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NEGOTIATING YUKON FIRST NATION SELF-GOVERNMENT

BY

DAVID N. RODDICK

A thesis submitted to the Faculty of
Graduate Studies and Research in partial fulfilment
of the requirements for the degree of
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Abstract

Since March 1984, national Aboriginal organizations and provincial, federal and Territorial governments have searched for ways to define and implement a general right for Aboriginal self-government. Once achieved, federal officials hoped this consensus would eventually lead to an amendment of section 35(1) of the Constitution Act(1982) that recognizes and affirms Aboriginal and treaty rights. Between 1984-1994, negotiations were also under way between Yukon First Nations and the Yukon and federal governments toward concluding a Territory-wide land claim agreement. There emerged from these negotiations a consensus on a First Nation self-government regime to displace the Indian Act. Governments' recognition of this form of Aboriginal self-government set several important national precedents. The negotiating process used to obtain this agreement was novel. It was also emblematic of a new, emerging Native - government relationship in the Yukon. With reference to the theories of negotiation, this paper proposes that the early, explicit recognition of principles of basic procedural fairness in negotiation both enhanced the terms for agreement and provided the foundation for this new relationship.

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My thanks to Yukon First Nations, Yukon and federal claim negotiators Dave Joe, Douglas McArthur and Timothy McTiernan, and Michael Whittington, respectively, for the opportunity to interrogate them about obscure details of past negotiations. I owe a debt of gratitude to the Whitehorse Federal Claims Office, specifically my supervisor, Elizabeth Hanson, and to Tim Koepke, CYI Chief Federal Negotiator, and James Bishop, Associate Chief Federal Negotiator for their support and encouragement. My thanks also to the Institute of Canadian Studies, and Michael Whittington my thesis supervisor, for their patience, guidance and practical instruction in the use of deadlines to obtain results. My thanks To my wife and family for their encouragement in helping me to bring six years of procrastination to an end. To my readers, the events described are not the official record of Yukon claim negotiating history. I am sure other important First Nation and Yukon Government commentaries will emerge over time to provide an alternate interpretation of events.

Table of Contents

PAGE

Abstract.....	i
Acknowledgements.....	ii
Table of Contents.....	iii-v
Table of Maps & Figures.....	v
Preface.....	vi-x
Introduction.....	1
Methods.....	7
 Chapter 1: Comprehensive Claims as a Negotiating Process.....	 13
Negotiating Strategies and Dispute Resolution.....	14
Summary.....	22
 Chapter 2: Negotiating Agreements.....	 26
Introduction to the Theory of Negotiating.....	27
Behaviourial Approaches.....	31
Representative Negotiators.....	35
Negotiating Concepts.....	40
Win/Lose and Simple Compromise Agreements.....	45
Win-Win or Integrative Agreements.....	47
Interest-based Negotiation.....	51
Summary.....	58
 Chapter 3: Self-Government in a Comprehensive Claims Context.....	 64
Self Government in a Claims Context.....	65

Table of Contents (cont'd)

	<u>PAGE</u>
Yukon First Nations: Their Relationship to Public Government.....	72
Political and Constitutional Context:.1982-87.....	78
Summary.....	88
 Chapter 4: Establishing the Ground-rules for Negotiation.....	 91
Preparing to Negotiate.....	91
Defining Key Issues.....	98
Identifying Needs & Interests.....	120
Generating Ideas & Problem-solving.....	129
Summary.....	137
 Chapter 5: Yukon Self-Government Negotiations.....	 139
Shaping an Agreement on Self-Government.....	140
Equal Exchange, Fair Compromise: Agreement.....	149
Denouement:.....	161
Summary.....	166
 Chapter 5: Conclusion.....	 169
Bibliography.....	179-184

Table of Figures

PAGE

Negotiation - Adjudication Continuum.....	15
Tactics Associated with Negotiating Strategies.....	41
1989 CYI-AiP.....	119
Yukon Self-Government Agreement - Dispute Resolution Processes.....	147-148

Table of Maps

Traditional Territories and Settlement Lands of the first four Yukon First Nations to conclude Settlement Agreements.....	115
Yukon First Nation Traditional Territories.....	116

Preface

On February 14, 1973, Canada accepted a proposal from the Council for Yukon Indians (CYI), representing status Indians affiliated with the Yukon Indian Brotherhood, to begin negotiations toward a Yukon land claim settlement. Negotiations commenced in earnest in 1974, between CYI and senior officials from the Department of Indian Affairs and Northern Development (DIAND).¹ In 1975, the Yukon Association of Non-Status Indians (YANSI) joined CYI to negotiate a joint land claim. The following year CYI was re-organized and claim negotiators reported directly to an expanded CYI Board that included representation from YANSI, the Yukon Indian Women's Association and the twelve Yukon Indian bands.

In 1978, CYI withdrew from negotiations to further research its claim. In 1979, it submitted its re-drafted claim, **A Proposal for a Yukon Indian Settlement** to government. That same year, the Yukon Government joined in negotiations as a member of the federal team. In 1980, DIAND Minister John Munro appointed Dr. J. Holmes as his special representative to CYI claim negotiations. A period of

¹ Yukon Government, **Analysis and Position - Yukon Indian Land Claims**. Whitehorse, YTG. 1974

intensive negotiations followed and in February 1981, Dennis O'Connor replaced Holmes. By January 1983, parties had initialled fifty-four sub-agreements, including a sub-agreement for a one-model system of local government.²

In April 1983, despite a successful band-by-band ratification process, dissatisfaction with the proposed Agreement-in-Principle (AiP) began to emerge within some Yukon bands. In January 1984, DIAND Minister David Crombie decided that sufficient consensus for agreement no longer existed among Yukon Indian bands and federal support was withdrawn.

In 1986, Canada completed its first detailed review of federal land claims policy since 1973. In June 1987, after a two-year hiatus in negotiations, DIAND Minister William McKnight proposed to CYI that parties re-start negotiations. McKnight appointed Michael Whittington, a political science professor, as CYI Chief Federal Negotiator to begin exploratory talks with parties toward finding a basis for a new CYI AiP negotiating mandate. The Yukon Government appointed Territorial Judge Barry Stuart as its Principal

² Yukon Government, *Agreement-in-Principle: Summary*, Executive Council Office. November, 1983)

Negotiator, and CYI Chairperson Mike Smith led a team of Yukon First Nation negotiators. CYI regional negotiators included Dave Joe, a former CYI Chief Negotiator and one of the architects of the 1984 CYI AiP.

In November 1988, a new CYI AiP was initialled and parties moved onto the next phase, the negotiation of a Territory-wide Umbrella Final Agreement (UFA). Much like the start of the 1973 CYI negotiations, these were uncharted waters for federal land claims policy. Under the revised 1986 Comprehensive Claims policy guidelines, parties were to move directly to the negotiation of a Territory-wide settlement agreement. However, in a compromise with CYI, Cabinet agreed to pursue an Umbrella Final Agreement (UFA) model, instead. Accordingly, the **CYI Umbrella Final Agreement**(1993) provides a template for the negotiation of fourteen individual Yukon First Nation settlement agreements.

The UFA, negotiated chapter-by-chapter in the Yukon communities between 1988 and 1989, and revised periodically since, includes Territory-wide provisions for land and resource management regimes. It also provides guidelines for the negotiation of local land selections and specific First Nation provisions for such things as economic development

opportunities. The UFA is considered a land claim agreement for purposes of section 35(1) of the Constitution Act (1982). Chapter 24 of the UFA obligates Canada to enter into negotiations with each Yukon First Nation toward the conclusion of self-government agreements and lists the subject areas available for negotiation.

During UFA negotiations, CYI, the federal government and Yukon informally agreed to negotiate a separate "model" Yukon First Nation Self-Government Agreement. This agreement was to serve as a basis for the subsequent negotiation of individual Yukon First Nation agreements. On November 29, 1991, parties concluded a draft Yukon Model Self-Government Agreement. Parties opened the agreement for re-negotiation the following January and concluded a revised agreement in May 1992. Following this, parties immediately moved on to completing negotiations on the first four Yukon First Nation Self-Government Agreements based on language contained in the May 1992 draft.

On May 29, 1993, four Yukon First Nations, the CYI, Canada and the Yukon Territory, signed the **CYI Umbrella Final Agreement**, four Yukon First Nation Final Agreements, Self-Government Agreements, and associated implementation plans and financial transfer agreements. On July 6, 1994,

Parliament ratified the Yukon Land Claim Settlement Act and the Yukon First Nation Self-Government Act. Finally, on February 14, 1995, twenty-one years from the day CYI's land claim proposal had been accepted for negotiation by Canada, the provisions of the first four Yukon First Nation Final Agreements and Self-Government Agreements came into effect.

Canada, Yukon, and six of the remaining ten Yukon First Nations yet to conclude agreements are currently at various stages of the negotiating process. Canada, Yukon First Nations and the Yukon Government have informally agreed to complete all remaining land claim negotiations by February 1997. However, since the December 1993 election of federal Liberals to office the federal government has announced it is considering major changes to the existing policy framework for comprehensive claims. At this time it is uncertain how these changes might alter the time-lines proposed for completing the remaining ten Yukon First Nation final and self-government agreements.

INTRODUCTION

Over the past decade, federal and provincial governments have debated in various forums the issue of how to give expression to an Aboriginal right to self-determination within the existing Canadian federal system of government. In 1993, the national Liberal Party's election platform "Redbook" made an explicit commitment to recognize an Aboriginal "inherent right" to self-government. Following the Liberal election victory of December 1993, the federal government, in concert with provincial and territorial First Ministers and national Aboriginal groups, began discussions as to the scope and definition of the term "inherency" and possible outcomes associated with its implementation.

Since 1984, the federal government has been exploring ways by which a "top-down" constitutional amendment might affirm an Aboriginal right to self-government that would also be acceptable to provincial and Territorial governments. After the March 1987 failure of the First Ministers Constitutional (FMC) process, the federal government undertook to negotiate "bottom-up" arrangements directly with First Nations to implement self-government. This commitment initially took the form of a new "Community-

based Self-Government Negotiation" initiative.

In 1987, guidelines for the negotiation of Community-based Self-Government arrangements served as the starting point for defining the parameters for the negotiation of Aboriginal self-government in the Yukon Territory. However, these guidelines were set aside as an outcome of an internal policy debate within DIAND, one that eventually involved the Departments of Justice and Finance. The question they struggled with throughout the negotiating process was how to accommodate Aboriginal self-government within the context of both a comprehensive claims settlement, and ongoing northern political development. On May 29, 1993, four years after a new CYI Agreement-in-Principle (AiP) was signed, governments and four Yukon First Nations signed an Umbrella Final Agreement (UFA) and the first of fourteen Final Agreements and Self-Government Agreements to be negotiated under a new Umbrella Final Agreement (UFA) process.

Viewed as a whole, the Yukon land claim negotiating process has evolved into a multi-tiered arrangement. The UFA provides a common template for the negotiation of specific, community-by-community final land claim and self-government agreements. At a table with a team of negotiators representing the federal and Territorial governments, each

of fourteen Yukon First Nations negotiates its own set of agreements. The Yukon land claim will be complete when all parties have ratified fourteen First Nation final agreements, self-government agreements, and ancillary implementation plans and financial transfer arrangements.

Yukon First Nation self-government agreements provide for on-going fiscal transfers supporting programs and services to First Nation citizens and specific implementation funding for new First Nation institutional structures. Parallel First Nation settlement agreements also provide First Nations' beneficiaries with a range of settlement-related benefits and supporting implementation funding. Yukon First Nations will receive \$242 million (1988\$) in financial compensation, lands totalling 8.6 per cent of the Yukon Territory, and a share of future Territorial resource revenues. They also provide for guaranteed First Nation representation on various territory-wide and regional resource management bodies and institutions of public government. These entities exercise a range of policy advisory and management responsibilities. Their scope encompasses matters relating to fish and wildlife management, renewable resource management, water resources, heritage resources, surface rights, access to Crown lands, land use planning and development

(environmental) assessment processes. In exchange for these and other benefits, First Nation citizens have agreed to surrender some of their Aboriginal rights within the Yukon Territory.

