merely state that the BCTC must produce an annual report on the status of treaty negotiations.

When the first commissioners and Chief Commissioner (Chuck Connaghan) of the BCTC were appointed in April of 1993, they faced the difficult challenge of formulating just how they would go about meeting the requirements of the Task Force report and the B.C. Treaty Commission agreement. Although the BCTC had been established and the costs of its operation had been split 60-40 between the federal government and the province, an agreement was not yet in place for funding the negotiations between specific First Nations and the two non-Aboriginal governments. The provincial and federal governments appeared to be in no rush to undertake these difficult negotiations. In response to this hesitancy, the BCTC opened the process without funding and began accepting statements of intent from interested First Nations on December 15,

1993. This action persuaded the province and the federal government to complete their negotiations on cost-sharing (discussed below).

Within 45 days of receiving a statement of intent, the Commission must give written notice to each of the parties to convene a meeting at which the parties will formally commit themselves to negotiations. After the initial influx of statements of intent that coincided with the BCTC officially opening its doors, the commissioners were kept busy facilitating and attending these meetings. These were exciting times for the young commission, as many of the meetings bordered on the cathartic as their rich symbolism combined with the excitement experienced by First Nations of at last being able to address long-standing injustices.<sup>8</sup>

After spearheading this initial phase of the negotiations, Chuck Connaghan retired as Chief Commissioner in December of 1994. Commissioner Barbara Fisher temporarily held the role of Chief Commissioner until the three parties to the negotiations could agree upon a new Chief Commissioner. On May 15, 1995, they selected Alec C. Robertson, Q. C. Robertson set out to 'institutionalize' the processes of the BCTC during his tenure. The Commission had to this point succeeded in getting the negotiations underway, but now faced the challenge of attending to the more difficult task of facilitating the parties in dealing with the actual substance of negotiations. Robertson and his fellow commissioners felt that the BCTC could best attend to this task by cementing their own internal systems and policies. First and foremost, decision-making mechanisms needed to be installed so that the BCTC could function more efficiently. Each commissioner was responsible for a portion of the tables, with the Chief Commissioner in charge of trouble-shooting throughout the province. However, BCTC meetings tended to get bogged down as each commissioner presented to the general group the numerous challenges faced at specific negotiation sessions. To better orient its meetings, the BCTC established

various committees responsible for attending to different areas of treaty-making, such as communications and funding. These committees were responsible for examining the facts with regard to certain issues and for generating recommendations to be brought to the general BCTC meetings.<sup>9</sup>

Miles Richardson, one of the architects of the B.C. Treaty Process, replaced Alec Robertson as Chief Commissioner November 19, 1998. Robertson had succeeded in pressing the government to consider interim measures and to improve their communication and public information strategy (by handing these responsibilities over to the BCTC); however, Richardson had to contend with the reality that the treaty process was still not moving as quickly as had been hoped. Under his guidance, the BCTC became active in trying to further address some of the more problematic issues that had been stalling negotiations: certainty, compensation, and interim measures. Meetings at the principals' level, between B.C., Canada, and the First Nations Summit, which had begun earlier in the process, were intensified to better address these issues, and the BCTC became more involved in these meetings. However, despite offering some clarity as to what each party meant in their use of these terms, they failed to advance the negotiations.<sup>10</sup>

At the current juncture, First Nations' debt loads have risen well above \$150 million, yet few benefits have been experienced by their communities, resulting in a growing discontent with the treaty process. Similarly, in non-Aboriginal communities individuals are becoming more concerned about the money spent in negotiating treaties without achieving any tangible results. These concerns, and many others, have led Richardson and the BCTC to re-evaluate the treaty process, suggesting that the parties take an incremental approach to treaty-making through which they work to build agreements piece by piece rather than waiting to reach a comprehensive settlement (BCTC, 2001).

The establishment of the BCTC as the “keeper of the process” marked a significant change from earlier approaches to treaty negotiations in Canada, and around the world. It was felt that by creating such a body, some of the power imbalances witnessed in previous negotiations would be avoided. In particular, the BCTC would be in a position to monitor the playing field to help alert the parties to any potential imbalances. However, the BCTC was given no adjudicatory powers in performing this role; instead, it was required to rely entirely on ‘moral suasion’. This power consists of attempts to influence the parties to remain faithful to the recommendations of the Task Force report. For example, if a party does not fulfill its promise to obey a recommendation, the BCTC will typically write a letter to or meet with the party to alert them of their transgression. As well, the other two principals will be alerted to the infraction in hopes that the transgressing party will not wish to lose ‘face’<sup>11</sup> in front of its co-negotiators. However, if this tactic fails to persuade the transgressing party, the BCTC will then consider going public with this information, although it has rarely taken this step since the BCTC’s inception. In general, most commissioners, both former and current (especially those appointed by the non-Aboriginal governments), suggest that moral suasion is the most effective tool available to the BCTC and that the Commission should not seek more “teeth”. Their reasoning is that so long as the BCTC maintains its integrity and is regarded by all parties and the public as being ‘fair’, it will be capable of influencing the three parties to the negotiations. Having more “teeth”, in their view, would likely bring the parties to resent the BCTC and to perceive it as a threat, thus leading the principals to close their doors to the commissioners and their influence.<sup>12</sup>

Another way in which it was hoped that the BCTC would help minimize power imbalances within the negotiation process was by taking funding responsibilities out of the hands of the non-Aboriginal governments. It was feared that if the non-Aboriginal governments had

control over funding they would be able to use this leverage to influence activities at certain tables. Therefore, it was decided that a neutral body such as the BCTC would be a less controversial allocator of funds. However, this also meant that the BCTC would be saddled with the difficult and time-consuming work of orchestrating funding, not to mention the resentments that can arise in a situation where there is not enough funding available for all those making requests. This potentially detracts from the respect and trust the BCTC has sought to establish amongst the parties involved in the treaty-making process. The BCTC faces this challenge by being candid about its limitations and by making the effort to address face-to-face any funding concerns voiced by First Nations.<sup>13</sup>

The discourse of integrity and consensus-building that is drawn upon to describe the nature of the BCTC's influence in the B.C. Treaty Process, however, masks the impotence of this organization. While the concern that having more 'teeth' could push the negotiating parties to tune out the BCTC may be legitimate, the assumption that an appeal to moral rationality will somehow sway an intransigent party is naïve in the context of negotiations where manipulation and guile are not uncommon in pursuit of broader political ends. Indeed, federal and provincial negotiators are often able to construct 'communicative blockades' whereby they will close progress to a discussion by saying, "we understand your position, but we have a different interpretation." In mobilizing this discursive technique, the governments are able to portray a First Nation interest as a hard 'position', and their own position as a reasonable response.<sup>14</sup> However, by drawing the battle lines on an issue in this intractable manner, they also curtail the possibility of considering creative options – something they only attempt to do when appropriate pressure is placed upon them.<sup>15</sup>

### 4.3 The Treaty-Making Process

Like the federal Comprehensive Claims approach to treaty making, the B.C. Treaty Process is a multi-staged system. It begins, as noted above, with the First Nation submitting a statement of intent to the BCTC. Unlike the Comprehensive Claims policy, however, the First Nation is not required to demonstrate their Aboriginal title to the lands claimed (Molloy, 2000). As federal and provincial negotiators often mention, the process is meant to be a political, as opposed to legal one. Therefore, it is held that an initial compromise is made by all parties – the non-Aboriginal governments do not require the First Nations to prove their Aboriginal title and the First Nations do not attempt to hold the non-Aboriginal governments liable for infringement of title.<sup>16</sup> The problem is that this supposed compromise represents more the interpretation of the non-Aboriginal governments than an explicitly stated pre-negotiation exchange. While it is broadly accepted amongst the parties that negotiations are a more realistic path toward reaching agreement than the courts, Aboriginal representatives have rarely accepted their entrance into negotiations as a means for absolving the federal and provincial governments of their historical guilt for divesting their lands and imposing themselves on First Nations cultures.<sup>17</sup>

The guidelines of the BCTC specify that the statement of intent is to be made by an Aboriginal governing body representing a 'nation' – that is, a group that shares a collective sense of identity as a nation, that has historically exercised control over an area or region, that has existed historically as a governing body, and that represents a sizeable number of Aboriginal persons (B.C. Claims Task Force, 1991). The governing body of the nation could be a traditional government based on a hereditary system, a band established under the Indian Act, or a tribal council comprised of a political alliance of bands or tribes. In making its statement of intent, the First Nation governing body needs to demonstrate that it has received a mandate from

the people it represents to negotiate a treaty. To meet this obligation, it is required that the governing body give clear notice to all of its constituents of its intentions to negotiate a treaty, as well as provide them with the opportunity to participate in the decision-making process.<sup>18</sup> With regard to their territory, the governing body must attach a map marking its traditional territory to its statement of intent.<sup>19</sup> Furthermore, the governing body is required to notify the BCTC of any territories that may potentially 'overlap' with neighboring Aboriginal groups.<sup>20</sup> Once the statement is submitted, the BCTC will review the statement to ensure that all of the requirements are met, then it will forward copies to the federal and provincial governments and schedule a meeting between the three parties to take place within 45 days of the filing of the statement.

The second stage of the process involves preparing for negotiations and assessing the readiness of the parties. This stage officially begins with the meeting of the parties organized by the BCTC. This meeting is chaired by the BCTC, who use this opportunity to explain to the parties the criteria for readiness and to assess the length of time it will take each party to ready themselves. The parties to the negotiations are also expected to publicly state their commitment to negotiating a treaty with one another. Finally, the parties may also begin at this stage a discussion about the issues for which they feel negotiations are required (BCTC 1997b). As mentioned above, these are often symbolically potent gatherings that can build a sense of promise and hope for treaties amongst all who attend. The potential downfall of this is, however, that it can unduly raise expectations in First Nations communities about the commitment of the government to the process and give the impression that change is on its way.

Once the meeting is over, the parties begin the work of preparations, with each party filing a readiness submission with the BCTC when they are sufficiently prepared. To be considered 'ready' the parties must meet the following criteria: a) the First Nation must make a

formal commitment in writing to negotiating with Canada and B.C.; b) each party must appoint a Chief Negotiator to head their negotiations and liaise with the BCTC<sup>21</sup>; c) each party must confirm that it has a mandate to negotiate a treaty on behalf of its constituents as well as an effective process by which this mandate can be adapted and developed as they proceed through negotiations; d) each party must demonstrate that they have the financial and human resources to negotiate a framework agreement; e) each party must describe the ratification procedure it intends to follow if it succeeds in concluding a final treaty; f) each party must identify procedural and substantive issues it wishes to negotiate; and, g) First Nations must identify and begin to address overlap issues, while the federal and provincial governments must identify non-Aboriginal interests in the region and identify mechanisms for consulting these non-Aboriginal third parties. If the BCTC accepts each party's claim to readiness, the parties are permitted to advance to stage 3, the framework agreement negotiations (BCTC 1997b).

It is during stage 3 framework agreement negotiations that the parties begin to confront the true challenges of treaty-making. Stage 3 negotiations set the agenda for the eventual Agreement in Principle (AIP) negotiations, which serve as the basis for the final agreement. Thus, it is the framework agreement stage at which the parties must come to a common understanding of what issues will be on the table for negotiation (BCTC 1997b). This presents a problem with an issue such as 'compensation', which some First Nations demand be on the table, while the provincial and federal governments refuse to discuss the matter. First Nations such as the Musqueam, whose traditional territory covers much of the lower mainland, have been unable to progress beyond stage 3 in negotiations because they are unable to reach an agreement with the non-Aboriginal governments to address this issue, though it is imperative to the Musqueam. Furthermore, it is at stage 3 that the parties must define the procedural arrangements

they will implement for their negotiations (BCTC 1997b). These arrangements can include difficult questions of 'openness' and 'confidentiality' as the parties seek to determine to what extent they need to get the general public involved, and to what extent they need *in camera* negotiations where they can brainstorm without fear of raising alarm in the community. As well, the three parties must establish the structure of their negotiations: What purpose will be served by the public main tables? What will the role of negotiators and chief negotiators be at the private side tables? What working groups need to be established? How frequently will these various bodies meet?

The developments at this stage of the negotiation process help determine the specific character of the negotiations, and it is here that the negotiators' maxim that "no two tables are alike" begins to ring most true. Each table differs slightly procedurally from the next, with some placing more emphasis on open and public negotiations, while others feel the need for greater privacy. Some may need to establish numerous working groups to deal with the complexity of issues at the table, while others may be more reliant on side tables. Nonetheless, despite these preferences, each table is required to pass through this stage of the rigid six-stage process in order to arrive at stage four, the negotiation of the AIP.

Stage four has proven thus far to be the toughest stage of all, with only one First Nation in the province successfully completing this stage, the Sechelt. To make matters worse for proponents of the process, the Sechelt have recently stepped back from their AIP to re-assess some of its elements. While they are still in communication with the federal and provincial governments, what was expected to be the first success story of the B.C. Treaty Process seems an ever more distant hope.

The BCTC (2001) recently referred to stage four AIP negotiations as part of a 'big bang' theory of negotiations. This stage requires the parties to make a thorough examination of the substantive issues outlined in the framework agreement and to work toward developing 'chapters', or sub-agreements, on each of these issues. The substantive issues typically include matters such as land, wildlife, cash settlements, cultural heritage, self-government, access, sub-surface mineral rights, foreshore harvesting, municipal servicing agreements etc (see, for example, the Sechelt Agreement in Principle, 1999). The work of developing chapters on these issues begins with the "technical working groups", comprised typically of assistant negotiators and analysts, who consult with various experts and interested parties in the community to arrive at a common understanding amongst the three parties to the negotiations as to what the 'facts' are in relation to a specific issue. This group will feed information to the "main table working group" comprised of the negotiators for the three parties, who review these facts, examine points of agreement and disagreement, and present recommendations to the "main table". The "main table" refers to the periodic gatherings of chief negotiators who are the key decision makers at the local level, who are responsible for communicating treaty issues within this public forum, and who, in the case of the chief negotiators for Canada and B.C., consult and negotiate within their own governments to gain approval for drafted chapters.

The structure of these negotiations are by no means linear, however. The main table also plays a role in directing the activities of the main table working group and of the technical working groups. As well, there is also a "legal drafting group" made up of negotiators and legal counsel who are charged with translating the issues from negotiation language to legal language. At the end of all of this, the negotiations hope to achieve a document that compiles all of the chapters, in which each respective chapter is consistent with all related chapters.

Before the AIP can be considered fully complete, the First Nation must settle all 'overlap' issues with neighboring First Nations. This can be a challenging requirement if the neighboring First Nations have a history of poor relations. It can also be challenging if the neighboring band is at an early stage of its negotiations and has not fully clarified what lands it will propose be transferred to it in the event of a treaty.

Thus, the AIP negotiations are derided as being part of a 'big bang' approach to treaty-making because they attempt to address virtually all issues of land and resources, governance, and fiscal relations in one extended round of intense negotiations, aiming to lay the basis for the entire final agreement. In contrast to this process, the BCTC now recommends that an incremental approach be used whereby the parties attempt to create "slim" AIPs that leave some issues aside to be discussed in higher level negotiations between Canada, B.C., and the First Nations Summit, while simultaneously reaching substantial agreements on issues particular to the First Nation engaged in treaty negotiation, such as land and resources, that will allow the First Nation to begin preparation for its post-treaty existence (BCTC, 2001).

The BCTC (2001) also points out that the funding arrangements agreed to by Canada and B.C. create a powerful disincentive for First Nations to reach an AIP. Until the point of signing the AIP, the debts that a First Nation has amassed are interest-free; however, funds borrowed after the signing the AIP are subject to interest. The logic of this funding policy is likely that this will inspire the First Nation to make quick progress toward final agreement and ratification after signing the AIP. But the policy has backfired and, in fact, leads to First Nations being more hesitant to sign an AIP.

Less can be said about the final two stages of the BCTC process since no First Nation has yet made it to through to the end of the process. In stage five, it is envisioned that negotiations

will take place to finalize the treaty laid out in the AIP. Here, technical or legal issues that were not resolved in the AIP discussions will be resolved. At the end of stage five, the parties will sign and ratify the final agreement. This effort will bring the parties to stage six, at which point they will begin to implement the treaty. This implementation may take place at once, or be implemented over time, depending on the arrangements agreed to by the three parties (BCTC 1997b).<sup>22</sup>

The report of the B.C. Claims Task Force simply laid out the skeleton for the negotiation process. Over time, flesh has been added to this process, as the parties define the procedural requirements they see as necessary to achieve workable treaties. However, there has been a tendency for the parties to get locked in proceduralism, whereby, at times, the procedure appears to be an end in itself. This weighing down of the treaty process in part stems from a lack of clarity as to what treaties are supposed to be about. One person will tell you that treaties are a vehicle for justice and for dealing with the past, while another will insist they are about certainty and creating a better, common future. The lack of a common end goal often leaves the parties at cross-purposes, unable to come to agreement on key issues because they are unable to reach an understanding about the direction in which the agreement is to lead them.

The breadth of the issues to be covered in treaty negotiation also contributes to the mounting proceduralism. With treaties potentially affecting such a broad array of interests, a multitude of parties are scrambling to be heard within the treaty process. The consultation process, described below, sets out to organize the involvement of these parties, but it nonetheless takes a great deal of time to examine and assess the particularities of each treaty decision and its potential impact. More insidiously, as with any project to which a great deal of government funding is directed, a treaty negotiation “industry” gets under way, and many lawyers,

consultants, and experts of various stripe are scrambling to get a piece of the pie. The cynical would suggest that these individuals lack motivation for settling treaties since this would mean an end to their pay cheques. But even barring the potential for self-interested misuse of the treaty process, the ever-expanding division of labour within the treaty process can lead to a fetishization of the means of negotiations with little regard for reaching substantive ends. As more parties become involved in the negotiations, the likelihood grows that they will seek to solidify their involvement by arguing for the importance of the role they play. For example, within the federal government bureaucracy of treaty-making, no document can change hands between negotiation parties until it has been read by upwards of six people from various departments, each charged with protecting a particular vital interest. A single item can take months to crawl through this institutional structure. Under these circumstances, individuals tend to concentrate most on the role they are assigned, rather than on the over-arching purpose for which this role has been created – in short, they seek to competently follow and reproduce the rules of the bureaucratic game.<sup>23</sup>

#### 4.4 The Memorandum of Understanding on Cost Sharing

Perhaps even more difficult for the provincial and federal governments than agreeing to the overall structure of the B.C. treaty process was coming to an agreement between themselves as to how they would divide the costs of treaty-making. In the discussions between the three parties leading up to the British Columbia Treaty Commission Agreement (1992), there was noted disagreement between the federal and provincial governments with regard to how the costs of negotiating and settling treaties would be divided. However, both non-Aboriginal governments did agree that some sort of funding arrangement was necessary, otherwise

individual negotiation tables would bog down under the weight of funding disagreements. The First Nations Congress representatives told the non-Aboriginal governments that it was up to them how they split the costs, although they also stressed that First Nations should not be forced to pay for a process designed to overcome their past victimization.<sup>24</sup>

Thus, a bilateral process for negotiating costs was established after the signing of the British Columbia Treaty Commission Agreement. At this point in time, Michael Harcourt and the NDP had replaced Vander Zalm's Socreds in the provincial capital. The NDP had campaigned in 1991 with a promise to address the long-standing land claims issue, and in their pre-election position document on land claims (NDP, 1990) they promised to recognize Aboriginal title and the right to self-government. Unlike the Socreds, who felt that under the terms of union the federal government was responsible for all costs of treaty-making, the NDP felt that since the province was the 'owner'<sup>25</sup> of most of the lands in B.C., the province would have to make some contribution to the costs of treaties. Harcourt went so far as to acknowledge publicly that the province would cover as much as 25% of the total costs of treaty-making.

The federal government, in contrast, wanted to create the impression that the cost-sharing was split 50-50 between the two parties. Thus, the negotiations for the MOU turned on this crucial disagreement, and the compromise the parties sought was to find a means whereby they could both represent themselves as having lived up to their public statements on costs. In this sense, the MOU negotiations were an example of what Goffman (1967: 12) describes as "face work"; that is, the parties took actions to prevent the MOU negotiations from resulting in a loss of face, giving the impression that the end results were consistent with the line they each publicly established.

The parties were aided in achieving this goal by the mathematical models they established to determine the costs for which each party was responsible. These models were fairly simple with regard to matters such as pre-treaty costs, negotiation costs, and the funding of self-government, where the parties agreed to have the federal government cover 60% of the costs, while the provincial government would cover 40%.<sup>26</sup> However, it was a greater challenge to devise a formula for settlement costs. The difficulty stemmed from two key elements. First, the parties disagreed with regard to what the province's contribution to the cash settlement would be. The federal government maintained its position that everything should be split 50-50. The province, on the other hand, argued that this question was related to the second element, the question of determining land values. Since much of the province's contribution to final settlements would be through land transfers, the province felt that the difficult issue of valuing land had to be addressed before decisions about splitting the cash settlement could be made. It was eventually agreed that land would be valued against so-called "representative land". Through this system, lands in the province are reduced to measurements of average land. For example, urban lands in Vancouver would be valued according to the measure of high value representative land. They also had to take into consideration the value of the resources located on any plot of land and it was determined that the value of these resources would be assessed and considered part of the cash settlement, which would be determined by a sliding scale cost-sharing formula.

The sliding scale cost-sharing formula was designed based on the assumption that First Nations, depending on the region in which they lived, would receive different combinations of land and cash. In particular, it was expected that First Nations situated in or near urban areas would receive most of their settlement in cash rather than land. Depending on the land/cash ratio

being distributed to a First Nation, Canada's share of the cash settlement costs would vary between 75% and 90%. Their contribution would be higher in cases where a significant amount of land was distributed and lower where the settlement was primarily cash-based. Similarly, the province's share of any cash settlement varies between 10% and 35% according to this formula – lower in cases where the province provides substantial value in land, and higher in settlements where little land is involved. Based on these figures, each party was able to present to their constituents that the costs were being divided according to their initial projections – 50-50 according to the federal government and 25-75 according to the province. The federal government was able to emphasize the province's contributions in land to support their argument, while the province referred to the cost-sharing formula for cash settlements to give the appearance of having met their goal.

The provincial and federal governments on June 21, 1993 finalized the MOU, nine months after the signing of the British Columbia Treaty Commission Agreement. While these negotiations were termed a political success for the two governments involved, problems have arisen with regard to their impact on First Nations involved in treaty negotiations, leading some to question the initial decision made by the First Nations' leadership not to involve themselves in these talks. For example, based on the Memorandum of Understanding, urban lands redistributed in treaty are to be valued in relation to 'high value representative land'. In densely populated regions such as Vancouver, where the price of property is extremely high, the addition of a small parcel of land to a treaty settlement package could then account for a significant portion of the final agreement.<sup>27</sup> This has led some First Nations, such as the Musqueam – who have had much of their traditional territory swallowed by the city of Vancouver – to demand *quid pro quo* that lands lost should be compensated in a manner that reflects their current value.

#### 4.5 The Consultation Process

Critics of the Nisga'a treaty, which was negotiated outside of the B.C. Treaty Process, charged that it lacked adequate consultation mechanisms. Tom Molloy (2000), chief federal negotiator for the federal government at Nisga'a, suggests that in the later stages of the Nisga'a negotiations, consultation was carried out on a scale on par with the consultation mechanisms of the B.C. Treaty Process, but critics feel they were not provided enough opportunity for input in the earlier stages, largely due to the private nature of the federal government's comprehensive claims policy.<sup>28</sup>

The B.C. Treaty process, in contrast to Canada's comprehensive claims policy, was designed to be an open process. Thus, it was determined that a portion of the negotiations at every table would occur in public (the main tables), that sectoral interest groups would be consulted at the local and provincial level, that local government would be involved both through consultation and through membership on the provincial negotiating team, and that the parties would endeavor to keep the general public informed and educated on treaty matters.

Each set of negotiations, therefore, begins with a protocol agreement on openness. The extent to which the negotiation table is open will depend on the sensitive nature of the matters to be discussed. In some instances, where it is felt the negotiators require the flexibility to brainstorm outside of public ear-shot, more side table discussions will be held to provide a degree of confidentiality and to avoid alarming the public with negotiations that are more exploratory than substantive. However, there is a growing sense at many treaty tables that once negotiations reach a certain stage, it is to their advantage to conduct more of the negotiations in public. Public meetings usually take place in the form of main tables, although there are

instances where side tables, main table working groups, and technical working groups are open to the public. These meetings are often long, dry, and rarely garner much in the way of public attendance.

The consultation process began with the Treaty Negotiations Advisory Committee (TNAC), which was established by the provincial and federal governments and is comprised of 31 members representing all major provincial interest and industry groups, including forestry, organized labour, business community, fish, wildlife, and environmental groups. TNAC is a forum through which these representatives can advise and counsel both non-Aboriginal governments, although it often serves also as an opportunity for provincial and federal representatives to present information to the interest and industry groups. This group meets once a month for a period of two to three days. During this period, TNAC will divide into sub-groups to discuss specific matters, such as land and forestry or compensation for businesses affected by treaty settlement. However, they also meet as a general forum to present their views to senior members of the provincial and federal governments. These views are not based upon consensus amongst those present; instead all are welcome to present their advice, and the two non-Aboriginal governments will typically respond to this advice in chart form, either demonstrating how the advice was incorporated, or explaining why they were unable to use a certain piece of advice.<sup>29</sup>

In order to demonstrate their readiness at specific tables, the provincial and federal governments are required by the rules of the B.C. Treaty Process to establish mechanisms to consult with local, non-Aboriginal interests. The two non-Aboriginal governments fulfill this requirement bilaterally by establishing Regional Advisory Committees (RACs) and Local Advisory Committees (LACs) to represent the range of community interests. The primary

difference between the RACs and the LACs, in areas where both exist side-by-side, is that the RAC is the consultation body for a broader region in which several sets of treaty negotiations may be underway (the Lower Mainland RAC would be an example), whereas the LAC deals with issues concerning a specific set of negotiations (the Tsawwassen Consultation Group is a LAC in this sense). Frequently, these bodies are comprised primarily of individuals with specific sectoral interests, such as in fishing, agriculture, hunting, or forests, but they also include representatives from environmental organizations and, in some cases, religious groups. The reasons provided for why these committees are largely made up of groups with material interests, as opposed to social interests, are that individuals who have a material interest at stake tend to be more concerned about these issues and therefore more willing to participate on an advisory body, and, also, that these individuals often wear "many hats" in the community and are able to represent social interests in addition to material interests. Still, it should be noted here in anticipation of the discussion of 'justice' and 'certainty' (Chapters 6 and 7) that all of the advisory bodies providing input to the negotiation policies of the federal and provincial government are heavily weighted toward issues of pragmatic or instrumental import (i.e. certainty). As we shall see, although this provides the non-Aboriginal governments with useful technical advice with regard to specific economic circumstances within the areas they are negotiating, non-Aboriginal voices with a concern for moral issues are less often heard.

In September of 1994, a protocol agreement was signed between the province and the Union of B.C. Municipalities (UBCM), spelling out a formal relationship between the two parties that would guarantee representation for each municipality in the province on a Treaty Advisory Committee (TAC). Furthermore, each TAC was empowered to assign one of its members to serve as a representative on the provincial negotiation team at a specific set of

negotiations. This representative would be permitted to provide input to the provincial negotiating team, although he or she would possess no decision-making power with regard to the negotiations. Prior to this development, it was assumed that municipal representation would occur through the RACs, but municipal governments pushed hard for stronger representation in treaty negotiations, given that they are the governments that will be working and living alongside First Nations governments in a post-treaty environment. This development was controversial, however, because, from a First Nations' perspective, it appeared to weigh the negotiation table more heavily in favour of non-Aboriginal parties. Already the First Nations found themselves negotiating against two non-Aboriginal governments who had the advantage of extensive resources and personnel. With the addition of a TAC member to the table, the First Nation found itself facing three potential adversaries in treaty-making.<sup>30,31</sup>

Based on recommendations 17, 18, and 19 of the British Columbia Claims Task Force Report, Canada, B.C., and the First Nations were required to jointly undertake a public education process, to provide public information at each individual table, and to prepare resource materials for use in schools and by the general public (B.C. Claims Task Force, 1991). Initially, they responded to these recommendations by creating a Tri-partite Education Committee that was responsible for devising a province-wide education/information campaign. As well, once the negotiation tables were up and running, the three parties appointed consultation managers to attend to the business of public information and education at the local level. However, the Tri-partite Education Committee soon proved to be ineffective, as its members had trouble agreeing to a joint information strategy. The BCTC expressed concern that the parties were not fulfilling the Task Force recommendations, and in 1997 it was decided that the BCTC would be provided with extra funding to carry out public education and information. It was felt that the perceived

neutrality and integrity of the BCTC made it the ideal source for information about the process. But in taking this responsibility, the BCTC reminded the three parties that they were not absolved of their public education and information responsibilities.<sup>32</sup>

Keeping the public informed has remained a challenge, however. After the Nisga'a treaty was finalized in 1997 there was a great deal of media attention to the subject of treaty-making in B.C., but this glut of information soon led the general public into a state of 'treaty exhaustion'. Moreover, despite this brief, intense period of public awareness, public information and education has failed to shake the deeply entrenched historical denial that is prevalent amongst the general public of B.C. The "white founding myth" of B.C. (Tennant, 1990) and the myth of white benevolence (Furniss, 1997) continue to cast a powerful spell over the province. School-based programs, where they actually exist, and limited public debate have done little to increase the knowledge everyday British Columbians possess about the past injustices suffered by First Nations in B.C. While a general sense exists in the mainstream public that wrongs were committed, the specific nature of these wrongs is often left undiscussed, and the thematic frame of the B.C. Treaty process, "creating future relationships", has been used as a rationale for forgetting the past.

In the lower mainland, First Nations such as the Tsleil-Waututh have taken the initiative to do their own public education amongst the non-Aboriginal population. Often this involves speaking in schools, where students may learn about the Haida, but not about any other First Nation in the province. Indeed, in Vancouver, students are often unaware that First Nations live on the boundaries of and within the city and have claims to city property. The only time non-Aboriginal students hear anything about these local First Nations is when a controversy arises with regard to their lands. For example, the Tsawwassen became a topic of public concern when

they decided to erect a condominium unit called Tsatsu shores near the Tsawwassen Ferry Terminal. In response to their plans, people from the Delta community erupted in protest, arguing that this development would threaten bird habitats and encroach on public beach access. However, in making this argument, they conveniently ignored that the ferry terminal, as well as a coal port, had been arbitrarily imposed on Tsawwassen lands, killing most of the shell fish life which was a source of food for the Tsawwassen people.<sup>33</sup>

Recently, the B.C. Liberal party, who came to power in the province in 2001, have argued that a referendum on treaty issues will serve many purposes, including public information (see Chapter 8). The idea is that all British Columbians will be provided the opportunity to have input into the provincial government's negotiation mandate through responding to a series of questions concerning key treaty issues. The B.C. Liberals feel that this effort will re-spark interest in the treaty process and create a broad dialogue about treaty-making amongst members of the general public. In this manner, it is held that a wider variety of voices will be heard than is currently possible through the RACs, LACs and TACs. However, this strategy has been severely criticized by individuals from all parts of the political spectrum in B.C. First Nations view the idea of the referendum as a unilateral act of bad faith since, in their eyes, the B.C. Liberals are not living up to the negotiating conditions agreed to by the previous government. As well, they argue that it is unacceptable that the majority would be given the power to decide the rights of the minority. Even representatives from the business community fear that the referendum might increase uncertainty in the province by angering First Nations and further slowing down the treaty process.

The call for a referendum does, however, point to a definite problem with the current state of public education. As the process currently stands, those with vested material or

economic interests are becoming more educated about the past and the current need for treaty, while others are left uninformed and uninvolved. This said, a referendum is far too blunt an instrument to deal with such a complicated matter. A referendum is only likely to further polarize parties rather than create mutual understanding and positive relationships between Aboriginal and non-Aboriginal communities.<sup>34</sup>

#### 4.6. The Processes within the Treaty Process

Each of the three principal parties to the negotiation—Canada, B.C. and the First Nation Summit—possesses distinct internal processes that shape their treaty mandates and present limitations to the effectiveness of their negotiations.

##### *a) The Federal Government*

After the formation of B.C. Treaty Process, the federal government felt it necessary to create a separate body responsible for negotiations in B.C., the Federal Treaty Negotiation Office (FTNO). The official reasoning for establishing the FTNO was that the issues being discussed at treaty tables went beyond the interests of the Department of Indian Affairs and Northern Development (DIAND); therefore, it was deemed preferable to have a separate office that could better foster cooperation amongst various federal departments (e.g. Fisheries and Justice). The FTNO, nonetheless, is integrated with DIAND and many of the executive members of the FTNO have DIAND experience. The FTNO is also part of the B.C. Regional Office of Indian and Northern Affairs Canada.

Until December 15, 1993, when the BCTC opened its doors to statements of intent from First Nations, the FTNO was a small office undertaking preparation work for treaty negotiation.

However, once the treaty process was underway, the FTNO became bigger and more bureaucratized. Negotiators and staff were recruited to attend the 41 negotiation tables that had been established.

The federal government was in a better position to deal with the sudden influx of First Nations into the process since they entered the negotiations with a great deal more experience in negotiating treaties than the other parties. As well, the FTNO was well-resourced and able to hire ample consultants, negotiators, and staff. However, these advantages held by the federal government do have negative consequences for the negotiations as a whole since the federal government's past experience with treaty negotiations contributes to its inflexibility with regard to what is possible through treaty-making, and the ample resources enable the increased bureaucratization and proceduralization of the treaty process.

It is commonplace for Chief Federal Negotiators to say that they are engaged in three sets of negotiations: one with the parties at the table, a second with the public, and a third within their own bureaucracy. The process for internal negotiations begins with the federal negotiation team at a specific treaty table. This team is supplied with general and specific treaty negotiation mandates that are approved by the federal cabinet in Ottawa. However, in the course of negotiations, it is often necessary for the negotiation team to clarify or seek greater flexibility from their mandates. The first step in the process of seeking mandate accommodation is to approach the director of the FTNO, John Watson, and ask him to champion the issue with other federal departments and DIAND to gain their support. The next order of review for getting any change accepted is to present the issue to the federal caucus in B.C. If approval is achieved here, the matter will be forwarded to the federal caucus and steering committee in Ottawa for their approval. Finally, ultimate approval for the accommodation comes from the federal cabinet.<sup>35</sup>

The concern of the federal government in this extensive process is to ensure that all government interests are considered before the federal government commits itself to any particular direction. There is also a need to ensure that the federal government does not commit itself to any arrangement that might cause problems elsewhere in the province, or in the country. For this reason, the federal government displays an actuarial attention to detail in order to determine that every document produced for treaty purposes is meticulously reviewed by all concerned departments, as well as by the Department of Justice which scans each document to ensure that the language does not jeopardize government interests.

*b) The Provincial Government*

In general, the provincial government has fewer resources and fewer staff members at its disposal than the federal government. Some within the process charge that the province has not committed sufficient resources to the job of getting treaties done; however, at tables where the province has committed its resources, such as the Tsawwassen table, the fact that the province is less bureaucratized can permit them more efficient turnover in terms of dealing with issues presented at the treaty table.