At the time of their signing, Yukon First Nation Final and Self-Government Agreements set important, national precedents with respect to federal land claims and self-government policy: they were the first agreements not to require a blanket extinguishment of Aboriginal rights; the first negotiated with the capacity to displace the Indian Act entirely within a single province or Territory; the first to recognize First Nations' jurisdiction off settlement lands; the first set of agreements concluded in a regional setting where First Nations' citizens constitute a minority of the resident population; and, the first providing a federal legislative framework empowering First Nations with the capacity to create and amend their own constitutions, define their own membership and exercise a broad range of municipal and Territorial legislative powers.

Concluding Yukon First Nation self-government agreements is only the first step toward implementing chapter 24 of the **CYI Umbrella Final Agreement**, recognizing

agreements themselves provide for continuing negotiations regarding the paramountcy of federal and First Nations laws, jurisdiction over the administration of justice and the implementation of taxation arrangements. In this respect, Yukon First Nation self-government agreements constitute an explicit political accord between Yukon First Nations and governments, establishing processes and protocols that give structure to their new intergovernmental relationship.

The focus of this study is on negotiations leading up to the conclusion of the 1992 draft Yukon First Nation Model Self-Government Agreement. This agreement served as a template for the subsequent negotiation of the first four Yukon First Nation Self-Government Agreements. It seeks to answer some general questions about the nature of the self-government negotiating process and arrangements concluded to date: what was the context in which demands and concessions were exchanged between government and First Nation negotiating teams in arriving at draft Yukon First Nation Model Self-Government Agreement? How did these trade-offs reflect First Nation and government priorities and interests? And, as a result of these agreements, do parties now share a common vision for Yukon's future political development?

To provide answers to these questions it is necessary to explore the nature of the relationship between the parties and the substantive issues that arose between them during the negotiating process. This analysis is developed by examining, respectively: some hypotheses regarding the nature of claims disputes negotiations in Canada (chapter 1); the theory and practice of negotiating agreements (chapter 2); a comparison of Yukon First Nation self-government with other, like arrangements negotiated under recent claim settlements, and historical background as to its origins within the context of events surrounding the 1984-87 First Ministers Conference Process (chapter 3); an overview of negotiations leading up to the conclusion of the 1988 CYI-AiP (chapter 4); an overview of Yukon self-government negotiations (chapter 5); and, conclusions and tentative findings about the evidence presented in support of the thesis (chapter 6).

Yukon First Nation self-government arrangements establish important Yukon, and national, precedents with respect to the manner in which First Nations can find ways to express their Aboriginal rights and interests within the context of the existing Canadian federal system of government. Also, the process followed in obtaining these agreements shows how a broad, federal legislative framework

for self-government can provide an alternative to Indian Act models of governance, while simultaneously offering a practical, "bottom-up" approach to recognizing and implementing an Aboriginal right to self-government in Canada.

Method

The time-frame surveyed by this study has been limited to the most recent, ten-year phase of CYI negotiations spanning the years between 1984-94. It begins with the Council for Yukon Indians' rejection of the 1984 CYI AiP and concludes with the final phase of negotiations leading up to the introduction of the Yukon First Nation Land Claims Settlement Act and Yukon First Nation Self-Government Act. This tact was chosen, in part, because the CYI land claim negotiation has been a protracted affair lasting more than twenty-two years and is too lengthy a subject for this paper. More specifically, it was only during the last ten years of negotiations that Yukon First Nations' aspirations for self-government began to crystallize.

The Yukon land claims negotiating process and the changing nature of the political relationship between the

federal and Territorial governments and Yukon First Nations, has been studied from different historical perspectives and different theoretical models. These historical and theoretical perspectives have attempted to situate the Yukon land claim within the larger framework of Northern and Native studies, more specifically, research in the field of land claims policy, Native/non-Native relations, and northern political and constitutional development. Supplementing these studies, others have focused, more generally, on the evolution of the comprehensive claims policy in the national context.³

Yukon land claim negotiations have also served as an important barometer for monitoring changes in federal land claims policy. These changes, and the Council for Yukon Indians' response to them has formed part of an extended 'game of moves' between national Aboriginal organizations and federal and provincial governments, each vying to answer the question as to what role First Nations should play in an

³ Canada, **Living Treaties and Lasting Agreements: Report of the Task Force to Review Comprehensive Claims Policy**. Department of Indian Affairs and Northern Development. 1985.

Canada, **A History of Native Claims Processes in Canada: 1867-1979**. Research Branch, Department of Indian and Northern Affairs. February, 1980.

Canada, **Report to the Royal Commission on Aboriginal Peoples: Federal Policy for the Settlement of Native Claims**. August, 1992.

evolving Canadian federal system of government. In the Yukon, these same issues were addressed, if not wholly resolved, in a series of agreements that concluded in the Yukon land claim settlement. These agreements have set new policy precedents for federal recognition of First Nation Aboriginal self-government arrangements. They also provide a basis for the future negotiation of remaining, outstanding issues.

The organization of the contemporary comprehensive claims policy process in Canada has emerged over a period of more than two hundred years in response to the changing social and political context of Native peoples in Canada. For purposes of this study there are two broad areas of special interest with respect to the evolution of Native claims policy:

- i) the recent evolution of federal Aboriginal self-government policy and its implementation within the context of Yukon land claim negotiations; and,
- ii) the government's role as negotiator of Yukon self-government agreements.

To explore these subjects, this paper employs two different theoretical perspectives: theories of negotiation borrowed from the behavioral sciences and elsewhere; and, an

historical approach, focusing on recent Yukon self-government negotiations. Looking through these twin lenses it is seen that while theories of negotiation rely heavily on a rational-choice model of decision-making to explain negotiator behaviour, the practice of negotiation also requires a knowledge and integration of social customs and, most importantly, concepts of justice and fairness.

The first chapter of this paper discusses contemporary processes for resolving of Native claim disputes. Is the comprehensive claims process truly a process of negotiation, or is it a hybrid of processes for dispute resolution? Chapter two surveys available literature on the theory of negotiation. It is extensive, highly diverse and informed by different academic perspectives and draws upon a long tradition of practice. Regarding this literature, with specific examples from Yukon self-government negotiating experience, what lessons might be drawn to inform future land claim and self-government negotiating processes? Chapter three reviews the origins of recent federal policy for negotiating self-government within a comprehensive claims context. It provides a critical framework for understanding how Yukon First Nation self-government arrangements are similar to and different from First Nation self-government agreements negotiated elsewhere in Canada.

It also describes the contemporary history of the federal government's policy toward the negotiation of self-government, leading up to the 1987 CYI negotiations. Chapter four and five offer a case study of the negotiation of Yukon First Nation self-government. After discussing the history of CYI negotiations leading up to the signing of the 1989, revised CYI AiP in chapter four, chapter five goes on to focus on specific negotiating activities relating to the conclusion of the 1992 draft Yukon First Nation Model Self-Government Agreement. It provides evidence in support of the thesis that the parties' success in reaching agreement depended largely on their tacitly accepting a minimum standard for procedural fairness respecting the conduct of negotiations. This proto-agreement was realized during CYI land claim negotiations when parties borrowed, derived and created for themselves a custom-tailored set of rules to decide during negotiations:

- i) what was to count as fair and appropriate procedures; and,
- (ii) having obtained (i) above, what then constitutes equal concession and fair compromise.⁴

Chapter six summarizes the significance of the Yukon-

⁴ This criteria is borrowed from argumentation set out by S. Hampshire in regard to 'Basic Procedural Justice' in *Innocence and Experience*. Harvard University Press, Cambridge, Massachusetts. 1989. pp.72-78

Chapter six summarizes the significance of the Yukon-self-government negotiating experience, generally, for Native claims negotiations in Canada. It discusses some hypotheses concerning those choices available to disputants entering into land claim negotiations and, in light of the evidence presented, offers some tentative conclusions. It also suggests that ultimately the parties failed to achieve the type of agreement they sought - a fully integrative agreement - because they could not reach complete agreement as to what constituted fair and just dealings for purposes of negotiating Yukon First Nation self-government.

CHAPTER 1

COMPREHENSIVE CLAIMS AS A NEGOTIATING PROCESS

In 1990, former CYI staff advisor and lawyer Paul Emond presented a paper to a national conference on Indian Government that discussed the CYI comprehensive claims negotiating process within the context of systems for dispute resolution.⁵ Emond's discussion is helpful in clarifying the context of Canada's approach to claims dispute resolution in terms of available procedures for dispute resolution, and identifying alternatives to the existing comprehensive claims process. He sketches a framework for analyzing how First Nations with claim disputes might go about choosing from among various options available for dispute resolution. This framework, in the form of the two hypotheses given below, is used throughout the balance of this paper in comparing and contrasting alternative explanations of negotiating behaviour, and reviewing and discussing the merits of CYI claims and self-government negotiating processes.

⁵ Emond, D.P. "Negotiation Strategies and Dispute Resolution". Prepared for United Indian Councils of Mississauga and Chippewa Nations Conference on National Indian Government. October 3-5, 1990. Osgoode Hall Law School, York University.

Negotiation Strategies and Dispute Resolution

According to Emond, the goal of "finality" that has been the impetus for federal policy on comprehensive claims negotiations since at least the early 1970s, is misguided and represents a fundamental misunderstanding of the character of the Native - government relationship in Canada:

Comprehensive claims negotiations are, in my opinion, more characteristic of a "marriage" between strangers. The goal must be... "a social contract", not a "final agreement". To this end there are, as First Nation people assert, many discreet points at which a particular result is achieved, only processes or ways of relating to each other in the context of an issue.⁶

Reviewing the CYI land claim negotiating experience within the context of a discussion of alternative dispute resolution processes, Emond suggests there exists two broad classes of claims-related processes:

1. informal, unstructured discussions leading to agreement between parties (negotiation);
2. more formal and structured processes, by which one or both parties involve a third party to pronounce on the dispute (adjudication).⁷

⁶ Emond, "Ibid", p.41

⁷ Emond, "Ibid", pp.3-4

Emond characterizes the current choice available to First Nations for resolving claim disputes, between negotiation and adjudication, as problematic. He contrasts First Nations' situation with an ideal one where the choice of alternate dispute resolution processes is made from a menu of options. This menu is organized along a negotiation-adjudication continuum, ranging from unstructured/internal processes to structured/external ones (see Figure: 1).⁸

Figure 1: Negotiation - Adjudication Continuum (Emond, "Negotiation Strategies and Dispute Resolution", p.4.)

Emond suggests the choice of what process to select to resolve a particular claim dispute depends on a consideration of the circumstances surrounding the dispute. In particular, Emond focuses on issues arising from the dispute and their relation to the processes available for their resolution, and the relationship among disputants. Setting aside questions concerning the issues arising from

⁸ Emond, "Ibid", p.4

the dispute for the moment, Emond argues the appropriate fit between issue and process depends largely on the nature of the existing relationship:

If one party has significantly less bargaining strength than the other, negotiations may generate a situation in which one party may impose its will on another. In these circumstances, the weaker party is best advised to seek an adjudicative resolution to the dispute, where principle and not power usually determine the outcome. Thus, the relative strength of the parties will determine each parties preference for a dispute resolution process.⁹

For Emond, negotiation is characterized by voluntarism. It is consensual, informal and unstructured. Its outcome may produce legally enforceable agreements, however, most often it offers the prospect of incremental adjustments to an existing relationship. Still, he asserts negotiations are not well suited to resolving basic, fundamental disputes, i.e., where the issues in dispute hinge on the relationship among parties themselves:

Government negotiators expect even the most complex negotiations to be resolved in a matter of months, or at most a year or two. Such expectations are completely unrealistic when applied to

⁹ Emond, "Ibid", p.10

comprehensive claim negotiations. This is because the process is, in my opinion, less designed to produce a specific result or final agreement and much more an exercise in generating mutual respect and understanding.¹⁰

Returning to the question of issues arising from a dispute and those processes available for their resolution, Emond characterizes mediation as a means for exploring the underlying issues in dispute and one of various devices that may be used to facilitate negotiation. Parties to a negotiation who agree to use a mediator may expect the mediator to suggest ways in which positions can be moderated and different means used in order to achieve important goals. Mediators must be independent and have the trust and respect of both parties. Similarly, conciliation is another means for facilitating the negotiating process. A conciliator may, like a mediator, suggest ways in which extreme positions can be tempered. Beyond this, however, their approach is quite different: they hear and review evidence with a view to evaluating claims, providing an impartial overview of evidence, and recommending terms for settlement.¹¹

¹⁰ Emond, "Ibid", p.15

¹¹ Emond, "Ibid", pp.5-6

Adjudication, as distinct from negotiation, is characterized by Emond as an involuntary process that is external to any relationship that may exist among parties at the time of dispute. The process by which evidence is heard, proofs presented, and arguments advanced, is highly structured in order to ensure impartiality is maintained. The mode of discourse demands "rationality", as this constitutes the basis upon which decisional criteria are employed to evaluate the merits of competing claims. It is therefore especially well suited to deciding binding, lawful obligations outside voluntary relationships.