In 1987, the Socred government created the Native Affairs Secretariat, establishing a body within the B.C. government committed to Aboriginal issues. In 1988, the Secretariat was transformed into the Ministry of Native Affairs. Under the Socreds this Ministry maintained a policy that was against acknowledging Aboriginal title and undertaking treaty negotiations, but they did demonstrate an openness to discussing these issues with First Nations (Tennant, 1990). After the NDP was elected in 1991, they renamed the ministry the Ministry of Aboriginal Affairs to reflect a new direction whereby more resources were to be committed to addressing

Aboriginal issues of self-governance and treaty-making. However, under both governments the Ministry lacked power in the provincial cabinet in comparison to the power held by DIAND in Ottawa. Since it is not a line Ministry, and since it does not possess a hefty budget like DIAND (approximately \$6 billion), the Ministry of Aboriginal Affairs does not by itself command a great deal of influence amongst the other ministries. This said, the Ministry has enjoyed strong backing from government leaders such as Mike Harcourt (NDP), which has allowed it to overcome some of its structural limitations.

Another concern about the Ministry of Aboriginal Affairs was that it was spread too thin and lacked the resources to adequately deal with treaty-making, let alone the other responsibilities it had with regard to "Aboriginal Affairs" (e.g. health and community development). For this reason, after their spring 2001 election the B.C. Liberals divided the Ministry of Aboriginal Affairs, locating responsibilities for treaty negotiations with a specially designed Treaty Negotiation Office in the Ministry of the Attorney General. Other Aboriginal services were off-loaded to the newly created Minister of Community, Aboriginal and Women's Services. It is too soon to tell whether or not this new organizational strategy will assist in expediting the province's ability to negotiate treaties.

As with their federal cohorts, however, the provincial negotiating teams need to engage in a series of internal discussions prior to negotiating. These negotiations begin within their own ministry to gain the support of those in charge (the deputy minister and minister), and continue with negotiations with the line ministry caucuses to ensure that these ministries do not feel threatened by the issue under consideration and to explore options for meeting First Nation demands. Finally, the negotiating teams receive their ultimate approval from the provincial cabinet. Also, similar to the federal government, the provincial negotiation teams are guided by

both general and specific mandates. The general, province-wide, mandates identify provincial interests on key treaty issues, but leave open the possibility of local considerations. These mandates are developed by the treaty mandate branch of the provincial government through consultation with interested provincial agencies and ministries. Moreover, the treaty mandate branch consults with TNAC to ensure that the interests raised by this body are represented in the mandates. The principles that guide the province-wide mandate include keeping private property off the table, ensuring that the Canadian Constitution applies to all citizens in B.C., and jurisdictional certainty between First Nations and municipalities. The specific mandates provide more detailed direction to the provincial negotiating teams to help them achieve “fair and acceptable settlement packages that address unique circumstances” (Ministry of Aboriginal Affairs, 2000).

These mandates, however, often prove to be too rigid and tend to lack clear definition, causing negotiators to seek clarification. This results in slowdowns at the negotiating tables as provincial and federal negotiators are forced to engage in complex internal negotiations within their bureaucracies in order to achieve progress at the treaty table.<sup>36</sup>

### *c) The First Nations Summit*

The First Nations Summit grew out of the demise of the First Nations Congress. Chief Bill Wilson was at the helm of the former organization, which was instrumental in the formation of the B.C. Treaty Process and which designated the First Nation representatives for the Task Force. However, Wilson’s outspoken and controversial style alienated some of the members of the Congress. Wilson was soon impeached and the organization changed its name to the First Nations Summit. Wilson has returned as a member of the Summit executive task force in recent

years, after Ed John left the task force to pursue a position with the provincial NDP and Joe Mathias passed away unexpectedly.

The First Nations Summit is made up of representatives from the majority of the bands and tribal councils in the province. Each of these 'First Nations' is understood to be an autonomous negotiating body, and the Summit does not claim to hold any negotiating power. Instead, the Summit is a forum for First Nations to meet and arrive at resolutions for the Summit Task Force to carry out. This focus on First Nations autonomy prevents the Summit Task Force from striking any agreements with the other two principals on province-wide issues of concern, such as certainty, interim measures, and compensation. In discussing these matters, the Summit Task Force is limited to drawing parameters for table negotiations.

The Summit also provides an opportunity for information sharing amongst First Nations involved in the treaty process, allowing them to learn from the research and experiences of other tables. The Summit is complemented in this latter task by regional bodies such as the south-coast-based First Nation Treaty Negotiation Alliance, which fosters cooperative research and mutual assistance amongst First Nations around common issues.

Of the three principals, the Summit faces the most severe resource limitations. Indeed, the FTNO's communication staff of nine people alone outnumbered the entire staff of the First Nations Summit, which at the time of writing was seven people, two of whom were on temporary contracts. Whereas the FTNO and the former Ministry of Aboriginal Affairs have expanded since the initiation of the treaty process, the Summit has not received a single funding increase since its inception, leaving it at a disadvantage in its discussions with the other two principles since it does not have the capacity to carry out the research needed to counter the arguments made by the non-Aboriginal governments.

The Summit also faces the challenge that, although it represents a majority of First Nations in the province, approximately 30% have either boycotted the B.C. Treaty Process or are strategically waiting on the sidelines to see if adequate settlements will be reached (Ratner et al., 2002). As well, the Summit to date has not been sufficiently inclusive of youth, elders and women. With these voices relatively scarce at Summit discussions, this body lacks a legitimate claim to representativeness when speaking on First Nation issues. Moreover, the fissures evident amongst the First Nation population are open to exploitation by anti-treaty forces seeking to disrupt the negotiations. This problem was evident in the Nisga'a settlement, when community members opposed to the final agreement were co-opted by B.C. Liberal opposition forces to speak out against and attempt to destroy the legitimacy of the Nisga'a treaty.

#### 4.7 The Process Outside of the Process

Negotiations do not occur in a vacuum. Myriad actions are enacted outside of the official negotiation process to try to affect what occurs within the process. This can include informal discussions between interested parties, lobbying, direct action protest activity, legal action, the media, and policy development in related areas.

The First Nations involved in the treaty process, given the inevitable power imbalances faced when negotiating with two non-Aboriginal governments, have been most active in seeking means outside the official process to increase their leverage at the treaty table. One important strategy for First Nations groups has been to foster relationships with businesses, environmental groups, municipalities, and labour organizations. By winning the support of these so-called "opinion leaders" in the province, the First Nations hope to encourage broader public support for treaty negotiations that will place more pressure on non-Aboriginal governments to commit to

the treaty-making process. As well, by arranging meetings between First Nation leaders and vested interests in the province, such as the "Business at the Summit" meetings organized by the First Nations Summit, new opportunities for social and economic development are made available to individual First Nations. Through an expanded dialogue between First Nations and businesses, some First Nations have successfully negotiated joint-management and cooperative economic arrangements with businesses that serve to provide economic and social benefits to First Nations on the ground. For example, these arrangements may take the form of permitting resource extraction activities on traditional land in exchange for jobs for local Aboriginal persons and a portion of the revenue. An arrangement of this sort not only helps improve the economic situation on a particular reserve, it can also provide much needed funds and governance experience that the First Nation can apply to its treaty negotiations.

First Nations also have in their action repertoire pressure tactics that can be implemented to try to gain a quick response from governments. These include the tactics that played an instrumental role in the formation of the B.C. Treaty Process: direct action protests (e.g., blockades) and legal action. With regard to the former, at various points during the treaty process individual First Nations have elected to "exercise their Aboriginal rights" by cutting timber on their traditional land in response to non-Aboriginal government procrastination on reaching interim measures to protect these stands of timber.<sup>37</sup> Other First Nations have blockaded roads to distribute information and to raise public awareness about particular treaty issues. The First Nations Summit also has a "war council" comprised of chiefs and First Nations representatives seeking to orchestrate coordinated First Nations protests in response to non-Aboriginal government inactivity. However, the war council is a recent development and has not yet succeeded in mobilizing the First Nations of the Summit in a unified manner. Part of the

difficulty they face may stem from the resolute focus on autonomy possessed by the First Nations Summit, and the fragmenting nature of the Treaty Process which deals with First Nations on a nation-by-nation basis. With these factors in place, the First Nations of the Summit appear less likely to make common cause with one another. This may change, however, depending on the actions of the B.C. Liberal government with regard to the treaty process.

With regard to legal action, First Nations involved in the treaty process have typically avoided engaging in legal battles over Aboriginal rights and title, since the federal and provincial governments have stated they will cease negotiations with any First Nation that takes them to court. However, the First Nations Summit reserves the right to intervene in court cases that might have implications for First Nations' interests in the province. For example, when prior to their election the B.C. Liberal party took the Attorney General to court, arguing that the Nisga'a treaty was unconstitutional, the Summit intervened to ensure that the interests of First Nations involved in the B.C. Treaty Process would be protected. As well, the Haida have stepped away from the treaty process to present their claim to Aboriginal title to Haida Gwaii (the Queen Charlotte Islands) to the courts. It is not expected that, if successful, this case will answer all the questions of interest to the Haida – governance and fiscal arrangements would still need to be negotiated; however, it is hoped that it will clarify the nature of Aboriginal title and pressure the Aboriginal governments to proceed with negotiations.

Such tactics are not solely the prerogative of First Nations. Municipal politicians and industry representatives have also been active in using the resources and political channels at their disposal to pursue their interests outside the treaty process. Many municipal representatives feel that their position on the provincial negotiation team is too limited; therefore, they endeavor to use their political connections to make sure that their concerns are heard. Informal

discussions are held with Members of Parliament, Members of the Legislative Assembly, Ministers and Deputy Ministers to ensure that important issues of municipal concern are brought to the attention of cabinet members and others with decision-making power in the treaty process. Similarly, TNAC representatives do not restrict their activity to advising within the formal TNAC body; instead, they use their networks and resources to make presentations and statements to politicians in Victoria and Ottawa in hopes of influencing the political agenda.

None of these activities should come as a surprise and all should be expected to occur in almost any broad negotiating context. However, they do signify the frustration many feel with the limitations of the formal treaty process. Indeed, since the federal and provincial governments possess an inordinate amount of power within the process, and the BCTC is not empowered with the means to motivate the governments, the non-Aboriginal governments are placed in a position where they can manipulate the process to delay settlement. At times, manipulation of this nature may not be a conscious political strategy but instead reflect a fetishization of the procedure of internal wranglings, through which bureaucrats concentrate more on the procedural rules than the end results the process is intended to accomplish.<sup>38</sup>

#### 4.8 The Challenges Faced in the B.C. Treaty Process

At every stage of the B.C. Treaty Process, from its formation by the B.C. Task Force to recent proposals for a revision of the process, problems are evident. These problems include the specific issues mentioned in the course of this chapter: the problematic definition of 'First Nation', the vagueness of some of the Task Force recommendations, the loan-based funding arrangements, the costs of negotiations to both First Nations and governments, the lack of 'teeth' on the part of the BCTC, the rigidly defined mandates, the lack of political will of the parties, the

bureaucracy, the limitations of the consultation process, and so on. Each matter represents a specific difficulty that must be addressed to help expedite the treaty process. But from a sociological standpoint, one wonders if there are broader, structural problems that may prove recent efforts to address some of these problems to be nothing more than an attempt to bail water from a rapidly sinking ship. Indeed, several fundamental problems may lay the conditions for these specific disruptions.

First, the B.C. Treaty Process lacks clearly defined goals. This claim is not intended as a critique from a managerial standpoint, but rather as an observation on the fragmented focus of the process. At different times, and by different sources, the treaty process is described as being about certainty, justice, reconciliation, Aboriginal rights or equality. It is most likely about some or all of these things, but this vision is yet to be clearly articulated. Of course, the goal of negotiations is that the parties will define the meaning of the process through their discussions; however, once locked into the struggle over issues of economic and political importance, the parties find themselves already chained to stances that are not amenable to meaning creation. This limits the symbolic resonance of the treaty negotiations and leads to negotiations more reflective of business arrangements than justice.

This issue is particularly evident with regard to the historical narrative, or lack thereof, developed through treaty negotiation. Although the B.C. Task Force Report contains a section on the history of non-Aboriginal/Aboriginal relations in B.C., this narrative had little social or political impact. Since the non-Aboriginal governments were not asked to agree to the Task Force's historical retelling of the events leading up to the formation of the B.C. Treaty Process, they were not required to express any remorse or sense of guilt for the injustices placed upon Aboriginal peoples. Instead, they were able to attend to the Task Force's theme of "creating

future relationships”, an expression that has been employed by non-Aboriginal government representatives to avoid discussing the past. It is not uncommon to hear at treaty tables, following a First Nation’s presentation on the hardships they experienced due to the policies of the federal and provincial governments, one of the non-Aboriginal government representatives remark: “we are here to talk about the future, not the past.”<sup>39</sup> With this statement, the non-Aboriginal government representative performs, however unwittingly, an act of symbolic violence, using a position of power and discursive competence to attempt to ‘name’ or define the negotiation context in terms suitable to government interests (Bourdieu, 1991). This act is arbitrary since it does not reflect any definite principle of the negotiation guidelines but instead a non-Aboriginal government interpretation of the meaning of negotiations.

Based on this imposition of meaning, the process more and more falls into conditions of historical blindness. Stories of hardship and suffering are termed inappropriate and extraneous to the important work of building pragmatic agreements.<sup>40</sup> (The fact that the treaty process has been in place for a ten year period without achieving any AIP agreements, despite the fact that the parties have been focusing on their ‘future relationship’, is disregarded here.) However, an opportunity is lost in this process to learn about and from the past, and to use this knowledge for improving the future. The contention here is not that the B.C. Treaty Process should serve to help the parties write a shared, singular history describing the events – a history of that nature is not likely possible; instead, the argument is that the parties need to discuss and open their narratives of the past to one another, exposing them to contradiction and contention, to arrive at a point where it is at least possible to tolerate the narrative possessed by the other.<sup>41</sup> Without a learning process of this nature, the historical denial that is the source of much intercultural

conflict in B.C. will continue unabated. Furthermore, consultation processes will continue to be mired in positional debate and self-interested posturing.

A second broad issue has to do with the process itself. The B.C. Treaty Process represents the admirable effort of three parties to come together and define a process for negotiations. However, as one First Nation Chief has stated, "a process is a process is a process...".<sup>42</sup> In other words, a process is only as strong as the political will of the participants involved.

Instead of stepping back to review the reasons why negotiations are occurring and to recommit themselves to the process, the parties are more often redeveloping their internal systems for negotiation. The ambitious and complex task of negotiating treaties with First Nations in B.C. has led to the need for further institutionalization and bureaucratization to attend to the multiple negotiation tables and the multitude of issues under discussion. But this need to systematize often occurs at a distance from the vaguely defined goals of the process. Like a 'language game' (Wittgenstein, 1994), the process becomes an assemblage of written and unwritten rules that serve to reproduce the process. Moreover, the process becomes an end in itself, as more professionals and experts seek to get involved. As the system expands, new levels of accountability and consultation are presented as 'necessary steps' based on a logic that these actions will present a line of defense against any mistakes being made. However, these additions more likely contribute to the process falling into a state of endless self-justification and systems-maintenance where the end goals appear less and less essential.

Finally, the process has failed to overcome the serious power imbalances that have historically hampered relations between Aboriginal and non-Aboriginal governments. Intercultural negotiations are always problematic since linguistic and cultural differences

exacerbate the likelihood of parties misunderstanding one another. Attempts were made through the design of the treaty process to address potential imbalances deriving from cultural differences and relations of power by setting up a neutral, facilitative body, the BCTC, to be the “keeper of the process”. But, as demonstrated above, the BCTC does not possess the adjudicatory or political power needed to correct the long-existing imbalances evident in the negotiation process.

Indeed, engagement in the process of treaty negotiation has removed some of the traditional sources of power possessed by First Nations in B.C and left them struggling for their rights within what has become a singularly impotent process. The B.C. Treaty Process has the unfortunate side-effect of removing or discouraging traditional First Nations points of leverage—direct and legal action. As mentioned above, the non-Aboriginal governments have a policy of discontinuing negotiations with any First Nation engaging in legal action; therefore, any First Nation that turns to the courts for clarification on an issue related to Aboriginal rights will find themselves cut off from the negotiations. Through this action, the First Nation would also lose access to the loan funding it receives through the process since the BCTC would no longer be able to provide these monies to the respective First Nation. The federal and provincial governments, in contrast, do not formally prohibit direct action. However, the nature of the process discourages unified First Nations action, and maintains a focus on the individual band. This fragmentation of First Nations is partially the result of the autonomy focus of the First Nations Summit, but it also results from First Nations being dealt with on a First Nation by First Nation basis which masks their common interests and does not facilitate collective action since each First Nation is too immersed in the complexities of its negotiations. Whether this results from an intentional ‘divide and conquer’ strategy, or is an unfortunate consequence of the

process, the end result is that First Nations are deprived of the political and legal sources of leverage they have historically possessed in their dealings with non-Aboriginal governments, leaving them more susceptible to the power imbalances of the B.C. Treaty Process.

In the next chapter, I offer a critical evaluation of procedural models of justice, suggesting that the problems identified here are not merely the result of the poor design of the B.C. Treaty Process, but rather stem from a failure to address the substantive issues underlying the project of treaty-making. An alternative conceptual model, based on the work of Nancy Fraser (1997), will be offered.

### Endnotes

<sup>1</sup> See Chapter 7 for a more thorough treatment of these factors.

<sup>2</sup> Three representatives were selected from First Nations because it was felt that an extra First Nations representative would help counteract a potential power imbalance between Aboriginal and non-Aboriginal representatives. As well, to be considered truly 'representative' of First Nations in B.C. it was decided that Aboriginal representatives should be selected from each of the key regions: the lower mainland, the north coast, and the interior.

<sup>3</sup> For the federal government reaction to the recommendations of the Task Force, see Canada (1991).

<sup>4</sup> The Department of Justice has been the institution within the Canadian government most adamant about 'extinguishment', viewing this as the safest and most time-tested way for the Canadian government to achieve legal certainty.

<sup>5</sup> Interview with Task Force member, April 23, 2001.

<sup>6</sup> The Task Force surmised that it was inappropriate to impose a definition of group identity on First Nations since these communities had already suffered through many years of having their identity defined by the Indian Act. However, it was not expected that so many First Nations would choose to define themselves according to the 'band' criteria imposed by the Indian Act rather than in accordance with larger tribal groupings.

<sup>7</sup> First Nations groups involved in the formation of the treaty process were insistent that legislation be passed to support the B.C. Treaty Process. It was felt that without legislation the First Nations would have less power to ensure that the non-Aboriginal governments honoured the BCTC agreement.

<sup>8</sup> Information garnered from interviews with BCTC commissioners and staff members 2000-2001.

<sup>9</sup> Information garnered from interviews with BCTC commissioners and staff members 2000-2001.

<sup>10</sup> Information garnered from interviews with BCTC commissioners and staff members 2000-2001.

<sup>11</sup> The term 'face' is used here in Goffman's (1967) sense of the word; that is, it reflects the "positive social value" parties hope to maintain by keeping their behavior congruent with the particular "line" they have taken in the course of the interaction.

<sup>12</sup> Information garnered from interviews with BCTC commissioners and staff members 2000-2001.

<sup>13</sup> Information garnered from interviews with BCTC commissioners and staff members 2000-2001.

<sup>14</sup> Again, we can turn to the work of Goffman (1967) to gain more insight into this technique. In an effort to 'save face' the non-Aboriginal governments work hard to define the situation as one in which the other party is acting 'out of line'. The goal, in this regard, is to make oneself appear reasonable and the other as making 'unreasonable' demands. For a fuller application of the work of Goffman to a negotiation context, see Keith Doubt (2000).

<sup>15</sup> This strategic positioning is exemplified by the pressure pro-land claims forces had to muster just to get the process underway. The logic of governance was to deny the existence of Aboriginal title and rights until forced to

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do so for economic and legal reasons. Bad publicity can have some influence, but governments tend to respond to such publicity first by trying to manufacture their own spin on the issue.

<sup>16</sup> Information garnered from interviews with federal Chief negotiators, negotiators, and staff members, 2000-2001.

<sup>17</sup> Members of the Union of B.C. Indian Chiefs objected to this aspect of the Treaty Process early on and today feel their concerns are vindicated by the position of the non-Aboriginal governments on these issues.

<sup>18</sup> There have been complaints within individual First Nations that the leadership has failed to live up to this requirement and instead make unilateral decisions to involve the community in negotiations. For an example of these concerns, see Charleson (1999).

<sup>19</sup> It is possible for a First Nation to amend its statement of intent after submission to the BCTC. This can occur in situations where there is a change in the governing body of the First Nation, where the First Nation decides to merge its negotiations with those of a related group, where the First Nation submits an amended map of its traditional territory, or where certain Aboriginal communities elect to separate from the First Nation.

<sup>20</sup> This, too, is problematic, since there are cases where only one or two bands from a former tribe are involved in the treaty-making process, yet they make a land claim that includes the entire traditional territory of the tribe.

<sup>21</sup> Each party to the negotiations will typically appoint a Chief Negotiator and a Negotiator. The former is responsible for the public negotiations, consultations with cabinet and other government departments (in the case of Canada and B.C.), decision-making at the table, and, for the most part, for interacting with the public and the media. The latter engage in many of the specific negotiations on the issues outlined in the framework agreement and interact frequently with the RACs and TACs. Each treaty team also involves a number of assistants, a communication manager, and various technical people.

<sup>22</sup> For more information on the various stages of the B.C. Treaty Process see BCTC 1995-95; BCTC, 1995-96; BCTC, 1997a; BCTC 1997b; BCTC, 1998; BCTC, 1999; BCTC, 2000b; and BCTC 2001b.

<sup>23</sup> For more on the relationship between bureaucratic organizational structures and the fetishization of procedure, see Bauman, 1989 and Barnett, 1996.

<sup>24</sup> Interview with First Nation representative, 10/24/01.

<sup>25</sup> Owner is placed in quotation marks here to recognize that many First Nations persons question this claim to ownership.

<sup>26</sup> It should be noted here, however, that the provincial government representatives at the MOU discussions felt that providing funds to First Nations in the form of loans was a bad idea. B.C. also felt that Canada should be responsible for these costs since it was responsible for Indian Affairs under the terms of union (interview with provincial representative, February 1, 2001)

<sup>27</sup> Many First Nations representatives suspect that the governments base their settlement offers on a *per capita* formula that provides \$40,000 to \$60,000 (in cash, land and resources combined) per First Nation member. If such a formula does exist, and indications from offers made in the B.C. Treaty Process thus far suggest that it does, this places severe limitations on the land demands of urban First Nations since any land they receive through treaty will take up a significant proportion of their final settlement.

<sup>28</sup> These views were most prevalent in my interviews with business and resource industry representatives.

<sup>29</sup> In the early days of the BCTC process, the federal government placed strict confidentiality guidelines upon TNAC, limiting the ability of individual members to consult with their constituents. These regulations changed after the TNAC membership raised their concerns that these restrictions would limit their effectiveness as an advisory body. Generally, however, it appears that the federal government is the party most unfamiliar with the public nature of the B.C. Treaty process and has had to move some distance from the confidentiality of its comprehensive claims policy.

<sup>30</sup> The degree to which the addition of a TAC member heightens the adversarial nature of the discussions depends on the municipal representative and their relationship with the local First Nations. In some negotiations, such as the Tsawwassen, the historical animosity existing between the Tsawwassen and the municipality of Delta made the addition of a Delta Council member to the treaty table a threatening prospect for the First Nation.

<sup>31</sup> It should also be noted that Coast Salish traditions of conflict resolution typically occur in a private setting, following a series of culturally based protocols. In contrast, the B.C. Treaty Process leans toward European notions of fairness and openness which stress the importance of public involvement (Miller, 2001).

<sup>32</sup> Information obtained from interviews with BCTC, federal, provincial, and First Nation Summit representatives.

<sup>33</sup> Another example of lower mainland First Nations only penetrating the public consciousness in times of controversy would be the fury over land rents on the Musqueam reserve. The Musqueam reserve is located on prime real estate in the expensive Shaughnessy area of Vancouver, near the University of British Columbia. A portion of reserve land had been set aside to be leased to non-Aboriginal persons. The federal government

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negotiated the deal on behalf of the Musqueam, and the lease rates were maintained at a rate far below the actual market value of the land. When the original contract expired, and the Musqueam were able to re-set land rates to reflect market value, an uproar occurred amongst the non-Aboriginal population who perceived the Musqueam to be aggressively inflating prices to chase the leasers from their homes.

<sup>34</sup> The referendum will be discussed in greater detail in Chapter 8.

<sup>35</sup> Information garnered from interviews with Federal Chief negotiators, negotiators, and staff members, 2000-2001.

<sup>36</sup> It is also the case that several First Nation negotiating teams lack a clear mandate from their communities, or lack the 'capacity' to ensure that their mandate continues to reflect the will of their people.

<sup>37</sup> The Westbank First Nation in the Okanagan are the most prominent example of a First Nation that elected to exercise its Aboriginal rights.

<sup>38</sup> Zygmunt Bauman (1989) refers to this process as 'technical responsibility' replacing 'moral responsibility'.

<sup>39</sup> I heard a provincial government representative make such a statement at the Tsawwassen negotiations (7/30/99). Interviews with First Nations leaders confirmed that this was a common statement made by both non-Aboriginal governments.

<sup>40</sup> First Nations people are often represented by provincial and federal representatives as possessing 'too much memory', which leads them to dwell on the past rather than seeking a better future. In contrast, the provincial and federal governments could be portrayed as being in a condition of "too much forgetting", ignoring the therapeutic value that derives from addressing the past (Minow, 1998).

<sup>41</sup> In what she describes as "reconciliation for realists," Susan Dwyer (2000) suggest a model of this nature for South Africa.

<sup>42</sup> Interview with First Nation Chief June 26, 2000.

## CHAPTER 5: BETWEEN THE PROCEDURE AND SUBSTANCE OF JUSTICE

“The Treaty represents a monumental achievement for the Nisga'a people and for Canadian society as a whole. It shows the world that reasonable people can sit down and settle historical wrongs. It proves that a modern society can correct the mistakes of the past and ensures that minorities are treated fairly. As Canadians, we should all be very proud.”

Speech at the Nisga'a Treaty Initialing Ceremony  
Chief Joseph Gosnell  
New Aiyansh [08/04/98]

In Chief Gosnell's words one can identify the key elements guiding the moral exercise of treaty-making. Although the Nisga'a treaty was achieved outside of the B.C. Treaty Process, the two processes are in many ways comparable and deal with similar sets of problems. In both situations the parties to the negotiations sought to create an open and communicative negotiation process that would lay the foundation for future relationships and, in the end, represent a form of restitution and repair for past injustices. This two-pronged objective highlights two aspects of justice often identified by legal scholars and sociologists when evaluating attempts at conflict resolution: justice as procedure and justice as substance.<sup>1</sup> In general, the procedural view of justice evaluates the mechanism put in place to resolve the conflict, examining elements of this mechanism such as whether it involves adjudication performed by a neutral third party or is forged through negotiations,<sup>2</sup> whether it is designed to minimize power imbalances, whether participation is mandatory or voluntary, whether the process is perceived as fair by the participants, along with other criteria. In this manner, those concerned with the procedure of justice assess the fairness of a particular agreement not by virtue of its content, but instead based on the form the discussions take and whether the parties are able to achieve agreement through communication rather than coercion. In contrast, the substantive view of justice looks at the end

results of the justice process. Here, the substance of an agreement is typically measured against an idealized standard of justice to see if it achieves certain pre-defined goods, such as the recognition of difference or the redistribution of desired resources (see Fraser, 1997).

In this chapter an overview of conceptual models of justice, roughly located in the procedural and substantive camps, will be used to move toward a conception of justice more sensitive to the interplay between procedural and substantive elements. This exercise will provide the basis for an analysis of the justice claims proffered by participants in the B.C. Treaty Process. In particular, my goal is to arrive at a more rigorous tool for evaluating the justice claims made by participants in the treaty process, and to expose the conceptual tensions that exist between these goals and the instrumental, certainty-oriented aims also deemed to be essential to the B.C. Treaty Process.

### 5.1 Between Universalism and Particularism

Before analytically separating theories of justice into procedural and substantive camps, there is another dualism that must be addressed since it is present within each of these camps. That is, theorists of justice seem forever bound to considering whether justice should take a universal or particular form.<sup>3</sup>

Some theorists seek a universal position that transcends the particular interests of the parties involved and by which a 'neutral' decision can be made to resolve conflict. This is the nature of John Stuart Mills' (c1861 [1993]) theory of utilitarianism with which he suggests that a fair decision can be reached on the basis of considering what is of the most 'utility' to society; that is, the validity of a norm for a particular social group rests upon its general usefulness to the maintenance and continued functioning of the group. Also in this universal vein, Rawls (1971;

1993) suggests that, in order to resolve conflicts, a “detachment” is required that allows those adjudicating to remove themselves from any circumstances that might bias their judgments.<sup>4</sup> In both cases, each theorist is suggesting that an individual can employ reason and thereby arrive at universally fair decisions, whether by measuring the *substantive* end result against an ideal standard of social utility, as with Mills, or by engaging in a *procedural* detachment, as suggested by Rawls.

In opposition to these perspectives, we find positions on justice that focus more on the ‘particular’ rather than the ‘universal’. In this chapter, two variations of the ‘particular’ perspective will be considered: one that concentrates on a specific version or construction of the ‘good life’ or ‘ethical life’ and one that posits a form of situational ethics that disdains any reliance on universal *a priori* arguments. In the former perspective, the universalist’s goal of neutrally resolving a conflict between two particularities is seen as inherently biased in favor of the more dominant party. Proponents of this perspective argue that theories aspiring to a “politics of universalism” subsume all difference under a Eurocentric ideal, replicating the values of western societies rather than offering a culturally neutral ideal (Taylor, 1992:61). Justice, in this anti-universal perspective, instead requires solidarity and a shared understanding of the ‘good’ amongst the members of a social unit.

In the second ‘particular’ perspective, this notion of solidarity, whether based on a shared conception of the ‘good’ or as a result of agreement achieved through a procedure based on universal principles, is called into question, as is the modernist notion of ‘justice’. Justice here is an “experience of the impossible” (Derrida, 1992) which cannot be formulated in absolute terms without enacting violence upon the other. Instead, justice must be accepted as that which is always *à venir* (to come); that is, we need to forever remain vigilant in deconstructing and

reflecting upon our attempts to approximate justice with an eye to exposing instances of imposition of arbitrary normative standards disguised as universal.

It is important to note that this distinction between universal and particular perspectives is significant when considering the justice sought through treaty negotiations. One of the tensions that is apparent in treaty discussions is that between First Nations' desire to be afforded economic opportunities and benefits equal to those available to non-Aboriginal Canadians while, at the same time, wanting to be recognized as a distinct and culturally separate people. In other words, there exists in negotiations both a demand for 'sameness' and a demand for 'difference'; that is, a demand for the co-existence of both universal and particular standards. This distinction was exemplified in a presentation made by Chief Kim Baird (1999: 101-2) of the Tsawwassen First Nation, who requested that the provincial and federal governments both repair the inequity that has left many First Nations in poverty, and recognize the distinct cultural differences between the Tsawwassen people and other Canadians. As can be seen in this example, universal and particular elements of justice cannot be easily separated. Later in this chapter a model for evaluating justice claims will be outlined that takes into account both the demand for sameness and the demand for difference.

However, the distinction between universal and particular concepts of justice does help bring to the forefront questions concerning the possibility of inter-cultural communication after injustices have occurred. For example, to what extent can a procedure of justice help reconcile competing worldviews, different understandings of history, opposing views of how negotiations should be conducted, and contrasting visions of what justice should entail?

## 5.2 Justice as Procedure

In contrast to claims made by some participants in the B.C. Treaty Process that a process is only as effective as the people taking part in it, the architects of the B.C. Treaty Process believed a well-designed negotiation process would be the foundation for fair negotiations. Indeed, the participants on the B.C. Claims Task Force (1991) intended that the process they designed would create a forum for "good faith" negotiations between Aboriginal and non-Aboriginal governments that heretofore had not existed in British Columbia (see Chapter 2).

The assumption that procedural conditions are the basis for 'fair' negotiations rests on an enlightenment philosophy that posits that free and equal individuals, possessed of reason, can coordinate their actions in a rational manner. One of the strongest early statements of this procedural ideal is found in the work of Immanuel Kant, for whom the "categorical imperative" is a principle that strikes invalid any norm that cannot be assented to by all who might be affected by it (Kant, 1873; Habermas, 1990: 63). This principle does not require that an actual discourse take place to consider whether or not each individual agrees with the norm in question; instead, normative standards are developed through the reasoning power of an individual who assumes an objective position from which it can be determined whether or not a norm meets the requirements of the categorical imperative (Honneth, 1996: 12).

Hegel rejected Kantian ethics, arguing that the formalism and abstract universalism of Kant's model leaves it blind to the particular context of the problem that is to be solved (Habermas, 1990:195); in other words, he doubted the possibility of formulating a concept of universal justice independent of any particular conception of the 'good life'. For Hegel, interaction is the philosophical basis for human self-knowledge (see Hegel, 1996 [c1807]). Therefore, rather than begin from an assumption of the transcendence of practical reason, Hegel

recommends that ethical philosophy start from the point of intersubjectivity, since self can only be known through the presence of an other who recognizes and affirms the identity of self (Honneth, 1996). However, intersubjectivity is fraught with peril and the recognition desired from the other is not always readily provided. Given the constant possibility of misrecognition, Hegel idealized the ethical community as a grouping of individuals who provide each other with mutual recognition on the basis of a well-formed, shared sense of ethics, or the 'good life'.

Despite Hegel's criticisms, Kant's procedural insights remain salient for scholars seeking a model of justice for modern pluralistic societies. Rawls (1971, 1993) is one such modern heir to the Kantian tradition. Like others working to refine Kantian universalism, Rawls attempts to free the Kantian tradition of its metaphysical abstraction and to apply procedural principles in a more limited fashion. In this vein, Rawls claims his "political" model of justice is only appropriate to modern constitutional democracies (Rawls, 1993: 49). This is because the rights-based nature of a constitutional democracy presupposes that individuals are to be provided political equality and liberty. Indeed, for Rawls these principles are ingrained within our understanding of "society as a system of fair cooperation between free and equal persons" (Rawls, 1993: 52). Given the limited intended application of his theory of justice, Rawls argues that he does not discount that individuals and groups of individuals possess divergent and sometimes intractable visions of the "good"; however, the conditions of a constitutional democracy direct us toward a "reflective equilibrium" whereby any strictly political conception of justice must be in accordance with our convictions about the inherent importance of equality and liberty within this societal form (Rawls, 1971).

Under these conditions, Rawls suggests that, when conflicts arise, those engaged in the conflict must step away from their privately held conceptions of the good and think in terms of

the underlying political values of the society. In this sense, individuals should resolve conflict by referring to the “original position”; seeking a position outside of their own particularity from which they can decide what is fair based on the requirements of the political system. An integral feature of the “original position” is what Rawls refers to as the “veil of ignorance,” which refers to a self-imposed ignorance that allows individuals to abstract from the contingencies of the social world so they can avoid the influence of the power imbalances that inevitably exist in the institutional context of the conflict and which threaten the ‘fairness’ of any instance of conflict resolution.<sup>5</sup>

On the surface it appears that Rawls acknowledges that fair resolutions result from interaction between two or more persons, and therefore answers Hegel’s criticisms of Kant; however, the model of “justice as fairness” is in fact monological rather than dialogical. Instead of discussing the conflict cooperatively, the parties to the conflict are asked to individually reflect on the requirements of fairness prescribed by the existing political system. Thus, the model fails to adequately take into account the potential divergences that may exist within the confines of a supposedly pluralistic democracy. In particular, the monological reflection suggested by the “original position” does not require the parties to deeply consider the needs and worldview of the other; rather, a degree of commonality is taken for granted based on the co-existence of different groups possessing varying conceptions of the ‘good’ within an overarching political system. Moreover, the legitimacy of this political system goes unaddressed. The legitimacy of the state, and the constitutional democratic system it operates under, are deemed as pre-given without ever including the other in a conversation through which this system, and its assumed principles, might be called into question.