While negotiation has the effect of bringing parties closer together, Emond notes, adjudication has a disjointive effect. Ultimately, adjudication is the pursuit of one's self-interest. The desired outcome is dominance through third-party recognition of an existing right or obligation, rather than any incremental adjustment to an existing relationship. However, there are variations on the adjudicative model, such as arbitration. Here, adjudication's narrowly defined parameters for admitting evidence may be modified to meet the contingencies of the particular circumstances, such as in labour negotiations where the knowledge, experience and sympathies of the

decision-maker play a special role in resolving disputes.¹²

Having described a menu of ideal dispute resolution processes that might be available to Native claim disputants, Emond returns to a consideration of the contemporary circumstance of First Nations. He asserts that, generally, all Native claims bear a certain common thread in their assertion of a right to resources and the determination of their futures:

...land claims are likely to be viewed by both parties as the last dispute - the one which, if resolved, will mark the end of a long and unhappy relationship between the parties. On the other hand, the parties will usually agree that, whatever the past relationship, a successful future demands a healthy, viable on-going relationship. Thus, the process must not only resolve the dispute, but also do so in such a way that the parties can develop a better, long term relationship.¹³

For Emond, understanding the nature of the relationship among disputants is the key to selecting a dispute resolution process. Significant differences in bargaining strength often produce a situation where one party is in a

¹² Emond, "Ibid", p.8-9

¹³ Emond, "Ibid", p.10

position to impose its will on another. In these circumstances, Emond suggests, the weaker party is better off seeking an adjudicative solution where principle, and not power, decides the outcome.

According to Emond, a second critical factor in choosing which dispute resolution process to follow depends on having as complete as possible an understanding of the substantive issues involved in the dispute and their relationship to the processes available. Emond notes some processes may lead to agreements without achieving a just and fair outcome. Such agreements seldom last and frequently serve only to undermine the relationship.¹⁴

Emond characterizes Native claim disputes as characteristically "novel" and "complex". Within the context of an agreement, choices with respect to the resolution of one aspect of the problem may have proliferating and difficult to predict ramifications for future decisions with respect to other aspects. This makes a First Nation's decision about whether to pursue adjudicative as opposed to negotiated solutions extremely difficult.¹⁵

¹⁴ Emond, "Ibid", p.10.

¹⁵ Emond, "Ibid", p.11

As issues become more complex and interrelated the success of highly formalized processes, such as adjudication, falls rapidly. Adjudication works best resolving single issues such as questions of liability (right or wrong) or damages (how much)...Thus the inherent limitations or capacities of adjudication make it particularly ill-suited to address comprehensive First Nation claims.¹⁶

While admitting a personal bias toward negotiation and mediation in claim disputes, Emond concludes that the decision to opt for either negotiation or adjudication should not be confused with the goal of achieving fair outcomes. Negotiation works best when it deals with small, incremental adjustments to an on-going relationship and therefore, by definition, is not well suited for settling comprehensive claims. Successes in negotiations on straightforward issues may generate momentum, but it leaves very little room for linkages, compromises, and trade-offs when the time comes to deal with the difficult issues.¹⁷

Also, negotiation is about compromise. Fair results can only be achieved if relative equality exists among parties. Accordingly, Emond believes that in situations where the

¹⁶ Emond, "Ibid", p.15

¹⁷ Emond, "Ibid", p.21-22

fundamental question in dispute is the relationship among parties, adjudication by the courts may be the only viable option available to the weaker party that offers the prospect of a fair outcome.¹⁸

Summary

Emond's commentary provides a useful bridge between the practical insights of someone with direct experience in land claim negotiations and a working knowledge of the comprehensive claims process, and a more academic discussion of concepts concerning negotiating behaviour. Emond makes a case for broadening the current range of processes available to First Nations and governments for resolving claims disputes, including more integrative forms of negotiation. He highlights the importance of two factors First Nations' must consider in deciding how to pursue land claim disputes: the nature of the relationship among parties; and, the relationship between the substantive issues involved and the processes available for their resolution.

The current comprehensive claims process provides

¹⁸ Emond, "Ibid", p.26

First Nations with essentially two dispute resolution options: negotiation or adjudication. The determination of rules for ensuring procedural fairness in negotiation is almost entirely subject to federal fiat. Third-party mediation, conciliation or arbitration, which might otherwise have an equalizing effect on the power structure of the relationship among parties, are seldom considered a viable option by First Nations because, under the current process, they lack impartiality and political independence.

In claim disputes, where the relationship between parties should be of paramount concern, the use of strategies and tactics by one party to dominate the process is not only dysfunctional for the process of negotiation, but also for the subsequent implementation of agreements. As Emond notes, the federal government's current claims policy on extinguishment of Aboriginal title, articulated as the goal of achieving "finality" in settling claims, constitutes such an approach.¹⁹ Yet, First Nations, as the weaker party in this negotiating process, are often ill-advised to seek an adjudicated solution in an attempt overcome this obstacle to a fair and equitable agreement, unless it is as part of a broader, overall strategy of negotiation.

¹⁹ Emond, "Ibid", p.41

Emond recognizes that, even within the confines of the existing federal comprehensive claims policy, negotiation creates more opportunities for identifying and exploring interests among the parties than does adjudication. By freeing themselves from narrow rules of evidence, parties are able to explore expectations, needs, and fears. Negotiation also creates opportunities for compromise and integration, forms of agreement ultimately capable of giving expression to the parties' complex interests in a manner that is generally unavailable through adjudication.

Emond expresses an intuitive "bias" toward negotiation, but does not articulate how this bias might be confirmed either in theory or experience. The balance of this paper attempts to show that, when a prior, explicit and common recognition can be obtained from parties as to rules for basic procedural fairness in negotiation, negotiation can constitute a viable alternative to adjudication as a means of equalizing power imbalances. However, in a situation where the weaker party is unable to obtain such agreement, then adjudication may be the only option for obtaining relief.

The next chapter will explore how Emond's bias toward negotiation is supported in the literature on the theory and

practice of negotiation. Building upon Emond's decision criteria for selecting among available dispute resolution processes, the next chapter surveys the literature on negotiation theory and discusses the various approaches to negotiation as a process for mediating disputes among parties.

CHAPTER 2

NEGOTIATING AGREEMENTS

Paul Emond has argued that two critical factors should influence a First Nation's decision in selecting a forum in which to pursue its land claim dispute: the nature of the relationship among parties; and, the relationship between the substantive issues involved and the processes available for their resolution. This chapter explores Emond's observations by examining the literature on negotiation from the perspective of its theory and practice.

A diverse literature exists with respect to the activity of negotiation and much of it is relevant to understanding the comprehensive claims negotiating process. The single, most important assumption that informs this literature is the "rational actor" model for decision-making, as it is applied to negotiating activity. This assumption provides an interpretive framework for explaining and predicting negotiating behaviour and outcomes.

Revisiting the "rational actor" framework in the context of negotiating behaviour, the following overview re-

assesses the utility of employing the dominant theoretical paradigm of "self-interest maximization" as a generic strategy for reaching negotiated agreements. In doing so, it proposes an alternative paradigm, based on an "interest-based" approach to negotiation. This new paradigm seeks to overcome of the limitations of the negotiator acting as "self-interest maximizer" by incorporating self-regulating features into negotiating behaviour. This approach suggests that parties, by mutual agreement, fetter their pursuit of self-interest by means of a prior agreement to common rules and procedures for the conduct of negotiations.

Introduction to the Theory of Negotiation

In chapter one, Emond distinguished among dispute resolution activities, organizing them along a continuum. This continuum ranges from internal to external processes, and classifies activities as employing either informal/unstructured or formal/structured techniques (see Figure one, below). Parties, in moving along the continuum from negotiation to adjudication, relinquish an ever greater degree of control over the process.²⁰

²⁰ Burdine, M., *Mediation Skills*, Centre for Conflict Resolution Training. Justice Institute of British Columbia. 1990.

Walton and McKersie,²¹ writing from the perspective of the behavioural sciences, provide a framework for analyzing and discussing negotiating behaviour. Their framework consists of four systems of negotiating activity, each serving a different function, and each having its own internal logic and identifiable set of instrumental acts or tactics:

- **distributive bargaining:** a hypothetical construct referring to the complex system of activities instrumental to the attainment of one party's goals when they are in basic conflict with those of the other party.
- **integrative bargaining:** the system of activities which is instrumental to the attainment of objectives which are *not* in fundamental conflict with those of the other party and which can therefore be integrated to some degree.
- **attitudinal structuring:** the system of activities instrumental to the attainment of desired relationship patterns between parties.
- **interorganizational bargaining:** the system of activities which brings the expectations of principals into alignment with those of the chief negotiator.²²

²¹ Walton, R.E., and McKersie, R. **A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System.** New York. McGraw-Hill. 1965.

²² Walton and McKersie "Ibid", pp.4-5

Puritt and Carnevale, revisiting this framework, identify three distinct types of dispute resolution activity:

- **joint decision-making**, which includes negotiation and mediation. Mediation is like negotiation except that a third party helps the disputants reach an agreement;
- **third-party decision-making**, which includes adjudication (going to court), arbitration, and decision making by legitimate authorities within an organization (autocratic);
- **separate action**, in which the parties make independent decisions. This decision may be to retreat, struggle or follow a strategy of tacit coordination.²³

Puritt and Carnevale note that, with the single exception of retreat, all parties almost always wind up using the same procedure. This is because all procedures require the participation of both parties; even struggle where the other party usually responds with some form of self-defense.²⁴

According to Puritt and Carnevale, the choice among

²³ Puritt, G., and Carnevale, P.J. *Negotiation in Social Conflict*. Open University Press. Buckingham, England. 1993. p.4

²⁴ Puritt and Carnevale, "Ibid", p. 184

dispute resolution processes is heavily influenced by past practice and social customs because the regulation of social conflict is a primary source for social norm formation.²⁵

It may seem only pragmatic that groups living within a larger societal context would develop systems for dispute resolution where struggle would be potentially injurious to the parties or the larger community. Yet, custom or past practices sometimes bias the parties' selection toward arbitration, adjudication or struggle, even when negotiation and mediation are feasible.²⁶

In their review of the social science literature on negotiation, Puritt and Carnevale identify three main approaches to the study of negotiation:

- **advice**, as in manuals and books, notably a genre of literature and training-associated practical advice to negotiators (e.g., Harvard Negotiation Project);
- **mathematical models**, of rational behaviour developed by economists and game theorists, ordinarily focusing on a narrow set of tactics;

²⁵ Puritt and Carnevale, "Ibid", p.119

²⁶ Puritt and Carnevale, "Ibid", p.187

- **behavioural tradition**, which seeks to develop and test predictive theory about the impact of the environmental conditions and behaviours on negotiating outcomes.²⁷

The following review of writings on negotiating strategy, tactics and outcomes begins with a survey of findings within the behavioural tradition. The behavioural approach was chosen as a starting point because it is the single, most comprehensive source of information on negotiating behaviour and helps set the stage for a discussion of more complex negotiating issues to follow.