Rawls' assumption of the legitimacy of democratic political systems, and the monological procedure of justice he views as fitting for this political system, are particularly problematic in light of the challenge Aboriginality presents to universalism and the legitimacy of colony-based constitutional democracies (Kulchynski, 1995). The injustices on which colonial societies were founded worked effectively to erase the presence of the Aboriginal other from the political context. Often, this was attempted through programs designed to assimilate Aboriginal persons to the European 'Universal', which was merely a particular worldview masked as universal.<sup>6</sup> Therefore, the conflicts over land and rightful governance that exist within this political context cannot be so easily resolved through abstracting to a supposed shared understanding of the underlying principles of the political system since the political system, and the legitimacy of the government within this system, are sites of conflict. Based on this realization, it is clear that any 'fair' discussion toward resolution of colonial wrongs requires a stronger recognition of Aboriginal perspectives and worldviews.

*a) Habermas: Justice as Communicative Process*

Increasingly, universalistic conceptualizations of ethics have attempted to create a space in their theories for considering difference and to move away from transcendental and monological approaches to justice. In this regard, Habermas's model of communicative ethics will be worth focusing on in some detail. Habermas (1981; 1990; 1992) argues that philosophy can no longer claim a foundational status in relation to other forms of thought, such as scientific reasoning. Furthermore, philosophy should no longer attempt to place itself above culture as an ultimate judge of its norms and morality. Both of these positions, argues Habermas, overstep the limits of philosophy since there is no space outside of the world that allows the philosopher a

standpoint from which to act as an all-knowing, all-seeing knowledge broker. In this sense, the Rawlsian concept of the “original position” fails because it asks individuals to assume a position outside of the discourse in which they are participating.

Habermas suggests that, since we are unable to take a strong transcendental position from which we can claim knowledge of right and wrong, we are left with the fact that we are participants in the world. In this light, Habermas (1990: 211) presents his revised universal and “weak” transcendental position as follows:

What moral *theory* can do and should be trusted to do is clarify the universal core of our moral institutions and thereby refute value skepticism.<sup>7</sup> What it cannot do is make any kind of substantive contribution. By singling out a procedure of decision making, it seeks to make room for those involved, who must find answers on their own to the moral-practical issues that come at them, or are imposed on them, with objective historical force.

The basis for norm validity, then, is agreement amongst participants affected by the norm that is argued to be valid. When taking part in such a discussion, participants do not assume norms to be arbitrary; instead, they subject these norms to discussion because they believe it is possible to intersubjectively arrive at the conclusion that one moral claim is superior to another. Moreover, even in discussions permeated by cultural differences, participants devise arguments to forward their own particular visions of the normative order. In this sense, it is not any single normative content that can be viewed as universal; rather, it is the process of argumentation itself that is universal. This is because, according to Habermas, the only means by which we can engage in normative discussion is through argumentation. Furthermore, argumentation is a universal form since even those who argue against the possibility of there being universal normative standards must engage in argumentation, and in doing so they will assume certain pragmatic presuppositions of communication are in place that allow them to employ reason and rationality

in order to convince others that their arguments are sound (Habermas, 1990: 82).<sup>8</sup> Therefore, since rational argument is a necessary element in any discussion of norms, it is, for Habermas, based upon argumentation that a moral procedure of justice can be developed.

Following from this, Habermas states that a norm is valid when “all affected can accept the consequences and side effects its general observance can be anticipated to have for the satisfaction of everyone's interests (and the consequences are preferred to those of known alternative possibilities for recognition)” (Habermas, 1990: 65). Discourse or communicative ethics, then, rests upon the process through which norms are validated whereby “only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse” (Habermas, 1990: 66). Thus, unlike the models put forward by Kant and Rawls, an actual public discourse is necessary to define which norms are valid.

In this sense, Habermas suggests that argumentation provides a universal ethical form through which just resolutions can be reached so long as the necessary underlying conditions are in place to allow for free and unrestricted discussion with adequate respect offered to all speakers. This entails interacting in what Habermas (1981; 1992) refers to as a communicative rather than a strategic fashion; that is, engaging in interaction through which individuals do not simply seek to efficiently actualize their interests, but instead work to develop common understandings and common interests.

Habermas's emphasis on communicative discourse makes this a useful model for analyzing treaty negotiations because it brings into focus questions of what the appropriate conditions might be for ethical communication between parties in conflict. In particular, Habermas's concern with 'reason' and the 'illocutionary force' possessed by the stronger

argument suggests that certain rules must obtain in discussion situations; namely, all participants must be free to communicate their thoughts in an unrestricted manner with the assurance that the other participants will listen and consider their propositions (Aragaki, 1993; Habermas, 1990; Thomassen, 1985:100). Thus, an equal opportunity of communication is required if the parties are to reach a consensus that meets the approval of all involved. In terms of treaty negotiations, these formal rules, if implemented, may hold potential for ensuring that fair terms of resolution are reached. However, some have argued that this model still does not provide enough insight into the demand for *recognition of difference* in intercultural communication (see Simpson, 1986: 329) and, therefore, it is overly optimistic with regard to the possibility of unfettered communication taking place.

#### *b) Criticisms of Habermasian Proceduralism*

For this reason it is instructive to contrast Habermas's reformulation of Kantian universalism in terms of procedures for dialogic argumentation with theories that can be considered 'particularistic' in terms of their views of justice or ethics. Before moving on to these perspectives, however, it should be noted that Habermas does acknowledge particular definitions of the 'good' through his concept of the 'lifeworld', which for him is

...formed from more or less diffuse, always unproblematic, background convictions. This lifeworld background serves as a source of situation definitions that are presupposed by participants as unproblematic. In their interpretive accomplishments the members of a communication community demarcate the one objective world and their intersubjectively shared social world from the subjective world of individuals and (other) collectives (Habermas, 1984: 70)

For Habermas, communicative action requires that we seek an hermeneutic understanding of the lifeworld, but that we also seek to move beyond our lifeworld predispositions and arrive at

shared understandings (Hohendahl, 1985). Without such a movement, interaction would remain at a level that ignores the broader, system-level connections shared beyond the particularities of the group. Indeed, communicative action is the main hope left for societies increasingly divided by different and competing lifeworlds (Habermas, 1992).

For critics of Habermas, however, the discussion of the lifeworld is not sufficient for overcoming the tendency of his model to privilege the reason of the male, European subject and ignore the indeterminacy and multiplicity of life. In particular, critics have suggested that Habermas contends with difference by imposing Eurocentric standards of communication, precluding discussion of the good life, and ignoring the need for a complementary reciprocity whereby each participant in discourse is able to introduce matters concerning their own distinctiveness (as opposed to being limited to seeking mutual understanding) into the conversation (see Aragaki, 1993; Benhabib, 1985 and 1992; Fraser, 1985).

Charles Taylor, who adheres to a more particularistic conception of justice, argues that the method recommended in the work of Habermas for overcoming difference is too facile since it imposes a system reflective of one culture's principles of equality and rationality<sup>9</sup> rather than a neutral model for consensus building. In contrast to Habermas's reformulation of Kant, Taylor (1992; see also Honneth, 1996) adopts Hegel's concept of the struggle for recognition, suggesting that since dialogue with others is essential to our self-formation, recognition from others is imperative to our feelings of respect. When someone refuses to provide recognition to our self or group definition, we feel harmed in the sense that we are being denied what Taylor perceives as a fundamental human need - recognition. In terms of a strategy of justice, for Taylor, it is necessary that misrecognition of this sort be minimized and that respect be given and value sought in each particular form of the 'good life' (Taylor, 1992: 72). This can only be

achieved through attempts at building mutual respect and cultural understanding that do not emanate from one culture's worldview.

Taylor's perspective raises questions with regard to the Eurocentric bias of the Habermasian universal, but fails to offer a practicable alternative for resolving conflicts between contesting parties. Based on this perspective, a 'just' resolution to cultural conflict within a pluralistic society seems unlikely since intercultural communication is always hamstrung by the intractability of different visions of the 'good life'. Furthermore, Taylor's critique of Habermasian proceduralism as located within a specifically European cultural horizon does not prove that this procedure will inevitably fail to produce fair resolutions; in other words, simply because a system stems from a particular culture's value system does not mean that it cannot include mechanisms, such as the guarantee of open and uncoerced communication, that enable the expression of other cultural values (Aragaki, 1993). Finally, the spectre of universalism remains present in Taylor's work since he assumes the existence and inherent value of an autonomous and reflexive self who is presupposed to inhabit each of these divergent lifeworlds (Alexander, 2000: 277-8). This self is encouraged to "learn to move in a broader horizon, within which what we have formerly taken for granted as the background to valuation can be situated as one possibility alongside the different background of the formerly unfamiliar culture" (Taylor, 1992: 67). In this manner, Taylor posits a universally shared human potentiality for intercultural learning and respect, yet offers no grounds for building upon this common humanity (Blum, 1998).

Another challenge to Habermasian universalism comes from theorists who can be loosely defined as adhering to a phenomenological perspective. For example, Knud Ejler Løgstrup's (1967) ethical philosophy is based on the argument that trust is essential to any conversation. In

a conversation we hand ourselves over to another person, assuming that the person will accept what we have said and vice versa. Thus, in interacting we place trust in one another, surrendering something of ourselves to the other. Following from this, Løgstrup suggests our existence demands that we protect the life of the person who has placed his or her trust in us – the person with whom we are communicating. This is the ethical demand that exists in human relationships but which remains unspoken (Løgstrup, 1967: 20). Since this demand is silent, it is incumbent on a person within a particular relationship to decide what the content of the demand is. Thus the person must decide how to take care of the other's life, without imposing a form of life on the other. In other words, ethical relations depend upon the situation and the particular needs of the individual whom one is confronting. In this sense, they cannot be formulated based on procedural rules that reflect the normative standards of a particular culture or group, as is the charge against Habermasian proceduralism.

Zygmunt Bauman (1998a) has pointed out that Løgstrup's arguments bear a striking resemblance to those of Emmanuel Levinas. Levinas also focuses on our relationship to the 'other', who, for Levinas, is alterior to us. However, the 'face', rather than the 'voice' we hear in Løgstrup's analysis of conversation, is the first object of this alterity that we confront. This 'face' sets our responsibility for the other. Levinas writes:

I understand responsibility as responsibility for the other, thus as responsibility for what is not my deed, or for what does not even matter to me; or which precisely does matter to me, is met by me as face ...since the other looks at me, I am responsible for him, without even having taken on responsibilities in his regard: his responsibility is Incumbent on me (Levinas, 1982: 95-6; see Bauman, 1989 for a reformulation of this argument).

Similar to Løgstrup, Levinas suggests that one's responsibility to the other can have no *a priori* or transcendental rules to guide it; instead, ethical relations with the other require consideration

of the particular context. Thus, for these theorists, there is little sense of any methodological preconditions that could be followed as a course for justly resolving conflicts.

Levinas' theory, in particular, points out the limitations of Habermasian communicative ethics. For Levinas, the alterity of the other prevents the mutuality that is required to avoid coercion in the Ideal Speech Situation. The ethical moment is when we first confront the other, face-to-face, prior to any attempt to communicate or interpret the other's utterances. This is because once communication is initiated, coercion is inevitably in play. The other, as alterior, is unknowable and the two selves are fundamentally intractable. Therefore, any attempt to characterize, any attempt to comprehend, results in a form of violence that establishes the other not in her specificity, but rather in terms that are comprehensible to the self (Trey, 1992).

In this idea of the impossibility of communication we can see Derrida's debt to Levinas. Derrida also suggests that an ineradicable difference separates self and other, and that any normative agreement requires an act of violence since the act of communication will inevitably involve a forced translation of the terms of the other into those of the self. However, Derrida is not satisfied with the passivity of the Levinasian approach to ethics. With Levinas, ethics is reduced to providing the other autonomous space in which to act according to her specificity. Derrida, in contrast, offers deconstruction as a vehicle for seeking normative relations between self and other without any sense of finality. This means that norms are agreed upon without closure, and deconstruction must be vigilantly employed to expose the power inherent in any norms so they can be refined and reconceptualized to better reflect the "experience of the impossible" that is justice (Derrida, 1992; Critchley, 2000).

These theories guide us away from universalistic and proceduralistic definitions of justice, pointing out their implicit ethnocentricity (Thomassen, 1992). In particular,

Habermasian proceduralism rests on an assumption that discourse can, in ideal circumstances, lead to multiple parties arriving at a consensus;<sup>10</sup> that is, that they can create a shared normative universe through participation in an exchange predicated on the rules of discourse ethics. However, these rules presuppose the possibility of an equal and open exchange, which may be nothing more than a chimera. Following Bourdieu (1991), it can be argued that discourse clearly needs to take place through language, which is situated in a social context and marked by the power imbalances existent within the institutional structures of society. These power imbalances are transposed onto language and empower certain speakers to sound more 'rational', thus, increasing the likelihood that their statements will be perceived as 'doxic' or common sensical.

Accordingly, conclusions resulting from a dialogic procedural exchange, although allowing for compromise as a strategy toward achieving consent (as opposed to consensus), in fact reflect a partial victory of the totalizing logic of the hegemonic group. This victory is referred to as 'partial' since, based on the work of Gramsci (1971), hegemony is understood here as an ongoing struggle through which the consent of the subaltern groups must be won and re-won to consolidate the power of the dominant classes. However, it should also be noted that these hegemonic victories also open up new fissures through which subaltern groups can undertake political action. In this light, we can examine the shared normative universe constructed through negotiation less as a synthetic combination of two lifeworlds, or even more modestly as a temporary reconciliation between two particularities, and more as a subtle, nuanced colonization guided by a strategy of affirmative repair.<sup>11</sup> Therefore, the shared normativity produced through these exchanges is likely to be one favourable to the hegemonic power and which assimilates (or 'translates,' to use O'Malley's [1996] terminology) the contrary logic of the other to its overarching goals.

Applying these philosophical precepts to treaty-making exposes the challenges of justice in an intercultural context. The criticisms provided by Løgstrup, Levinas, Bourdieu and Derrida demonstrate some of the pitfalls of procedural justice in the Habermasian form, which, with its focus on equal, uncoerced communication directed at mutual agreement, most closely resembles the ideals of the B.C. Treaty Process. Given the power imbalances derived from a history of oppressive relations, the totalizing tendencies of Capitalism, and the 'common-sense' status of European reason, treaty discussions appear likely to lead to arbitrary impositions on and convenient translations of Aboriginal cultures at the negotiation tables.<sup>12</sup> Indeed, the discussion of the B.C. Treaty Process provided in Chapter 4 suggests that it is extremely problematic to place too much faith in the rationality of a justice procedure when there exists an unequal distribution of power between the parties engaged in negotiations. In circumstances such as these, the procedural safeguards in place are too susceptible to the type of violence described by those adhering to particularistic visions of justice.

However, it should also be noted that, even with the Derridian alternative to Levinasian passivity, the thrust of the postmodern critique of justice leaves us stranded. It is not apparent in what direction Derridian deconstruction is to lead us. Can we expose the mechanisms of power underlying our normative accomplishments without presupposing an alternative normative goal to pursue? Is it adequate to deconstruct attempts at justice, or is it possible to explore some of the substantive demands of the other in a manner that will guide our procedure of justice?

### 5.3 Justice as Substance

For Habermas, the means of justice are the ends (Finlay and Robertson, 1992). The symmetrical communication advocated in his procedural ethics is intended to allow participants

to forge agreement through open and uncoerced discourse. However, as Habermas would admit, the specific conditions of the Ideal Speech Situation rarely exist in the real world. This is particularly true in situations of intercultural communications, such as the B.C. Treaty Process, where the potential for distorted communication is multiplied as divergent worldviews and narratives of history come into sharp contrast with one another (see Chapters 2 and 3), and where a history of unequal relations has exacerbated the power imbalances existing between Aboriginal and non-Aboriginal peoples. It is in this context that the criticisms offered by Levinas, Derrida and Bourdieu are most trenchant. The possibility of undistorted communications within intercultural negotiations founders on the impossibility of mutual understanding in any complete sense of the term. In the North American context, experiences of history have manifested themselves in specific contexts of oppression that produce visions of justice that differ on a First Nation by First Nation basis. Moreover, an even greater difference exists between the perceptions of the past and of justice espoused by Aboriginal and non-Aboriginal persons, especially given the tendency of the latter to temper their visions of justice by appealing to the pragmatic reality of certainty. As will be argued later, the non-Aboriginal discourse of certainty leads us toward a particular vision of justice that in turn acts as a limit on the substantive results achievable through the B.C. Treaty Process.

These criticisms, however, leave us in a procedural bind. How are we to pursue justice for past wrongdoings if justice is an “experience of the impossible” (Derrida, 1992)? The advice provided by the deconstructionists to remain vigilant in interrogating the imposed standards inherent in claims to justice is cold comfort where historical cycles of vengeance and despair continue to impact upon the present. We are left passively reacting to these developments rather than exploring the possible grounds for transformative justice.

#### 5.4 Nancy Fraser: Justice as Substance

The distinction between universal and particular ethics, while useful for framing the theoretical debate, is less useful for the analysis of actual situations of injustice. Each instance of justice typically involves both universal and particular elements: a sense of economic and social equality with the larger society alongside recognition of the unique qualities of the group. Furthermore, the procedural variants of universal justice, and the particularistic critiques of these approaches, do not provide us with a sense of the parameters or substance of justice. While it may be rash to conclude *a priori* that a just solution must or must not have certain particular features, general conditions can be laid. As Chief Baird's discussion, cited above, makes clear, socially marginalized groups often seek an acknowledgment of both 'sameness' and 'difference' when they demand reparations. Fortunately, Nancy Fraser (1997) provides a useful means for mapping the degree to which both of these objectives can be achieved. In her model of the 'dilemmas of justice' she suggests the need, in many cases, for reparations that provide distributive justice to a marginalized group to be complemented by a recognition of the group's difference.

Fraser's intention in her analytical framework is to remarry economic and cultural issues. At the present historical juncture, she argues, a shift has taken place from a class politics centered on achieving economic equality towards a politics of difference (exemplified by new social movements concerned primarily with identity politics) which accepts cultural recognition as an end in itself. This split leads to a singular focus on either issues of cultural misrecognition or economic maldistribution. A dual focus on these two forms of injustice is necessary but, for Fraser, their integration is problematic; their interconnection needs to be carefully developed so

as not to ignore the crucial tensions that exist between the two. To explore the connection and tensions between cultural domination and economic exploitation she develops a framework in which the analytical categories of "socio-economic injustice" and "cultural-symbolic injustice" are placed in contrast to one another. The distinction she makes between these two 'ideal-typical' forms of injustice is primarily philosophical; these do not represent two mutually exclusive categories that exist substantively in and of themselves (as Young, 1997:152 suggests), but rather they are exaggerations of elements of injustice which are then dichotomized in order to map forms of injustice and to gauge possible remedies. This heuristic classificatory system, rather than providing a description of reality, provides us with a tool for examining incidents of social injustice.

In this abstract sense, then, 'socio-economic injustice' is defined as being located in the "political-economic structure of society" and includes forms of injustice such as economic exploitation, marginalization from economic rewards, and material deprivation in relation to other groups (Fraser, 1997:13). 'Cultural-symbolic injustice', on the other hand, "is rooted in the social patterns of representation, interpretation and communication" (Fraser, 1997: 14). The injustices found under this label include cultural domination, the non-or misrecognition of a group, and disrespect for one's culture. Again, none of these aspects of injustice are to be taken as mutually exclusive since they often exist in combination with one another. However, taken as 'pure' types each form of injustice suggests a particular remedy for its resolution. Problems of socio-economic injustice need to be addressed through some form of redistribution, while problems of cultural-symbolic injustice can be eliminated by granting recognition to the ignored or maligned group.

Both forms of injustice are often experienced by groups simultaneously. That is, injustices faced by subaltern collectivities are often both of a socio-economic and cultural-symbolic nature. Thus, the ideal program for combating these injustices would appear to be one which simultaneously attempts to gain redistribution and recognition for the subaltern group. However, as Fraser notes, the problem with this 'simultaneous' struggle is that strategies of redistribution and strategies of recognition often contradict one another. While redistribution claims often attempt to uproot an unequal economic system and lay to rest societal differences, recognition claims often aim to concretize previously ignored identities and thereby establish the cultural specificity of a group (Fraser, 1997: 16). In this sense, a strategy of redistribution intends to de-differentiate groups from one another whereas a strategy of recognition attempts to differentiate them (Phillips, 1997: 148).

Fraser associates (ideal-typically constructed) groups with the strategies of redistribution and recognition. An exploited class, in a strict Marxian sense, represents the 'paradigmatic' case of a group whose interests would be best served by pursuing redistribution. In contrast, it is a 'despised sexuality' which best represents a group that seeks to redress injustice primarily on the plane of recognition. Although lesbians and gays often experience material hardships based on their sexual identity, Fraser (1997:18) argues that these difficulties result primarily from the devaluation of the despised sexuality in the cultural-symbolic structure of society. In between these two paradigmatic groups Fraser places groups she refers to as "bivalent collectivities". These are groups that are "differentiated as collectivities by virtue of *both* the political-economic structure *and* the cultural-valuational structure of society" (Fraser, 1997:19). Fraser argues that race and gender are the representative (12) forms of such collectivities; however, First Nations can also be understood as "bivalent collectivities" since First Nations peoples have experienced

injustices which are simultaneously cultural and socio-economic. Given the dualistic nature of the injustices experienced by such groups, neither redistribution nor recognition alone will serve to resolve their conflicts. As suggested above, both forms of justice need to be pursued simultaneously – but this requires that the contradictions of their simultaneous pursuit be circumvented. It should also be understood that not all remedial strategies properly address the ‘bivalent’ status of First Nations. In fact, some attempt to resolve only one aspect of injustice – either by suggesting the provision of only recognition or redistribution to these maligned groups.

Often, the very terms used to refer to First Nations reflect a presumption about the justice claims they are making. A classification of First Nations as “communities” tends to be associated with a stress on the need for socio-economic repair. Such a categorization of First Nations in treaty negotiations is found in an economic advisory report prepared for the Province of British Columbia by the accounting firm of KPMG Peat Marwick Thorne (1996). The authors of this report view treaty settlement as a way to revitalize Aboriginal “communities” and to promote their incorporation into the economic infrastructure of the province (KPMG, 1996:28-9). Furthermore, they recommend that First Nations conduct their affairs with an eye for investment in business and resource development in order to guarantee the sustainability of Aboriginal communities (KPMG, 1996: 14). They also suggest that B.C. provincial negotiators

[e]ncourage First Nations to invest in education and training, to guide them in their investment and resource management decisions, and to prepare them for participating in new businesses and institutions with other British Columbians... [And] tie payments of cash and transfers of land to certain conditions which will have greater potential for positive results (e.g. establishing agreements for continued supply of resources, minimizing employment dislocations, and defining standards against which future results will be measured (KPMG, 1996:22).

Culture in terms of language, traditional governing structures, and relationships with the natural environment are left unconsidered as relevant factors in this report. Instead, redistribution of

access to resources is seen as a sufficient remedy for the injustices experienced by First Nations peoples in British Columbia with little concern for resolving issues of cultural-symbolic injustice. Thus, in the very act of naming, we can see a translation of the First Nation lifeworld that places it on a level comparable to that of a local municipality or community.<sup>13</sup> Furthermore, through this translation the substantive results of negotiations are limited to meeting the needs of a community defined as such.

In contrast, references to First Nations as a “minority group” typically serve as a means to emphasize only the cultural-symbolic injustices experienced by First Nations and recommends recognition of the equality<sup>14</sup> shared by Aboriginal and non-Aboriginal individuals rather than an acknowledgement of group distinctiveness. References to First Nations groups as “minority groups” are often couched in a discourse through which Aboriginal peoples are perceived as ‘just another ethnic group’ seeking recognition in our ‘multicultural’ society. This categorization is evident in criticisms offered by various organizations opposed to the B.C. Treaty Process who suggest First Nations groups are seeking ‘special status’ through treaty negotiations. Such complaints have been levied by the Reform Party who offer in their policy recommendations to give Aboriginal persons the same “rights and responsibilities... as other Canadians”. Also, the British Columbia chapter of FIRE (Foundation for Individual Rights and Equality) has stated: “We are all Canadians. Period” (both quoted in Bateman, 1997:72-4). This rhetoric of ‘equality’ is based on a perception that injustices experienced by First Nations can be resolved by including these groups in a multicultural Canada where all receive equal opportunity, regardless of their ethnic identity. This form of inclusion would require no redistribution of economic resources to compensate for past socio-economic injustices. Thus the translation that occurs here limits the justice demands of First Nations to those that would be afforded to any other minority group

under the aegis of a multicultural society. As with the categorization of First Nations as communities, the possibility of substantive justice is narrowed to a number of non-threatening concerns.

A more inclusive option is the term 'First Nations,' which highlights Aboriginal groups as "bivalent collectivities". This understanding allows us to consider a greater variety of possible solutions to the injustices experienced by First Nations peoples as well as to understand the full scope of these injustices—as simultaneously cultural and socio-economic. The definition of Aboriginal nation provided by the Royal Commission on Aboriginal Peoples (1996:26) can give us a starting point for understanding First Nations in British Columbia.

Aboriginal nations should *not* be defined by race. Aboriginal nations are political communities, often comprising people of mixed background and heritage. Their bonds are those of culture and identity, not blood. Their unity comes from their shared history and their strong sense of themselves as peoples.

In contrast with perceptions of First Nations as racial groups seeking special status within an equal society, Aboriginal nations are understood here as willed communities bound together by a common history and by the possession of long-standing cultural traditions. Stemming from this, we can conceive of the bivalent First Nation as a 'political community' that, through contact with a dominant 'political community', has felt its cultural integrity threatened and, as well, has experienced exploitation and dispossession. Following on this, if the treaty process aims to address the injustices experienced by Aboriginal peoples in British Columbia it must take into consideration both the need for recognition and the need for redistribution.<sup>15</sup>

However, repair through recognition and redistribution is by no means simple. Fraser constructs oppositions within each remedy to gauge the forms that redistribution and recognition may take. She suggests that these remedies can range from those which are "affirmative" to

those which are “transformative”. In the case of redistribution, an affirmative strategy would attempt to correct the inequalities that arise from the organization of social relations without challenging these relations, while a transformative approach would engage in a “deep restructuring of the relations of production” (Fraser, 1997:27). Similarly, in the case of recognition, an affirmative strategy would attempt to affirm and revalue the identity of the previously ignored social group while a transformative strategy would deconstruct identity *en masse* and thereby disrupt societal practices of valuing particular cultures above others.

In the next chapter I will argue in more detail that lodging treaty negotiations in a framework bent on ensuring certainty fixates treaty negotiations on an ‘affirmative’ approach to injustice resolution. For now, some prefatory comments can be made. Under a redistributive remedy, in which the socio-economic injustices imposed upon a given First Nation would be addressed, an affirmative approach would seek to correct economic injustices without disrupting the status quo operation of the provincial economy. This strategy is clearly the one supported by economic advisors to the Province of British Columbia as well as various economic ‘think’ tanks. It can be otherwise described using Cassidy and Dale’s (1988:29-31) term “partners in development”. This term refers to a scenario that Cassidy and Dale see as a potential end result of land claims negotiations in British Columbia. In this scenario, Aboriginal peoples would gain access to capital and resources through which they could develop their communities in a way amenable to economic imperatives and the interests of capital.

In consideration of this form of affirmative redistribution, it can be argued that Fraser is too dismissive of affirmative approaches to injustice. An affirmative approach to redistribution in treaty negotiations would likely represent an improvement over the current state of affairs. The allocation of funds and resources to First Nations could potentially serve to increase their

self-sufficiency and decrease their dependence on government funding (McKee, 1996:64). It also may provide the resources needed by a First Nation to engage in a broader transformative struggle (Carroll and Ratner, 2001). However, if treaty allocations are tied to an obligation on the part of the First Nation not to disrupt the regular operation of British Columbia's economy, this could present some problems. First, this would fail to adequately deconstruct the perception that First Nations are a 'minority group'. Since the First Nation signatory to a treaty settlement would still appear to be under the jurisdiction of the B.C. provincial government, the First Nation would seem equivalent to other communities and this could incite complaints that First Nations peoples are receiving 'special' treatment by way of treaty monies. This is precisely the spin Melvin Smith (1995:104) puts on land claims settlements when he protests that First Nations peoples are "only the seventh largest ethnic group in the province... All status Indians, whether or not they live on reserves, are slated to receive the rich benefits that flow from these agreements. For B.C.'s relatively few Indians, the upcoming treaties promise a bonanza in cash, property and economic opportunity". Thus, despite the aim of redistributive justice to correct inequalities and to do away with differences, this remedy does nothing to challenge long-standing, antagonistic group differences between Aboriginals and non-Aboriginals since it fails to break down the construction of First Nations as dependents on and wards of the state. In other words, it fails to promote *recognition* of First Nations cultures or to correct the cultural-symbolic injustices and attempts at forced assimilation suffered by First Nations.<sup>16</sup>

Second, the continuation of regular economic relations may merely serve to set up an economic elite within given First Nations rather than allowing for an in-depth confrontation of economic deprivation on present-day reserves. Since the continuation of forestry, fishing, and mineral extraction would be guaranteed by the government, an affirmative remedy would place

some control over these projects in First Nations' hands (KPMG, 1996:41). Given that certainty requires clarity as to who is the landlord and, as well, that particular individuals take a controlling role in business matters, this may allow certain band members to use positions of power to increase their individual wealth.<sup>17</sup> However, there would be no guarantee of, and little opportunity for, wider economic redistribution. The failure of treaties to provide widespread redistribution is confirmed by analyses of past treaty negotiations between governments and Aboriginal peoples. The ARA Consulting Group (1995:24), based on an examination of treaties negotiated in Australia, New Zealand, Alaska, the Yukon, Inuvialuit, and Northern Quebec, reports incomes of Aboriginal individuals have not been significantly improved nor has there been a great impact on their employment through treaty settlement. While there may be more promise for increased employment in British Columbia given the wealth of resources in the province, under a 'business as usual' settlement there is little guarantee that economic benefits will be distributed beyond a new First Nations economic elite.

On the other hand, although individual First Nations may consider transformative redistribution strategies such as full employment, progressive taxation, collective ownership, and democratic decision-making, these strategies may prove inimical to certainty. Since these strategies would constitute changes to the 'normal' functioning of British Columbia's economy they would represent 'unknowns' in terms of certainty and may potentially require greater obligations on the part of potential investors (whether in terms of guaranteeing a certain level of employment or having to partake in more negotiations and impact assessments). Along these lines, KPMG (1996:12-14) warns that if First Nations choose to uphold a conservationist relationship with the natural environment or if they attempt to redistribute settlements more widely amongst their members, then this could present a threat to certainty. It is for this reason

that the ARA Consulting Group (1995: 19) argues that “[c]ertainty for developments on First Nations settlement land does not exist until settlement is final and First Nations post-settlement administrations have established policy and process for the development of settlement lands.”

Turning now to remedies focussed on addressing the need for recognition, an affirmative strategy would entail an acknowledgement that First Nations peoples represent a distinct ethnic group within the Canadian mosaic and that they deserve equal status to other ethnic groups within the nation. The underlying assumption of such an approach is that ethnic identities are primordial categories of difference and, to get along, we must recognize group differences. Fraser connects this remedial strategy with what she terms “mainstream multiculturalism” (1997:24). Again, there are pitfalls to an affirmative approach. Similar to an affirmative approach to redistribution, an affirmative approach to recognition maintains the sense that First Nations are merely seeking affirmation of difference within Canadian society. Such an approach opens the door for the provision of ‘respect’ for cultural differences, but it does not transform the cultural-valuational model on which this respect was originally denied. That is, difference is respected in relation to an assumed European norm. Thus there is the risk that cultural respect will amount to nothing more than ‘lip-service’ being paid to cultural difference while dominant relations continue in a new form. In the worst case scenario, this will produce what Zizek (1997:44) refers to as “a ‘racism with distance’—it ‘respects’ the Other’s identity, conceiving the other as a self enclosed ‘authentic’ community towards which he, the multiculturalist, maintains a distance rendered possible by his privileged universal position”. This multicultural relation provides the basis for new forms of exploitation, which treat the local culture as a new territory to colonize and assimilate to a global economic logic and therefore this form of recognition potentially contradicts the underlying objective of affirmative redistribution—de-differentiation.

This 'racism with distance' can be found in a suggestion by the ARA Consulting Group (1995: 23) that an awareness of First Nations' cultural practices "... may provide prospective investors an advantage in formulating a business arrangement". In this pragmatic sense, recognition requires only a surface acceptance of the dominated group, rather than a reevaluation of the dominant group's identity, which questions its historical patterns of cultural imposition. Furthermore, affirmative recognition may amount to little more than a means for investors to forward their own interests within First Nations' territories.<sup>18</sup>

This begs the question of whether such a form of recognition truly provides an advance away from the racism that has to date marred Aboriginal/non-Aboriginal relations in British Columbia (see Frideres, 1988:378-80). Also, it has consequences for strategies of redistribution since this affirmative approach serves to reproduce the category of 'Aboriginal' as an 'other' outside of 'mainstream' society. In combination with affirmative redistributive measures it feeds, and even constructs, the perception that these redistributive measures are being provided for a specific group that is seeking special privileges above and beyond those of 'normal' Canadians. Thus, rather than destabilizing cathected differences between identity groups, an affirmative strategy of recognition may exacerbate previously established group resentments by calling further attention to these differences (Fraser, 1997: 29).

In sum, the certainty that derives from an affirmative approach to recognition does nothing to challenge racial and ethnic cleavages and instead could function to make these cleavages deeper and more pronounced. A transformative approach, on the other hand, would require a more widespread deconstruction of identity rather than a mere 'surface' acceptance and construction of First Nations' cultural distinctiveness. The development of such a project would require a radical reconsideration of identities—not an effacement of difference, but an

acceptance of the multiple, intersecting, and evolving differences (without a valuation of one particular identity) that exist in British Columbia.<sup>19</sup> To begin, treating First Nations as historically legitimate nations that were politically constructed in an ongoing manner comparable to other nations would provide First Nations with a standpoint from which to struggle for the same form of self-determination permitted to other 'peoples' (Jenson, 1993: 345).

It should be apparent that non-Aboriginal conceptualizations of certainty restrict treaty negotiations to affirmative approaches to injustice resolution. In both of these affirmative approaches little is done to de-differentiate groups from one another or to promote just relations between different collective identities. The primary consequence of these approaches is that they contradict an overall goal of reconciliation by exacerbating group differences. Thus a narrow focus on certainty could potentially lead to remedies for injustice that only superficially address the problems faced by Aboriginal and non-Aboriginal persons in British Columbia.

### 5.5 Affirmative Reparations

Through Fraser it becomes clear that the substance of justice is in itself problematic. Facile solutions to injustice, which attempt to address the demands of the other through minor reformative change, draw us to affirmative responses that threaten to further exacerbate the previous injustices. I would add that such affirmative responses, particularly in the field of reparation, also serve as a tool of assimilation by establishing (constructing) a supposedly 'shared' set of normative standards. In doing so, the culture of the other is translated to re-affirm the dominant culture, to be seen as an addition, a complement to the logos of the dominant culture, thereby bringing the previously separate and intractable culture in line with that of the dominant society.

In this sense, Fraser's model of the dilemmas of justice needs to be reworked to better reflect the power relations that are inherent in the relationship of repair. As was the case with the critique of Habermasian proceduralism developed above, affirmative strategies of repair can be viewed as acts of symbolic violence through which a dominant group seeks consent for an arbitrary universal social order. Bourdieu (1990: 127) defines symbolic violence as: "gentle, invisible violence, unrecognized as such, chosen as much as undergone, that of trust, obligation, personal loyalty, hospitality, gifts, debts, piety, in a word, of all the virtues honoured by the ethic of honour." This is a notion of violence in which those to be dominated are encouraged to participate in their domination by performing an act of misrecognition rather than challenging the arbitrary imposition of the dominant worldview (Bourdieu, 1991). In this sense, Bourdieu's explication of the struggle to define what is 'common sense' bears a resemblance to Gramsci's (1971) idea of hegemony in that it attempts to explain how dominated groups play an active role in their domination. As well, both Gramsci (1971) and Bourdieu (1991) acknowledge that power often requires that concessions be made by those in power to those who are to be ruled. For Gramsci, a ruling group must consider, and make compromises toward, "the interests and tendencies" of those whom they wish to rule (Gramsci, 1971: 161). For Bourdieu, it is not uncommon for a dominant group to undertake a "strategy of condescension" through which they symbolically negate hierarchical divisions in order to profit from a presumed noble act. With both concepts, one gains a sense of how dominant groups seek to contain the other by providing a remedy that incorporates the other into the dominant system rather than providing transformative recognition and redistribution. This is not a new or surprising strategy in the sense that governments have long sought to pacify active social movements by co-opting leaders and watered-down versions of the social movement's agenda. However, it may be the case that

more nuanced versions of this activity have been developed in the era of neo-liberal governmentality (this issue will be explored in Chapter 7).

In the B.C. Treaty Process the discourse of certainty potentially serves the purpose of making the social and economic logic of dominant Canadian society into an unquestioned common sense – a universal. The mantra of certainty is repeated ad infinitum throughout the process, as government representatives and the business community seek to drive home the point that certainty is fundamental to the future well-being of the province. Some First Nations, too, accept this discourse as an accurate reflection of their future needs. These First Nations seek a pragmatic treaty that will permit their future growth and allow them the economic opportunities to run their governments, combat unemployment upon the reserves, reduce their debt load, and develop Aboriginal businesses. Others, however, reject this discourse and provide alternative definitions of what ‘certainty’ would mean for First Nations. Frequently, these alternative visions are dismissed as not accurately reflecting the needs for jurisdictional and legal clarity that are defined by businesses and the non-Aboriginal governments as necessary for greater economic stability (see, for example, Business Council of British Columbia, 1997: 2).

In this manner, a procedure, and the substantive results of this procedure, can effect a form of repair that reflects as much, if not more, the needs of the dominant party as it does the need of those who suffered injustices. But it should not be assumed that assimilation through affirmative repair is inevitable. While the motivation for affirmative repair lies in solidifying the legitimacy of the dominant system, it can in fact open new spaces for political action. Thus although affirmative responses to redistribution and recognition may not reflect justice in an ideal sense of the term, they may still provide building blocks on which the First Nation can refocus newly gained resources in fashioning their own transformation. However, this

indeterminacy of the end result should not allow those who have profited from injustice to view affirmative repair as a form of moral responsibility. It represents a pragmatic decision made by a First Nation to forge its own justice rather than waiting for the justice from the dominant society, and a convenient strategy for non-Aboriginal groups that is intended to make a larger problem disappear.

#### 5.6 Conclusion: Between the Procedure and Substance of Justice

We cannot ignore the problems of procedure and substance when pursuing justice. The procedural mechanisms define the spectrum of issues to be discussed and have a significant impact on the substance of the final agreement. Habermasian proceduralism offers a useful starting point for considering the ideal conditions under which negotiations might take place. These conditions include equal opportunities for the parties in negotiations to speak and be heard, and the absence of any form of coercion. However, lacking in this approach is an understanding of the power imbalances already inscribed into language. These power imbalances are particularly noticeable in intercultural negotiations where a dominant culture is reluctant or unable to understand the other culture except in terms provided by the dominant culture. In this context, negotiations can represent an exercise in attempting to classify, translate and understand the other in terms convenient to the maintenance of the status quo.

Under these conditions, the substance of justice cannot be left to the vagaries and subtle coercion of procedural justice. Instead, an understanding needs to be developed at the outset about the requirements of justice in the particular situation. Without explicit statement of the goals of justice – with regard to which injustices require repair and how they may be repaired–

the procedure of justice will implicitly lead us to goals convenient to the interests of dominant groups.

In the next chapter, I will examine competing visions of justice presented by participants in and critics of the B.C. Treaty Process. The objective of the chapter will be to demonstrate how symbolic violence is exercised through treaty negotiations in a manner that limits the forms of justice achievable through treaty negotiations to 'affirmative' standards.

### Endnotes

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<sup>1</sup> For example, this distinction is frequently employed in evaluating new justice initiatives such as 'Alternative Dispute Resolution'. See Dworkin and London (1989) and Menzel (1991).

<sup>2</sup> In the philosophical literature on justice this distinction is often characterized as between "monological" and "dialogical" approaches to justice (see Chapter 2). See, for example, Habermas (1990), Taylor (1992) and Williams (1999).

<sup>3</sup> This discussion runs parallel and overlaps with the sameness/difference debate that has engaged feminist social theorists for many years. Arguments for sameness tend to assume that there exist gender-neutral, universal qualities that both men and women possess in equal amounts (see, for example, Pateman [1989]). In contrast, arguments for difference highlight that which is particular in women and celebrate these differences (see, for example, Daly, 1992) or seek non-essentialized identities that do not create any homogenized categories such as "men" or "women" (see, for example, Butler, 1995; Haraway, 1992). For a useful overview of these perspectives, see Bryson (1992). It should also be noted here that the work of Nancy Fraser (1997), which will be discussed in some detail later, emerged from this debate and represents an attempt to consider the need for both "sameness" and "difference".

<sup>4</sup> Rawls' theory of justice will be discussed in more detail in the next section.

<sup>5</sup> Here, Rawls is referring to the inequalities and power imbalances that have been built into primary social institutions as the result of historical, social and natural factors (Rawls, 1993: 57).

<sup>6</sup> Bourdieu (1998) has suggested that this is true for all universals – they are always used to convince others that a particular and arbitrary viewpoint or rationality is, in fact, universal.

<sup>7</sup> By "value skepticism" Habermas is referring to theories that in this chapter are defined as being 'particularistic'; that is, those theories that doubt the possibility of universal normative standards or procedures.

<sup>8</sup> This is what Habermas, borrowing from the work of Karl Otto Apel, refers to as a "performative contradiction". By engaging in an argument about the validity of argumentation as a universal process, critics verify the very position they intend to discount. See Aragaki (1993 156-7) for an opposing view of the logic of the performative contradiction.

<sup>9</sup> In this sense, these procedures contain a presupposition of what the ideal qualities of the 'good life' are since they provide an a priori valuation of equality and freedom (Taylor, 1992: 61).

<sup>10</sup> It should be noted that consensus for Habermas is merely the ideal against which we measure agreements, and should not be interpreted in any absolute sense (Ryan, 1999; Trey, 1992). Nonetheless, even as an ideal it tends to overlook some of the barriers to undistorted communication noted by Bourdieu, Levinas, Derrida and others.

<sup>11</sup> This term, borrowed from the work of Nancy Fraser (1997), will be developed more fully in the final sections of this chapter. For now, it should be mentioned that the 'affirmative' aspect of affirmative repair refers to strategies used to effect reparation for past misdeeds that do not require any significant changes to the status quo.

<sup>12</sup> Some authors have suggested that many First Nations cultures are philosophically aligned with 'post-modern' or deconstructive approaches that challenge the Western tendency to impose paradigms. The basis of this alignment is located in the figure of the 'Trickster' who breaks all paradigms and refuses to be bound by convenient categorizations. See Ledwon (1997) and Haraway (1992).

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<sup>13</sup> As Chapter 8 will show, the current B.C. Liberal government through its referendum seeks to impose an understanding of First Nations communities that makes them directly comparable to non-Aboriginal municipalities, further minimizing the cultural distinctiveness of First Nations.

<sup>14</sup> This is in nearly all cases meant to provide an “equality of opportunity” for First Nations persons within the dominant society, rather than an “equality of condition”.

<sup>15</sup> The discussion here speaks to a larger debate taking place amongst Canadian political economists with regard to how First Nations should be understood in the context of the Canadian Constitution. Tom Flannigan has advocated the assimilation of First Nations into the dominant society, providing them with all of the benefits of equality. In contrast, Alan Cairns (2000) has revitalized the concept of ‘Citizen Plus’, suggesting that this term recognizes the distinct status and special rights required for First Nations if Canada hopes to build just relations between Aboriginal and non-Aboriginal people. Moreover, Cairns feels this term escapes the problems that arise when Aboriginal communities are viewed as First Nations in a nation-to-nation relationship with the Canadian government. For a view more similar to the one forwarded in this thesis, see Tully (1995, 2000).

<sup>16</sup> Culture should not be understood here in an essentialized and bounded sense. Following Clifford (1988), culture is understood as an a “deeply compromised” notion that has been used to place limits on what is in truth a complex set of relationships. Affirmative approaches to past injustice tend to seek a homogenized understanding of a ‘culture’ that is to be afforded surface recognition. Transformative approaches, in contrast, would view culture not as a thing but rather a loose assemblage of values, practices, and behaviors that are never wholly fixed, but rather always in interaction with historical processes of “appropriation, compromise, subversion, masking, invention, and revival” (Clifford, 1988: 338).

<sup>17</sup> The governmental structures imposed by the Indian Act and other non-Aboriginal legislation have already served to create power hierarchies on many First Nations reserves. In these circumstances, a comprador elite has been established who maintain control on reserves and receive the privilege of directing government funding toward their families and supporters.

<sup>18</sup> This, again, promotes an essentialized understanding of Aboriginal cultures as things that can be identified and delineated so they can be packaged as ‘authentic’ for mass consumption (see endnote 16).

<sup>19</sup> This project presumably would also need to take place on First Nations post-settlement lands where women and youth have complained of being marginalized from political processes.

## CHAPTER 6: VISIONS OF JUSTICE

In the past two chapters I have sought to demonstrate the problems associated with maintaining a resolute focus on procedural justice. In contrast to reparative attempts based on developing a 'fair and open' procedure for coming to terms with the past, it has been suggested that more effort needs to be made to understand the competing visions of justice possessed by the parties to the negotiation. This is not to say that issues of procedural justice are of no import; rather it is a recommendation that procedures be built on the foundation of a broad consideration of the substantive goals of treaty-making which admit into dialogue the justice demands of the maligned party.

Within the current context of treaty negotiations it is not uncommon for the parties to engage in what is referred to as a 'visioning exercise'.<sup>1</sup> This exercise is designed to give a particular First Nation an idea of what the two non-Aboriginal governments expect the land and cash settlement to look like. The utility of the visioning exercise is said to be that it provides the First Nation an early opportunity to assess whether or not the non-Aboriginal governments will be able to provide them with adequate monies and resources to meet their future needs, although one expects the exercise also serves the purpose for non-Aboriginal governments of providing the First Nation with a 'reality check' with regard to the limitations of treaty settlements.

No similar exercise has been carried out with regard to the visions of justice present both on and off the treaty table. Indeed, little work has been done whatsoever to clarify what the goals of this process are. Instead, each party discusses at cross-purposes their motivations for negotiating. In this chapter, several visions of justice will be explored and categorized to highlight some of the key differences between the parties at treaty tables in the lower mainland.

Moreover, it will be argued that, as treaty negotiations progress, discourses of justice are becoming less prominent. This is not a matter of them becoming less pertinent, as they are still essential to First Nations understandings of why they are engaging in treaty-making, but rather the silence on the issue of justice results from an imposition of meaning in the treaty process whereby justice increasingly is defined as certainty. In this sense, the definition of the situation prescribed by the nature of the process and by the manner in which the non-Aboriginal governments engage in this process becomes increasingly one characterized by pragmatic negotiations directed toward solidifying future relationships rather than rectifying the past.

The sections that follow will explore visions of justice that fall into justice frames drawn from the analysis provided in the preceding chapters: Procedural versus Substantive visions; Legal versus Moral visions; Particular versus Substantive visions; and visions of the past versus visions of the future. The oppositions presented within each justice frame should not be taken as pure types that delineate visions of justice in an either/or manner. Instead, these oppositions are analytical tools used here to illustrate conflicting visions of justice within the B.C. Treaty Process.

### 6.1 Procedural versus Substantive Visions of Justice

*“First Nations have shown patience so far, but are not interested in process for process’s sake. You are putting forth to the public matters of process rather than matters of substance. We don’t want to keep the process alive so we can make more process... All you have done is to delay and frustrate the process by laying preconditions that predetermine and frustrate the process”*(Chief Joe Mathias).<sup>2</sup>

This statement, made by one of the leaders of the First Nations Summit to high-ranking representatives from the federal and provincial governments, followed presentations made by these representatives detailing the introduction of a new tool in treaty-making: Treaty-Related

Measures (TRMs). TRMs are stage-related agreements implemented by the federal and provincial governments allegedly to expedite the negotiation process. They may involve studies that generate information deemed important to treaty-making, opportunities for economic or cultural enhancement, or First Nation participation in the management of government-run parks. But it remains unclear how these agreements add to or improve upon interim measure arrangements of the sort First Nations have been demanding since the inception of the treaty process and of which there have been only a few consummated.<sup>3</sup> For First Nations confronted with yet another addition to the treaty lexicon, TRMs were at first seen as a further proceduralization of a treaty-making process that was already cumbersome. Some First Nations representatives have cynically suggested that TRMs are merely a means by which the government downloads programs already on the books and presents them as part of the negotiations.<sup>4</sup>

With respect to the discussion of visions of justice, however, the relevance of TRMs is that they are an example of the tendency of participants in the treaty negotiations to create more process when confronted with an impasse. In this case, First Nation dissatisfaction with the slow pace at which interim measure agreements are being reached is responded to with the creation of a new form of pre-treaty agreement more palatable to non-Aboriginal government interests. Procedural refinements such as these are not uncommon in the course of any set of negotiations. But, in this situation, these refinements are also reflective of an additive approach that fails to recognize some of the structural challenges inherent in the treaty process. They do not tackle the essential problem that First Nations and the non-Aboriginal governments have entered these negotiations with little recognition of their divergent views of the past and of the substantive goals of treaty-making.<sup>5</sup> The error of proceduralism is to expect that somehow through rational,

fair, interest-based negotiations the parties will be able to overcome these differences and arrive at compromise.

Faith in proceduralism remains strong within the B.C. Treaty Process.

*“Justice is the process, not the result. If the process is fair, they will feel they received justice. The BCTC process strives to ensure the basic elements of fairness in the process”*(BCTC representative).<sup>6</sup>

*“This is a government to government process. Each party is equal. The procedures and protocols of First Nation processes must have equal standing to those of the government of Canada”* (BCTC Chief Commissioner, Miles Richardson).<sup>7</sup>

In both of these statements, one can observe the reliance on the dialogical rationality of opposing parties to forge just agreements through fair and equal negotiations. The second statement, however, advises that the procedural basis of justice must be founded on equality – an equality that permits each party to incorporate their own cultural specificity into the process. This is what Tully (1994, 2000) refers to when he stresses the importance of the parties entering the process as “equals”.<sup>8</sup> Unfortunately, although each of the parties prior to entering the B.C. Treaty Process played a role on the B.C. Claims Task Force, and therefore had a hand in designing the process, this equality of condition has not been a clear principle of treaty-making to date in B.C. Instead, the parties begin negotiations with a terrible disparity in resources and power, which limits the First Nations ability to influence the process and to establish their own protocols. Ovide Mercredi, the former Grand Chief of the Assembly of First Nations, offers a very bleak view of this disparity: *“wherever we are forced to get involved in these tables we are forced to assimilate. Tables are not about culture. First Nations are forced to assimilate every step of the way.”*<sup>9</sup>

The belief that 'good faith' negotiations can provide access to just settlements is confronted by the obstacles standing in the way of approximating what Habermas refers to as the 'ideal speech situation' (see Chapter 5). Interactions within the ideal speech situation ideally assist the parties in seeking consensus on normative issues, but these interactions must be based on principles of fairness, equality and uncoerced discussion (Baert, 1998). In effect, parties are required to forego their instrumental (means/ends) and impersonal motivations, and embrace, in contrast, a 'communicative' rationality characterized by truthful, sincere interactions directed toward mutual understanding (Ratner et al., 2002). However, in the B.C. Treaty negotiations these conditions are not yet in place, making further procedural adaptations an exercise in futility. Indeed, when negotiations of this nature are taking place between governments, the likelihood of systems-level, instrumental motivations dominating the discussions increases, making sincere and truthful interaction less likely. This is particularly true of the non-Aboriginal governments involved in treaty-making, both of whom are heavily bureaucratized and have internalized situational constraints that prevent them from participating in the open, interest-based negotiations necessary for communicative interaction. These constraints reflect the broader concerns of governance, such as the need to integrate policies concerning treaty-making with the goals and objectives of other government departments (e.g. forestry, fisheries) as well as macro-level economic and social concerns.

*"Let's not go through the fallacy of having this wonderful treaty process that's going to be interest-based and everyone is going to be able to bring forth everything that they want and we are going to have these great discussions and come up with a creative new idea. Why say that if you are going to come in and say we have to have these things and this can't change?"( BCTC representative).<sup>10</sup>*

*"The key to any negotiations is you have to consider your interests and express them honestly. Interests – not positions. That's what we talk about reconciling. Every party has things they won't compromise on. We have to realize the*

*interests we represent and where we won't compromise. So we are honest that we can't put fee simple on"* (provincial representative).<sup>11</sup>

The two quotations above, present contrasting visions of interest-based negotiations. In the first, the speaker, a former member of the BCTC, expresses the standard view of interest-based negotiations, drawn from the work of Ury and Fisher (1991), that 'interests' are malleable and allow for creative problem-solving, as opposed to 'positions' that are unmovable. The commissioner's criticism, from this standpoint, is that the non-Aboriginal government's attachment to unmovable positions contradicts the public presentation of the treaty process as one in which the parties will look creatively at their interests, and at how these interests might be met through compromises reached with the other parties to the negotiations.

However, in the second quotation, from a provincial government representative, we see how government actors are able to reinterpret the meaning of interest-based negotiations to situate their behavior within the rubric of this negotiative approach. Here, negotiating in an interest-based manner is seen as being "honest" about one's positions, making them known to the other party so that they can move on to other issues. By attaching their actions to the valued normative criterion of honesty, the symbolic objective of this statement is to disguise the instrumental, positional basis of the non-Aboriginal governments' negotiation policy. In this sense, non-Aboriginal government involvement in treaty negotiations seems neither sincere, since they are unwilling to negotiate their positions, nor truthful, since, despite their claim to honesty, they arrive at the table with fixed mandates, leading First Nations to suspect that treaty negotiations are merely a charade (Ratner et al, 2002).

Rather than seek mutual understanding of terms and goals, non-Aboriginal government actors instead often seek to redefine the situation in a manner complementary to the strategic goals contained within their 'mandates'. These mandates are devised and approved at the upper

echelons of government and passed down to negotiators who are responsible for negotiating within the parameters of these documents. As mentioned earlier, mandate changes or adaptations require the federal or provincial negotiator to engage in a lengthy process of negotiating within their own government.

*“If there is a problem at the tables it is because, and this is implicit in the process also, the negotiators for the government can only negotiate what they have authority to negotiate. And the usual problem at the tables is they do not have the mandate to negotiate the things that the First Nation wants them to negotiate”* (BCTC representative).<sup>12</sup>

Thus, discussions between the parties are hamstrung from the beginning by the inability of the non-Aboriginal government negotiators to truly ‘speak’. Since they are only able to act in a manner consistent with their mandate, they cannot engage in a truly dialogical process of seeking mutual understanding.

In this way, the process risks becoming a vehicle for the substantive goals of the more powerful party, which in this case is the non-Aboriginal governments. By putting forward their unmovable positions ‘honestly’, the non-Aboriginal governments place limits upon the negotiations since they are the ones in a position to redistribute resources and powers of self-governance. To operate rationally within this negotiative context, First Nations actors must respond by seeking means to force the government away from these mandated positions, either through turning non-Aboriginal government arguments against themselves,<sup>13</sup> or by taking strategic actions to press the non-Aboriginal governments to come closer to meeting First Nation demands.<sup>14</sup> Thus, positional and strategic negotiations often become the norm. Moreover, demands for ‘justice’, for substantive results that correspond to the magnitude of past crimes, appear more and more unrealistic because they fundamentally contradict the positions the non-Aboriginal governments have ‘honestly’ put forth. In effect, these mandated positions amount to

preconditions that lay the parameters for reasonable discussion in a fashion that is unilaterally imposed rather than cooperatively agreed upon.<sup>15</sup>

This attempt to structure the conversation is but one example of the pitfalls associated with relying primarily on proceduralism as a means to achieving justice. If the substantive justice objectives of the procedural apparatus are not explored at an early stage to provide the procedure with a clear direction, process alone is too susceptible to the whims and desires of the dominant party or parties. Indeed, the process becomes directed instead by the underlying and often unspoken 'justice' objectives of the party who is able, through the use of 'symbolic violence', to define the limits of the discussion. In the B.C. treaty process, First Nation demands that speak to historical injustices, that speak to settlement options that are outside of non-Aboriginal government mandates, are quickly portrayed as being unrealistic, naïve, or underprepared for the hard work of negotiations.<sup>16</sup>

*"First Nations negotiating a full and final agreement have an intense challenge facing them in their communities. They have to reconcile dreams of settlement with a cold and prickly reality check" (provincial representative ).<sup>17</sup>*

This 'reality check' is an attempt to achieve recognition (which, as Bourdieu reminds us, is also misrecognition) of the arbitrary, yet formalized, power relations exhibited in the status quo (Bourdieu, 1990, 1987). At every turn, Aboriginal negotiators run up against this 'cold' reality and are provided with the choice, which is a very limited choice, of achieving minor redress through a procedure that ultimately reaffirms and reproduces 'reality' as defined by the non-Aboriginal governments, or carrying on in their current state of deprivation while pursuing their ideal conceptions of justice.

## 6.2 Legal and Utilitarian versus Moral Visions of Justice

It has already been noted that there are difficulties in distinguishing between the legal and moral reasons for negotiating treaties (see Chapter 1). Legal visions of justice often contain a latent moral vision, and moral visions may be based on an alternative legal code, such as Aboriginal common law. The key distinction to be examined here is one of emphasis; that is, whether a participant in the treaty process places emphasis on rigidly codified legal rules or abstract moral principles when interpreting the reasons why they are engaged (or not engaged) in a process of treaty-making.

What is interesting in the B.C. Treaty process is how the parties will often switch from legal to political or legal to moral language, depending upon the purpose toward which they are negotiating. For example, when the issue of compensation arises, non-Aboriginal government representatives will refuse the use of this term at the treaty table, arguing that it is a legal term with specific legal implications that they are not ready to discuss in the treaty forum.

*“First Nations quite often want us to acknowledge something up front, and I think there is a real legal concern on the part of vulnerability about some bald faced statement that acknowledges something up front”* (federal representative).<sup>18</sup>

*“Compensation may be an issue of terminology. We view that we do supply substantial funding, but we do not call that compensation. According to our lawyers, this is a specific issue with meaning in the courts. But treaty settlements in urban areas will be weighted more heavily in terms of a cash component”* (FTNO Director, John Watson).<sup>19</sup>

By defining the issue of compensation as strictly a legal issue outside the purview of treaty-making the non-Aboriginal governments are able to avoid the moral reckoning that, for First Nations, is implicit in the term compensation. But it is hard to imagine any language that could both acknowledge First Nations experiences of injustice based on the historical infringement of their Aboriginal title and expropriation of their lands, and satisfy the non-Aboriginal

governments' concern that they not be held legally liable for damages that could well exceed their ability to pay. Nonetheless, by operating on the basis of liability and risk avoidance it is in fact the non-Aboriginal governments who bring legal concerns into the political realm of treaty-making.

In contrast, First Nations will often speak of compensation in moral terms, as fair recompense for what they have lost combined with a public acknowledgement of the harm done to them.

*"If everybody sits down and looks into their heart of hearts, if they knew everything that happened to First Nations peoples, they would know deep down that it was wrong. So I think if they knew the truth they would say, 'that was wrong so what are we going to do about it?'"*(Tsleil-Waututh representative).<sup>20</sup>

Here, the appeal is to the moral sensibilities of non-Aboriginal peoples and the assumption is that with increased knowledge about injustices placed upon First Nations peoples, non-Aboriginal people in B.C. will want to do what is morally right – to provide appropriate recompense. The desire for this sort of acknowledgement is rarely rooted in a desire to gain a strategic tool to use against the government in future litigation (although the non-Aboriginal governments are correct in viewing this as a potential negative consequence); instead, First Nation representatives often desire public recognition of their suffering as a means to re-claim and re-valorize a despised and maligned public identity, allowing them to re-establish their cultures not only through the funds provided by treaty settlements, but also through an affirmation that the past hardships were the result of external imposition, and not due to the failings of First Nations cultures.

When First Nations work to mobilize public opinion and non-Aboriginal government actors toward treaty settlements, however, they do not restrict themselves to moral reasons for settlement.

*“There are a number of comments like, ‘one law, one Canada’, ‘treat everybody equally’, and those types of sentiments that do not recognize that there is a whole lot of case law that has established the rights we uniquely hold today. Some of those rights are Constitutionally protected as well” (Tsawwassen representative).<sup>21</sup>*

Legal reasons have certainly played a determining role in motivating the parties to negotiate, and, indeed, there is a legal basis to the claim of Aboriginal title that has motivated the parties to engage in treaty negotiations. Therefore, it is no surprise that First Nations turn to legal visions of justice to further support the necessity of treaty settlement and to argue for an acknowledgement of their specific rights. But, in doing so, they are also participating in and reaffirming the legitimacy of the logic of the non-Aboriginal vision of treaty negotiation, which eschews arguments based upon moral reasoning and privileges those based on pragmatic principles such as legal or political realities. The associated injustices of assimilation and cultural misrecognition that combined with the expropriation of First Nation lands to culminate in the current inequitable position of First Nations within B.C. are largely ignored. In this sense, the result of a narrow legal focus with regard to treaty settlement is that it acknowledges the legitimacy of the imposition of European law on First Nation traditional territories. But, in return, First Nations do not receive acknowledgement of their own normative standards that exist outside of European common law which were transgressed by the non-Aboriginal governments.

The problem of mutual recognition is also demonstrated in the refusal of non-Aboriginal governments to acknowledge Aboriginal title.

*“The BCTC has made it clear that treaty negotiations begin with mutual recognition. First Nations recognize some legitimacy of Canada’s claim to title (that is, they accept that Canada and B.C. are here to stay). Canada and B.C. must be clear to recognize First Nation’s rights and title. The critical point is establishing mutual recognition” (BCTC representative).<sup>22</sup>*

This mutual acknowledgement has never come to fruition because the parties have failed to discuss the substantive goals of treaty-making in a meaningful way. This has provided the non-Aboriginal governments with the convenient argument that these are political discussions that neither ask the First Nations to prove their title, nor do they require the non-Aboriginal governments to acknowledge Aboriginal title. However, this is an inaccurate comparison. A more fitting requirement would be that First Nations should not be required to acknowledge Canada and B.C.'s title if the non-Aboriginal governments refuse to acknowledge the existence of Aboriginal title.

The utilitarian and instrumental visions of justice proposed by the non-Aboriginal governments in the current context of treaty negotiations portray questions of compensation and Aboriginal title as 'messy' and troublesome. The non-Aboriginal governments suggest that by bracketing these issues and other moral visions of justice, we can ensure that more effective and efficient negotiations will take place. As well, the current poverty and desperation of Aboriginal communities is pointed to as another pressing reason for engaging in pragmatic discussions. All of these arguments endeavor to establish a particular vision of treaties as functional tools for providing newfound certainty to all involved.

*"Treaties are, for a large part, a business deal. They are underlayed by all of these conceptual questions, but they are essentially a business deal... I don't think this is about justice in the sense of reparations through the process. I think there is a hope it will contribute to putting those things behind us simply because it will make for healthier communities that have satisfied some of their contemporary needs" (federal representative).<sup>23</sup>*

*"I think non-Aboriginal people mostly just want it to be over. They see it in many ways like a real-estate transaction – 'who gets what? How much is it worth? And, let's get on with the rest of our lives'" (federal representative).<sup>24</sup>*

In both of these quotations, the emphasis is placed upon the utilitarian benefit of completing treaties, while questions of justice or reparation are ignored or cast aside. They construct the treaty process as a pragmatic exchange between parties who are firmly immersed in the same shared reality, rather than as groups with competing legitimate visions of justice.

It should be noted, however, that non-Aboriginal participants in the treaty process often experience what might be referred to, following Dorothy Smith (1990: 17), as a “bifurcation of consciousness”; that is, “[e]ntering the governing mode of our kind of society lifts actors out of the immediate, local, and particular place in which we are in the body. ...It establishes two modes of knowing and experiencing and doing, one located in the body and in the space it occupies and moves in, the other passing beyond it.” This is to say that negotiators should not be portrayed as automatons pushing forward the party line. Many non-Aboriginal government actors possess deep moral visions of justice. Many cite their reasons for participating in the treaty process as related to wanting to help right a past wrong. Moreover, they are not entirely unresponsive, on a personal level, to the narratives of injustice related by First Nations peoples at the treaty tables. But they are able to separate these personal and embodied feelings from their public role as a negotiator, treaty analyst, consultant, etc. They are able to ‘wear many hats’ and to also understand and interpret the purpose of treaty negotiations from a space outside of the body, that passes beyond it, and which corresponds to the rational interests of the non-Aboriginal governments.

### 6.3 Particular versus Universal Visions of Justice (Sameness Versus Difference)

When weighing questions of how to address long-standing, structurally imbedded injustices, a key axis of debate is the question of whether repair requires that the maligned group receive opportunities and benefits similar to those available to the dominant group (sameness), or whether the distinctness of the maligned group needs to be recognized by the societal mainstream (difference). This debate occurs across several sites of injustice, taking hold in the discourses of anti-sexism (see Butler, 1994; Bryson, 1992; Benhabib, 1994; Cornell, 1994; Fraser, 1994; Pateman, 1989), anti-racism (see Harris, 2000; Zack, 1997), anti-homophobia (see Abelow et al., 1993; Jagonese, 1997), and post-colonialism (Ashcroft et al., 1995). As discussed in Chapter 5, social theorists such as Nancy Fraser (1997) have attempted to transcend the sameness/difference divide, but there has been little consensus with regard to the success of any given attempt to reach a definitive solution (for a critique of Fraser's attempt, see Blum, 1998; Yar, 2001; and Young, 1997).

Running parallel to the sameness/difference axis of debate is another concerning the divide between universalistic and particularistic theories of justice (see Chapter 5). Universalism-particularism is one of the five 'pattern variables' identified by Talcott Parsons for classifying types of social relationships (Parsons and Shils, 1936). This pattern variable is often evident in discourses concerning justice. Moral propositions founded on a universalist position contend that justice, whether achieved through a standardized procedure or prescribed substance, inhabits a space beyond any of the social and cultural cleavages that separate us as human beings. The project of the universalist is to tap into this space in order to arrive at just solutions that meet universal criteria. Particularistic views of justice, in contrast, protest against any attempts at the universal prescription of the contents of procedural or substantive justice. For the

particularist, the content of justice can only be approximated within the specific context of the conflict and, for the more radical adherents to this perspective, this approximation of justice is always unfixed, partial, and open to future deconstructive challenges (see Chapter 5).

The importance of these debates extends well beyond the academic circles in which they occur and has tangible implications within everyday justice processes such as treaty-making. Indeed, the gap between visions of sameness and visions of difference, and the gap between visions of universal justice and visions of particular justice, often appears unbridgeable in the rhetoric of the participants in and opponents of the B.C. Treaty Process. But in circumstances where the First Nations in B.C. have been denied sameness through their social and economic marginalization, as well as denied difference through the devaluation of their distinct cultures and forced assimilation, resolution of these two interlocked divides is essential.

*“What does equality mean? Anything different from the status quo is said to be unequal. This is seeking total assimilation. ...Assessing the needs of the Tsawwassen First Nation must be the starting point.”* (Tsawwassen representative).<sup>25</sup>

*“...this thing is race-based. You have begun a process of a race-based system of government. We can't understand or figure it out. It's undone a few decades of movement toward equality”* (Tsawwassen Consultation Group member).<sup>26</sup>

The first quotation should not be understood as a rejection of all forms of equality but rather as a rejection of a vision of equality that effaces difference. Generally, First Nations engaged in the B.C. Treaty Process are seeking forms of economic and social equality within Canadian society; however, they prefer that this equality take a form that also recognizes their specificity as the original cultures of this region. In this sense, their vision fits the model of bivalency described by Nancy Fraser (1997, see Chapter 5) in that they desire that both the redistribution of resources and recognition of cultural differences be included in any settlement package. For them, it is not

contradictory to demand simultaneously that repair come in forms of both sameness and difference. But for many of the non-Aboriginal participants in the process, these simultaneous demands present a paradox – one that threatens the mythical vision of the Canadian “just” society. Their understanding of equality is based on maxims such as ‘one law, one people’ and ‘no taxation without representation’ and they are unsure of the consequences treaty-making might have for these cultural values. They often ask: What form of governmental representation will non-Aboriginal persons living on reserve land receive? What rights and privileges will First Nations governments have above those of local municipal governments? Will First Nations be on par with the provincial or federal governments in certain areas of jurisdiction? Will First Nations continue to uphold and respect Canadian democratic values after treaty settlement?