Behavioural Approaches

Generally speaking, within the behavioural sciences the discussion of negotiating activity attempts to answer two questions with a view to developing a predictive framework for understanding negotiating behaviour: what are the psychological states, motives, perceptions, and the antecedents to these states; and, how does the interplay of tactics and strategies affect negotiating outcomes.²⁸ This

²⁷ Puritt and Carnevale, "Ibid", p.4

²⁸ . Puritt, G., and Carnevale, P.J., "Ibid". p.2; Walton, R.E., and McKersie, R.B, **A Behavioral Theory of Labour Negotiations**, p.9

approach is reflected in the behavioural sciences
definition of negotiating activity as:

...a discussion between two or more
parties with the apparent aim of
resolving a divergence of interest and
thus escaping social conflict....
Divergence of interest means that the
parties have incompatible preferences
among a set of available options.²⁹

According to Puritt and Carnevale, within the
behaviourial approach the discussion of negotiation activity
begins with the assumption of a negotiating paradigm of two
unitary rational actors. Each party has the aim of
maximizing their self-interest, whether they are individuals
or representatives of parties.³⁰ However, this assumption
itself that rational choice can be characterized as a single
end or goal, is problematic.

Elster, while asserting that there is no one theory
that can be singled out as the main competitor to the
"rational choice" model, has identified a number of
alternative, competing explanations of "rational choice"
based on a common conceptualization of a two-step process

²⁹ Puritt, and Carnevale, "Ibid", p.2

³⁰ Puritt and Carnevale, "Ibid", pp.7-8

for human decision-making:

....Any given piece of human behaviour may be seen as the net product of two successive filtering devices. The first is defined by the set of structural constraints which cuts down the abstractly possible courses of action and reduces it to a vastly smaller subset of feasible actions. The constraints are assumed to be given and not within the control of agents....The second filtering process is the mechanism that singles out which member of the feasible set shall be realized. Rational-choice theories assert that this mechanism is the deliberate and intentional choice for the purpose of maximizing some objective function, be it a real one (like profit) or a purely notational one (like the utility function representing preferences).³¹

Elster rejects interpretations of the rational choice theory that assert that behaviour can be explained, either in a strong or weak sense, as being a product of variance in opportunities. Such explanations, which Elster characterizes as "structuralist", fetter our concept of rational choice by attempting to limit the significance of choice in human decision-making:

The structuralist would study the fence around the cattle. The behaviourist

³¹ Elster, J. *Ulysses and the Sirens: Studies in Rationality and Irrationality*. Cambridge University Press. 1979. p.113

would study the activity of the cattle within the bounds of the fence....The Structuralist, on my definition, is not someone who *decides* to study the fence around the cattle rather than their movements within the fence, but someone who *asserts* that the cattle have very little freedom of movement within the fence.³²

In a similar fashion, the traditional paradigm of negotiator as "self-interest maximizer" severely restricts, if it does not deny, the importance of the second filter, i.e. the parties' preferences or interests and the importance of choice itself. It forecloses discussion of an important aspect of negotiating activity, i.e., those goals and methods adopted by parties when shifting from identifying positions to exploring interests. It doing so, it assumes all parties preferences can be spoken of in similar terms, and as if fixed across time and space.

Significantly for negotiating outcomes, parties' positions are often quite changeable and their interests subject to reconsideration and sometimes radical re-evaluation, depending upon the type of agreement being pursued. Later in this chapter, the "interest-based" approach to negotiation is contrasted with the dominant

³² Elster, "Ibid", pp.113-114. Footnote 4

paradigm of "self-interest maximization" as an alternative model for explaining how "rational choice" operates with respect to decision-making in negotiation.

Representative Negotiators

In contrast to situations where negotiators represent their own interests, negotiators sometimes act as the representative of a group or organization. When in this role they are known as "chief negotiators" or "principal negotiators". The authorizing body whom they represent and report to are called "principals", while members of the organization or group being represented are known as "constituents".

Puritt and Carnevale, in surveying the literature on representative negotiation, identify three perspectives used to describe negotiators - principal/constituent interactions: the "one-way influence" model (influence from constituents to negotiators, with constituents deciding policy and negotiators following it; the "mutual influence" model, with negotiators and constituents influencing each other; and, the "network" model, where both representatives and constituents are part of a large communications network

embracing both collectivities (parties).³³

The "one-way" model postulates that constituents exercise a significant amount of influence over positions taken by a representative negotiator, sometimes to the extent of having de facto authority to instruct the negotiator on position-taking. The "mutual influence" model, appears to accord more with experience, if only because complete constituency hegemony over negotiator position-taking is simply be too difficult to enforce in practice. As well, because of their closeness to the other party, negotiators also have significant impact upon constituent policy-making, often arguing for greater concession-making based on a more realistic perception of the other parties' interests. However, the isolated position of the solitary negotiator may also create a perception of disloyalty among constituents, increasing constituent resistance to policy changes and sometimes resulting in a "cycle of distrust" in negotiator - constituent relations.³⁴

During the course of a negotiation, negotiators and constituents can have differing expectations as to

³³ Puritt G., and Carnevale, P.J., *Negotiation in Social Conflict*, p.155

³⁴ Puritt and Carnevale, "Ibid", pp.156,162

negotiating outcomes. Constituents tend to be more anxious for success in negotiation than their representatives, though representatives tend to take longer to reach agreement than negotiators acting on their own behalf. Surveillance by constituents is more likely to enhance negotiator toughness. But when representative negotiators have a high standing within the constituent group, they are less likely to be tied constituent views and freer to make greater concessions than negotiators with lower status.³⁵

Research into negotiator - principal/constituent relations also show that negotiating outcomes may be significantly influenced by the structure of the negotiating organization - supporting the "network model" hypothesis. In negotiations where a single negotiator acts for a client, parties are less likely to adopt contentious tactics, and problem-solving activity is also less likely to occur. However, where representative negotiators are part of a negotiating team, the reverse tends to happen. Negotiations are both more contentious and there is increased problem-

³⁵ Benton, A. and Druckman, D. "Constituents Bargaining Orientation and Intergroup Negotiations", in *Journal of Applied Psychology*, 4, 1974. pp.141-150; Carnevale, P.J. and Puritt, D.G., "Looking Tough: The Negotiator under Constituent Surveillance", in *Personality and Social Psychology Bulletin*, 5, 1979. pp.118-21; Hermann, M.G. and Kogan, N. "Negotiation in Leader and Delegate Groups", in *Journal of Conflict Resolution*, 12, 1968. pp. 332-44; Puritt, G., and Carnevale, P.J. *Negotiation in Social Conflict*, 1993. pp.7-8; Walton R.E., and McKersie, R.B., *A Behavioral Theory of Labour Negotiations*. 1965. pp. 283-289

solving activity, leading to increased opportunities for integrative agreements.

Significantly, the negotiating team approach seems to lessen conflicts associated with "boundary spanning" by creating opportunities for team members to take on different functions, such as "into" group communications. Role differentiation also helps increase opportunities for "out-from" group communications, which assists inter-party dialogue and presumably enhances the quality of communication at the negotiating table.³⁶

In multilateral negotiations - where more than two parties are involved - the function of representative negotiators and the structure of the negotiating organization takes on added importance. Puritt and Carnevale note consensus building activities in multilateral negotiations often give rise to a unique situation, which they term the "mediated" multilateral negotiation. Mediation in this context occurs when a single actor takes on a facilitator-like role among the parties.

A "mediator" in a multilateral negotiating context may

³⁶ Puritt G., and Carnevale, P.J., *Negotiation in Social Conflict*, pp.162-163

be one of the representative negotiators themselves, or conversely, may be an outside facilitator. Whichever is chosen, the essential qualifications are high status and acknowledged impartiality in the group context, combined with the capacity to assist the other parties in finding common ground for agreement. The task of mediation involves identifying all parties (stakeholders) with an interest in the negotiation, seeking agreement on a body of ground-rules, and advising representatives about how to deal with constituents.³⁷ Generally speaking, the role of mediator in a multilateral negotiation embodies many of the attributes associated with the representative negotiator as effective team leader: the ability to organize and manage negotiating teams; and, the capacity to implement a broadly-based strategy of "networking" among collectivities of representatives, constituents, and principals.

Having briefly reviewed the role of negotiator from the differing perspectives of the single negotiator, the representative negotiator, and as facilitator of multilateral negotiations, the next section focuses on the various strategies and tactics negotiators employ in pursuit of agreement.

³⁷ Puritt and Carnevale, "Ibid", pp.199-200

Negotiating Concepts

The behavioural approach to negotiation makes a distinction between two categories of activities pursued by parties: broad strategies and specific tactics. During negotiations, the use of strategies and tactics by parties in discussing issues may be quite fluid, more so than in mediation or adjudication where the parties relinquish some degree of control over the process. Ultimately, negotiating outcomes fall into one of four general categories:

- **victory or win/lose** outcome for one of the parties;
- **simple compromise**, as defined as some middle ground on an obvious dimension connecting the parties' initial offer;
- **a win-win agreement** also called an **integrative** agreement, where parties achieve a higher joint benefit than they could with a compromise;
- **failure** to reach agreement, which includes the possibility of either party dropping out of negotiation or failing to ratify agreements.³⁸

One of the most extensively researched areas of

³⁸ Puritt and Carnevale, "Ibid", pp.16-17

negotiation are strategies and tactics associated with win/lose and simple compromise agreements. There are four broad strategies for negotiation: contending, concession-making, problem-solving, inaction and withdrawal (see Figure two, below). Negotiating setting and time-preferences are two other important variables. Though not identified as a strategy or tactic per se, they may substitute for either in a given circumstance.

Within three of the four broad groupings of strategies and tactics for negotiation (excluding withdrawal), various negotiating tactics may be used in support of strategies, or

TACTICS ASSOCIATED WITH NEGOTIATING STRATEGIES	
Contending:	<ul style="list-style-type: none">- threats- harassment- positional commitments- imposing deadlines & delaying
Concession-making:	<ul style="list-style-type: none">- reductions in demands
Problem-solving:	<ul style="list-style-type: none">- expanding the pie- exchanging concessions- solving underlying concerns- re-focusing questions- acquiring information about the other party's concerns- promises
Inaction & Withdrawal:	<ul style="list-style-type: none">- breaking off negotiation

Figure 2: (Puritt & Carnevale, *Negotiation in Social Conflict*, pp. 29-47)

provide bridges for switching between strategies, as needed. Inaction and withdrawal do not involve negotiating tactics, as such, but mark the end-point of a phase of negotiation or the consideration of alternatives to negotiation.

During negotiations, concession-making may have a positive initial effect in drawing the other party into problem-solving activity, but will have the inverse effect if introduced as an opening position or persisted in over time. Concession-making, when initiated from a position of strength, can also induce the other party to put aside contending behaviour in favour of problem-solving.³⁹ On the other hand, time pressure by itself will tend to encourage concession-making and the increased use of contentious tactics.⁴⁰

Despite extensive analytic research within the behavioural sciences, the challenge of negotiating agreements remains an art rather than a science. Implementing negotiating strategies by means of various tactical manoeuvres requires the ability to respond to

³⁹ Puritt and Carnevale, "Ibid", p.18

⁴⁰ Carnevale, P.J. and Lawler, E.J., "Time Pressure and the Development of Integrative Agreements in Bi-lateral Negotiation", in *Journal of Conflict Resolution*, 30. 1968. pp. 636-59

changes in the negotiating environment with immediacy. Experience in negotiation remains the most significant predictor of success, but why negotiators do what they do, when they do, must be discussed with reference to the outcomes of negotiating behaviour.

In terms of cognitive determinants of negotiating outcomes, Puritt and Carnevale cite research describing how cognitive effects and determinants influence negotiating outcomes. Learning and feedback play an important role in negotiation. Individual negotiators' decisions are often made in the context of complex social, organizational and cultural systems that involve legal constraints and have historical underpinnings. According to Puritt and Carnevale, the main question, in terms of a negotiator's frame of mind, is "what information and decision processes are important in negotiator reasoning about issues, concessions, trade-offs, and strategy."⁴¹ In response, the authors note negotiators consciously or unconsciously rely on heuristics (mental shortcuts and simplifying strategies) and schema (selective use of attention, memory and information). As such, these schema tend to be self-perpetuating and, accordingly, the perception or misperception of motives and intentions play

⁴¹ Puritt G., and Carnevale, P.J. *Negotiation in Social Conflict*, p. 80

an important part in negotiation.⁴²

Beyond considering the cognitive and perceptual basis for negotiator behaviour, the concept of persons as "rational actors" and what this entails for negotiating outcomes has been extensively researched within the literature of mathematical modelling or theory of games. This thinking continues to have a pervasive and significant influence on the theory of negotiation and has served to focus attention on the problem of mixed-motive negotiating dilemmas.⁴³ The regular occurrence of such dilemmas as "prisoners' dilemma" (uncertainty as to other party's strategy), "game of chicken" (drive to dominance), and "resource dilemma" (opportunities for mutual cooperation or exploitation, with disastrous consequences for the latter) have been researched extensively, with computer models developed showing how outcomes vary depending on the type of strategies and tactics employed.⁴⁴

Puritt and Carnevale distinguish between game theory,

⁴² Puritt and Carnevale, "Ibid", pp. 83-84

⁴³ Luce, R.D. and Raiffa, H. *Games and Decisions: Introduction and Critical Survey*. Wiley, New York. 1957.

⁴⁴ Puritt and Carnevale, "Ibid", pp.19-26; Lax, D.A., and Sebenius, J.K., *The Manager as Negotiator*, New York. Free Press. 1986. pp.155-164

as a vast game of moves with respect to strategies and tactics, and negotiation, which requires consensus if agreement is to be the final outcome. Accordingly, a game of moves is sometimes solved through negotiation, but not vice-versa. Agreement, on the other hand, is required to successfully complete three of the four possible negotiating outcomes (victory, simple compromise, and win-win or integrative agreements) described above.⁴⁵

"Win/Lose" and "Simple Compromise" Agreements

A simple win/lose negotiation is an example of a game of moves ending in agreement in which one party incurs an absolute loss and the other an absolute gain. Beyond this, simple compromise agreements constitute some distributional agreement in which the parties share gains and losses, proportionately, in some calculable and quantifiable ratio. For example, a simple financial negotiation may end in a simple compromise agreement.

In a negotiation ending in a simple compromise agreement, parties may use various techniques to identify

⁴⁵ Puritt G., and Carnevale P.J., *Negotiation in Social Conflict*, p.19

goals, limits and antecedent determinants of the other parties' financial demands in an attempt to predict the other players' choice or preferences. A party's bottom-line will determine the outer limit of the range for possible agreement. Successive offers may reveal new information about each party's goals for agreement, as well as narrowing the range possible for agreement. If the parties' limits overlap, the range is positive and agreement is possible. If they don't and the range is negative, agreement is not possible. Possible agreements are called viable options.

While viable options for agreement in financial negotiations may present themselves during simple bartering, options for resolving non-financial issues need to be developed and constructed from the information provided, rather than simply inferred from it. To overcome this difficulty, negotiators sometimes create their own, artificial frameworks for valuation. This is done by constructing a hypothetical limit, a de facto "best alternative to a negotiated agreement" (BATNA) which the negotiator can use as a "bottom-line" yardstick against which to compare other parties' offers. Prior to entering a negotiation, negotiators will have already assessed their "worst alternative to a negotiated agreement" (WATNA), and determined that the potential gains to be achieved through

negotiation are greater than those available through alternative processes.⁴⁶

Where parties have mixed motives with respect to some or all of the issues brought to the table, they need to find alternative frameworks for stating and analyzing their problems. The "BATNA/WATNA" approach offers an initial cognitive framework that parties can use to start this process. In subsequent negotiations, by elaborating on their interests, parties are in a better position to estimate the extent to which non-quantifiable gains or losses are incurred by either party. Parties who are cognizant of their own and others' preferences can achieve complex compromise or integrative agreements as opposed to simple compromise or win/lose arrangements. However, unless parties separate out the competitive and cooperative issues for negotiation, the search for any agreement beyond that of a simple compromise will be illusive.

"Win-Win" or "Integrative" Agreements

Departing from the traditional negotiating paradigm,

⁴⁶ Fisher, R. and Ury, W., *Getting to YES: Negotiating Agreement without Giving In*. Houghton Mifflin. Boston. 1981

where parties attempt to maximize their own self-interest, it is useful to explore the concept of a "mixed motive" negotiating setting further. "Mixed motive" settings evoke both competitive and cooperative moves in contexts where parties share preferences on some issues and diverge on others. Mixed-motive settings create dilemmas for negotiators in terms of the selection of negotiating strategies. As Emond observed in chapter one, the dilemma of cooperation versus competition is a common experience for First Nations about to enter into land claim negotiations.⁴⁷

In mixed-motive settings, dilemmas are commonly resolved by isolating competitive (contending) and cooperative (problem-solving) elements of the negotiation. Broadly speaking, when employing either contending or problem-solving strategies, negotiating behaviour may be characterized as "claiming value" or "creating value", respectively.⁴⁸ Isolating competitive or cooperative elements is carried out by various means, including rapid sequencing (concede-contend-concede), moving through stages (contending followed by problem-solving), arena shielding

⁴⁷ Emond, D.P., *Negotiating Strategies and Dispute Resolution*, pp.14-18

⁴⁸ Lax, D.A. and Sebenius, J.K., *The Manager as Negotiator*, p.36

(contending at the negotiating table, while problem solving in unofficial meetings on the side), personal shielding (good-guy/bad-guy, whereby one team member contends while the other problem-solves).⁴⁹ A common negotiating strategy in mixed-motive settings is to match (reciprocate) the level of cooperation or non-cooperation among other parties, commonly called "tit-for-tat". Tit-for-tat negotiating is very effective in eliciting concessions, which may in part be due to the conveying of a perception of the negotiator as being "firm but fair".⁵⁰

In terms of negotiating outcomes, integrative or win-win agreements generally rely on three strategies for constructing agreement:

- **expanding the pie:** increasing the availability of resources to satisfy both parties' needs;
- **exchanging concessions:** yielding on issues of low priority to ones self and high priority to the other side;

⁴⁹ Puritt G., and Carnevale, P.J., *Negotiation in Social Conflict*, p.18

⁵⁰ Esser, J. and Komorita, S.S., "Reciprocity and Concession making in Bargaining", in *Journal of Personality and Social Psychology*, 31, 1975. pp.864-72; Komorita, S.S., and Esser, J. "Frequency of Reciprocated Concessions in Bargaining" *Journal of Personality and Social Psychology*, 32, 1975. pp.699-705

- **solving underlying concerns:** examining and addressing concerns that underlie positions.⁵¹

Methods, as opposed to tactics, are more commonly employed in support of integrative negotiating outcomes and may include: ways to acquire information, i.e., questioning (open questions, re-focusing or re-framing issues); log-rolling, i.e., re-structuring negotiating priorities (exchanging concessions on low priority items); unbundling, i.e., dividing a single issue into its constituent parts; managing the setting (employing locality or environment to influence negotiating outcomes); and, managing time-preferences (setting deadlines, using process clauses to defer difficult negotiations).⁵²

Promising is also an important method of eliciting agreement frequently used in support of problem-solving strategies and stands in contrast to the use of threats as a tactic in contending behaviour. Generally speaking, promises commit negotiators to rewarding behaviour for compliance to demands, as opposed to using punishment as a reward for non-compliance.

⁵¹ Puritt G., and Carnevale, P.J., *Negotiation in Social Conflict*, p.36

⁵² Puritt and Carnevale, "Ibid", p.37

As in the tactic of using of threats, negotiator credibility is always at stake when promising is used; past consistency in fulfilling promises re-enforces credibility. However, promises are also more flexible than threats in the face of failure. If promises do not work, then negotiators can try to use another tactic.

In contrast to promising, threats tie the utterer's hands. Failure to achieve compliance requires more extreme measures, including the consideration of alternatives to negotiation. Also, the other party's non-compliance must be met with retaliatory action in order to maintain negotiator credibility. Finally, where threats do elicit compliance, resentment also may appear, presenting new problems for the implementation of agreements.⁵³

Interest-based Negotiation

The interest-based approach to negotiation, most commonly associated with the Harvard Negotiating Project, gives precedence in negotiations to the principle of

⁵³ Puritt and Carnevale, "Ibid", p.44

procedural fairness.⁵⁴ The notion of bargaining from "interest" rather than "position" is one of five key goals for agreement that differentiates the interest-based approach to negotiation from the traditional paradigm of self-interest maximization.⁵⁵ Depending on the source, the five main characteristics associated with interest-based approach are: treating your opponent with respect; responding to opposition with integration; finding an agreement based upon the justice of the situation; and, making timely and positive commitments.⁵⁶

Puritt and Carnevale, in their assessment of the interest-based approach to negotiation, agree negotiations proceed more quickly if negotiators concur as to what general principles are applicable and how they are to be interpreted. However, they argue negotiations go more slowly and often founder when principles are advocated, because

⁵⁴ Fisher, R. and Brown, S. *Getting Together: Building a relationship that gets to YES*. Boston: Houghton Mifflin. 1988; Fisher, R. and Ury, W. *Getting to YES: Negotiating agreement without giving in*. Boston: Houghton Mifflin. 1981; Lax, D.A. and Sebenius, J.K. *The Manager as Negotiator*. New York. Free Press. 1986; Ury, W.L., Brett, J.M. and Goldberg, S.B. *Getting Disputes resolved: Designing Systems to Cut the Costs of Conflict*. San Francisco. Jossey-Bass. 1988

⁵⁵. Puritt G., and Carnevale, P.J., *Negotiation in Social Conflict*, p.8

⁵⁶ Matkin, J.G., *Principled Bargaining*, Industrial Relations Centre, Queen's University. Reprint Series No. 53

emotions accompanying these principles tend to induce rigidity:

...principles often have an emotional appeal - they seem righteous and moral, even when they are self-serving. Hence, they tend to encourage rigidity with respect to one's demands, and hostility if the other party rejects these demands. This is likely to reduce the amount of problem-solving and thus diminish the likelihood of agreement....⁵⁷

Accordingly, Puritt and Carnevale recommend against strategies such as the interest-based approach advocated by the Harvard Negotiation Project. They are not alone in this assessment. Other authors have also argued that the introduction of principles tends makes positions inflexible, because goals and limits are usually identical.⁵⁸ Extending their critique, Puritt and Carnevale's set conditions under which an interest-based approach might be successful. They suggest that an interest-based approach might succeed if negotiator behaviour meets two contingent variables:

....if the other party accepts the principle proposed and the proposed interpretation of it, and if objective

57 Puritt G., and Carnevale, P.J., *Negotiation in Social Conflict*, pp. 124-125

58 Zartman, W. "The Structure of Negotiation", in *International Negotiation: Analysis, Approaches, Issues*. Jossey-Bass. San Francisco, 1991.

information is available allowing unambiguous application of the principle.⁵⁹

Puritt and Carnevale's tacit acceptance of the interest-based approach does not so much set out the ground rules for obtaining agreement on a set of negotiating principles as it does describe the necessary pre-conditions for "strategically" rational decision-making to take place. Elster, in differentiating between "parametric" and "strategic" rationality elaborates on why, in the absence of such a prior determination, rationality itself is problematic for the task of negotiation:

There is something strange, even contradictory in the notion of parametric rationality. A parametrically rational agent believes himself free to adjust optimally (given his end) to a constant environment, at the same time he can hardly fail to have some awareness of the fact that this environment is made up in part of other agents similar to himself. He could, of course, assume that other agents are trying to adjust optimally to what looks to *them* like a constant environment, and then adjust optimally to their optimal adjustments....It is clear, however, that this only makes the paradox appear at a higher level. The contradiction can only be eliminated by transition to the