The uncertainty presented by First Nation calls for both sameness and difference presents a challenge to mainstream visions of justice. This is because the legitimacy of mainstream visions of justice rests on their ability to be universalized, to transcend particular circumstances and to apply to and protect all citizens. For this reason, the portrayal of these visions as assimilative offends the idealized ‘fairness’ of this vision.<sup>27</sup> Consider, for example, the following exchange between an Aboriginal woman and a non-Aboriginal RAC member at a Lower Mainland RAC meeting:

*“It’s very unsettling to listen to people here talk about First Nations receiving special treatment. Was residential school special treatment? Was being placed on a reserve special treatment? Our lives are always dictated. We are being judged all of the time. Where were you when we were being dragged to residential school?” (Observer at LMRAC meeting).<sup>28</sup>*

*“All of that was wrong, but the way to fix it is not to put in another set of differences. Martin Luther King died for equality – we got close and now we’re going back again. Where was society when I was hauled to jail for not being able to pay custody?” (LMRAC member).<sup>29</sup>*

Here, in the second statement, the specific experience of injustice imposed on First Nations is viewed as an obstacle to the ideal of fairness. The speaker concludes by providing a personal anecdote of the hardships that individuals sometimes have to suffer in the pursuit of this ideal. In his mind, injustices imposed on a singled-out group cannot be resolved by developing 'special' reparative circumstances. In this regard, difference, in and of itself, is seen as a societal problem which must be corrected through the universalization of the principles of fairness and equality.<sup>30</sup> But unrecognized in this desire for universalization is that the particular values of a specific culture are being universalized. The ideological goal of justice arguments such as these is to elevate the interests and beliefs of a specific group to an abstract level of broad social acceptance.<sup>31</sup>

Other non-Aboriginal persons involved in the treaty process fear that differential treatment directed toward correcting past wrongs will result in the imposition of new injustices; that is, that the wrongs of the past will be addressed by creating new wrongs, this time imposed on those who did not directly play a role in the initial injustices. In their view, these earlier injustices have been 'superceded' and compensation for the past will only result in a new round of injustices.<sup>32</sup>

*"We need equality. All of this is smoke and mirrors unless there is equality. You're going to end up with division. We've been involved in this for years and years. And we (fishermen) are the only people having their jobs negotiated away" (LMRAC member).<sup>33</sup>*

*"If you take our jobs then do it in a fair way so we aren't left with nothing like Aboriginals once were. No one else in this room is having their jobs expropriated. The government did not compensate fishermen properly in Nisga'a. All I ask is that you give us some dignity" (LMRAC member).<sup>34</sup>*

The plight of fishermen is particularly revealing in this regard. For many years they have been permitted to build their livelihoods on the basis of non-Aboriginal governments ignoring

Aboriginal rights and title. Now, as the fisheries in the province continue to deteriorate, and as First Nations seek to further establish themselves in this traditional industry, those who have fished their entire lives feel that their personal security is under threat. This example demonstrates that it is not just Aboriginal visions of justice that are delimited by the B.C. Treaty Process. Indeed, many non-Aboriginal persons who work in the natural resource sector and who live in rural communities complain that their voices are not heard within the treaty process, and suspect that treaty settlements will be achieved at the expense of their jobs and well-being.

First Nations certainly do not demand that non-Aboriginal peoples receive harms similar to those once cast upon First Nations communities and individuals. However, they also do not believe that the potential hardship placed on non-Aboriginal persons and businesses should be used as a rationalization for limiting the material redistribution and symbolic recognition afforded to Aboriginal peoples. In making these arguments, they too fall back upon utilitarian justifications, arguing that, despite the hardship experienced by some individuals, treaty settlement is for the general good. Furthermore, they suggest that both non-Aboriginal and Aboriginal communities will benefit from treaty settlements since economic development will thereafter be able to take place in an environment of certainty. As well, it is expected that the non-Aboriginal governments will compensate those non-Aboriginal persons who are negatively impacted by treaty settlements. Whether or not these actions will suffice to ease the insecurity experienced by fishermen and others is yet to be determined.

It is through issues such as these that the treaty process comes up against what Max Weber (1946: 122) refers to as the 'ethical irrationality of the world'. In attempting to right past wrongs, new ones potentially arise and present new obstacles to peace and security. The 'ethic of ultimate ends', which endeavors to repair the past, therefore comes to be replaced by an 'ethic

of responsibility' that considers the available options for addressing injustices within the present socio-political reality. In this manner, certainty begins to appear to be the most realistic goal available to the parties through treaty settlement, and justice seems more and more like a minefield full of unknown hazards. Moreover, especially in the non-Aboriginal worldview, the justice of certainty takes the form of a universal sameness that provides all with the common benefit of being able to move forward in their relationships.

These issues spill over into debates about universal versus particular standards of justice. The non-Aboriginal vision of justice as sameness is based on several universal principles, most of which have been touched upon already: equality, fairness, utility. But the particularity of First Nation demands often stand in conflict to these universal principles.

*"What First Nations were really saying to government was that European-based , western views on everything from rights through to land tenure are contingent. 'They are your views and they are no better than our views. If you are going to sit down and negotiate with us you are going to have to accept that all of the foundational beliefs that you have developed, the legitimacy they have gained, and the manufacture of consent that occurs around them, are the products of a certain set of cultural assumptions.' And the government thinks, 'you want us to come to the table and put all of these assumptions on the table? Oh my God! This could turn the world inside-out'" (provincial representative).<sup>35</sup>*

*"These folks over here think this, but those over there think that. First Nation over here wants to negotiate with you. This one over there says you have no role in negotiations. This one thinks co-management is possible. That one wants exclusive jurisdiction over the land base. First Nation over here doesn't think you have the right to manage anything, you are on their property so get off. And the government bureaucracies see this and are like, 'what the hell is this?'" (provincial representative).<sup>36</sup>*

In both statements, non-Aboriginal government notions of bureaucratic rationality are challenged by the specificity of First Nations' worldviews. Furthermore, as is evident in the second statement, First Nations visions of justice do not represent a single, easily-identified particularism that is simply contrary to European universalism. Instead, there is a multiplicity of

First Nations' realities and visions of justice, each with varying degrees of separateness from the principles of European universalism. The cacophony of these visions, part of the ethical irrationality of the modern world, often leads governments to throw up their hands and to seek a pragmatic, universal vision of justice. Again, it makes the option of prioritizing certainty more attractive.

Alternatively, the fragmented nature of First Nation visions can be instrumentally used to stall the treaty-making process. It allows the non-Aboriginal governments to cite the pragmatic impossibility of negotiations with groups so divided on key issues. It also opens the door for the non-Aboriginal governments to employ 'divide and conquer' strategies aimed at fostering dissent amongst First Nations, preventing them from presenting a unified front in the face of non-Aboriginal government intransigence. For this reason, The BCTC (2001) has recently stressed to the First Nations Summit the need for the First Nations involved in treaty-making to effectively 'mandate' the Task Force of the Summit. It is argued that, at present, the First Nations Summit Task Force is limited in its effectiveness when carrying out discussions with the other principals because it is unable to take a strong stand on any issue. Instead, treaty policy on issues such as certainty, compensation, and interim measures are the prerogative of the individual First Nations. These First Nations often jealously guard their autonomy and are reluctant to divert any of their government powers to the leaders of the First Nations Summit. For this reason, visions of justice, and visions of the overarching purpose of the treaty process, are left undiscussed even amongst the First Nations themselves, and the Treaty Process continues on in a seemingly directionless manner.

Side-stepping the challenges of addressing particular visions of justice potentially leads to a series of graver problems. As Poole (2000: 6) writes, "[j]ustice is not merely a matter of

imposing a pre-existing principle of justice, it must respond to voices from outside the tradition in which the principle of justice was formed.” Thus, whether in terms of exploring visions of justice within the treaty process, or within the First Nations Summit, there is a dire need for the parties to clarify the proposed purpose of treaty negotiation. This does not, however, mean that a common goal must be delineated. Instead, by exploring their respective goals and visions of justice the parties might be able to better understand the particular visions of each group and seek options that provide for their mutual satisfaction. If these voices are not addressed or acknowledged, reconciliation will not be achieved since these particular visions will not disappear with the imposition of one universal vision. Instead, they will likely fester and eventually manifest themselves in a new round of challenges to the legitimacy of the non-Aboriginal governments.

#### 6.4 Visions of the Past versus Visions of the Future

A final confrontation in the justice discourses of treaty-making occurs with regard to the temporal objectives of treaties: Are the negotiating parties seeking to repair the past or to improve the future? Few involved in the B.C. Treaty Process actually treat these as two separate questions. Once again, the essential difference in visions is one of emphasis. For First Nations, the path to a better future runs clearly through discussions about the past – about the hardships suffered and their impact on First Nation societies. They argue that an acknowledgement of past injustices, through material redistribution and symbolic recognition, is a necessary step if First Nations are going to ‘heal’ their communities and arrive at the better ‘future’ stressed by the non-Aboriginal governments. But for the latter, all of this discussion about the past is nothing

more than a quagmire in which the treaty process could sink if weighted with the baggage of historical injustices.

*“I really believe it (the past) is a powerful reminder of why the treaty process is so important. ...It is important to be educated about the historical, legal and cultural context of treaty-making. British Columbia’s perspective, however, is that while there are legal and historical reasons for being here, the fundamental reason is to look at the future. The past is mired in uncertainty”* (provincial representative).<sup>37</sup>

*“We have to talk about what happened to Aboriginal people and their communities, and it is not nice, to put it bluntly, to sweep aside what happened to Aboriginal people with these glowing generalizations that this is all about the future. Well, that is easy for somebody who is comfortable in the present and has profited from what has happened in the past”* (consultant to a First Nations organization).<sup>38</sup>

The first statement acknowledges the importance of the past, but argues that it is a distraction from the fundamental goal of certainty. This is not an uncommon statement for a provincial or federal government representative to make, reflecting the non-Aboriginal governments’ interpretation of the B.C. Claims Task Force’s (1991) theme of ‘creating future relationships’. As mentioned in Chapter 4, this theme, as it is presented in the Task Force report, by no means precludes discussions of the past. However, since the non-Aboriginal governments only agreed to the recommendations of this report, and not the historical overview provided therein, they have been able to firmly hold to the position that treaty-making is a political process and therefore they are not required to acknowledge the historical existence of, or their post-contact infringement upon, Aboriginal title. As a consequence, they are able to avoid discussions of the past and to direct the conversation toward issues of pragmatic importance to achieving certainty. This avoidance, however, often causes deep offense amongst First Nations representatives as they see this as a continuation of Canada and B.C.’s policies of disrespecting First Nation cultures. In their view, the position held by the non-Aboriginal governments severs the

relationship between the present and the past, and by bracketing the latter, it silences any discussion of the responsibility or culpability of the non-Aboriginal governments for the injustices experienced by First Nations.<sup>39</sup>

The issue of past versus future visions of justice invokes two related concerns: apology and compensation. First, it is not uncommon for a First Nation to request that an apology be made to their community in the course of treaty negotiations to acknowledge the negative impact non-Aboriginal government actions have had on their lives. This symbolic gesture is seen as being even more important in light of other apologies that have been made both within and outside of Canada for injustices that, in the eyes of Canadian Aboriginal persons, are less severe than what they have experienced.

*“The federal government has apologized to the Japanese, they have apologized to others they have done wrong to, who aren’t even part of the short history of this country. They can apologize to them, and certainly they deserve it, but they can’t do it for us. Certainly it is part of our healing to have some acknowledgement that they did some grievous wrongs to our people. ...And I think that would go a long way for all of us. First Nations people would be able to say, ‘Okay, it will never happen to us again, now we can look forward’” (Squamish representative).<sup>40</sup>*

*“Once you know that you have an agreement it’s much easier to deal with those types of things (apologies). If those things are preconditions to negotiations it’s much more difficult: ‘I won’t negotiate with you unless you apologize’ is much more difficult than, ‘now that we have reached this agreement what we need to make this work for us and our people is that you include an apology’” (federal representative).<sup>41</sup>*

For the First Nations, apologies are not demanded for reasons of increasing their bargaining leverage; instead, as stated above, an apology symbolizes to the First Nation that the new relationship constructed through treaty will be different from the old relationship. First Nation communities harbour feelings of profound distrust towards non-Aboriginal governments. For First Nation communities, a show of honour on the part of the non-Aboriginal governments is

necessary for them to believe that they will not experience new harms, nor continue to suffer the same injustices, under treaties. Thus, for them, an apology is a promise offered by the non-Aboriginal governments, stating that assimilative actions of the sort carried out in the past, will not be carried out in the future (Tavuchis, 1991). But an apology is not a simple act in the context of treaty-making. The non-Aboriginal governments, regardless of whatever personal feelings government representatives may hold with regard to the rightness or wrongness of past actions, feel the risk of liability being attached to an apology is too great. For this reason, symbolic acts of this nature cannot be employed as tools for moving talks forward,<sup>42</sup> unless delivered for a non-treaty matter such as residential schools.<sup>43</sup>

Apologies are only likely to be delivered, if at all, after the major elements of the treaty have been delineated. This is the only time that an apology, from the perspective of the non-Aboriginal governments, would be safe. However, this raises the question of whether the sincerity of an apology is less meaningful to the person or group wronged when it is delivered without risk. Will a carefully constructed and conveniently delivered apology have the same positive impact on Aboriginal/non-Aboriginal relations as one offered sincerely and without thought to the consequences? Tavuchis (1991) suggests that in group-to-group apologies, sincerity is not a primary factor for assessing the adequacy of the apology. However, this may not be the case in instances where apologies are provided to Aboriginal peoples who have distinct cultural traditions that emphasize concepts of shame and dignity. In these circumstances, convenient and carefully worded apologies may not meet up to the ritualized standards of the community in question (Miller, 2001).

Even more controversial within discourses of treaty-making is the second element of past versus future visions of justice: compensation. Compensation refers, quite simply, to monies

provided for harms and losses that cannot be addressed through restitution. Although many First Nations will seek restitution of lands, resources and cultural objects through treaty negotiations, there will also be cash disbursements paid to First Nations through treaty settlements. The intention behind these cash settlements is that they will help “make up for” some of the injustices that occurred in the past,<sup>44</sup> but the non-Aboriginal governments neither wish to catalogue the injustices that are to be addressed through cash settlements nor do they want to refer to these monies as ‘compensation’.

Non-Aboriginal government arguments against trying to assign monetary value to historical injustices typically run as follows:

*“From a nuts and bolts perspective, if you start looking at compensation for past takings, then you start thinking, ‘how do we even quantify that?’ ...How do we justify spending a lot of money to count up what we can’t even count anymore” (provincial representative).<sup>45</sup>*

*“In so many ways, compensation looks backwards. If you have got to make a choice about where to allocate scarce resources, would you put the money toward the future, and the children? Or would you put it toward the past? Just calculating potential damages is going to be money spent on accountants and lawyers” (provincial representative).<sup>46</sup>*

By employing arguments such as these, non-Aboriginal government representatives acknowledge that a host of wrongs have been visited on First Nations peoples in British Columbia. However, the scope and magnitude of these injustices is transformed into a rationale for circumventing issues of compensation. Rather than deal with compensation on the symbolic and moral level on which First Nations try to engage the governments, non-Aboriginal government representatives shift the focus to that which can be quantified. The implication is that that which cannot be counted cannot be provided reparation. Thus, the magnitude of the non-Aboriginal governments’ past crimes is used as a means to make First Nations demands

seem unreasonable and to once again limit the spectrum of negotiable topics to the concrete and pragmatic.

With regard to the use of the term compensation, First Nations involved in treaty-making argue that compensation should be a matter of negotiation within treaty talks. They cite the recommendations of the B.C. Claims Task Force (1991), and, in particular, the second recommendation, which states that any party can place any issue on the table for negotiation. However, the federal and provincial governments refuse to have the issue on the table.

*“When you look at the issue of compensation, for example, for First Nations that equals a big part of justice. And governments haven’t even allowed it to be put on the table. So we can’t even explore interests in what we are really looking for in justice... B.C. and Canada say, ‘no, we are forward looking, we are forward looking.’ ...What is heard is basically, ‘when you see what the cash settlement is you will have to factor into it whether or not that is enough to compensate you for past wrongs – but we are not going to talk about it.’ That’s the informal word on the negotiation table” (Tsawwassen representative).<sup>47</sup>*

*“Compensation is due when somebody has done something that is a breach of law, or where there is a compensatory obligation. The Crown has never accepted the First Nations’ view that we stole the land. The view was that Her Majesty conferred the establishment of Crown land and the Supreme Court has said that, and they refer to Aboriginal interests existing on Crown land” (federal representative).<sup>48</sup>*

The polarization of these two views presents a huge hurdle for treaty negotiations. The divide between these two visions of justice is even greater in urban settings where ‘compensation’ has meaning beyond providing recognition of the wrongs committed by the governments of Canada and B.C. against the First Nations of British Columbia. For First Nations in an urban setting, the land and resources they could potentially claim have been largely developed or exploited, leaving them with little foundation on which to build a local economy. As mentioned in Chapter 4, the Memorandum of Understanding (1993) on treaty cost-sharing negotiated between Canada and B.C., states that any urban lands redistributed in treaty are to be valued at current market

prices. In densely populated urban areas like Vancouver, where the price of property is extremely high, the addition of a small parcel of land to a treaty settlement package could then account for a significant portion of the final agreement.<sup>49</sup>

The non-Aboriginal governments, however, feel that they risk too much in terms of potential legal liability if the term 'compensation' is used within treaty-making. For example, if treaty negotiations were to fail, but through the process non-Aboriginal governments were to acknowledge that a need for compensation exists, First Nations could then take their land claims to the Supreme Court on much more solid footing. In this manner, the term compensation introduces a great deal of uncertainty into the treaty discussions, and the Federal government, in particular (on the advice of its Department of Justice), has remained adamant that this term must remain off the table. In the context of the Musqueam negotiations, which are currently stalled at Stage 2 of the process because the Musqueam refuse to accept a Framework Agreement that does not list 'compensation' as one of the issues of debate, the parties have examined alternative language. As well, at meetings at the principal level the representatives for the three parties have discussed language that might provide the same acknowledgement of past wrongs that is implied by the term compensation, but which will not make the non-Aboriginal governments legally vulnerable. At the time of writing, little progress has been made with regard to these matters, but one wonders if there exists any terminology that will allow the parties to address the past by not actually talking about it.

Indeed, this remains one of the key differences of vision separating the two parties. Whereas First Nation visions of justice are firmly entrenched in the past, and look to the B.C. Treaty Process to address this history and to effect repair, the non-Aboriginal governments envision treaty-making as a means for delivering B.C. into the future, offering the province less

cumbersome and problematic options for governance. In addition, both parties possess different ideas of what reconciliation will entail. First Nations see reconciliation as built on ‘healing’ and renewed trust which derives from a solemn promise that the past will not repeat itself. In contrast, non-Aboriginal governments envision reconciliation in the establishment of improved, cooperative relationships carefully circumscribed in treaty documents. For them, this represents an element of finality, in that clear processes will be established for dealing with any conflicts that arise in the newly established relationship. But for First Nations, this finality contradicts the vision of the future, which is delicately entwined with the visions of the past they hold – that it is impossible for the leaders of today to negotiate away the Creator-granted rights of future generations.

In light of these differences, the procedural guidelines of treaty-making appear inadequate for ensuring a fair and open discussion amongst competing worldviews. The power imbalances that are present – the differing levels of economic and symbolic capital possessed by each of the parties – create conditions whereby government visions of justice are able to assert themselves as rational, as common-sense, as doxic. This occurs not necessarily through outright demands and displays of raw force, but rather through the subtle persuasion of an ideological discourse that presents the non-Aboriginal governments’ mandates as ‘realistic’, while Aboriginal demands for compensation and for the recognition of past injustices are viewed as problematic.

### 6.5 Certainty as Justice: The Problem of Affirmative Reparation

*“The certainty language that we used in Nisga’a is quite interesting. It speaks to the fact that we envision a treaty settlement as the full and final settlement, and it recognizes the past. And while it has been difficult for some of the participants in the process to hear the language of certainty, the more you talk about it, the more*

*it starts to be clear that it does in itself convey a reconciliation” (provincial representative).<sup>50</sup>*

Zygmunt Bauman (1999) speaks of the “political economy of uncertainty”. In this environment dominated by unknown and little understood forces such as ‘recession’, ‘fall in market demand’, ‘downsizing’ and ‘globalization’, individuals are left less ‘certain’ about the future of their livelihoods. Add to this the predominance of ‘risk’ (Beck, 1992; Ericson and Haggerty, 1997), whereby dangers formerly relegated to the lower echelons of society now seem ever-present and of potential detriment to all social classes, and one can understand the lure of the promise of certainty. Under these conditions, the security and predictability suggested by the term ‘certainty’ appear more attractive than ever – to the point where certainty itself seems equivalent to justice. It is as though by establishing a relationship in clear and concise terms we can overcome our past differences and move forward into a better future.

It is in this environment that the symbolic violence of affirmative reparations is employed. By bracketing discussion of questions of justice, the non-Aboriginal governments seek to situate treaty talks within the moral universe of neo-liberal capitalism. First Nations are encouraged to think in terms of what is practical and realistic – with practicality and reality defined in terms of the interests of government and business. This entails negotiating within the contours of the provincial and federal mandates and recognizing that the non-Aboriginal governments are not going to step outside of these pragmatic principles. It also entails First Nations planning how they will regulate and administer their post-settlement lands, a requirement non-Aboriginal governments stress continuously throughout the negotiations. In this light, First Nations are provided treaty-related measure monies to explore how they will manage their forestry operations, how they will regulate local fisheries, how they will implement taxation, along with many other matters of governance. These are no doubt important

considerations to ensure the stability of post-treaty First Nation governments, but they need not be examined to the exclusion of issues of justice as the discourses mobilized by non-Aboriginal government representatives seem to suggest.

For First Nations the 'certainty' and stability of social existence that is promised through the redistributive justice of affirmative repair is not enough to guarantee a certainty and stability of cultural survival. The rational systems of 'accountable' governance that are encouraged through initiatives to build First Nation governing 'capacity' are often presented as antinomial to visions of the past, visions of moral rightness, and visions of particular manifestations of justice. As well, affirmative approaches to redistribution, which provide surface reallocations of land and cash to First Nations, and affirmative approaches to recognition, which provide limited recognition to First Nations governments (as equivalent to municipal governments) and fail to recognize past injustices, appear yet another assimilative gambit in the short history of Aboriginal/non-Aboriginal relations in B.C. Instead of seeking to truly redefine the place of First Nation societies within British Columbia, these additive approaches are instead bent on maintaining the status quo, eschewing the opportunity for a transformation of Aboriginal/non-Aboriginal relations through a deep exploration of the problem of justice.

How has certainty come to be the new justice? Is this merely another expression of instrumental rationality in the face of substantive justice? Or is there something about the modern period that makes the rationality of certainty ever more appealing, and the call for justice seem ever more unrealistic? The next chapter will explore the discourses of certainty employed within treaty negotiations, situating them within the socio-economic context of neoliberal capitalism and globalization.

## Endnotes

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<sup>1</sup> A visioning exercise was performed at the Tsleil-Waututh table during the course of my research. The Tsleil-Waututh were very disappointed with the amount of land and cash presented through the visioning exercise, and felt that these figures bore no relation to the actual talks taking place at their table; instead, the figures were perceived to be merely a reflection of the provincial and federal mandates.

<sup>2</sup> Statement made to John Watson (FTNO) and Dale Lovick (Minister of Aboriginal Affairs) at the First Nations Summit, 10/29/99. All quotations in italics are drawn from interview transcripts or field notes.

<sup>3</sup> The non-Aboriginal governments claim to have signed many interim measures, but few of these are of the sort that First Nations would define as 'real' interim measures, which are agreements that protect the lands claimed by First Nations in the treaty process from development and resource extraction.

<sup>4</sup> Interview with a member of the First Nations Summit, 10/24/01.

<sup>5</sup> It would be naïve to expect parties to enter a negotiation process with a shared vision of substantive goals or of the past. This is not what is being suggested here. Instead, the argument is that substantive matters cannot be ignored up front in a negotiation process; otherwise, the interests of the more powerful party will dominate the talks.

<sup>6</sup> Interview transcript, 10/13/01. Interviewees are referred to as 'representatives' without identifying their position in order to protect their anonymity.

<sup>7</sup> Statement made to the First Nations Summit, 12/1/99.

<sup>8</sup> For parties to participate in the process as 'equals' is very different from the liberal discourse of equality. Whereas the latter speaks to an equality at the individual level, the former recommends an equality of this order between collectivities. The group-based equality suggested here requires that consideration be given to the demands of the other because such an equality is impossible before the power imbalances of the existing relationship are deconstructed and problematized.

<sup>9</sup> Ovide Mercredi speaking at a "Round Table on Interim Measures", organized by the David Suzuki Foundation and the Laurier Institute, 10/23/00.

<sup>10</sup> Interview transcript, 9/8/00.

<sup>11</sup> Statement made to the Tsawwassen Consultation Group, 10/12/00.

<sup>12</sup> Interview transcript, 10/13/01.

<sup>13</sup> Such techniques involve using arguments about potential government cost-savings or reduced administrative responsibilities that might stem from settled treaties to suggest that there is a government and/or business interest in meeting First Nation demands.

<sup>14</sup> Legal and direct action strategies have typically been used to press non-Aboriginal governments into considering forms of justice outside of their mandates.

<sup>15</sup> The media is also used to forward this strategy. The non-Aboriginal governments have to date made several offers to First Nations that have been made public. Although the offers rarely satisfy the demands of First Nations, and often reflect more the per capita formula of the non-Aboriginal governments rather than what is happening at the table, they appear to the public to be extremely generous given the amount of cash and land that is typically being discussed. When the non-Aboriginal public reads about these offers being dismissed by the First Nation, with no knowledge of why the First Nation is dismissing the amount, public fear is created about the unreasonable demands of First Nations.

<sup>16</sup> Characterizations such as these were made in many of the interviews I conducted with non-Aboriginal government representatives and TNAC members, especially with respect to First Nations who have elected to remain outside of the treaty process because it does not meet their justice needs (e.g. the UBCIC).

<sup>17</sup> Statement made to the North Shore Consultation Group, 03/01/00.

<sup>18</sup> Interview transcript, 5/3/01.

<sup>19</sup> Statement made to the First Nations Summit, 6/16/00.

<sup>20</sup> Interview transcript, 12/15/00.

<sup>21</sup> Interview transcript, 6/26/00.

<sup>22</sup> Statement made to the First Nations Summit, 6/16/00.

<sup>23</sup> Interview transcript, 8/29/00.

<sup>24</sup> Interview transcript, 5/3/01.

<sup>25</sup> Interview transcript, 7/30/99.

<sup>26</sup> Statement made at meeting, 11/18/99.

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<sup>27</sup> Another vision of justice as fairness that non-Aboriginal individuals bring to the treaty table is that of 'proportionality'. This argument is typically stated in the following manner, "if First Nations represent 5% of the population of B.C., why don't settlements redistribute 5% of the lands?" When confronted with this argument of proportional fairness, First Nations individuals often respond by declaring, "all of the lands belong to our peoples so why should we settle for just 5%?" This positional debate, however, stands in stark contrast to traditional First Nation understandings of boundaries as being fluid and permeable. Moreover, from the standpoint of a critique of affirmative reparations, the problem with arguments such as these is that they increase the likelihood of future conflict rather than reconciliation. The proportionality argument serves to further essentialize the classification of First Nations in rigidly delineated ethnic terms by creating an equation that links land ownership to ethnic group representation in the population. As well, there exists no clear calculus for arriving at such an equation. For example, questions would certainly arise with regard to the percentage of Aboriginal heritage that marks one as being First Nation and whether or not non-status Aboriginal persons figure in the equation.

<sup>28</sup> Statement made to LMRAC meeting, 12/9/99.

<sup>29</sup> Statement made at LMRAC meeting, 12/9/99.

<sup>30</sup> See, for example, Bellett (1999:B3) in which Delta Councillor, Vicki Huntington, states: "But I'm concerned too about how we might come out of it (treaty negotiations). Are we all going to be equal before the law – all with the same rights as Canadian citizens – or are we forever going to be different?"

<sup>31</sup> For discussion of the connection between ideology and universalization see Eagleton (1991:56-58) and Marx and Engels (1974).

<sup>32</sup> See Waldron (1992/93) for an argument about the 'supercession' of historical injustice. Kymlicka (1995) develops this argument further in the Canadian context, suggesting that First Nations are due reparation not for what they have lost, but for the inequalities they currently face. See Poole (2000) for a thoughtful discussion of both authors.

<sup>33</sup> Statement made at LMRAC meeting, 12/9/99.

<sup>34</sup> Statement made at a Delta Public Meeting, 11/30/00.

<sup>35</sup> Interview transcript, 2/1/01.

<sup>36</sup> Interview transcript, 2/1/01.

<sup>37</sup> Statement made in response to a main table presentation made by the Tsawwassen First Nation, 7/30/99.

<sup>38</sup> Interview transcript, 2/2/01.

<sup>39</sup> See Cuneen (1999: 129) for similar arguments regarding the Australian government and the past.

<sup>40</sup> Interview transcript, 11/10/00.

<sup>41</sup> Interview transcript, 8/17/00.

<sup>42</sup> For discussion of the use of apology in negotiations and the role it can play in helping parties get beyond an impasse see Cohen, 1999; Fisher and Ury, 1991; Levi, 1997; Schneider, 2000; Tannick and Ayling, 1997; and Taft, 2000.

<sup>43</sup> See Serafini (2000). The federal government offered an apology to the Nu-chah-nulth for administering the residential school system and for the impact these schools had on Nu-chah-nulth culture.

<sup>44</sup> Provincial representative speaking to Sechelt representatives at main table, 8/11/99.

<sup>45</sup> Interview transcript, 6/1/01.

<sup>46</sup> Interview transcript, 6/1/01.

<sup>47</sup> Interview transcript, 6/26/00.

<sup>48</sup> Interview transcript, 5/3/01.

<sup>49</sup> See Chapter 4, endnote 26.

<sup>50</sup> Interview transcript, 6/1/01.

## CHAPTER 7: VISIONS OF CERTAINTY

The project of certainty is not new.<sup>1</sup> In the B.C. context, many of the injustices imposed on First Nations were in fact attempts to secure unimpeded (or certain) access to and jurisdiction over lands, as well as to eliminate forms of Aboriginal organization and property ownership that did not mesh with the prevailing systems of the colonial society.<sup>2</sup> Certainty, however, takes on new importance in an era in which government authority is said to be withering in the face of globalization (Ross and Trachte, 1990; see Weiss, 1997 for an opposing view), and in which the expansion of group and individual rights has made direct, control-based strategies of certainty less feasible.<sup>3</sup> It is in this context that the discourse of certainty has emerged as the conceptual basis for modern treaty-making.<sup>4</sup>

This chapter begins with a clarification of the modern forms and functions of certainty, followed by an exploration of the impact that globalization and neoliberal rationalities of governance have had on the project of treaty-making in B.C. These two phenomena are viewed as intimately entwined with the project of certainty, which in its modern form seeks to secure legal, economic, and political security in a manner consistent with the established institutions of the dominant society, and without relying on the colonial tools of domination and coerced assimilation. The second half of the chapter will situate visions of certainty presented by participants in and outsiders to the B.C. Treaty Process within various certainty 'frames' as well as within the overarching discourses of globalization and neoliberalism. It will be argued that the interplay of these visions does not appear to be heading toward a mutual understanding of non-Aboriginal and Aboriginal certainty needs. Instead, the model of certainty gaining ascendancy within the treaty process is one built on particular non-Aboriginal cultural

perspectives that are discursively presented as universal goods, but which, in truth, represent more the professed needs of non-Aboriginal business and government.

### 7.1 Certainty: Then and Now

In Chapters 2 and 3 it was argued that, as the apparatus of control and marginalization previously employed to deal with the land question gave way, and Aboriginal groups began to make headway in pursuit of their Aboriginal rights and title, the security of Crown ownership of and jurisdiction over lands came to be more and more fragile. Legal victories, alongside heightened First Nation direct action and protest activity, contributed to a climate of increased ‘uncertainty’, pressing the non-Aboriginal governments to address the long-ignored land question in British Columbia. More recently, and particularly in light of the recognition of Aboriginal title provided in Supreme Court decisions such as *Delgamuukw*, First Nations have become ever more emphatic in their refusal to accept the extinguishment of their Aboriginal rights and title in exchange for treaty rights, which is the offer made through Canada’s Comprehensive Claims policy. Thus, Canada is now pressed to deal with Aboriginal title in B.C. without resorting to its traditional means for obtaining certainty, and much controversy has ensued as to how certainty might be achieved without extinguishment.

The debate over extinguishment demonstrates the difficulty of reconciling the visions of certainty held by First Nations and non-Aboriginal governments. For the non-Aboriginal governments, the language of extinguishment – that is, wording that states that the First Nation signatory agrees to “cede, surrender, and release” all heretofore unidentified Aboriginal rights in exchange for the rights defined in the treaty – is the safest, most time-tested method they know for achieving certainty. The language of extinguishment has proven itself against legal

challenges and has provided non-Aboriginal governments with the finality and legal and jurisdictional clarity they desire. For First Nations, in contrast, extinguishment means greater uncertainty. Their Aboriginal rights and title are exchanged for a package of treaty rights that are untested and which may or may not meet the needs of future generations (Stevenson, 2000: 115). In support of the First Nations' perspective, the British Columbia Claims Task Force and the BCTC have both stated that the language of extinguishment is no longer acceptable and a new means for achieving certainty needs to be found (B.C. Claims Task Force, 1991; BCTC 2000).

Third parties such as businesses and investors are also very concerned about the issue of certainty. They wish to see certainty achieved in a manner that permits them more security in their projects and which places fewer administrative obstacles in the way of their business operations. When asked about certainty, business people in British Columbia inevitably draw on anecdotes intended to exemplify the costs of uncertainty to the province of B.C. They tell of attending meetings with potential investors, or of phone calls with individuals considering investing in B.C.'s resource industries, and always the first questions asked by these would be investors are with regard to Aboriginal land claims. When worried investors learn more about the potential complications deriving from unresolved Aboriginal title, it is presumed that they take their money elsewhere. Business representatives corroborate these anecdotal stories with empirical data citing lost investment dollars and a significant "B.C. Discount" – an undervaluing of the price of B.C.'s lands and resources due to the uncertainty over land claims. It should be noted, however, that land claims are not the only factor impacting the financial health of British Columbia. For example, taxation levels, government regulatory policies, market downturns in Asia, and lower global prices for natural resources can all negatively affect profits in B.C.

Nonetheless, land claims reflect an area of risk over which governments and businesses can exhibit a modicum of control through the signing of economically rational treaties, something that cannot be said for business risks such as price fluctuations.

Finally, there is a general desire among non-Aboriginal community members and municipal representatives that land claims be put to rest, that a final understanding be achieved with regard to where their communities end and those of First Nations begin, and that the relationship between these communities be spelled out in a clear manner. These hopes for closure, however, do not translate into unqualified public support for treaty-making. Some who work in industries such as forestry or fishing fear that they may bear the burden of uncertainty so that the rest of the province can achieve certainty, with their jobs negotiated away to First Nations communities in exchange for a resolution to the land question.

The B.C. Treaty Process is currently struggling under these sometimes competing and conflicting visions of certainty. Given the diversity of viewpoints on what constitutes certainty, and the fact that one person's certainty is often another's uncertainty, it is necessary to consider some of the various forms certainty may take prior to examining these various visions in more detail.

## 7.2 Forms of Certainty

Certainty represents an antidote to an assemblage of questions, risks, and fears for non-Aboriginal government and business interests. These are questions about ownership and jurisdiction over the land base of the province, risks of continuing lost investment in the provincial economy, and fears that the land question will remain unresolved or, perhaps worse in the minds of some, that the Courts will provide First Nations with levels of compensation

beyond all affordability. These troubles operate across a number of societal fields – legal, economic, political, and individual – yet they are also interconnected and feed off of one another.