⁵⁹ Puritt G., and Carnevale, P.J., *Negotiation in Social Conflict*, p. 125

strategic or game theoretic mode of thinking.⁶⁰

By contrast, the "strategically rational" actor sees him/herself as a player in a game in which, in the ideal case, all players have full knowledge about each others' preferences. Everyone has to take into account the fact that everyone takes into account everyone else before making a decision. However, as Elster notes, the best possible outcome available to parties acting within a strategically rational framework is something akin to a simple compromise agreement:

...games without solution constitute a deep anomaly in the theory of rational behaviour. If all games had a non-cooperative solution, then the strategically rational actor would be the perfect incarnation of the Leibnizian monad. He would be windowless, in the sense of not being able to communicate with others, and nevertheless his point of view on the universe would reflect and internalize all other points of view in a harmonious whole. The fact that such tacit coordination or pre-established harmony is not always possible, and that some choices cannot be made by the rational self, has implications for philosophy, psychology and the social sciences in general.⁶¹

⁶⁰ Elster, J. *Ulysses and the Sirens: Studies in Rationality and Irrationality*. Cambridge University Press. 1979. p. 117

⁶¹ Elster, J. "Ibid", p.117

As Puritt and Carnevale note with respect research on "mixed motive" negotiating settings, the paradigm of negotiator as "self-interest maximizer" has limited utility within the context cooperatively orientated negotiations.⁶² In support of this finding, as previously noted, Walton and McKersie have also identified the relationship aspect of the negotiating process itself as an important, separate sub-process of the process by which parties obtain agreement:

...we postulate that an additional major function of negotiations is influencing the relationship between parties, in particular such attitudes as friendliness-hostility, trust, respect and the motivational orientation of competitiveness-cooperativeness.⁶³

The influence of relationship issues upon negotiating outcomes is an aspect of negotiating behaviour that appears to function independently of considerations related to the individual self-interest of parties. Yet, both cooperative and competitive preferences must be accounted for in any approach to negotiating behaviour that aspires to accommodate and explain negotiating outcomes beyond those found in win/lose or simple compromise agreements.

⁶² Puritt G., and Carnevale, P.J., *Negotiation in Social Conflict*, pp.8,83-84,104-117; Lax, D.A. and Sebenius, J.K., *The Manager as Negotiator*. New York. The Free Press. 1986. pp.154-182

⁶³ Walton, R.E., and McKersie, R.E., *A Behavioral Theory of Labor Negotiations*, pp.4-5

Looking beyond the individual to the social context of negotiating behaviour, one of the most important social norms for behaviour that influences negotiating outcomes is the principle of fairness.⁶⁴ Within the literature on international negotiation, for example, the requirement of procedural fairness is acknowledged as a belief commonly held by parties upon entry into negotiation:

It is interesting - and a testimony to the power of the basic idea - that even when the parties are not in equality in power terms other than the basic veto, the expectation of dynamic equality through reciprocity is still present.⁶⁵

Similarly, studies of disputants' preferences in situations of conflict show that, with respect to the critical question of the selection of procedures for resolving disputes, the weaker party in a dispute tends to prefer processes for joint decision-making, as opposed to arbitration or adjudication where the individual rights and interests of the parties are held paramount.⁶⁶

⁶⁴ Puritt G., and Carnevale, P.J., *Negotiating in Social Context*, pp. 123-124

⁶⁵ Zartman, W. "The Structure of Negotiation", in *International Negotiation: Analysis, Approaches, Issues*. Jossey-Bass. San Francisco, 1991. p.67

⁶⁶ Heuer, L.B., and Penrod, S. "Procedural Preference as a Function of Conflict Intensity". *Journal of Personality and Social Psychology*, 1986, Vol.51. pp.700-710

Generally speaking, various negotiating dilemmas common to mixed-motive settings (i.e., prisoners' dilemma, resource dilemma, and game of chicken) provide evidence in support of the view that the paradigm of negotiator as "self-interest maximizer" fails to adequately explain how rational choice operates outside the context of competitively oriented negotiations. In this respect, the interest-based approach recommends itself as a viable alternative to the traditional paradigm, by offering a context within which both competitive and cooperative elements of negotiation can be pursued toward obtaining complex compromise or integrative agreements.

Summary

In this chapter, three different types of negotiating roles were identified: the unitary actor; the negotiator as representative; and, the negotiator as mediator or facilitator within the context of a multilateral negotiation. As well, expanding on Puritt and Carnevale's classification, three generic goals for agreement were identified: victory or win/lose; simple compromise agreement; and, complex compromise and integrative agreements. From the discussion of negotiating tactics and strategies,

it also became evident that the concept of "self-interest maximizer" as a paradigm for negotiator behaviour has serious short-comings when it comes to analyzing and predicting outcomes associated with cooperatively-oriented negotiations.

As discussed in chapter one, Emond has suggested two factors should be considered by a First Nations when deciding how to proceed with a claim dispute: the nature of the relationship among parties; and, the nature of the substantive issues involved and the processes available for their resolution. Taking into account Elster's discussion about how rational choice operates in human-decision-making, and in particular what was discussed above about the limits of the traditional paradigm of negotiator as "self-interest maximizer", it is now possible to extend Emond's first hypothesis by integrating it into the main thesis of this paper. In determining what is to count as fair and appropriate procedures for the resolution of disputes through negotiation, parties must look first to the context of their relationship for direction. What constitutes fair and just dealing can only be decided after proper consideration has been given to this fundamental issue.

In the foregoing chapter it was also seen that in

choosing one goal for agreement over another (i.e., win/lose, simple compromise or complex compromise and integrative) parties' generally commit themselves to a certain, broad negotiating strategy. This choice is influenced by the nature of the relationship among parties and their relationship goals for the future. Generally speaking, the greater the importance of the relationship as a factor in obtaining agreement, the greater the need for deliberation as to the type of strategy chosen for negotiation.

For parties seeking complex compromise or integrative agreements, joint decision-making as to what negotiating procedures will be followed is essential for obtaining agreement. However, such prior agreement does not preclude the use of competitive or non-cooperative negotiating strategies and tactics within the context of the negotiation itself. Rather, as noted by Puritt and Carnevale earlier, contentious tactics are often a necessary prelude to problem-solving and in turn increase the likelihood of obtaining integrative agreements. Generally speaking with regard to integrative agreements, estimating the distribution of gains or losses obtained among the various parties is, by definition, impossible. Frequently, what constitutes equal concession and fair compromise cannot be

calculated from a comparative list of items exchanged, if only because many of the items involved are incommensurable. In these circumstances, the success of the agreement turns on the question of whether basic procedural fairness in negotiation has been respected. With respect to the context in which such a decision takes place, Stuart Hampshire has observed:

For each type of negotiation, and in each context of negotiation, there is a heritage of customs and rules which determine the fair and appropriate procedure for that type, and which determine what counts as an equal concession and as a fair compromise. Universal and abstract principles of justice will undermine what counts as equal and as fair dealing in the widely various contexts of negotiation. But the parties who are entering the negotiation are not inventing the practices for the first time and their expectations of just procedures are based on precedents that fit the present context.⁶⁷

Between 1984-87, in part in response to the First Ministers Conference process (FMC), the federal government developed and implemented a set of custom rules and procedures to guide the negotiation of Aboriginal self-government in Canada, on a community-by-community basis. The impetus for this policy emerged from an April, 1985 FMC

⁶⁷ Hampshire, S. *Innocence and Experience*. Harvard University Press, Cambridge, Massachusetts. 1989. pp.74-75

statement by the Prime Minister committing Canada to negotiate self-government with First Nations.⁶⁸

The 1986 Community-based Self-Government Negotiation (CBSG) initiative was intended as a policy platform for implementing the Prime Minister's April 1985 commitment. At the same time, the revised 1986 Comprehensive Claims policy provided an alternative approach to the negotiation of self-government within the context of comprehensive claims negotiations. Between 1986-94, modifying the CBSG guidelines to reflect a Cabinet approved negotiating mandate, parties to the Yukon CYI self-government negotiations developed their own custom set of rules and principles for proceeding with Aboriginal self-government negotiations in the Yukon. By 1994, these arrangements had borne fruit. Four Yukon First Nation Self-Government Agreements had been concluded and ratified by the CYI, Canada and Yukon. These agreements are currently being implemented.

The next chapter examines the history of Yukon self-government in the context of the First Ministers Conference process and compares Yukon First Nation self-government arrangements with similar agreements negotiated elsewhere in

⁶⁸ Van Loon, R., "User's Guide to Self-Government", January 6, 1986. Whitehorse Federal Land Claims Office. p.1

Canada. It then discusses issues arising from the unique relationship of Yukon First Nation Self-Government to existing institutions of public government in the Yukon Territory. This overview helps set the scene for a more detailed discussion of the negotiation of the draft Yukon First Nation Model Self-Government Agreement to follow.

CHAPTER 3

SELF-GOVERNMENT IN A COMPREHENSIVE CLAIMS CONTEXT

In 1986, after thirteen years of unsuccessful negotiations toward a land claim settlement, the Council for Yukon Indians (CYI) embarked on the second part of what has become a modern land claim negotiating odyssey. In 1984, negotiations concluding in an Agreement-in-Principle (AiP) had failed to generate the necessary consensus among Yukon First Nations to achieve a settlement. In part, the reason for this failure was that the 1984 AiP could not accommodate Yukon First Nation emerging aspirations for self-government. Instead, the 1984 AiP simply made available to First Nations those existing statutory responsibilities found in the Indian Act, and federal officials were unwilling to go further. In this new phase of negotiations, CYI was seeking a new Agreement-in-Principle, one that would include a constitutionally protected form of Aboriginal self-government for Yukon First Nations.

Between 1984-87, at the national political level, federal officials were also attempting to find ways to give expression to a general right to Aboriginal self-government

by means of an amendment to the Constitution. It was hoped that if consensus could be reached among provincial and Territorial premiers, and national Native organizations on a definition of an Aboriginal right to self-government, this might provide the basis for the negotiation of individual First Nation self-government agreements. Accordingly, a major federal policy review of options for giving effect to such a right was undertaken following the March 1984 First Ministers Conference (FMC), in anticipation of at least two further such conferences to take place before March 1987.

This chapter reviews the recent history of Native self-government in Canada as background to a discussion of the specific negotiation of Yukon First Nation self-government. It discusses the emergence of Yukon self-government arrangements from the perspective of on-going, national Constitutional consultations. It also compares aspects of the Yukon self-government agreements with similar ones concluded either as stand-alone arrangements, or as a part of other comprehensive claim settlements in Canada.

Self-Government in a Claims Context

The Indian Act was introduced in the late nineteenth

century in an era when Canada was negotiating treaties with First Nations to facilitate settlement and contain the nomadic life-style of Native people, especially those on the Prairies. It provides for a limited form of municipal government. For instance, band members can elect their own band council governments, exercise some powers over their membership, funds, as well as municipal type responsibilities on reserves. However, these powers are subject to either explicit regulations or Ministerial discretion, including the power of disallowance.⁶⁹

Just as there are important differences between Indian Act governance and other forms of self-government in Canada, there are also important differences among and between the few self-government arrangements negotiated outside the Indian Act to date, most of which have been developed within the context of comprehensive claim negotiations. Between 1973 and 1994, six land claim agreements were ratified by Canada and Native claimant groups (excluding Yukon First Nations), giving expression to some form of Aboriginal self-government, including:

⁶⁹ Whitehorse Federal Land Claims Office. "Inherent, Delegated or Contingent Forms of Aboriginal Government" Knoll, D. Discussion paper. File: CYI Self-Government, 4.3.2. July, 1989

- James Bay and Northern Quebec Agreement(1975)
- Northeastern Quebec Agreement(1978)
- Inuvialuit Final Agreement(1984)
- Gwich'in Comprehensive Land Claim Agreement(1992)
- Sahtu and Dene Metis Agreement(1993)
- Tungavik Federation of Nunavut Agreement(1993)

The first self-government arrangements were concluded in Northern Quebec. For instance, the Cree-Naskapi Act(1984), which was enabling legislation with respect to specific provisions of the James Bay and Northern Quebec Agreement(1975), was the first Indian self-government legislation in Canada to replace Indian Act governance for affected bands. In exchange for rights specified in the James Bay and Northern Quebec Agreement(1975) and the Northeastern Quebec Agreement(1978), the Cree and Naskapi people and the Inuit of Northern Quebec agreed to cede all rights and interests with respect to their land.