When participants in the treaty-making process speak of certainty they are most often referring to legal certainty. As mentioned above, extinguishment has been the traditional way of achieving legal certainty in Canadian treaty negotiations. For non-Aboriginal governments, the challenge faced in the B.C. Treaty Process is to fashion a new language of certainty that will achieve the same results as the language of extinguishment, but will not offend First Nations. In the Nisga'a final agreement, and in the agreements in principle developed or drafted through the B.C. Treaty Process thus far, certainty is established through the "modification" of existing Aboriginal rights into constitutionally protected (Section 35) treaty rights, while all undefined Aboriginal rights are "released".<sup>5</sup> This is but one method for arriving at certainty without using the language of extinguishment. More generally, however, we might describe the predominant legal models for reaching certainty (adapted from Stevenson, 2000: 126-7) as follows:

- 1) The "co-jurisdiction" model. This model would provide a First Nation with exclusive law-making authority over their settlement lands, while the provincial and federal government would maintain exclusive jurisdiction over non-settlement lands. Any shared lands under this model would be co-managed and the revenues would be shared. This model may not provide the level of certainty desired by industry since co-managed lands would still require businesses to contend with two landlords and any attendant conflicts existing between them.
- 2) The "recognition" model. This model would recognize the existence of all Aboriginal rights, but the treaty would specify that not all of these rights would be exercised. For certainty to exist through this model, the treaty would need to clarify the circumstance under which, if ever, certain Aboriginal rights might become exercisable again. This model would allow the

relationship between the parties to evolve over time rather than seeking 'finality'. Variations on this model appear to be most appealing to First Nations engaged in the B.C. Treaty Process.

- 3) The "fundamental breach" model: Under this model it would not be necessary to exhaustively delineate the scope and multitude of Aboriginal rights within a treaty. Instead, the First Nation signatory to the treaty would agree that undefined Aboriginal rights would not be exercised unless there is a 'fundamental breach' of the treaty relationship. The problem presented by this model is that there would likely be considerable difficulty in defining what constitutes a 'fundamental breach'.
- 4) The "exhaustive definition" model: This model, which is closest to what is currently being attempted through the B.C. Treaty Process and through the "modification and release" of Aboriginal rights, sets out to define exhaustively all of the Section 35 Aboriginal rights of the First Nation in question.<sup>6</sup>

In all of these models, the common question is: What legal language might we use to resolve conflicts between Aboriginal rights and non-Aboriginal rights, and between Aboriginal and Crown title? For the non-Aboriginal governments, the fundamental concern with the language of certainty is that it provide effective closure to all claims-related legal challenges made by the First Nation treaty signatory, aside from those relating to the specific terms of the treaty. In contrast, for First Nations the concern is that treaties do not exclude them from accessing future developments in the law surrounding Aboriginal rights.

The legal certainty sought through the B.C. Treaty Process is closely connected to the quest for greater political certainty. Unlike treaties reached through the federal government's Comprehensive Claims policy, the treaty negotiations in B.C. include self-government

provisions. For non-Aboriginal governments, this aspect of the negotiations must establish clear relations of governance between Aboriginal and non Aboriginal orders of government (i.e. municipal, provincial and federal). For First Nations, self-government will ideally provide certainty in terms of placing the survival of each group's cultural practices in their own hands. However, there is some debate about the extent of self-governing powers to be distributed to First Nations. In general, it is agreed that self-government powers transferred to First Nations will include those integral to the continuing existence of the First Nation community, potentially establishing First Nation control over health, education and social services that have since settlement been administered by the non-Aboriginal governments under the guidance of the *Indian Act* (BCTC, 2000: 12). But, for the non-Aboriginal governments, including the municipal governments, there is a desire for political certainty that will provide clear limits to the extent and reach of First Nations powers and responsibilities. The fear is that if First Nations powers of self-determination are too extensive, and if these communities are mis-managed, there will be negative repercussions for neighboring communities. To prevent mis-management in areas of regulation that extend beyond a single community (such as fishing, environmental assessment, and criminal justice), provincial and federal governments are therefore insisting that laws of general application need apply in the post-treaty context. Although they are content to off-load some administrative powers of self-governance to First Nations, Canada and B.C. do not want to jeopardize their ability to govern the province and nation.<sup>7</sup>

A third type of certainty that treaties are meant to achieve is economic certainty. The tentative support provided by the business community for the treaty-making process is predicated on the assumption that treaties, once signed, will achieve a degree of economic security for their investments. These businesses want treaties to put an end to the blockades,

injunctions, and other claims-related activities that add costs to their operations. This, they suggest, can only be achieved through clarity of jurisdiction and ownership. In general, it does not matter to the business community whether their landlord is Aboriginal or non-Aboriginal, they simply want to know who their landlord is and what the rules are for operating on the land. First Nations also desire greater economic certainty for their communities, which they believe will be possible through greater participation in the mainstream economy. However, not all First Nations promise to uphold the same market values as non-Aboriginal landlords. Many hope to institute conservationist principles and to develop business standards that preserve their traditional territories. Thus, treaty settlements are not necessarily an unmitigated good for businesses, and there remains some worry that business operations will need to adapt to new regulations on post-treaty lands.

Those concerned with the broader economic health of the province suggest that the land question in B.C. has had reverberations beyond the resource sector of the economy. According to this view, there is a general lack of confidence in the economic future of B.C. that affects not only those looking to invest directly in development projects, but also those who make other forms of institutional investment.<sup>8</sup> As well, many argue that greater economic certainty will be achieved through the monies injected into the province through treaty settlements. Since the federal government is responsible for the bulk of the monies provided through cash settlements, these settlements will represent not only a positive gain for Aboriginal communities, but also for the non-Aboriginal communities in B.C. that will receive the benefits of Aboriginal spending (KPMG, 1996; Grant Thornton Management Consultants, 1999). Thus, it is proposed that economic certainty is not just of value to First Nations, businesses and governments, but will also benefit non-Aboriginal communities and individuals.

The final form of certainty that is sought through the B.C. Treaty Process is what I will refer to as 'subjective certainty'. Unlike the other forms of certainty that claim application at an objective level, stressing what are portrayed as universal benefits, subjective certainty refers to the individual certainty that derives from a sense that the past has been dealt with and conflicts have been resolved. This quest for subjective certainty takes both material and symbolic forms. In terms of material subjective certainty, non-Aboriginal individuals seek the knowledge that their livelihoods and homes are secure in the face of treaty settlements, while Aboriginal individuals hope that settlements will provide them with new opportunities for economic security and community sustainability. In terms of symbolic subjective certainty, non-Aboriginal individuals seek the feeling that things have been "made right". Many non-Aboriginal Canadians feel the weight of historical guilt placed upon them by the actions of past generations. Even if they do not feel directly responsible for these actions, they are uncomfortably aware of the implications this past has for current attempts at Canadian identity construction, which are largely based upon an image of Canada as a kind and peaceful nation. In contrast, symbolic subjective certainty for Aboriginal persons rests on a reaffirmation of Aboriginal identities, recognizing the impact colonial actions have had on the ability of Aboriginal communities to preserve their sense of dignity and to maintain their traditional cultures. Aboriginal persons seek a bulwark against the seemingly endless onslaught of assimilationist pressures that have threatened the survival of their communities and devalued Aboriginal identities.

These forms of certainty have been shaped into their present pattern by the force of broader social processes, namely globalization and neo-liberalism.

### 7.3 Certainty and Globalization

The “globalization of fear” (Davis, 2001) is most evident in events such as the terrorist attacks on the World Trade Centre and Pentagon or in the changing weather patterns associated with global warming. With both of these global risks, individuals previously impervious to the insecurities and uncertainties experienced by the unfortunate many (those who live outside of the protections of developed societies, or who are the excluded classes of these societies) came to realize a heightened degree of personal anxiety (see generally, Beck, 1992a, 1992b; Giddens, 1991). Coupled with this fear and anxiety of personal and global destruction are anxieties stemming from the precariousness of local economies in the face of economic globalization. The increased capital mobility accompanying economic globalization has brought with it heightened pressure on local regions to create an inviting and secure investment climate (Ross and Trachte, 1990). Unless they implement capital-placating measures, localities also face the risk of industries withdrawing investment and transplanting their operations to other, more inviting regions and taking with them the jobs and the livelihoods of local citizens. There is no simple calculus that local representatives can follow to ensure continued investment, and capital at times withdraws for reasons beyond local control; nonetheless, today’s politicians and civil servants are expected to manage local and regional economies in a manner that reduces the risk of lost jobs and investment.

In the shadow of these global risks, the idea of ‘certainty’ is extremely appealing. Certainty is not only offered as an answer to the demands of the economic elite; it also promises to dispel the anxieties of everyday people who are increasingly unsure that their jobs will exist tomorrow. However, certainty of this nature may be nothing more than a false hope since the certainty of the global economic elite is often dependent on the uncertainty experienced by

subaltern groups in local contexts (Bauman, 1999). Indeed, it is ideal for global capital if localities become disciplined by the forces of uncertainty; that is, that they fear the loss of investment and, in response, comply with the needs of investors who seek maximum flexibility in their operations. Given that such flexibility includes the need for regulatory systems, environmental management, labour laws, and policies of taxation adaptive to the ever-changing needs of business, it is difficult to envision how these arrangements could ever amount to the subjective certainty desired by individuals living in local communities.

In the context of British Columbia's treaty negotiations, economic certainty in the face of globalization is conceptualized primarily in terms of the needs of resource industries. Resource industries tend to be very unstable and are susceptible to market fluctuations. As well, employment in these industries has been decreasing steadily in recent years. Aboriginal land claims are just one of several factors that impact the ability of resource industries to remain profitable in B.C. As Owen Lippert (2000: 398) writes of the forest industry,

“Until quite recently, the B.C. forest industry enjoyed four years of strong markets and prices. During that time, capital investment remained low by historical standards. Today, profits go toward boosting internal rates of return to cover future risk or to acquisitions in other provinces and countries. Many reasons may explain why this is so, including high taxes, high labour costs and a heavy regulatory burden. Among them surely lurks the possibility of uncompensated or inadequately compensated expropriation through a possible land claims settlement.”

In this sense, treaty settlements are not a silver bullet for the economic uncertainty facing industry. Although settlements may provide a means for easing investor anxiety about possible expropriation of lands and interruptions to business operations, economic certainty is a project that goes beyond any single issue and, for the ideologues of global capitalism, needs to be addressed on a society-wide basis. Nonetheless, the issue of Aboriginal land claims is a pressing

one for resource industries. According to a survey of mining companies operating in B.C., 92% of executives consider Aboriginal land claims to be a major concern (Sumanik, 2000: 460). Similar studies have shown that land claims are also a serious issue for representatives of forestry and other resource-based industries (Price Waterhouse, 1990).

Economic certainty based on the settlement of Aboriginal land claims is a major concern to resource industries because the vitality of these industries is based on large investments of capital. Without secure knowledge that the resource will be available and accessible on clear terms, managers of funds become more and more wary about making these investments. Undefined Aboriginal rights and title, and the potential for these legal issues to erupt into work stoppages, make it extremely difficult for resource companies based in B.C. to secure the finances they require to remain competitive within the global economy.<sup>9</sup> But security for resource industries will not simply come through any form of certainty. For these industries, the certainty that matters most is having the non-Aboriginal governments and First Nations come together to implement Aboriginal title in an “economically rational manner” (Lippert, 2000: 400). The impetus for these parties to reach economically sound agreements, according to Lippert (2000), should be the understanding that the private sector is the major source of wealth creation in the province and if its needs are not met it will respond in an economically rational manner by withdrawing its investment and the jobs created through that investment.

This economic trump card affords industry the opportunity to attempt to define the prevailing rationality of treaty negotiations in terms of maximizing economic certainty for business, typically by promoting an exhaustive definition model of legal certainty. Under these pressures, issues of morality and justice with respect to the past appear more and more nonsensical since attempts at a broader recognition of Aboriginal rights and title, as suggested by

a recognition model of certainty which would seek a revalorization of indigenous identities through material redistribution, would not provide the sort of clarity and finality sought by most in the business community. Beck (1992b: 99) refers to the risk-management philosophy that characterizes business thinking on certainty as “a type of ethics without morality”. It is a “mathematical” ethics that is guided entirely toward calculations of the future with little regard to the past. Similarly, Giddens (1991) argues that globalization and its attendant risks of economic uncertainty contribute to the marginalization of morality, a process which he perceives as an element of ‘high’ modernity. In the face of global issues that are of a magnitude beyond the ability of individual agency to address, a calculative attitude toward the minimization of risk becomes the predominant mode of reacting against modern uncertainties. This calculative attitude contributes to a shift in orientation from one that looks to the past for guidance and direction to one that looks to the future, hoping to obviate potential risks to economic and social security. It is in this context that the eclipsing of visions of justice by those of certainty occurs.

#### 7.4 Neo-liberalism and Certainty

Economic concerns in the face of increasing globalization, however, do not by themselves account for the prominence of discourses of certainty within the B.C. Treaty Process. The non-Aboriginal governments who are the key players in the treaty process, the province of B.C. and Canada, are not simply pawns blindly carrying out the bidding of the global and domestic economic elite. These governments seek to balance their desire to improve the investment climate in B.C. with their need to ensure their continuing ability to govern the Aboriginal and non-Aboriginal populations of the province. The expansion of Aboriginal legal rights and the disruptive protest activities of First Nations have presented new forms of risk and

anxiety for non-Aboriginal governments since these governments are no longer able to clearly determine use and planning on Crown lands (Appadurai, 1998: 228). To be able to govern effectively, therefore, the non-Aboriginal governments need to create a level of political certainty in the province. This can be achieved by orienting individual subjectivities in the province toward particular visions of certainty.

It is not only the advancement of Aboriginal rights that has led the non-Aboriginal governments away from control-based strategies (e.g. the Indian Act) for managing First Nation populations. The ascendancy of the logic of neo-liberalism has provided the discursive opening (Laclau and Mouffe, 1984) necessary for a reconceptualization of the logic of governance in a manner that can circumscribe and limit notions of Aboriginal self-governance and autonomy. According to proponents of neo-Foucauldian perspectives on neo-liberalism, such as Barry, Osborne, and Rose (1996: 10), advanced liberal rationalities of governance emerged in greater force after the Second World War, operating through techniques situated 'beyond' the state (Miller and Rose, 1992, 1995) to create the conditions for heightened competitive and entrepreneurial activity.

In contrast to control-based traditional mechanisms of political domination such as the *Indian Act*, which have proven over time to be cumbersome, time-consuming, and expensive, neo-liberal techniques of governance seek to govern populations "at a distance" (Rose, 1993: 295, 1996: 43; Miller and Rose, 1992: 2). This entails employing devices of governance that permit detachment between the activities of government and activities in localities. These devices include the proliferation of expert knowledges (Rose, 1996), ranging from accounting to psychiatry, that contribute to the shaping of individual responsibility (Burchell, 1993: 276) without being directly deployed by the state. Rather, the state is but one part of an assemblage of

forces spreading the rationality of neo-liberal governance throughout society, and inculcating individuals with the force of its all-encompassing reason. In this manner, governing at a distance enables the governance of individuals through their own freedom, encouraging them to make decisions conducive to the logic of neo-liberal governmentality based on principles of constructing oneself as a responsible economic actor. As Rose (1996: 41) writes:

“Advanced liberal rule ...seeks to degovernmentalize the State and to de-statize practices of government, to detach the substantive authority of expertise from the apparatuses of political rule, relocating experts within a market governed by the rationalities of competition, accountability and consumer demand. ... ‘Community’ emerges as a new way of conceptualizing and administering moral relations amongst persons.”

In this endeavour, uncertainty and anxiety stemming from globalization can contribute toward governmentalizing local populations. It is in the face of uncertainty that individuals and communities are encouraged to govern themselves in a manner that incorporates discipline to the strictures of consumerism, market demand, accountability, and competition (O’Malley, 2000: 478). An integral part of this discipline is training individuals and communities toward a ‘future focus’ whereby they seek to predict and model the needs of capital in order to win economic security over their competitors in the global marketplace.

The ideas of neoliberal governmentality have some resonance with forms of certainty proposed in the B.C. Treaty Process. In particular, the quest for political certainty can be understood, in part, as a quest for neo-liberal regulation – a form of regulation equal to, yet different from, that provided by the *Indian Act*. The current non-Aboriginal government perspective that the *Indian Act* must be removed stems not from a moral opposition to this form of oppressive regulation of First Nations peoples, but from an understanding that this piece of legislation is a dated and outmoded tool of governance. The *Indian Act* did serve an initial

purpose for government by providing the grounds for naming and enumerating First Nations communities that resisted assimilation to the Canadian mainstream; in other words, the *Indian Act* successfully constructed First Nations as an object on which government could be enacted. It also contributed to the establishment of a degree of dependency within First Nation communities (Calliou and Voyageur, 1998), which fortified non-Aboriginal control over First Nations through a regime of paternalistic regulation. But administration in the form of the *Indian Act* requires a great deal of government involvement and expense, something contrary to the *laissez faire* goals of neo-liberal governance. Therefore, a shift toward devolving administrative responsibilities to First Nations communities and offering a limited form of economic integration is effected, with the goal of relocating regulation within Aboriginal populations in a manner consistent with mainstream norms and values. For this to occur, it is necessary that self-regulation be enrolled and internalised by a class of Aboriginal leaders who will serve as relays between the mainstream economy and Aboriginal communities, promoting the entrepreneurial spirit of market capitalism. With these new Aboriginal ‘experts’ operating in First Nations communities, the variant of late modern certainty could potentially serve as a foundation for the non-Aboriginal state to ‘govern at a distance’.

The understanding of neo-liberal governance through treaty negotiation presented in this chapter, however, detracts from the “radical nominalism” (Bourdieu, 1990) – in other words, the extreme disavowal of general categorizations and of portrayals of power as being centred in, and emanating from, the body of the state – evident in much of the neo-Foucauldian literature on governmentality. While this literature is useful for describing the emergence of a logic of governance that provides government with a new means to think and calculate populations beyond the direct assertion of power and domination, it fails to capture the neo-colonial

paternalism that is a continuing theme in Aboriginal/non-Aboriginal relations. Governing at a distance is most effective when exercised upon populations that share a common stock of cultural experiences and knowledges. But in circumstances where two cultural lifeworlds are in direct confrontation, the work of translating the rationality of neo-liberal governance becomes more difficult as it comes up against more distinct and separate traditional rationalities. This prevents the various “relays” of neo-liberalism, be they experts, local Aboriginal elite or government employees, from simply imparting a logic that is easily related to long-standing, habituated modes of understanding and knowing. Rather, the actors engaged in the process of governmentalizing a population still need to resort to the force and threat that lies in the resources of the state.

The pressure tactics deployed by the federal and provincial governments to influence First Nations not currently involved in the treaty-making process (namely the UBCIC) exemplify this demonstration of force. The UBCIC has attempted to put forward an alternative model of treaty negotiation that befits their traditional views and morality. In response, the governments of Canada and B.C. have told them that there is only one treaty process, and they view the treaty process recommended by the UBCIC as a logical impossibility. In this sense, without a common worldview it is difficult for neo-liberal power to infiltrate and affect Aboriginal subjectivities. Without a commonality of this order, communication founders and force is sometimes needed to draw the Aboriginal group into the sphere of negotiations. Therefore, governing at a distance may be an ideal on which modern treaty-making is founded, but the need for the direct and oppressive relations of force housed in the state are still an ever-present last resort for installing the neo-liberal agenda.<sup>10</sup>

In addition, the concept of governing at a distance may understate the symbolic violence inherent in negotiations between consenting parties. Although it is reasonable to argue that treaty negotiations play a role in advancing neo-liberal rationalities of government (as seen in the previous chapter, visions of justice forwarded in the course of treaty negotiations are typically countered by visions of certainty, or ‘translated’ [O’Malley; Miller and Rose, 1992] into visions amenable to a particular form of certainty), this is no mere enactment of positive power that operates with a life of its own, but rather an act of symbolic violence employed to limit treaty discussions to questions of defining and solidifying the future relationship between Aboriginal and non-Aboriginal persons. As Bourdieu’s work (1991: 239) would suggest, the form of power associated with neo-liberal governance, while not necessarily emanating directly from the state, does reflect the class ‘habitus’ or dispositions of a particular grouping of agents who struggle for “the monopoly of legitimate naming.” While the form of naming advanced by any particular grouping is arbitrary,<sup>11</sup> an act of symbolic violence seeks to have this arbitrary naming (mis)recognized by others as legitimate and doxic, thus reproducing symbolic valuational structures that privilege a particular form of life.

Given the impact of symbolic violence, it is clear that the treaty negotiations break drastically from the Habermasian communicative ideal discussed in Chapters 5 and 6. Instead, conforming to the neo-liberal principles of devolution and deregulation, the thrust of the negotiations is shaped through the offer of a form of self-government that “focuses on reassigning powers and devolving administrative responsibilities to Aboriginal communities” (Slowey, 1999: 118), ostensibly with the goal of fostering greater development and economic opportunities within First Nation communities. As much needed as economic redistribution is for most First Nation communities, the form it is presently offered in may amount to little more

than an exchange of paternal state control for market discipline (Ratner et al., 2002), immersing First Nations in a form of economy that “plays right into the consumptive commercial mentality shaped by the state corporatism that has so damaged both the earth and human relations around the globe” (Alfred, 1999: 114).

Certainty may, in fact, be a misnomer since there is no necessary course that the relationship between Aboriginal and non-Aboriginal persons in B.C. will take. Instead, there is a significant degree of indeterminacy that can only be regulated through the imposition of ‘uncertainty’ on First Nations in the form of admitting them into the entrepreneurial arena of market capitalism. The vagaries of this arena are such that a limited security of ‘predictability’ can be expected for government and third party interests since it can be assumed that First Nations, in order to successfully employ the entrepreneurial spirit, will abide by the norms and rules of the entrepreneurial arena. Indeed, assumptions such as these are at the heart of the government studies administered to try to predict the potential effects of treaty settlement on the provincial economy. KPMG’s 1996 report on the “benefits and costs of treaty settlement”, which was replicated by Grant Thornton Management Consultants in 1999, is modelled on the premise that First Nations will ‘rationally’ engage in economic practices in a post-treaty environment. These practices will include the pragmatic management of First Nation settlement lands in a manner that does not disrupt business operation, the ‘wise’ investment and spending of treaty settlement funds, and a system of community administration that reduces the demand for non-Aboriginal government sponsored social programs (KPMG, 1996: 7-8). Aboriginal self-reliance and autonomy, in effect, are visualized in a manner that does not deviate from non-Aboriginal economic and social practices except in matters of cultural importance that do not impact on economic relations.

This attempt at fostering discipline through self-reliance is also evident in recent treaty settlements in neo-colonial societies that have been achieved through processes slightly different from the B.C. Treaty Process. For example, in the Yukon, Aboriginal corporate structures were formed on post-settlement lands to administer the economic affairs of the Aboriginal group. Like any corporation, these bodies were directed with the task of achieving the best financial return for their shareholders – the individual members of the Aboriginal group (ARA Consulting, 1995: 13). Engaging Aboriginal groups in this form of economic activity generally contributes to improving economic certainty in the treaty area, providing a more secure environment for investment. Similarly, the Nisga'a have developed Nisga'a Economic Enterprises to manage their treaty funds, which will be invested in a conservative manner (e.g., in trust funds, mutual funds, and interest bearing accounts) to ensure that the money provides long-lasting self-reliance (Bell, 1998: A13).

The logic of certainty, in the absence of a developed discourse of justice, brings forward the prospect of assimilation by other means for First Nation communities. Detached from considerations of historical right, ethical obligations, and cultural recognition, settlements threaten to constrain First Nations through the rationality of neo-liberal capitalism, rather than permitting a return to self-determination. From here, the “way forward” is expressed in terms of the now irrefutable logic of the market:

“[A]s the Aboriginal community begins to derive more and more of its income from private wealth creation rather than public transfer payment, they will come to appreciate more fully that beyond a certain level government debt and expenditures represent a drag on the overall economy. As their attention focuses increasingly on economic growth as opposed [to] public redistribution, they will not jeopardize new-found wealth to cling to the fraying safety of wardship” (Lippert, 2000: 416).

Thus, although certainty takes several forms, it is a particular vision of certainty that is assessed as being most complementary to neo-liberal governmental and economic objectives. This is a vision of certainty that seeks to extinguish (or modify and release) Aboriginal rights, to achieve finality based on the model of the contract, and which focuses on objective rather than subjective needs.

### 7.5 Extinguishing Versus Recognizing Aboriginal Rights

Based on the Nisga'a Final Agreement and the Sechelt Agreement in Principle, it appears that the prevalent form of legal certainty sought in B.C.'s treaty negotiations will be that achieved through the 'exhaustive definition' model. The language by which an exhaustive definition of Aboriginal rights and title is to be achieved is that of a modification of Aboriginal rights coupled with a release of undefined Aboriginal rights. This language takes the following form in the Sechelt Agreement in Principle (1999):

- 1.9.1 Notwithstanding the common law, as a result of the Final Agreement and the settlement legislation, the Aboriginal rights, including Aboriginal title, of Sechelt, as they existed anywhere in Canada before the Effective Date, including their attributes and geographic extent, will be modified, and continue as modified, as set out in the Final Agreement.
- 1.10.1 The Final Agreement will provide that if, despite the Final Agreement and the settlement legislation, Sechelt has an Aboriginal right, including Aboriginal title, in Canada, that is other than, or different in attributes or geographical extent from, Sechelt's section 35 rights as set out in the Final Agreement, Sechelt will release, as of the Effective Date, that Aboriginal Right to Canada to the extent that the Aboriginal right is other than, or different in attributes or geographical extent from, Sechelt's section 35 rights as set out in the Final Agreement.
- 1.10.2 The Final Agreement will provide that Sechelt will release Canada, British Columbia and all other persons from all claims, demands, actions or proceedings, of whatever kind, and whether known or unknown, that Sechelt ever had, now has or may have in the future, relating to or arising from any act of omission, before the Effective Date that may have affected or infringed any Aboriginal rights, including Aboriginal title, in Canada of Sechelt.

Sechelt has since backed off from this Agreement in Principle to permit the community more opportunity to reflect upon and possibly revise some of its provisions. The non-Aboriginal governments, however, are unlikely to compromise with regard to the language of certainty that is employed.

Likewise, despite the autonomy of each First Nation to negotiate certainty on their own terms within the B.C. Treaty process, the non-Aboriginal governments are unlikely to accept the risks of multiple models of certainty since this would increase the likelihood of error in one or another set of certainty provisions, opening the language of certainty to numerous potential points of attack. As one federal government representative stated:

*“We put a lot of energy and effort into the modification of rights and title that we adopted with the Nisga’a at huge expense and we are not really interested in rediscovering the whole issue of certainty at every table we go to. With certainty, when we have the opportunity to look at the work being done on it, then we look at the proposals made at individual tables, these do not meet a number of legal tests when we examine them”* (federal representative).<sup>12</sup>

In this sense, while the modification language of certainty is not a pre-requisite to each individual set of negotiations, the space for variations on this language is severely limited.

Many critics of the modification language of certainty, both within and outside of the treaty process, feel that this language is merely a restatement of the extinguishment language found in treaties negotiated under the federal government’s Comprehensive Claims policy. From the viewpoint of First Nations outside of the treaty process, such as the UBCIC, this language is only semantically different from the former requirement that First Nations “cede, surrender, and release” undefined Aboriginal rights. They argue that, in effect, through modification and release, the First Nation does surrender rights that may be heretofore undefined, e.g. if the Supreme Court of Canada were to later determine that First Nations possess

a right to water or a commercial interest in wildlife (Union of British Columbia Indian Chiefs, 1998). For the UBCIC, as well as many First Nations engaged in the B.C. Treaty Process, this language fails to provide necessary recognition of their cultural distinctiveness and historical existence as fully functioning societies possessed of a different understanding of their relationship to the land.

“Canada cannot understand our Sacred connection to the Land, our Aboriginal Title. It is “uncertain,” because it prevents Indigenous Peoples from viewing the Land as a commodity to be bought, sold or traded. From Canada’s perspective, our Aboriginal Title has to be changed, altered, and defined in a treaty so that it fits with Canadian laws and ideas about Land” (Union of British Columbia Indian Chiefs, 1998)

The tension between collective ownership and individual ownership has long been of concern to non-Aboriginal businesses and government. Although in the U.S. context collective ownership of land has not proven to be an obstacle to economic development (Cornell, 2002), non-Aboriginal business and government representatives in Canada nonetheless promote fee simple ownership as the most rational means of distributing settlement lands. It is assumed that individual ownership of lands is the most responsive and adaptable to the dynamics of the market economy (Flannegan, 2000: 131). Typically, treaties will designate a certain portion of the land distributed as First Nation fee simple land which remains subject to non-Aboriginal jurisdiction. Other lands will be designated treaty settlement lands on which treaty rights and First Nation jurisdiction will apply (see, for example, Nisga’a Final Agreement, 1998).

Another aspect of the certainty sought by the non-Aboriginal governments through treaties is that final agreements represent the “full and final settlement” between the parties (Molloy, 2001). In releasing undefined or unarticulated Aboriginal rights through treaty, agreements in B.C. to date have added a provision stating that the First Nation signatory to the

treaty indemnify the non-Aboriginal governments to any later challenges based on Aboriginal rights. That is, if a First Nation member decides to challenge the provisions of the treaty,<sup>13</sup> the First Nation is responsible for settling the matter and providing any costs to Canada or B.C. As well, the First Nation agrees not to pursue any future legal claims against Canada or B.C. with respect to past wrongs relating to interference with or infringement upon the group's Aboriginal rights (Union of British Columbia Indian Chiefs, 1998).<sup>14</sup> With this provision, the treaty language affects the non-Aboriginal governments' goal of dealing with past injustices without the necessity of discussing the nature of these injustices. It ensures that issues of injustice will be buried by the treaty, leaving them no legal opportunity to re-surface.

Undefined Aboriginal rights present government and business with the problem of incalculability. They provide no object on which the techniques and rationalities of governance can operate. Without clear and exhaustive definitions of rights and title, the First Nations may feel less compelled to undertake economically rational self-regulating practices because the hope will remain of further developments in the nature and extent of Aboriginal rights, and non-Aboriginal governments will be less secure in their jurisdiction over non-settlement lands and resources. For this reason, it is impossible for the non-Aboriginal governments to consider recognizing these rights or to allow them to evolve with the relationship between the two parties, as suggested by the recognition model of certainty.

*"The difficulty with that is that if it is a final settlement then it necessarily says that there are no other rights in the future that remain, at least to be exercised. And, of course, that is also fundamental to the notion of economic certainty because as long as there are remaining unstated and unarticulated rights that could be exercised the cloud on title and land necessarily remains. But many First Nations do say that these are rights they have had since time immemorial and 'how can we be asked to surrender these rights? It's not acceptable.' And I am afraid I do see that as a hugely difficult problem in terms of achieving treaty settlements" (provincial representative).<sup>15</sup>*

Thus, although a discussion is taking place between the parties on the question of certainty, it is clear that the current socio-economic context of the negotiations limits the possibilities for resolving this issue through any compromise that fully recognizes the alternative rationalities of Aboriginal lifeworlds.

#### 7.6 Finality versus Predictability

The legal language operationalized in treaty documents working under the ‘exhaustive definition’ model is designed to bring finality to the issue of undefined Aboriginal rights and title. The notion of finality, however, is itself controversial and many First Nations prefer other terms such as ‘predictability’ (FNTNA, 2000). The term ‘predictability’ is used by First Nations participating in the treaty-making process to acknowledge that they are not seeking to preserve undefined Aboriginal rights that may be arbitrarily exercised at any point in time. Predictability, in contrast, acknowledges that Aboriginal and non-Aboriginal persons need to come to an agreement that provides each with clarity with regard to the role, obligations, and rights of the other. This is perceived to be different from ‘finality’ or ‘absolute certainty’, however, because it attempts to encompass possible changes or developments that may impact the relationship set out in the treaty. Through ‘predictability’, a First Nation agrees only to exercise those Aboriginal rights that are constituted as Section 35 rights through the treaties. Other rights will remain dormant unless a point in time comes at which it is necessary to discuss these undefined rights. In this sense, the predictability model is a variation of the recognition model in that it makes the focus of treaty the recognition of Aboriginal rights rather than the release of undefined rights.

“The purpose of treaties is to recognize, affirm and protect Aboriginal rights and title, not to extinguish them, and to achieve mutual reconciliation between those

rights and the interests of other parties. ...In return (the *quid pro quo*) for the recognition by Canada and B.C. of a First Nation's Aboriginal rights and title, the First Nation would agree, through clear and concise treaty language, to have the manner and extent to which these rights will be exercised by a First Nation, and the manner in which other parties will exercise their rights and responsibilities, set out in the treaty" (FNTNA, 2000: 16).

The model also, however, draws on the 'fundamental breach' model of certainty since one of the conditions for the forbearance of the treaty is that no material or fundamental breach of the treaty provisions occurs. Other matters that would require remedial action with regard to the elements of the treaty would be the discovery or recognition of new rights in the post-treaty environment, or if a major subject matter of the treaty, such as fish, ceased to exist in sufficient quantities to meet the treaty provisions (FNTNA, 2000: 16).

The 'predictability model' in the eyes of many non-Aboriginal government and business representatives does not provide the certainty that they believe can be achieved only through finality.

*"Treaties should be final in the sense that they cannot be re-opened for subsequent negotiation on more land. Second, they should remove the burden of these undefined Aboriginal rights over Crown land that may be part of the traditional territory of the First Nation – and therein lies the nub of the problem since most First Nations won't accept that model. ...Third, the other provisions of the treaty, as far as the jurisdictional power to be exercised on their own territories and with respect to their own people should be very clearly spelled out" (TNAC representative).<sup>16</sup>*

*"We can deal with certainty and finality because we understand what that means. Everybody in the province wants certainty and finality. When a treaty is finished that should be the end of it. And, as you know, that is opposite of the view of many First Nations who say, 'that's not what we mean by certainty and finality.' They want to be able to access developments on Aboriginal Rights that might be determined by the Supreme Court. They do not want extinguishment. But I am sure the majority of non-Aboriginal people would agree with certainty and finality. In the Nisga'a and draft AIPs the treaty exhaustively sets out all Aboriginal treaty rights and there are no other rights" (provincial representative).<sup>17</sup>*

The spectre of continuing undefined Aboriginal rights and the possibility of re-opened negotiations are not prospects many non-Aboriginal persons wish to consider. However, this expectation of finality and absolute certainty goes beyond what is pragmatically possible. All treaties will require provisions for the potential revision of treaty elements or for dispute resolution mechanisms to be employed if the parties to the treaty take differing interpretations of a particular provision. No document, no matter how many legal experts are employed, can overcome all of the vagaries of textual interpretation and societal change (Smith, 1985).

There is evident here, however, a more fundamental distinction between these two visions of treaty-making that goes beyond the dichotomy of absolute certainty versus openness. The difference with regard to finality comes down to a question of trust (which will be discussed in greater detail in the next section).<sup>18</sup> First Nations have difficulty trusting that non-Aboriginal governments will live up to the provisions of treaties and do not want to bind future generations to a treaty if its promises go unfulfilled. Non-Aboriginal persons and government representatives fear that First Nations will continue to seek greater powers and economic privileges and that leaders will hope to maintain the benefits they receive from the culture of protest and complaint.<sup>19</sup> For example, Gordon Gibson (2000: 505) of the right-wing think tank, the Fraser Institute, argues:

[Finality] is a bottom-line goal for most non-aboriginals, and probably for most aboriginals not part of the Indian Industry. However, a significant number of the Indian elite draw their status and livelihood from non-resolution. Finality is not in their personal interest. They attempt to justify this by an in-principle argument against the traditional treaty words of "cede, release, and surrender" with respect to potential claims not covered by the treaty, and to give the lack of finality institutional life in requirements for ongoing consultations and negotiations and co-management schemes.

The lack of trust on both sides of the negotiations results in competing understandings of what 'reconciliation' means in the context of the B.C. Treaty Process. For the non-Aboriginal governments, reconciliation is the 'full and final' settlement of Aboriginal rights redefined as Section 35 Constitutional rights and the release of undefined Aboriginal Rights. For the First Nations, reconciliation consists of the recognition of their societies through the establishment of an ongoing relationship between Aboriginal and non-Aboriginal governments that adapts and changes as any relationship between nations might (Tully, 2000).

Gibson's statement about "co-management schemes" provides an example of the difficulties that extend from these differing conceptualizations of reconciliation. The idea of co-management reflects the principles of the 'co-jurisdictional' model of certainty. Under this model, non-Aboriginal and Aboriginal governments would agree to co-manage areas under their mutual jurisdiction. This model is particularly significant in the urban context of treaty negotiations, where there exist few unoccupied or untenured lands to be distributed in treaty settlements. As an alternative to returning traditional territories, the Tsleil-Waututh, who reside on the Northern side of the Burrard Inlet in what is now called North Vancouver, have suggested that an "integrated treaty management approach" be implemented to provide the Tsleil-Waututh economic, cultural and social opportunities through the building of partnerships with their non-Aboriginal neighbors.<sup>20</sup> However, the non-Aboriginal governments and business representatives have rejected this model, arguing that it opens the door to too much uncertainty. The critics of co-management are doubtful that this model will allow efficient and pragmatic decision-making to occur with regard to land and resources. As former provincial Minister of Aboriginal Affairs Dale Lovick told the First Nations Summit: "*We do not support co-management over areas*

*outside treaty lands. This undermines our ability to make decisions for all residents. ...It is likely to produce more gridlock*".<sup>21</sup> Members of the business community echo these sentiments:

*"Co-management is not a concept we support from a jurisdictional point of view. That is, when I was describing certainty for you I was describing the opposite of co-management. Co-management is a regime under which there will be joint management or jurisdiction over all or a large part of the land base in BC – that is not an outcome we want to see put into effect. And we do not see how that will get us anywhere as far as the issues that are facing industry are concerned"* (TNAC representative).<sup>22</sup>

Some First Nations members, in contrast, view the non-Aboriginal distaste for co-management models as part of non-Aboriginal government preoccupations with defining First Nations groups in order to resolve the questions they pose to non-Aboriginal sovereignty.

*"[The governments want] to put a nice strong fence around what a First Nation is. An approach that we have taken is that there would be an opportunity for the Tsleil-Waututh to participate in different ways throughout the whole of the traditional territory, whether it be management of resources, participating in development, or co-managing a park, or looking after smaller parcels of First Nation land. And the response to that was that we could only deal with settlement lands and all of the rest of it would fall outside of treaty. ...And that certainly wouldn't work for the First Nation. There needs to be, from the First Nation's perspective, some certainty"* (Tsleil Waututh representative).<sup>23</sup>

For the Tsleil-Waututh, the non-Aboriginal desire to draw clear lines upon a map that explicitly represents where Aboriginal jurisdiction ends and non-Aboriginal jurisdiction begins reflects a totalizing western worldview that seeks to unrealistically separate the land into 'ours' and 'theirs'. In their view, this is not a worldview that promotes either reconciliation or certainty for the Tsleil-Waututh First Nation; rather, it continues the traditional policies of Aboriginal marginalization, relegating them to an expanded, yet still limited, sphere of cultural, political, and economic activity.

### 7.7 Contract versus Sacred Promise

Reconciliation and trust were envisioned as foundational principles based on which modern treaties in B.C. would be formed. The first recommendation of the British Columbia Claims Task Force (1991: 82) advocates that a new relationship between Canada, B.C. and the First Nations be built on “mutual trust, respect, and understanding.” But the nature of this trust is contested within the language of certainty. Trust is the basis on which the parties will be able to achieve greater certainty, but does this trust derive from a contract, as would exist between business partners, or is it of a sacred nature, a promise made to cooperate with and respect one another? This distinction reflects a key difference between non-Aboriginal and Aboriginal visions of treaty-making that is outlined in the report of the Royal Commission on Aboriginal Affairs (1996, Volume 2, Part 1: 18). The Royal Commission recommends that treaties be based on mutual recognition, assuming that both parties will be able to understand each other’s model for comprehending trust. But the division between the two understandings of trust is not so easily bridged.

The trust achieved through exhaustive models of certainty extends not from the parties or the strength of their relationship, but rather from the legal durability of the treaty document. An attempt is made to factor out of the relationship the uncertainty of human behaviour, using concise legal language to counter the risk associated with the unpredictability of the future decisions of the other. In this sense, the contract is a technical means to overcome the inherent uncertainty of human relationships.

*“Certainty is a many faceted concept which means many things to many people. ...Treaty negotiations are like any form of contract negotiations. The object is to put in place sufficient rules so parties can accomplish objectives with relative peace” (BCTC representative).<sup>24</sup>*

Contracts are limited in their efficacy, however, by the fact that any agreement is only as sturdy as the will of the parties to maintain its terms. While the person or group who breaks with the terms of contract may be subject to a battery of sanctions or legally obligated to partake in some form of dispute resolution, the indelible fact of human agency remains. In this sense, the trust encapsulated within the legal contract relies on a theory of rationality that assumes that individuals or groups will be deterred from breaking the conditions of the contract for fear of the penalties agreed to in the same document.

This vision of trust based upon contract is an element of what Durkheim ([c1933] 1984) would term the shift from mechanical to organic and contractual solidarity. With organic solidarity, legal codes become more elaborate, defining and regulating a wider variety of social interactions. These codes reflect the 'collective consciousness' of the society, and through them, individual rights and obligations are set and punishments for transgressing these codes are described (Durkheim, [c1950] 1985). The non-Aboriginal vision of certainty through contract is echoed in Durkheim's ([c1933] 1984: 160) statement on the necessity of formal contracts in societies defined by a complex or simple division of labour:

“...For [individuals] to co-operate harmoniously it is not enough that they should enter into a relationship, nor even be aware of the state of mutual interdependence in which they find themselves. The conditions for their co-operation must also be fixed for the entire duration of the relationship. The duties and rights of each one must be defined, not only in light of the situation as it presents itself at the moment when the contract is concluded, but in anticipation of circumstances that can arise and modify it.

However, Durkheim's proposition is based upon societal relations in which individuals share some commonality with regard to their respective consciousness; that is, that their collective consciousness can provide the basis for a legal order to govern contractual relationships. In circumstances where relationships are being formed between different societies possessing

divergent worldviews, this collective consciousness cannot be assumed. Rather, contractual constrictiveness of this order is tantamount to an assimilative force as one group is required to understand relationships in terms of the worldview of the other. Consider the position stated by the province of B.C. (Ministry of Aboriginal Affairs, 1996):

Treaties will provide a clear understanding of the rights, responsibilities and accountability of all parties. Treaties will translate historic aboriginal rights into contemporary terms. They will define the scope and limits of these rights so that they fit with the legal, economic and social systems of the province.

No consideration of co-existing and evolving interests is admitted here. The systems of the province are to be determinative of the future relationship existing between the two parties.

In opposition to this contractual expression of relationships, First Nation visions of certainty see predictable relations resulting through the establishment of a sacred promise made by the parties. This view relies on an idealized sense of relationality. The hope is that through the strength of mutual interests, the parties can recreate an ongoing relationship with one another through which each is afforded respect and autonomy.

*“I do not think it’s okay that Aboriginal people have the most horrendous socio-economic statistics in the country. If these arrangements don’t prove to work decades down the road what are we going to do about it? Are we going to be ignored because we signed a treaty and it didn’t work?”* (Tsawwassen representative).<sup>25</sup>

*“To me certainty is a time frame. ...Certainty is a place you get to. We want to make sure we are part of (discussions about the development of resources in traditional territories), that we are there. We do not want to be on the opposite side of the table from the forest companies. We want to work together with them to get something done. So certainty provided for everyone, not just the government who thinks that once they get certainty we have given up everything in our traditional territory. To me, that’s not where it should be going. It should be something we can live with. For me certainty is not the word. We talk about reconciliation. Part of reconciliation is us getting something from our traditional territory that we haven’t in the past”* (Squamish representative).<sup>26</sup>

For many First Nations, the signing of a treaty provides no absolute closure on the nature of the future relationship. As well, this future relationship cannot be simply separated from the past relationship which has impacted First Nation communities in a negative manner. The bond of a sacred trust, then, is one in which the parties work together to re-evaluate both the past and future relationship to provide First Nation communities with the security that they will not again be subjected to misrecognition, marginalization, and forced assimilation. With this trust, First Nations believe that government is not relieved of its responsibility for First Nations through the termination of the Indian Act; instead, a fiduciary responsibility continues in the sense of non-Aboriginal governments working with First Nations to right past wrongs.

#### 7.8 Subjective versus Objective Certainty

A final distinction can be drawn between subjective and objective conceptions of certainty. The predominant forms of certainty discussed in treaty negotiations are of the legal, economic, or political variety. These are quite often forms of subjective certainty; that is, forms of certainty that provide existential security to individuals who are concerned with the general economic, political and legal contexts of the province. However, these subjective forms of certainty are represented as forms of objective certainty; that is, as items that are of benefit to all persons in the province. This ignores the fact that it is impossible for the rhetoric of the treaty process to promise objective certainty since clearly some individuals will find themselves in more uncertain circumstances in the immediate post-treaty environment.

Non-Aboriginal government and BCTC representatives speak of objective certainty resulting from treaty-making in terms of issues of general public and private access to settlement areas.

*“Uncertainty is a concern for everybody from the sportsfisherman who wants to go to his local lake to somebody who wants to go berry picking to somebody who uses a gravel road to get to the cottage. Uncertainty permeates everything. It’s a concern for everybody: individuals, corporations, governments, and First Nations”* (BCTC representative).<sup>27</sup>

*“I think economic certainty is a part of it, but also cultural certainty, certainty for the person walking down the street about what it means to go fishing, hunting, canoeing—it’s a pretty desirable objective”* (provincial representative).<sup>28</sup>

Treaties can provide this sort of general certainty, it is suggested, through setting the terms of non-Aboriginal access to settlement lands within the treaty document. However, this form of certainty once again relies on a degree of reconciliation being achieved between the two parties to incline them to accept the relationship drawn up in the treaty. Moreover, this form of objective certainty is cold comfort for the individual fearing the loss of his or her resource sector job due to treaty settlements. For these individuals, such as the fishermen discussed in the previous chapter, objective certainty comes up against their own lack of subjective certainty, and they will feel subjective certainty only when they are assured that they will be adequately compensated for any material losses they might face due to treaty settlements.

On the symbolic side of subjective certainty, the desire is for that which was previously referred to as ‘finality’. Treaty settlements, it is hoped, will be an unburdening, a once-and-for-all casting off of feelings of guilt and shame concerning the past treatment of Aboriginal peoples in B.C.

*“There needs to be a level of certainty because people want there to be an end to it. Public support is based on, ‘okay, we should do this, we should make this right, we should do what is historically, legally right, we should negotiate treaties. But once we’ve negotiated, we’ve negotiated.’ I think there is a real fear in the public, and I’ve heard this at the RAC and TCG, ‘we’ll do this now, and in another 50 years we’ll do it again”* (federal representative).<sup>29</sup>

Finality of this sort is a form of symbolic purification for non-Aboriginal Canadians, allowing for identity construction unimpeded by the sub-text of historical guilt. Treaties, in this respect, are viewed as a potential source of pride for Canadians. They are seen as a means for recapturing a sense of national nobility based on a moral willingness to do what is 'right'. However, non-Aboriginal Canadians desire that this purification process be efficient and timely so that the B.C. Treaty Process does not become a constant reminder of past wrongdoings.

Aboriginal persons also seek various forms of subjective certainty. Most emphatically, these visions of subjective certainty concern reclaiming the power of self-determination. The goal is to gain the material and symbolic subjective certainty necessary for the preservation and future development of the cultural group.

*“Certainty – it’s a real ugly and hard to understand term. But if a treaty can create anything it will create certainty in terms of the Tsawwassen First Nation being able to enact laws based on our own cultural values instead of basing laws on someone else’s common law from 300 years ago and 10,000 miles away. Certainty in terms of where we can live and how we can live. Certainty in terms of being able to own and buy and sell property. Certainty in terms of where we can practice certain traditional activities and how we might go about it and when” (Tsawwassen representative).<sup>30</sup>*

*“My version of certainty is that wherever there is an Indian reserve on Crown land nobody can come in there and do any kind of development work unless the band says they may. As long as the band ever says no, that territory is not touched. But the minute they agree to the government that they’ll divide it into fee simple parcels of land, it’s open for business, you understand? It is uncertainty” (UBCIC representative).<sup>31</sup>*

The subjective goal of certainty, both in its material and symbolic form, is a certainty of identity protection and cultural survival for First Nations – a form of recognition that enables them to continue existing as Aboriginal peoples without the pressures of assimilation. This consists of both a redistribution of resources that provides for the formation of sustainable communities, as

well as recognition of the cultural practices and differences that define First Nations people as who they are.

### 7.9 Conclusion

The concept of certainty potentially admits of several forms, and operates across a number of societal fields. The basic goal of certainty to permit predictable and unambiguous relationships between the non-Aboriginal governments and First Nation communities within these social fields has been with us for some time, even if the language of certainty is a contemporary development. However, the social contexts of economic globalization and neoliberalism contribute to certainty being understood in a manner that privileges the economic, political, legal, and subjective interests of the dominant culture of mainstream Canada, and, in particular, of specific groups within this dominant culture. The social and material repercussions of globalization, in combination with the emergent discourses of neoliberal governance, have brought the issue of certainty to new prominence and have affected the manner in which discourses of justice are articulated. With these forces, visions of justice that emphasize the need for a moral reckoning with the past, and which propose a model of certainty developed out of notions of reconciliation, cooperation and trust, are dismissed as irrational since their ineffable character makes them appear 'risky' and imprudent. In their place we find visions of justice and certainty that correspond to affirmative understandings of economic redistribution and cultural difference. Thus, it is not certainty itself *per se* that confines justice to an affirmative response to past wrongs, but rather the particular manifestation of certainty that is developed in accordance with neo-liberalism and globalization.

Within this environment of treaty making, certainty is understood as a modification and release of aboriginal rights, and is directed toward achieving the final terms on which the

relationship will be based rather than allowing the relationship to evolve. Certainty is viewed as a business contract rather than as a sacred promise uniting two different peoples who share the same geographic space. As well, a subjective certainty that privileges particular interests over others is packaged as a form of objective security for all. These characteristics of certainty belong to the 'exhaustive definition' model of treaty-making. This is the certainty that allegedly develops based on laying the conditions for a more prosperous future rather than mirroring former antagonists in the past. It is a calculative rather than reflective approach to relationship building.

In the concluding chapter, the relationship between the B.C. Liberal referendum on treaty-making and non-Aboriginal government and business visions of certainty will be examined. This analysis will result in a broader exploration of the impact these hegemonic visions have on the prospects for justice through treaty-making.

### Endnotes

<sup>1</sup> Kymlicka (1995) notes that liberal states have long argued against the implementation of minority rights for reasons of societal stability. However, this notion of 'stability' lacks the immediate economic connotations of 'certainty'. A similar notion to that of certainty has recently arisen with regard to reparations claims stemming from World War II abuses. The deluge of claims for compensation made by the many victims of the Nazi war machine (e.g., slave labourers, Holocaust survivors) has led some to request that a "legal peace" be established to parallel the "physical peace" that was achieved at the War's end. A legal peace would consist of timely compensation for victims in a manner that would create greater security for German companies and other organizations worried about becoming lodged in an endless cycle of reparation claims.

<sup>2</sup> As Chapter 2 shows, in the early post-contact history of British Columbia, the colonial government was able to impose direct control in order to ensure a certainty and security of access to resources and settlement.

<sup>3</sup> Indeed, the First Nations social movement activity described in Chapter 3 helped create greater uncertainty, contributing to a shift in government policy.

<sup>4</sup> A.C. Hamilton's (1995) report, *A New Partnership*, was one of the first documents to capture and articulate the discourse of certainty as the *raison d'être* of treaty-making. Hamilton's analysis of certainty is based upon comments made by Aboriginal, government and third party representatives at hearings held across the country.

<sup>5</sup> Many First Nations disapprove of this model of certainty, arguing that it is simply extinguishment by other means (Union of British Columbia Indian Chiefs, 1998).

<sup>6</sup> The Nisga'a Final Agreement explicitly states its intention to define Aboriginal rights in an exhaustive manner: "This agreement exhaustively sets out Nisga'a section 35 rights, the geographic extent of those rights, and the limitations to those rights..." This exhaustive definition is intended to ensure that future court challenges by the Nisga'a Nation will be limited to those addressing violations of the terms of the treaty and nothing more (Rynard, 2000).

<sup>7</sup> Stephen Cornell (2002: 21) refers to the form of sovereignty suggested here as "operational administration" whereby non-Aboriginal governments sub-contract administrative responsibilities to First Nations while big decisions are still made off-reserve.

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<sup>8</sup> Interview with Provincial representative, 5/24/01.

<sup>9</sup> Duncan Davies (CEO Interfor Forest Products) 10/23/00 speaking at a Round Table Dialogue on Interim Measures (sponsored by David Suzuki Foundation and the Laurier Institute).

<sup>10</sup> It should be noted that neo-Foucauldian authors are not completely blind to the continuing force of 'despotism' (Valverde, 1996) and do argue that liberal governance should not be assumed "internally consistent and self-identical". Nonetheless, the strategic deployment of acts of force is under-emphasized given the focus in this literature of overcoming the binary opposition of domination and emancipation.

<sup>11</sup> It is arbitrary in the sense that it does not rest upon anything as determinative as the mode of production.

<sup>12</sup> Interview transcript, 8/29/00.

<sup>13</sup> For example, there is a possibility that a member of the Aboriginal group may later bring a lawsuit, claiming that part of their traditional territory was not included in the final settlement, or that the First Nation negotiators had no legitimate right to negotiate on behalf of the band.

<sup>14</sup> This point was also noted in an interview with a representative from the federal government 8/17/00.

<sup>14</sup> Interview transcript, 5/24/01.

<sup>16</sup> Interview transcript, 8/4/00.

<sup>17</sup> Interview transcript, 6/5/01.

<sup>18</sup> Gambetta (2000: 217) defines trust as "...a particular level of subjective probability with which an agent assesses that another agent or group of agents will perform a particular action, both *before* he can monitor such action (or independently of his capacity ever to be able to monitor it) *and* in a context in which it affects *his own* action. When we say we trust someone or that someone is trustworthy, we implicitly mean that the probability that he will perform an action that is beneficial or at least not detrimental to us is high enough for us to consider engaging in some form of cooperation with him."

<sup>19</sup> One is reminded here of the insights of game theory which suggests that rational individuals will not necessarily partake in cooperative behavior simply because it would benefit all members of the group (see Binmore and Dasgupta, 1986: 24).

<sup>20</sup> See Tsleil-Waututh, 2000, for a more complete description of this treaty-making model. The premise of the model is to allow the Tsleil-Waututh a greater voice in their traditional territory, not through outright control, but through alternative arrangements that permit the First Nation to ensure the sustainability of their community and culture through increased job creation, culture and heritage protection, and environmental management, to name but a few of the guiding principles.

<sup>21</sup> Dale Lovick speaking to the First Nation Summit, 10/29/99.

<sup>22</sup> Interview representative, 8/4/00.

<sup>23</sup> Interview transcript, 10/24/00.

<sup>24</sup> Interview transcript, 10/13/00.

<sup>25</sup> Interview transcript, 6/26/00.

<sup>26</sup> Interview transcript, 11/10/00.

<sup>27</sup> Interview transcript, 7/26/00.

<sup>28</sup> Interview transcript, 8/11/00.

<sup>29</sup> Interview transcript, 7/7/00.

<sup>30</sup> Interview transcript, 6/26/00.

<sup>31</sup> Interview transcript, 8/17/00.

## CHAPTER 8: CONCLUSION

I have argued in this thesis that the non-Aboriginal governments' understanding and expression of certainty operates to circumscribe the reparative options available through the B.C. Treaty Process. This hegemonic perspective is facilitated by the procedural model on which the B.C. Treaty Process rests, which lacks clear substantive guidelines and is therefore susceptible to power imbalances. This allows the non-Aboriginal governments to define the parameters of the negotiations, limiting visions of justice and certainty to those that correspond to the project of neoliberal globalization. Those First Nation visions which call for transformative justice – that is, for a significant reconfiguration of the relationship between Aboriginal and non-Aboriginal persons that begins with the non-Aboriginal governments acknowledging past injustices, recognizing First Nation powers of self-government, and providing meaningful monetary compensation and land restitution – are deemed inadmissible to this process since they contradict this dominant economic and political 'reality'. Within the context of these affirmative reparations, justice is rendered equivalent to certainty because, ideally, it will mark an end to the long-standing conflict over Aboriginal title in British Columbia in a manner that ensures that the political and economic future of the province will not be disrupted in order to amend the past.

Today, working within this framework, the parties to the negotiations appear no closer to settlements. In fact, the uncertainty felt by non-Aboriginal British Columbians in relation to First Nation justice demands has been harnessed and exploited by B.C.'s recently-elected Liberal government. This government, under the leadership of Gordon Campbell, is in the process of holding a referendum to gain public support for the principles of their negotiating mandate. In

this manner, the B.C. Liberals are seeking public backing to more rigidly define justice as certainty.

### 8.1 The B.C. Treaty Referendum

Despite the initial expressions of hope and expectation, in its first seven years,<sup>1</sup> the B.C. treaty process failed to achieve any settlements. In addition, the Sechelt First Nation withdrew from the only Agreement in Principle signed through the process. By its eighth and ninth years, the treaty process came to a stuttering halt. A federal election in November 2000 delayed negotiations, as the parties withdrew from the treaty tables during the lead-up to the vote. Soon after they returned to negotiating, a provincial election writ was dropped, stalling negotiations once again, this time so the provincial government could focus on its bid for re-election. From the beginning of its campaign, however, it was apparent that the governing NDP was doomed to lose this election based on the financial troubles and controversy that had attached to them during their years in power. The opposition B.C. Liberals waltzed to victory in the May election, capturing 77 of a total 79 seats.

Prior to the May vote, the B.C. Liberals promised the electorate that a Liberal victory would bring a referendum on the provincial treaty-making mandate. Their rationale for this promise was based on their contention that the majority of British Columbians had been left out of the B.C. Treaty Process and deserved an opportunity to influence the negotiations. After their electoral win, they gave themselves a year to design and administer the referendum. On August 27, 2001, the legislative assembly instructed the ten B.C. liberal MLAs who comprised the Select Standing Committee on Aboriginal Affairs to tour the province and hold public hearings to determine the issues to be addressed in the referendum questions.<sup>2</sup> While the provincial

government waited to receive the 'people's mandate', treaty negotiations were restricted to preparatory topics such as interim and treaty-related measures.

Those who support holding a referendum argue that the advantages of such an exercise are threefold. First, as mentioned above, they suggest that a referendum will provide every British Columbian with a chance to participate in the treaty discussions. The consultation mechanisms established through the B.C. Treaty Process are perceived to be ineffective and involve only a select few representatives. To address this deficiency, the B.C. Liberals have decided that a mail-in ballot will be distributed to all citizens of voting age in the province. Critics of the referendum, in contrast, believe the referendum responses of the citizenship of B.C. are more likely to be influenced by self-interest than by a sophisticated understanding of difficult legal issues such as Aboriginal rights and title. Indeed, the historical denial of and aversion to past guilt demonstrated by many British Columbians are held as reasons to avoid submitting the future of non-Aboriginal/Aboriginal relations in B.C. to the whims and fears of an underinformed populace.

Proponents of the referendum address this criticism with the second claimed advantage to holding a referendum. They contend that rather than allowing an underinformed majority to determine the negotiation strategy of the provincial government, the referendum process will stimulate debate in the province and increase citizen knowledge of treaty-related issues. Levels of public interest in the treaty-making process have dipped drastically since the inception of the B.C. Treaty Process and it is held that a referendum might help revitalize discussion of these issues. This relates to the third stated advantage of holding a referendum: the reinvigoration of the B.C. Treaty Process. The B.C. Liberals and their supporters avow that they are not against negotiating treaties with the First Nations peoples of B.C. In fact, they believe it to be a legal,

economic, and social necessity. Nonetheless, the current process is stagnating, and the provincial government suggests that a referendum will re-ignite the treaty process by gaining popular consent for the provincial negotiating mandate.

Those who oppose a referendum see this bid for popular consent as a disingenuous strategy for avoiding legal and moral justice. In light of recent Canadian Supreme Court decisions supporting Aboriginal rights and title, critics charge that the B.C. Liberals are seeking to foment a groundswell of public opinion against just settlements in the hope of limiting the extent of Aboriginal rights and title (see Lowe quoted in Grove, 2002, and Mandel, 2002). Furthermore, critics cast the referendum as a means by which the majority is empowered to decide the rights of the minority, which is problematic in part because these rights will not be assessed by the majority based on historical or legal principles, but rather on their material and political interests and biases. In this sense, a referendum is portrayed by its critics as a potentially divisive mechanism which pits the fears and interests of the majority against the rights of Aboriginal peoples (see Knox, 2001). For example, critics claim that referendum questions relating to the nature of Aboriginal self-government, or to the resource and jurisdictional rights of First Nations imply that these rights are at odds with non-Aboriginal interests and represent a degree of risk for non-Aboriginal peoples against which they must protect themselves (see Cassidy quoted in Joyce, 2001).

## 8.2 The Proposed Questions

At the end of November 2001, the Standing Committee proposed 16 prospective questions to be asked in the referendum:

### *Openness*

1. Treaties should be negotiated in as transparent a manner as possible. Yes or No

2. Treaty negotiation should be responsive to the input of local community and economic interests. Yes or No
3. Local Government participation in the treaty process is guaranteed. Yes or No

*Property and Interest Issues*

4. Private property is not negotiable, unless there is a willing seller and a willing buyer. Yes or No
5. Continued access to hunting, fishing, and recreational opportunities will be guaranteed for all British Columbians. Yes or No
6. The Province will maintain parks and protected areas for the use and benefit of all British Columbians. Yes or No
7. All terms and conditions of provincial leases and licences will be honoured. Yes or No
8. Fair compensation for unavoidable disruption of commercial interests will be assured. Yes or No

*Aboriginal Governance*

9. The Province will negotiate Aboriginal Government with the characteristics and legal status of Local Government. Yes or No
10. Treaties must strive to achieve administrative simplicity and jurisdictional clarity amongst various levels of government. Yes or No
11. Province-wide standards of resource management and environmental protection will continue to apply. Yes or No
12. Treaties should provide mechanisms for harmonization of land-use planning between Aboriginal Governments and Local Governments. Yes or No

*Settlement*

13. Affordability should be a key factor in determining the amount of land provided in treaty settlements. Yes or No
14. Treaties must ensure social and economic viability for all British Columbians. Yes or No
15. The existing tax exemptions for Aboriginal people will be phased out. Yes or No
16. Treaty benefits, including cash and land, should be distributed and structured to create economic opportunities for all, including those living on and off reserve. Yes or No

These questions have since been reduced from sixteen to eight (see below). However, it is illustrative to examine the initial sixteen questions because they reveal the justice and certainty assumptions guiding the B.C. Liberal treaty referendum.

The first set of proposed questions on 'openness' is largely inoffensive. For the most part, it simply restates the already existing principles of the B.C. Treaty Process. However, it is

possible that an affirmative response to these questions would be used by the B.C. Liberal government to push for increased non-Aboriginal government and business involvement at treaty tables that already appear stacked in favour of these interests.

As for the second set of proposed questions, it is difficult to fathom how they would generate much debate about the treaty process. They simply ask mainstream British Columbians to confirm their own self-interests. In other words, they appeal to underlying common sense notions of material rights in a form that is extremely likely to elicit 'yes' responses. However, as the critics of the referendum process have charged, by making these general protectionist statements, this set of questions encouraged the assumption that First Nations are interested in obtaining property from unwilling sellers, denying access to non-Aboriginal persons, and rescinding the leases and tenures of businesses operating in treaty settlement lands. Thus, through this line of questioning the province does little to overcome the xenophobic fear of the other that has historically characterized intercultural relations in B.C. At the same time, these questions overlook the complexity of justice. For example, should a First Nation be denied a land settlement beyond their existing reserve because the government has doled out all of the surrounding lands to businesses? Clearly, yes/no referendum questions lack the subtlety to deal with such questions.

Questions 4, 5, 6, and 7<sup>3</sup> pander to the worst fears of British Columbians – the very fears that were expressed in the hearings and submissions to the Standing Committee. But they fail to articulate the potentially beneficial aspects of treaty-making. For example, they ignore the federal monies that will flow into regions near treaty settlement lands, or the cooperative efforts established between First Nations, non-Aboriginal communities, and businesses to engage in economic or environmental protection activities.<sup>4</sup> Instead, one gets the impression that non-

Aboriginal interests require government protection in the face of the unknown risks of Aboriginal title. In this sense, the referendum can be understood not only as a tool for reaching out and assessing the opinions and interests of British Columbians, but also as a means for constructing these interests. It defines for the non-Aboriginal population exactly what their key interests are and asks them to internalize and think in terms of these interests. It is, in effect, a means of governing through uncertainty (O'Malley, 2000). The referendum articulates, expands, and amplifies the fears and uncertainties of non-Aboriginal persons, allowing government to propose Aboriginal policy options that limit the extent of Aboriginal rights, title and self-government with the claim that these limitations are reflective of the general will.<sup>5</sup>

Question 8, in raising the issue of compensation, presents what First Nations perceive as a contradiction within the non-Aboriginal government mandates. First Nations representatives question why it is that the issue of compensation can be discussed for commercial interests and not for First Nations. From their perspective, they have lost not only millions of dollars in revenue through the expropriation of their traditional lands, but also elements of their languages and cultures through the onslaught of assimilation. Thus, they often feel great offence when they see how responsive the non-Aboriginal governments can be to the losses faced by industry. While this question may appear to speak to the issue of 'fairness' in the eyes of non-Aboriginal respondents to the referendum, for First Nations it is emblematic of a history of unfairness.<sup>6</sup>

Fear mongering through the referendum is also evident in the proposed set of questions on Aboriginal governance. Non-Aboriginal government is presented here as a bulwark against the unknown qualities of Aboriginal forms of self-government. To address the potential uncertainty of Aboriginal forms of self-government, the B.C. Liberals request public support for an affirmative and prescriptive mandate with regard to this issue. Such an approach would allow

the B.C. Liberals to define Aboriginal self-government in terms of the known form of local government (see question 9). This is an extremely controversial issue, which ultimately ignores that the sustainability of First Nations communities depends on their administrative control over powers that go beyond the characteristics of municipalities, such as the regulation of language and schooling, and that the Canadian Constitution confirms the inherent right of First Nations to self-government. More generally, restricting Aboriginal models of governance to known forms expresses a profound lack of recognition for the distinctiveness of Aboriginal cultures. To say to First Nations that they may govern themselves so long as they do so in a form recognizable and amenable to non-Aboriginal forms of governance is to make sameness the grounds for the expression of difference. This is contradictory since the expression of First Nation difference would be severely circumscribed by the imposition of non-Aboriginal forms of governance. While it is a legitimate concern that different levels of government be familiar to one another in order to allow their mutual coordination, the challenge of justice in a multi-national society is that coordination be sought between various forms of distinctiveness, rather than attempting to force a common, culturally specific model on all groups.<sup>7</sup>

The other questions that comprise the section on Aboriginal governance are also problematic. Question 10 ignores that government to government relationships are always complex and that “administrative simplicity” and “jurisdictional clarity” often do not apply to relationships between non-Aboriginal levels of government, let alone between Aboriginal and non-Aboriginal governments. Question 11 overlooks that, in the eyes of many First Nations, current standards of resource management and environmental protection are not high enough. Indeed, these First Nations may not wish to be constrained by lower standards of environmental protection that suit the economic interests of business as much as they advance conservation

(Glavin, 2002; Hume, 2002; Mandel, 2002). Finally, Question 12 presents the ideal of harmonization in land-planning arrangements, something most First Nations would not object to so long as this harmonization does not interfere with their ability to make laws for their communities.

The final set of referendum questions focuses on the nature of the settlements to be offered through the treaty process. Questions 13 and 14 seem deliberately vague. Using terms such as 'affordability' and 'social and economic viability', they provide government with a significant degree of leeway to later determine what these factors mean.<sup>8</sup> Questions 15 and 16, however, are more specific. They reflect particular policy issues that the B.C. liberals expect will receive popular support. The issue of taxation, for example, has been a long-standing source of discontent for non-Aboriginal Canadians. Non-Aboriginal Canadians often identify strongly as 'tax-payers'; it is an essential characteristic of their notion of citizenship. Their perception that Aboriginal peoples do not pay taxes suggests to them a basic inequality whereby a certain group receives the benefits of citizenship without the responsibilities. Conveniently ignored in this view is the fact that Aboriginal Canadians do pay taxes off reserve; it is only on the reserve that they receive tax-free status through section 87 of the *Indian Act*. This means that First Nations peoples, who make the majority of their purchases off reserve, do pay taxes. Furthermore, it is likely that many First Nations will turn toward policies of taxation after treaty settlement in order to secure monies to maintain their self-government.<sup>9</sup> Nonetheless, the issue of phasing in taxation through treaty settlements is a contentious one and there is strong First Nation opposition to the loss of existing tax exemptions through treaties. Interestingly, taxation is not an area of provincial jurisdiction, making the decision to address it in a referendum on the provincial negotiating mandate a curious one (Mandel, 2002). It seems that this question does

little more than appeal to an inflammatory issue in hopes of raising anti-First Nations sentiments and creating further controversy within the treaty process.

The final question seems to be directed at ensuring that off-reserve First Nations receive some benefits from treaty settlements, an issue that was raised several times during the Standing Committee's hearings. However, it is interesting that the question states "economic opportunities for all" rather than simply equal opportunities for "all Aboriginal persons". The motivation of the question is to ensure that off-reserve Aboriginal persons are not solely the responsibility of non-Aboriginal government social services after treaty settlements are distributed. But this goal is couched in terminology that once again appeals to a broader but misguided sense of economic fairness.

In March 2002, these referendum questions were pared down by Attorney-General Geoff Plant and presented to the B.C. legislature for debate (Beatty, 2002). The edited questions are accompanied by a preamble stating, "Whereas the Government of British Columbia is committed to negotiating workable, affordable treaty settlements that will provide certainty, finality and equality; Do you agree that the provincial government should adopt the following principles to guide its participation in treaty negotiations?" These principles are:

- 1) Private property should not be expropriated for treaty settlements.
- 2) The terms and conditions of leases and licenses should be respected; fair compensation for unavoidable disruption of commercial interests should be ensured.
- 3) Hunting, fishing and recreational opportunities on Crown land should be ensured for all British Columbians.
- 4) Parks and protected areas should be maintained for the use and benefit of all British Columbians.
- 5) Province-wide standards of resource management and environmental protection should continue to apply.
- 6) Aboriginal self-government should have the characteristics of local government, with powers delegated from Canada and British Columbia.
- 7) Treaties should include mechanisms for harmonizing land use planning between Aboriginal governments and neighboring local governments.

8) The existing tax exemptions for Aboriginal people should be phased out.