The Cree-Naskapi Act(1984) established new legal and political regimes in the form of local governments accountable to Cree and Naskapi peoples and the Inuit of Northern Quebec. By establishing individual bands as corporations, Cree and Naskapi government obtained the legal

status, capacity, rights, powers and privileges of natural persons outside of the Indian Act, subject to specified reserves on lands held by Canada for the use of Cree and Naskapi people. In terms of municipal-like powers, band authorities exercise law-making authority through two different types of arrangements: those affecting internal administration and management; and, those concerned with local government.

By contrast, the Inuit communities of northeastern Quebec are incorporated under Quebec legislation, with specified powers delegated to them from the province. To assist in the development of common services for Inuit communities a regional government structure (Kativik regional government) was also established under provincial legislation, as was a parallel Cree regional authority.⁷⁰

In other comprehensive claim agreements, such as the Inuvialuit Final Agreement(1984), the Gwich'in Comprehensive Land Claim Agreement(1992) and the Sahtu and Dene Metis Agreement (1993), the question as to what form of Aboriginal self-government First Nations will adopt has been left open

⁷⁰ Elliott, D.W., (ed.) *Law and Aboriginal Peoples of Canada*. Canadian Legal Studies Series. Captus Press. 1992. pp.172-175

for future negotiation.

The Inuvialuit Final Agreement (1984) includes provisions for the administration of the settlement by means of corporate structures concerned with land and investment. Corporate activities at the community level are administered through six non-profit local Inuvialuit corporations. The structures integrate Inuvialuit decision-making relating to ownership of lands and the management of benefits with structures of public government.

Collectively, local Inuvialuit corporations control the Inuvialuit Regional Corporation (IRC), which in turn owns 100 percent of the shares of subsidiary land, investment and development corporations. **The Inuvialuit Final Agreement (1984)** did not address the question of regional government structures for the Inuvialuit. However, section 4(3) of their agreement provides the Inuvialuit with the option of full participation in any future restructuring of the public institutions in Western Arctic Region. A recently revived 1977 Inuvialuit proposal for the creation of a Western Arctic Regional Municipality (WARM) envisions establishing a regional government structure encompassing all law-making powers "vital to the people within the

region."⁷¹

The **Gwich'in Comprehensive Land Claim Agreement**(1992) and **Sahtu and Dene Metis Agreement**(1993) include specific provisions for efficient planning and utilization of municipal services. Both contain identical provisions respecting governments' commitment to negotiate future changes to existing municipal government boundaries. In addition, there are specific provisions for the future negotiation of self-government, as well as a requirement for consultation in regard to future, proposed changes to existing Territorial structures of public government.⁷²

Another model for regional Native self-government, negotiated outside the context of a comprehensive land claim, is the Sechelt Band Indian Self-Government Act (1987). Sechelt self-government derives its authority as a band council from separate federal legislation, while the Indian Act only applies where it is not displaced by provisions of the Sechelt Act(1987). The Sechelt band also

⁷¹ Whitehorse Federal Land Claims office. "Inuvialuit Nunugat" (A Proposal for an Agreement-in-Principle) Part IV. Committee for Original Peoples Entitlement (C.O.P.E.) 1977.

⁷² Canada, **Sahtu Dene and Metis Comprehensive Land Claim Agreement**. Vol. 1, Department of Indian Affairs and Northern Development. 1993. pp.16,98; and, Canada, **Gwich'in Comprehensive Land Claim Agreement**. Vol.1, Department of Indian Affairs and Northern Development. 1992.

exercises powers as a district council, conferred upon it by provincial enabling legislation.

At the time of incorporation, Sechelt district government also included some five hundred non-status Indians living within community boundaries whose interests were represented on a special district government advisory body.⁷³ The Sechelt model was negotiated in advance of the Sechelt band's comprehensive claim settlement. Parties to this land claim have just completed the framework stage of their settlement negotiations as part of the British Columbia Treaty Commission negotiation process.

In recent history, one the most important examples of a change to an existing structure of public government arising as a result of a comprehensive claim settlement, is found in the **Tungavik Federation of Nunavut Agreement**(1993). The successful conclusion of this settlement agreement hinged upon the federal government's agreement to Article (4), calling upon government to create a new, separate Territorial institution of public government to give effect to the public government provisions of the Tungavik

⁷³ British Columbia, "Federal/Provincial Responsibility and the Sechelt", Department of Municipal Affairs. J.P. Taylor and Cary Paget (Authors). Paper: National Conference on Federal and Provincial Governments and Aboriginal Peoples. Carleton University. 1988. pp.31-37

Federation's land claim settlement. This offer includes federal agreement to finance new government structures and give Inuit beneficiaries (who constitute a majority population within the eastern Arctic) a form of public government separate and distinct from that of the Government of the Northwest Territories.⁷⁴

Yukon First Nations: Their Relationship to Public Government

The Yukon First Nation Self-Government Act (1994), creates a legislative framework for new institutions of First Nation self-government within the Yukon Territory. Within the Yukon Territory, First Nations can "opt-in" to federally legislated self-government arrangements by establishing constitutional forms of self-government and concluding self-government agreements with Canada and Yukon, as part of the **CYI Umbrella Final Agreement** (UFA) process. The comprehensive claim itself is given effect to by means of a separate piece of federal legislation, the Yukon Land Claim Settlement Act (1994).

⁷⁴ Elliott, D.W., (ed.) **Law and Aboriginal Peoples of Canada**, pp.179; **Canada, Nunavut Land Claims Agreement**, Department of Indian Affairs and Northern Development. 1993

Yukon First Nations are guaranteed representation ranging from 25-50 percent on all institutions of public government created under the land claim. Representation on boards, commissions and councils is drawn from nominees put forward by CYI, Canada and Yukon. The CYI executive, made up from representatives from all fourteen Yukon First Nations, figures prominently throughout the **CYI Umbrella Final Agreement** as the collective voice of Yukon First Nations. New institutions of public government created under the Yukon land claim settlement include:

- Surface Rights Board;
- Fish and Wildlife Management Board;
- Development Assessment Board;
- Heritage Resources Board;
- Yukon Water Board;
- Disputes Resolution Board; and,
- Land Use Planning Council.

In addition to representation on Territory-wide institutions of public government, individual Yukon First Nations have the right to nominate 50 per cent of appointees to regional Renewable Resources Councils and National Park Management Boards (where applicable), and one-third of the appointees to Regional Land Use Planning Commissions. Taken

together, these guarantees for participation in joint-decision-making bodies constitute an integral part of Yukon First Nations' expression of their Aboriginal right to self-determination in the Yukon Territory.

The Yukon First Nation Self-Government Act(1994) gives a legal status and capacity to First Nation government institutions independently of the Indian Act. It displaces the Indian Act and provides First Nations with the capacity to assume specified Indian Act or other federal programs and services, where First Nations choose to do so. Yukon First Nations have the legal status of natural persons and law-making powers over their own internal affairs and community settlement lands.

Yukon First Nations also have the power to enact legislation in a variety of Territorial areas of current Territorial jurisdiction related to First Nation citizen-based programs and services, both on and off-settlement lands. This power is subject only to consultation with the Territorial government as to the scope of affected jurisdiction. Specific provisions have also been incorporated into Yukon First Nation self-government agreements with respect to the future negotiation of First Nation jurisdiction over the administration of justice,

taxation and the paramountcy of federal laws.

The ratification of the **CYI Umbrella Final Agreement** and Yukon First Nation self-government agreements established a number of policy precedents for the federal government. The 1989 CYI AiP and subsequent 1993 **CYI Umbrella Final Agreement** were the first land claim AiP and settlement agreement in Canada not to require a blanket extinguishment of Aboriginal rights. They were also the first such agreements to be concluded in a regional setting where claim beneficiaries constituted a minority of the resident population.

Yukon First Nation self-government arrangements also established a number of additional national precedents. They were the first self-government agreements in Canada to:

- empower First Nations with the capacity to create and amend their own constitutions, define their own membership, and to exercise a broad range of municipal and provincial-like legislative powers;
- provide First Nations with the capacity to displace the Indian Act in its entirety within a single province or Territory as it affects its own citizens;

- recognize First Nation jurisdiction over its citizens both on and off settlement lands;
- give First Nations paramountcy over Territorial laws where jurisdiction overlaps;
- replace Indian Act section 87 tax exemptions with a tax exempt status for First Nations government where First Nations are performing the functions of a public government;
- provide for a regime of concurrent Territorial and First Nation property taxation;
- extend to Yukon First Nation governments the right to avail themselves of powers and exemptions related to taxation on the same terms as those concluded between Canada and any other Indian government or entity.

There is also a unique requirement for Yukon First Nations, and the Yukon and federal governments, to negotiate the sharing of tax room. This provision is intended to ensure the provision of reasonably comparable levels of public service to First Nation or Territorial citizens, at reasonably comparable levels of taxation. This obligation is paralleled by a bilateral federal-Yukon agreement to adjust federal transfers to the Territory to reflect any net savings realized as a consequence of transfers by the Yukon Government of jurisdiction and services to Yukon First Nations.

Generally speaking, despite their differences all contemporary land claim settlements establish some unique, integral relationship between First Nation governments regional and national institutions of public government. Yukon First Nation government is simply an example of one of its more complex manifestations, reflecting the unique circumstance of Yukon Territorial political development. The hallmark of Yukon First Nation self-government and the Yukon land claim settlement has been the attempt to create a "level playing field" between First Nations and other forms of governments. This requirement is specifically addressed in those sections of Yukon First Nation self-government agreements dealing with political and financial accountability, the generation and use of revenues, and the requirement for the provision of comparable levels and quality of public services for all citizens. As a consequence of Yukon First Nations assuming responsibility for the provision of public services to their citizens, together with their sharing of land and resource management responsibilities with public government institutions, the distinction between "public government" and First Nation government in the Yukon Territory has become blurred.

Besides seeking a variety of ways to give expression to an Aboriginal right to self-determination through regional

land claim and self-government agreements, Yukon First Nations have also pursued a parallel goal of having their self-government arrangements entrenched under section 35(1) of the Constitution Act(1982). Under existing federal land claims policy, settlement agreements and self-government agreements are considered separate documents, with only settlement agreements having the status of treaties under the Constitution. As background to a discussion of Yukon First Nations' recent experience in negotiating self-government arrangements in a comprehensive claims forum, together with their efforts to have these constitutionally protected, it is useful to review developments that occurred at the level of national, constitutional processes in order to better appreciate the context within which proposals for Yukon First Nation self-government arose.

Political and Constitutional Context: 1982-87

In 1986, as a consequence of a wider national political debate over proposed changes to Canada's constitution, the federal government agreed to negotiate self-government concurrently with claims negotiations as part of its revised comprehensive claims policy. The origins of this initiative lay in Canada's repatriation of its Constitution in 1982,

and the evolution of a broadly-based federal strategy for constitutional entrenchment of Aboriginal self-government.⁷⁵

In November 1981, in the context of the then proposed repatriation of Canada's constitution and under pressure from the provinces, Canada agreed to withdraw constitutional provisions recognizing Aboriginal and treaty rights. Shortly after that, parties agreed to restore a provision recognizing "existing" Aboriginal and treaty rights. At the same time, under the Constitution Act(1982) it was agreed to hold three further provincial and federal First Ministers conferences on the Constitution.⁷⁶

Between 1982 and 1987, several proposals were considered for the constitutional protection of Aboriginal self-government. During March 15-16, 1983, at the first such conference, provincial and federal First Ministers agreed to amendments to the Constitution Act(1982), including provisions for the constitutional recognition of rights

⁷⁵ Canada, "Opening Statement by Prime Minister of Canada The Right Honourable Pierre Elliott Trudeau to the Constitutional Conference of First Ministers on the Rights of Aboriginal Peoples", (Booklet). Ottawa, March 8-9, 1985.