This set of questions appears intended to be less absolutist than the previous set, which often employed the word 'will' instead of 'should' (e.g. "The Province *will* negotiate Aboriginal Government with the characteristics and legal status of Local Government" is now "Aboriginal self-government *should* have the characteristics of local government, with powers delegated from Canada and British Columbia."). Moreover, they are no longer presented in a yes/no format (although they still require an either/or response – either one agrees or disagrees) and certain questions have been removed, including a few that were perceived to be controversial (the federal government objected to the earlier question on "affordability") or redundant (i.e. questions that merely reiterated already existing treaty policy) (Palmer, 2002).

The B.C. Liberals were likely motivated to adjust the referendum questions given the widespread criticism of the first set of proposed questions. Although a majority of British Columbians still support the proposed referendum, opinion leaders in the media, business and politics pressured the Liberals to reconsider their strategy, arguing that the referendum would be misguided, costly and divisive (Smyth, 2002). Moreover, First Nations leaders in the province, both those involved in the B.C. Treaty Process and those outside of it, mobilized against the referendum, threatening to erect blockades, promote boycotts and to re-instigate legal actions against the province (Bolm, 2002). Indeed, with the stagnation in the treaty process brought on by the elections and the referendum process, many First Nations have turned their energies toward existing and new legal battles. In March 2002, the Haida won an important decision against the B.C. government and a forestry corporation (Weyerhaeuser) that obliges these parties to consult with the Haida not only on proven title but also on claimed title (Gibson, 2002). This legal victory was followed by the Haida launching a larger suit against the B.C. government for

Aboriginal title to all of Haida Gwaii (the Queen Charlotte Islands) with the hope of clarifying some of the issues unresolved in Delgamuukw (Gibson, 2002; Inwood, 2002). The success of the Haida also inspired the Tsawwassen First Nation to launch a court case of their own, suing B.C. Ferries and the Vancouver Port Authority for the nuisance effect the two ports have had on the Tsawwassen reserve (Fournier, 2002; Tsawwassen First Nation, 2002). The risk of these legal challenges, as well as the threat of renewed battles on the highways of B.C., has led many to question the rationality of administering a set of referendum questions that appear to do little more than anger First Nations peoples and their supporters.

These questions, however, do more than provide provincial negotiators with the people's mandate. They provide the B.C. Liberals with a means of moral avoidance whereby popular consent is gained for providing a superficial response to the justice demands of Aboriginal persons. Given that these demands are not solely based in the ethical lifeworlds of First Nations communities, but also emit from the legal principles of Canadian society, this strategy provides much needed legitimacy for pursuing by popular consent that which may not be legally or morally justifiable. As well, the province will be able to fob off responsibility for the rigidity of their mandate on the citizens of the province. In effect, the 'will of the people' serves as the proverbial scapegoat for the political vision of the B.C. Liberals.

This political vision is one of achieving the sort of neoliberal certainty described in Chapter 7. In this sense, the referendum functions to further remove First Nations visions of justice from the sphere of treaty negotiations since making demands of this sort seems not only irrational, but also impossible to realize if public opinion stands in opposition to them. Public support for a limited provincial mandate, therefore, provides further protection against First Nation demands for justice. As well, this support helps entrench the provincial government's

vision of certainty, restricting their ability to discuss matters that extend beyond the narrow 'people's mandate'.

Aside from the protest and legal strategies they are currently pursuing, First Nations proposed that their friends and supporters respond to the referendum in one of two ways. One group, headed by the First Nations Summit, suggested that the citizens of B.C. simply boycott the referendum and thereby refuse to legitimize what is seen as a misguided and poorly thought out policy. In contrast, many groups, including those outside of the B.C. Treaty Process such as the United Native Nations (UNN) and the UBCIC, suggested that people spoil their ballots, in hopes that the number of ruined ballots would near or surpass those mailed in. However, those pursuing the latter strategy faced the concern that Elections Canada might simply ignore ballots that are filled in 'incorrectly'. To address this concern, Chief Judith Sayers of the Hupacasath First Nation near Port Alberni on Vancouver Island assisted those wishing to ensure that their spoiled ballots were counted by collecting them at her office so they could be counted by a professional auditor.

### 8.3 Offering a Statement of Regret

Several representatives from religious communities across the province, such as Catholics and the Society of Friends, made strong appeals to the Standing Committee that the need for justice be considered. They reminded the committee members of the history of the province and the hardships placed on First Nations communities. In response to these speakers and others concerned with the ethical dimensions of treaty-making, the Standing Committee recommended that a "statement of regret" be issued alongside the referendum (Beatty and McInnes, 2001). This statement would acknowledge the difficulties experienced by First

Nations peoples in the province, recognizing "...that many aspects of the past relationship were unfortunate, unproductive and impacted very negatively on aboriginal people" (Standing Committee Chair, John Les, quoted in Theodore, 2001).

The statement, however, would stop short of a full apology. As well, it would make only vague reference to the past and would not specify the nature of the injustices experienced by First Nations peoples. First Nations leaders, such as Katherine Teneese of the First Nations Summit, dismissed the proposed statement of regret as insincere and patronizing (quoted in Theodore, 2001). The regret professed by the B.C. Liberal government was perceived as little more than an olive branch intended to soften the blow of a referendum most Aboriginal people oppose.

A further criticism of the proposed statement of regret is that it would contribute to the B.C. Liberal's misguided vision of reconciliation, which is based on increasing Aboriginal integration into mainstream Canadian society and on the broad acceptance of equality understood in terms of Aboriginal persons holding the same rights and responsibilities as other Canadians. The statement is silent on the topic of the wrongs committed because acknowledging the distinctiveness of Aboriginal experiences of injustice would, in part, acknowledge the distinctiveness of Aboriginal cultures. The wrongs imposed on Aboriginal societies did not merely take the form of social exclusion from the mainstream; they also include the refusal to accept the existence of Aboriginal cultures as separate and different from the culture of mainstream Canada. An admission of this difference is not in the interests of the B.C. Liberal government, who hope to use Aboriginal/non-Aboriginal reconciliation as a means to fortify and affirm mainstream culture and values.

This affirmative vision of reconciliation is also evident in the proposed and final referendum questions, which speak largely to the need for certainty and equality in the face of Aboriginal difference. This is an understandable sentiment, as the assertion of Aboriginal difference in terms of self-government and culturally-specific rights appears to threaten the foundation of Canadian society and to detract from a collective normative orientation founded on the principle of equality. But conceptualizing difference in this manner places a pre-emptive blockade in front of intercultural understanding. It decides beforehand that First Nations' demands contradict mainstream norms and values, without listening to the content of these demands and allowing the substance of these demands to frame a cooperative search for reconciliation and justice.

By the time that the referendum was distributed, the proposed statement of regret had faded from serious consideration. Given that First Nations had rejected the sincerity of this 'regret' statement, the B.C. Liberal government probably surmised that it would have little impact in terms of winning support from First Nations constituents. Furthermore, the statement of regret would likely elicit little respect or support from B.C. Liberal backers, who still cling to the "white myth" of British Columbia and see little purpose in acknowledging historical guilt.

#### 8.4 Uncertain Justice?

In this thesis, it has been suggested that treaty negotiations be considered a form of reparations. This is not meant to deny the legal basis of First Nations land claims, but rather to emphasize the importance of justice as a response to the past. In particular, it has been argued that we need to make an effort to understand the historically grounded material and symbolic demands of First Nations so that this understanding can serve as a basis for creating justice in

cooperation with First Nations peoples, rather than continuing the historical pattern of imposing non-Aboriginal justice upon them. However, procedural safeguards, including those that contribute to an increased involvement of Aboriginal persons in the justice process, are not by themselves sufficient for ensuring that negotiations will arrive at a just solution to the land question. Indeed, these safeguards are too susceptible to power imbalances, both material and symbolic, which impact the negotiations and contribute to the prioritization of notions of certainty conceptualized in limited political, economic, and legal terms, over notions of justice that call for a more difficult certainty, a certainty which develops over the course of a relationship between groups willing to question their own foundational truths.

The historical record of the relationship between non-Aboriginal and Aboriginal persons in British Columbia must be reflected upon to make a transformative politics of reparation possible. An examination of the history of the province exposes the meaning work that has been performed to frame the expropriation of Aboriginal lands in justifiable terms (see Chapter 2). The result of this activity on the part of non-Aboriginal governments was the furtherance of the material and symbolic assault on First Nations in British Columbia. By casting First Nations as inferior, as a conquered peoples, as incapable and in need of paternal governance, First Nation societies have suffered the injustice of misrecognition that has severely hampered the survival and development of their cultures. In addition, by denying them access to both traditional and non-traditional forms of economic activity, First Nation societies have suffered the injustice of poverty and relative deprivation within Canadian society. In the B.C. Treaty Process, the non-Aboriginal governments are only required to acknowledge these injustices in the most general terms. By remaining at this abstract level, the non-Aboriginal governments are able to avoid any

sense of moral responsibility for the past and can instead re-fashion the purpose of treaty-making solely as a means for improving the future, particularly their own.

First Nations in British Columbia and Canada have expended a great deal of effort in attempting to reframe and challenge the historical discourses of justification operationalized by non-Aboriginal governments within Canada, and in order to reclaim a positive Aboriginal identity (see Chapter 3). Indeed, their political agency has played a vital role in bringing about the treaty-making process in British Columbia. Through petitions, protests, court cases and other avenues, the First Nations peoples of British Columbia have made it more difficult for the non-Aboriginal governments to maintain their narratives of justification for the illegal and unethical expropriation of First Nations lands. However, these efforts are jeopardized by the historic compromise currently offered through the B.C. Treaty Process. Through these negotiations, the non-Aboriginal governments are offering to provide minor material and symbolic redress for past wrongdoings so long as they are not required to provide explicit recognition of Aboriginal rights and title. This entails negotiations that concentrate on the 'future' relationship between Aboriginal and non-Aboriginal societies rather than on the mistakes of the past, with the result for First Nations that the past infringements on Aboriginal title will be left unacknowledged and poorly compensated by the non-Aboriginal governments.

Yet, the B.C. Treaty Process, as it was originally designed by the Aboriginal and non-Aboriginal members of the B.C. Claims Task Force, does not restrict treaty negotiations to the 'future focus' that is the preference of the non-Aboriginal governments. Nor does it suggest that only a limited form of recognition be provided to First Nations through treaty-making. Instead, it is primarily intended to be a procedural means for achieving just and certain treaty settlements. However, the vagueness of some of the Task Force recommendations has allowed the parties too

much flexibility in the manner in which they interpret their participation in the process. In particular, the non-Aboriginal governments instrumentally interpret the recommendations in ways that allow them to shape the nature of the discussions to ensure that the emphasis is placed on achieving certainty (that is, 'their' vision of certainty) and to avoid spiraling into more difficult questions of justice. Moreover, the disingenuous commitment to procedure, combined with the bureaucratization and professionalization of the bodies charged with carrying out the negotiations, has resulted in a treaty process that reproduces itself while making only glacial movement toward vaguely defined goals (see Chapter 4).

The proceduralization of justice is ineffective because it fails to operate on the basic ground rules of the ideal speech situation as articulated by Habermas (1984, 1990); in essence, the parties are not able to participate in an open and uncoerced dialogue directed toward a just reconciliation of their conflict. More significantly, a procedural model of justice is inappropriate in situations of intercultural conflict since the ideal conditions for the enactment of communicative ethics do not exist where a marginalized other is in confrontation with the dominant culture (see Chapter 5). In such conditions, if justice is the ideal goal, it must begin through a process capable of including and hearing the voices of the other. To this end, there needs to be a shared awareness of the role that power plays in negotiations, and deconstruction is a necessary tool for analyzing acts of symbolic domination and violence so as to point out their arbitrary foundation and open the discussion to alternate worldviews. However, in contrast to postmodernist understandings of justice that provide little guidance for how to create an inclusive discussion with the other, it is suggested that a procedure guided by the substantive elements of justice outlined by Nancy Fraser provides a means by which non-Aboriginal persons can interpret and understand the justice demands put forward by First Nations and enables

assessment of whether these demands are being responded to in an affirmative or transformative manner.

In this sense, a reparative approach to treaty negotiations is conceptualized as a means for potentially introducing the voice of the other, so as to allow us to hear the demand for justice put forth by the wronged party. For this reason, an explicated vision of the end goals of treaty-making is recommended as a needed starting point prior to developing the procedural tools through which this vision will be sought. However, it is not enough simply to hear the vision presented by the other and to contort it into the hegemonic worldview of mainstream society. As Nancy Fraser's work on justice shows, reparative schemes that offer merely affirmative remedies to the problem of justice more often than not fail to resolve the social tensions resulting from injustice. Affirmative reparation provides a "surface reallocation" of material goods and opportunities to participate in the mainstream economy. This redistribution is tied, however, to an affirmative strategy of recognition that provides limited cultural recognition within a multiculturalist framework. In such a framework, the distinctiveness of the Aboriginal group is essentialized and portrayed as one amongst many ethnic differences. This characterization prioritizes the divergences between Aboriginal and non-Aboriginal communities without problematizing the nature of the relationship between these two groups or examining how non-Aboriginal cultures came to devalue and marginalize the cultures and identities of First Nations. In the moral universe of affirmative reparation, the essentialized identity of the First Nation other, combined with the affirmative redistribution of material goods and economic opportunity, presents itself to the liberal mindset of the ordinary citizen as a relationship of special treatment whereby one group, based upon their ethnic identity, receives privileges that contradict accepted discourses of equal rights and responsibilities.

Adding to Fraser, it is also necessary to examine the power inherent in the act of affirmative reparation. Affirmative reparation is a tool of hegemony that seeks to convert processes of justice into a means for reproducing the status quo by furthering, in this case, the integration of Aboriginal peoples into mainstream society. As can be seen in the narrowing of treaty discussions toward a particular understanding of certainty (see Chapters 6 and 7), a form of certainty that is then equated with justice, negotiations represent less a communicative discourse through which equal partners cooperatively define their common interests and more a display of symbolic violence directed toward spreading the rationality of neoliberalism into heretofore resistant Aboriginal lifeworlds.

What we miss by taking an affirmative approach to treaty settlement is the challenge that is presented to mainstream Canadian society by the Aboriginal other. Within this challenge lies the possibility of transformative justice. This is not to suggest the Aboriginal lifeworld as an Edenic alternative to mainstream society. Nor are the First Nation visions of justice and certainty that are presented here necessarily meant to be ideals to which treaty-making should aspire. Rather, it is an acknowledgement that, in the face of our past wrongs, we are presented with the opportunity to reflexively deconstruct and reconstruct the basis of our society. But this can only occur if full consideration is taken of the conflicting visions presented at and outside the treaty table. Simply dismissing these visions as 'pie in the sky', 'unrealistic', or 'misguided' represents a failure to engage in an open conversation between self and other (see Asch, 2001). In this respect, this dissertation does not provide specific transformative reparative options for revising the relationship between Aboriginal and non-Aboriginal persons within British Columbia. More modestly, it calls for an opening of the treaty process so that transformative visions of redistribution and recognition can be considered.

Transformative *redistributive* visions include economic relations between First Nations and non-Aboriginal governments that go beyond fee-simple ownership of land and a rigid division of jurisdiction, that provide economic 'compensation' that is not restricted to a per capita formula, that allow First Nations to prioritize cultural protection and environmental conservation, and that permit policies of wealth distribution within First Nations that are contrary to the precepts of competitive capitalism. Transformative visions of *recognition* entail a deep reflection on the patterns of colonialism and their continuing impact on Aboriginal peoples today, an understanding of First Nations cultural practices (e.g. the importance of burial grounds and other sacred sites<sup>10</sup>) that ceases historical patterns of disrespect, a recognition of the historical existence of Aboriginal title, an end to cultural representations of First Nations peoples as inferior and 'savage', and an acceptance of First Nations' right to self-determination that moves us beyond imposing European forms of governance on Aboriginal peoples. As it stands, considerations such as these are deemed 'impractical' and 'unworkable' within the B.C. Treaty Process. In the face of this refusal, First Nations are finding themselves more frustrated with the B.C. Treaty Process, not to mention the huge loans they are incurring to participate in this process, and are returning to strategies of creating uncertainty through legal and political challenges in order to achieve their justice demands.

Opening treaty negotiations to the possibility of transformative reparation through the full and equal inclusion of the First Nation visions of justice is a difficult challenge in light of the quest for certainty. The political-economic context of neoliberal globalization has thus far persuaded non-Aboriginal governments and business people that treaty settlements provide legal, economic, and political certainty through the exhaustive definition of Aboriginal rights and title.<sup>11</sup> Indeed, future comparative research on reparation processes and negotiations with

indigenous peoples worldwide needs to be conducted to ascertain how far-reaching this neo-liberal logic is, and to gauge whether there are parallels between the hegemony of certainty in British Columbia and discourses employed elsewhere to limit indigenous justice demands.

But a radical inclusion of the other in the negotiation requires that we go beyond visualizing 'full and final' certainty as a form of justice. Justice, as Derrida points out, has no fixed quantity and cannot be implemented in a full and final form. It entails, instead, an ongoing relationship that is always open to scrutiny and reassessment. In this sense, justice is uncertain. This does not mean, however, that in dealing with the past we need to launch ourselves into a future relationship that is forever at risk of collapsing because of the arbitrary and unpredictable actions of the other. Rather, certainty is built upon a foundation of trust and mutual knowing.<sup>12</sup> If Aboriginal and non-Aboriginal peoples remain committed to a living appreciation of each other's lifeworld, the relationship can develop in ways that lead to a gradual common understanding which provides a basis for trust. In the end, this form of certainty has the potential to be far more secure than that promised through an exhaustive definition, which seeks to cage First Nations within the defined rights of the treaty. If those rights prove too restrictive and unsustainable for Aboriginal communities, one can rightfully expect that First Nations will challenge the terms of the treaty and uncertainty will present itself once again.

The current status of the B.C. Treaty Process, awaiting the B.C. liberal referendum, reflects the difficulty of negotiating treaties between justice and certainty. The reluctance to include visions of justice and certainty that extend beyond the limitations of affirmative repair has resulted in a treaty process geared toward forwarding a particular vision of certainty, and which remains largely silent on the issue of justice, refusing to articulate and acknowledge past injustices. The referendum brings this historical denial one step further by offering surface

recognition of the need for treaties alongside a set of questions designed to further delineate the form of justice to be offered to Aboriginal persons in B.C. in an affirmative manner. Through actions such as these, the hope of achieving a meaningful conversation between mainstream Canada and Aboriginal persons, and the hope of arriving at a just resolution of the past, seem an ever more distant possibility.

### Endnotes

<sup>1</sup> In establishing this time frame, the opening of the process to statements of intent in December of 1993 is taken as the starting point.

<sup>2</sup> The transcripts of these hearings are available from Hansard at <http://www.legis.gov.bc.ca/CMT/37thParl/aaf/hansard/a10926p.htm>.

<sup>3</sup> There are other specific concerns that First Nations leaders have about these questions. Scott Clark of the United Native Nations has mentioned that Question 5 ignores that the Sparrow decision in the Supreme Court of Canada identifies First Nations priority with regard to fishing rights, that Question 6 presents the risk to First Nations that more parks will be created (as they already have been) without consulting First Nations, further limiting the lands available for treaty settlements, and that Question 7 is a loaded one since there are few interim measures to protect lands claimed by First Nations through the treaty process, while the province can strategically sign leases in order to bind First Nations to certain forms of resource development.

<sup>4</sup> This is not to suggest that referendum questions need to be redesigned in order to take into account these positive elements of treaty-making. Rather, this demonstrates the inability of yes/no referendum questions to fully portray the nature of treaty settlements.

<sup>5</sup> It must be remembered here that the fears expressed by the general public at the various Standing Committee hearings are not solely the manifestation of empirically valid worries derived from experiences with existing treaty settlements. Indeed, these fears are largely based on the politicking of groups such as the B.C. Liberals who, when they were the official opposition, raised concerns such as these when engaged in debate with the NDP.

<sup>6</sup> At a local talk discussing the referendum questions, a youth leader pointed out that the referendum questions use the term 'fairness' with respect to the interests of non-Aboriginal businesses, but the term 'affordability' is employed in Question 13 with respect to First Nations' interests, once again signalling to First Nations that a double standard is at work in Aboriginal/non-Aboriginal relations.

<sup>7</sup> See Tully (1995) and Kymlicka (1995) for a more thorough discussion of the question of how modern multicultural and multinational societies might deal with the radical heterogeneity of the modern nation state. Cairns (2000) and Flannigan (2000) have also addressed this issue, focussing on Aboriginal peoples within Canada.

<sup>8</sup> The text accompanying the proposed referendum questions states that the B.C. Liberals would interpret a 'yes' response to the question on 'affordability' as a rationale for scaling back the resources committed to treaty negotiations (Palmer, 2001).

<sup>9</sup> See the report made by the consulting firm Fiscal Realities (1999) to DIAND.

<sup>10</sup> See endnote 8, Chapter 1.

<sup>11</sup> There remains some question as to whether the liberal state is able to realistically uphold the ideal of transformative justice, especially considering the economic pressures placed on the state by global capital. Given these circumstances, it is necessary for social movement activity to place equal pressure on the state in hopes that it will live up to the ideals of transformative justice as much as possible.

<sup>12</sup> A lasting certainty of the sort envisioned by the non-Aboriginal governments may be impossible in a market economy based on competitive relations. Instead, interactions based on a trust that is rebuilt over the course of a relationship is a more realistic goal.

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## APPENDIX A: RECOMMENDATIONS OF THE BRITISH COLUMBIA CLAIMS TASK FORCE<sup>1</sup>

*The Task Force recommends that:*

1. The First Nations, Canada, and British Columbia establish a new relationship based on mutual trust, respect, and understanding—through political negotiations.
2. Each of the parties be at liberty to introduce any issue at the negotiation table which it views as significant to the new relationship.
3. A British Columbia Treaty Commission be established by agreement among the First Nations, Canada, and British Columbia to facilitate the process of negotiations.
4. The Commission consist of a full-time chairperson and four commissioners -- of whom two are appointed by the First Nations, and one each by the federal and provincial governments.
5. A six-stage process be followed in negotiating treaties.
6. The treaty negotiation process be open to all First Nations in British Columbia
7. The organization of First Nations for the negotiations is a decision to be made by each First Nation.
8. First Nations resolve issues related to overlapping traditional territories among themselves.
9. Federal and provincial governments start negotiations as soon as First Nations are ready.
10. Non-aboriginal interests be represented at the negotiating table by the federal and provincial governments.
11. The First Nation, Canadian, and British Columbian negotiating teams be sufficiently funded to meet the requirements of the negotiations.
12. The commission be responsible for allocating funds to the First Nations.
13. The parties develop ratification procedures which are confirmed in the Framework Agreement and in the Agreement in Principle.
14. The commission provide advice and assistance in dispute resolution as agreed by the parties.
15. The parties select skilled negotiators and provide them with a clear mandate, and training as required.
16. The parties negotiate interim measures agreements before or during the treaty negotiations when an interest is being affected which could undermine the process.
17. Canada, British Columbia, and the First Nations jointly undertake public education and information programs.
18. The parties in each negotiation jointly undertake a public information program.
19. British Columbia, Canada, and the First Nations request the First Nations Education Secretariat, and various educational organizations in British Columbia, to prepare resource materials for use in the schools and by the public.

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<sup>1</sup> From British Columbia Claims Task Force, 1991.

## **APPENDIX B: GLOSSARY OF ACRONYMS AND TREATY-RELATED TERMS**

### Acronyms

AIP (Agreement in Principle)  
APCC (Aboriginal Peoples Constitutional Conference)  
BCTC (British Columbia Treaty Commission)  
CNIBC (Confederation of the Native Indians Of British Columbia)  
DIAND (Department of Indian Affairs and Northern Development)  
FIRE (Foundation for Individual Rights and Equality)  
FNC (First Nations Congress)  
FNTNA (First Nation Treaty Negotiation Alliance)  
FTNO (Federal Treaty Negotiation Office)  
HBC (Hudson Bay Company)  
LAC (Local Advisory Committee)  
LMRAC (Lower Mainland Regional Advisory Committee)  
MOU (Memorandum of Understanding on Cost-Sharing)  
NDP (New Democratic Party)  
NSMs (New Social Movements)  
RAC (Regional Advisory Committee)  
RMT (Resource Mobilization Theory)  
SMOs (Social Movement Organizations)  
TAC (Treaty Advisory Committee)  
TNAC (Treaty Negotiations Advisory Committee)  
TRM (Treaty-related Measure)  
UBCIC (Union of B.C. Indian Chiefs)  
UBCM (Union of B.C. Municipalities)  
UNN (United Native Nations)

### Glossary of Treaty Related Terms

(Note: the following definitions are drawn from the glossary used by the provincial government's Treaty Negotiation Office and, therefore, represent the provincial interpretations of these terms rather than definitions shared by all parties to the B.C. Treaty Process <<http://www.gov.bc.ca/tno/rpts/glossary.htm>>).

#### **Aboriginal rights:**

- refer to practices, traditions or customs ("activity[ies]") which are integral to the distinctive culture of an aboriginal society and were practiced prior to European contact, meaning they were rooted in the pre-contact society (the date is no longer prior to 1846, the date British sovereignty was asserted in B.C.);
- must be practiced for a substantial period of time to have formed an integral part of the particular aboriginal society's culture;
- must be an activity that is a central, defining feature which is independently significant to the aboriginal society;

- must be distinctive (not unique), meaning it must be distinguishing and characteristic of that culture;
- must be based on an actual activity related to a resource: the significance of the activity is relevant but cannot itself constitute the claim to an aboriginal right;
- must be given a priority after conservation measures (not amounting to an exclusive right);
- must meet a continuity requirement, meaning that the aboriginal society must demonstrate that the connection with the land in its customs and laws has continued to the present day;
- may be the exercise in a modern form of an activity that existed prior to European contact;
- may include the right to fish, pick berries, hunt and trap for sustenance, social and ceremonial purposes (for example, ceremonial uses of trees and wildlife locations);
- may include an aboriginal right to sell or trade commercially in a resource where there is evidence to show that the activity existed prior to European contact "on a scale best characterized as commercial" and that such activity is an integral part of the aboriginal society's distinctive culture;
- may be adapted in response to the arrival of Europeans if the activity was an integral part of the aboriginal society's culture prior to European contact;
- do not include an activity that solely exists because of the influence of European contact; and
- do not include aspects of aboriginal society that are true of every society such as eating to survive.

Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. Treaty negotiations will translate aboriginal rights into contemporary terms.

**aboriginal title:** a sub-category of aboriginal rights dealing solely with land claims.

**agreement in principle (AIP):** document produced in the fourth phase of the six stage treaty negotiation process. The AIP outlines the major points of agreement between the parties regarding provisions which will form the basis of the treaty. An AIP is not binding on the parties, and changes may occur in negotiating the final agreement.

**band:** an organizational structure defined in the Indian Act which represents a particular body of Indians as defined under the Indian Act.

**band council:** body elected according to provisions of the Indian Act, charged with the responsibility for "the good government of the band" and delegated the authority to pass by-laws on Indian reserve lands.

**British Columbia Treaty Commission (BCTC):** an independent body of five commissioners appointed by Canada, the Province and the First Nations Summit. BCTC oversees and facilitates the six-stage process for negotiating treaties.

**capacity-building:** the development of human, technical and financial resources in First Nation communities. For example, some First Nations may require capacity building to respond to provincial requests for consultation concerning aboriginal rights, and subsequently to carry out the authorities that they will assume under treaties.

**certainty provisions:** treaty provisions designed to clearly define the authorities, rights and responsibilities for all parties to the treaty. See also extinguishment.

**Cost Sharing Memorandum of Understanding (MOU):** the 1993 political agreement between Canada and British Columbia which outlines the financial responsibilities of the federal government and the Province pursuant to treaty settlements. The agreement is entitled: Memorandum of Understanding between Canada and British Columbia Respecting the Sharing of Pre-treaty Costs, Settlement Costs, Implementation Costs and the Costs of Self-Government.

**Crown land:** land or an interest in land, owned by Canada or the Province. Almost all Crown land in British Columbia is owned by the Province.

**extinguishment:** term used to describe the cessation or surrender of aboriginal rights to lands and resources in exchange for rights granted in a treaty. To date, Canada has required full or partial extinguishment to conclude treaties.

**fee simple:** legal interest in land that is commonly characterized as private ownership.

**fiduciary duty:** legal obligation of one party to act in the best interests of another. Canada has a fiduciary obligation with respect to Indians and lands reserved for Indians under s.91(24).

**final agreement:** document produced in the fifth phase of the six-stage process. The final agreement embodies the principles outlined in the AIP which are to be included in the treaty. Once ratified by the parties, it becomes a treaty.

**First Nation fee simple land:** land held in fee simple by a First Nation that does not have the status of treaty settlement land. No special rights attach to First Nation fee simple land and no aspect of First Nation jurisdiction will apply on it.

**First Nations Summit:** an umbrella organization of some British Columbia First Nations and tribal councils. The First Nations Summit is one of the parties to the British Columbia Treaty Commission.

**fiscal arrangements:** government financial arrangements for treaties, including financial limits on settlements, revenue raising powers negotiated in the treaty, cost sharing arrangements between Canada and the Province, financial transfer arrangements with First Nations, and compensation arrangements with third parties.

**framework agreement:** document produced in stage three of the six-stage process. The framework agreement identifies negotiation topics and objectives, and establishes a timetable and any special procedural arrangements for the negotiations.

**INAC:** acronym for Indian and Northern Affairs Canada. INAC is responsible for negotiating treaties on behalf of Canada. (Also referred to as the Department of Indian Affairs and Northern Development (DIAND).)

**Indian Act:** federal legislation designed to give effect to the legislative authority of Canada for "Indians, and Lands reserved for the Indians," pursuant to s.91(24) of the Constitution Act, 1867.

**Indian reserve:** defined in Section 2 of the Indian Act as a tract of land that has been set apart by the federal government for the use and benefit of an Indian band. The legal title to Indian reserve land is vested in the federal government. See also s.91(24).

**infringement:** an action of the Crown which impairs an aboriginal right. See also Crown Lands Activity Policy.

**interim measures:** any activity undertaken by the Province in the interim before treaties are concluded, that is related to the management or use of land or resources, and aimed at meeting British Columbia's legal obligations while balancing the rights and interests of aboriginal and non-aboriginal British Columbians. Interim measures include, but are not limited to activities undertaken pursuant to the Province's legal obligations. Interim measures may take the form of documented agreements between the Province and a First Nation, but they do not extend to broad restrictions or moratoria on the development or alienation of lands. Interim measures are conducted by individual line ministries, within their day to day operating mandate.

**interim protection measures:** formal agreements between Canada, the Province and a First Nation, which are undertaken in the later stages of a treaty negotiation. The agreement may include carefully defined limits on the development or alienation of a specific area of land in order to protect what has been agreed to in the negotiations. Interim protection measures require agreement among all parties to the treaty and must be approved by the Provincial Cabinet.

**land claims agreement:** term used by the federal government to refer to a treaty with a First Nation.

**land quantum:** amount of land to be negotiated as treaty settlement land in a particular treaty.

**land settlement model:** description of the legal status of treaty settlement land, which will follow from the particular legal mechanism used to transfer the land from the Crown to First Nations.

**legal obligations:** obligations regarding Crown activity which arise from court decisions. When the Province engages in Crown activity it must determine if aboriginal rights exist in the area of the proposed activity, whether the activity will infringe upon those rights, and make efforts to avoid or minimize the infringement of those rights to the extent possible. See also Crown Lands Activities Policy and Delgamuukw obligation.

**legal uniformity:** provincial policy which holds that some laws will apply uniformly across the Province after treaties are concluded. This includes the Charter of Rights and Freedoms and the

Criminal Code. Provincial laws of general application will also apply uniformly unless specifically varied by treaty.

**negotiation-specific mandates:** instructions for provincial negotiators to conclude treaties with individual First Nations. See also treaty mandates.

**openness protocol:** document negotiated between the three parties to a treaty, which provides for public involvement in the treaty process, for example, through public observation of negotiation sessions, media coverage and the public release of tabled documents.

**overlaps:** areas of land identified by more than one First Nation as part of their traditional territory.

**province-wide treaty mandates:** broad instructions given to provincial treaty negotiators by Cabinet, to establish consistent treaty policies and provide guidance in all treaty negotiations in the province.

**readiness:** term which denotes that a negotiating party is adequately prepared to enter treaty negotiations. The readiness of each party -- Canada, the Province, and the First Nation -- is assessed by the BCTC in the second phase of the six-stage process.

**Regional Advisory Committee (RAC):** a body of representatives from key social and economic sectors in a region where negotiations are occurring. A RAC advises both provincial and federal negotiators about issues in the region which should be taken into consideration in treaty negotiations.

**Regional Caucus:** a body comprised of local provincial ministry, Crown corporation, and Treaty Advisory Committee representatives that provides advice to provincial negotiators regarding issues specific to the region.

**s. 35:** section of the Constitution Act, 1982 that states that aboriginal rights and treaty rights are recognized and affirmed and makes it clear that treaty rights include rights that now exist by way of land claim agreements or that may be so acquired. As a result of this constitutional protection, government has an obligation not to infringe upon aboriginal and treaty rights without justification.

**s. 91.24:** section of the Constitution Act, 1867 which confers upon the federal Parliament the power to make laws in relation to "Indians, and Lands reserved for the Indians."

**self-government:** the internal regulation of a First Nation by its own people.

**six stage process:** process established for all treaty negotiations in the Province. The six stages are:

1. A First Nation sends a statement of intent to the British Columbia Treaty Commission;
2. the readiness of all parties is established;
3. the parties negotiate a framework agreement;

4. the parties negotiate an agreement in principle;
5. the parties negotiate a final agreement;
6. the provisions of the treaty are implemented.

**statement of intent:** document submitted by a First Nation to the B.C. Treaty Commission indicating their intention to negotiate a treaty.

**traditional territory:** the geographic area identified by a First Nation to be the area of land which they and/or their ancestors traditionally occupied or used.

**treaty:** an agreement between government and a First Nation that defines the rights of aboriginal peoples with respect to lands and resources over a specified area, and may also define the self-government authority of a First Nation. Treaties are final agreements which have been ratified by all parties.

**Treaty Advisory Committee (TAC):** a committee of local government representatives, set up pursuant to an agreement between the Province of British Columbia and Union of B.C. Municipalities. Treaty Advisory Committees enable local government representatives to discuss issues and interests, advise provincial negotiators on local government issues and participate in negotiations as members of provincial negotiating teams.

**treaty mandates:** instructions for negotiators from their respective governments which set out treaty policy related to the subjects to be negotiated.

**Treaty Negotiations Advisory Committee (TNAC):** committee established to identify province-wide interests of third parties with respect to treaty negotiations, and provide advice to the provincial and federal ministers responsible for treaties. The 31 member TNAC includes provincial organizations whose members may be directly affected by treaty settlements. Committee members represent the interests of business, labour, environmental, recreational, fish and wildlife groups, and municipalities.

**treaty right:** right protected under s. 35 of the Constitution which is held by First Nations people pursuant to a treaty.

**treaty settlement land:** area of land that will be owned and managed by a First Nation pursuant to a treaty. The precise legal status of treaty settlement land, and the extent of First Nation jurisdiction on it remains to be determined. Some areas within treaty settlement lands will be held in private ownership, or otherwise designated for uses incompatible with public access. Other areas will accommodate public access as provided for in treaties. The underlying title to treaty settlement lands will rest with the Provincial Crown.

**tribal council:** a self-identified entity which represents aboriginal people or a group of bands.