⁷⁶ Canada, "Background to the First Ministers Conference", (Press Kit). First Ministers Conference, Ottawa, March 8-9, 1985.

under land claim agreements, the guaranteeing of these rights equally to male and female persons, a commitment to consult Aboriginal people prior to making certain constitutional changes affecting them, and a provision for three future Aboriginal constitutional conferences. At the same time, a review of proposed federal legislative initiatives to reform the Indian Act, undertaken by the House of Commons Special Committee on Indian Self-Government, was under way. This committee, struck by Parliament in December 1982, tabled its final report (the Penner Report) in 1983.⁷⁷

The Penner Report recommended that the federal government commit itself to constitutionally entrenching self-government arrangements as soon as possible, within the context of framework legislation for Indian self-government to be developed in consultation with First Nations. The Special Committee rejected Department of Indian Affairs' proposals for re-vitalizing Indian Act band governance. Instead, it called for the replacement of the Indian Act by legislation (subsequently draft Bill C-52) to accommodate a full range of institutional and intergovernmental

⁷⁷ Canada, Indian Self-Government in Canada, House of Commons: Minutes of the Proceedings of the Special Committee on Indian Self-Government. First Session of the Thirty-second Parliament. Issue No. 40. 1983.

arrangements between governments and First Nations.

With respect to the federal Comprehensive Claims process, the Penner Report recommended that a new settlement process be set out in legislation, following negotiations with First Nations representatives. Such a process would be consistent with the principles of fair and just resolution of outstanding claims, and would provide for the constitutional protection of Aboriginal and treaty rights afforded by the Constitution.⁷⁸

In March 1984, in response to the Special Committee report and on the eve of the second Constitutional Conference, the Minister of Indian Affairs accepted the Special Committee's finding that Indian communities were historically self-governing; acknowledged that reform of the Indian Act was an inappropriate route in terms of engendering a new relationship between Native people and governments, and agreed to proceed with framework legislation, countering that any substantive change to the existing relationship must also involve the provinces. Toward this end, the DIAND Minister stated any implications arising from the constitutional entrenchment of self-

⁷⁸ Canada, *Indian Self-Government in Canada*, pp.115-116

government, as well as the specific recognition and implementation of these rights based on treaties or Aboriginal title, would proceed through the multilateral constitutional process.⁷⁹

Between 1984 and 1987, the federal government focused attention on the goal of identifying the political and constitutional implications of a proposed self-government amendment to the Constitution and how this might mesh with a legislative program to replace the current Indian Act.⁸⁰ In 1985, at a subsequent First Ministers conference, a draft accord for the recognition of Aboriginal self-government arrangements fell short of the consensus that would be required for a constitutional amendment. At the same time, the federal government commenced work on the Bill C-52, the proposed framework legislation to replace the Indian Act.⁸¹

⁷⁹ Canada, **Response of the Government to the Report of the Special Committee on Indian Self-Government**. Department of Indian Affairs and Northern Development. Ottawa. March 5, 1984. pp.2-3

⁸⁰ Whitehorse Federal Claims office. **Innovative Legal Strategies for the Implementation of Indian Self-Government: A Review of Legislative Approaches to Indian Self-Government**, prepared by C.D. Marchant for the Department of Justice and the Department of Indian Affairs and Northern Development. Revised January, 1987.

⁸¹ Van Loon, R., **"User's Guide to Self-Government"**, Whitehorse Federal Land Claims Office. CYI Self-Government, 4.3.2. January 6, 1986

In his opening statement to the April 1985, First Ministers Conference, Prime Minister Brian Mulroney committed the federal government to exploring the concept of self-government for Aboriginal peoples on a case-by-case basis and by constitutional means and otherwise, in response to the special circumstances of First Nation communities. Setting out the federal position, Mulroney proposed the Constitution of Canada should be amended:

- to recognize and affirm the rights of aboriginal peoples of Canada to self-government within the Canadian federation, where those rights are set out in negotiated agreements;

- to commit the Government of Canada and the provincial governments, to participate in negotiations directed toward concluding agreement with aboriginal people relating to self-government that are appropriate to the particular circumstance of those people.⁸²

Despite the federal government's failure to obtain the necessary consensus of provincial First Ministers to the proposal, the Prime Minister committed the federal government to exploring self-government arrangements with First Nations outside the constitutional process. In doing so, he reflected an existing commitment made by the DIAND

⁸² Van Loon, R. "Ibid", p.1

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Minister in his response to the Special Committee on Indian Self-Government, to explore legislative alternatives to the Indian Act.

As a result of these commitments, the federal government embarked on a dual strategy for implementing self-government with a view to both meeting the requirements of the constitutional process, in anticipation of a further, final First Ministers Conference on Aboriginal constitutional issues to be held in 1987, and also fulfilling the immediate aspirations of First Nation communities for independence.⁸³

Up until this time, federal initiatives had focused on the acknowledgement of a general right to Aboriginal self-government, subject to the negotiation and agreement of the provinces. After the 1985 FMC, the federal government refocused its efforts on achieving self-government by identifying several, non-constitutional initiatives to increase self-reliance and self-sufficiency in First Nation communities, including a new Community-based Self-Government

⁸³ Van Loon, R. "Ibid", p.2

Negotiation (CBSG) initiative.⁸⁴

Generally speaking, the proposed CBSG initiative was consistent with outstanding federal commitments made in the first two First Ministers Conferences. In those discussions, the federal government had sought agreement on a constitutional amendment to recognize Aboriginal self-government through negotiated agreements. The federal government had also committed to the provinces not to constitutionally protect Aboriginal self-government without first achieving a federal-provincial consensus. The CBSG process maintained this commitment while also showing good faith with First Nations by following-up on suggested legislative initiatives, specifically the Penner Report's recommendation that First Nations be given a legislative alternative to the Indian Act.

Under the terms of the revised 1986 comprehensive claims policy, and consistent with its Community-based Self-Government Negotiation initiative, the negotiation of self-government arrangements with First Nations participating in land claim agreements was to be separate and distinct from

⁸⁴. Canada, "Questions and Answers". Indian Self-Government Community Negotiations, Department of Indian Affairs and Northern Development. May, 1989.

the constitutionally protected land claim agreements themselves. However, this did not answer the question as to whether First Nations self-government arrangements, negotiated within the context of a land claim agreement, might themselves be constitutional documents. The federal government could not answer this question, at least until after the last FMC. Accordingly, 1986 comprehensive claims policy was vague in this regard, asserting "most aspects" of self-government arrangements under the policy would not receive constitutional protection.⁸⁵ Testifying before the Standing Committee on Aboriginal Affairs, Assistant Deputy Minister Richard Van Loon observed:

The difference between the departmental policy and the comprehensive claims route, if you like, is the comprehensive claims approach can include the type of negotiations that will take place under the departmental community negotiations program, as well as negotiations with respect to the management of non-renewable resources in the settlement-wide area. It is broader in that it can encompass areas which are not directly under aboriginal control. It can encompass the whole settlement area. But the community-based part of it would essentially be the same as our

⁸⁵ Canada, **Comprehensive Land Claims Policy**. Department of Indian Affairs and Northern Development. 1987. p.18

departmental policy.⁸⁶

Generally speaking, the federal government's strategy going into the 1987 First Ministers Conference appeared to try to capitalize on legal uncertainty surrounding the question of the constitutional protection of Aboriginal self-government to motivate provincial governments to agree on a constitutional amendment recognizing a general Aboriginal right to negotiate self-government. At the same time, the 1986 announcement of the Community-based Self-Government Negotiation initiative signalled to the provinces the federal government's determination to unilaterally pursue the recognition of Aboriginal self-government in the absence of provincial consensus. As it turned out, the March 1987 First Ministers Conference ended in failure. Despite this, after March 1987, federal policy on the question of the recognition of a constitutional protection of a right to Aboriginal self-government remained unclear, as the federal government attempted to pursue further constitutional initiatives.

In January 1987, Yukon land claim negotiations between

⁸⁶ Canada, Minutes of the Proceedings of the Standing Committee on Aboriginal Affairs and Northern Development. Second Session of the Thirty-third Parliament. Issue No. 19. 1987 pp. 19:7-19:22. 1987

the federal government and the Council for Yukon Indians were re-started after a hiatus of two years. The re-negotiation of the CYI AiP mandate offered a test-case for post-FMC federal policy, both as to the issue of constitutionally protecting self-government provisions within a land claim, and federal flexibility with respect to legislative alternatives to Indian Act governance. The fact that the negotiation of the CYI claim fell almost entirely within federal jurisdiction, that is within the context of a Territory rather than a province, significantly enhanced the perception among CYI and the Yukon Government that the federal government was fully capable of delivering on both counts.

Summary

Between 1982 and 1987, the evolution of the constitutional debate surrounding Aboriginal self-government led the federal government to pursue a flexible strategy to negotiate self-government within the context of comprehensive claim negotiations. The Community-based Self-Government Negotiating initiative that emerged as a by-product of the First Ministers Conference process helped define an initial set of parameters for the negotiation of

Aboriginal self-government arrangements in Canada.

Also emerging from First Ministers Conference process was a federal willingness to pursue a changed relationship between Native claimant groups and the federal government. In recognizing a right to negotiate self-government as subject matter for discussion within the 1986 revised comprehensive claims policy, the federal government confirmed its willingness to reconsider its policy of extinguishing Aboriginal rights in favour of certain as of yet undefined alternatives. Yet, federal agreement to explicitly acknowledge a broad range of First Nation legislative rights was not automatic: CYI and Yukon First Nations had to obtain this recognition within the context of a complex, multilateral negotiation.

In terms of understanding the gains achieved by Yukon First Nations during the course of Yukon First Nation self-government negotiations, it is important to recognize how the organization of the negotiating process contributed toward First Nations' obtaining their goals. In the next chapter, in examining the novelty and complexity of negotiating arrangements employed to reach agreement on Yukon First Nation self-government arrangements, it becomes apparent that these agreements could not have been obtained

through an adjudicated process, nor just any type of negotiation.

The history of negotiations leading up to the conclusion of the draft Yukon First Nation Model Self-Government Agreement is a case study in the application of the interest-based approach to negotiation. It shows how, by building upon a few, broadly based, mutually recognized custom rules and procedures for negotiation, First Nations and governments were able to generate their own proto-agreement on self-government.

CHAPTER 4

ESTABLISHING THE GROUND-RULES FOR NEGOTIATION

Preparing to Negotiate

In 1973, Canada accepted the Council for Yukon Indians (CYI) land claim for negotiation under a new federal land claims policy. However, it was not until March 1983 that a near complete CYI land claim AiP was ready for public scrutiny.⁸⁷ In reaching agreement, federal and Yukon negotiators had been guided by three broad objectives:

- beneficiary participation in mainstream Yukon life (one-government system);
- the equal sharing of settlement benefits among all beneficiaries, both status and non-status;
- the enhancement of beneficiary economic conditions and preservation of Indian culture.⁸⁸

⁸⁷Canada, **Agreements-in-Principle** Whitehorse Federal Land Claims Office. (short-title) Vol. 1-3. October, 1983

⁸⁸Whitehorse Federal Land Claims Office. "Press Release", in 1984 CYI AiP **"Agreements-in-Principle"**. (short-title) October, 1983. (photocopy).

Acceptance of a one-government model represented a trade-off for Yukon First Nations: in exchange for giving up their Indian Act reserve lands and separate institutional status, they would receive land, improvements to community infrastructure, program-related affirmative action measures within the existing territorial government system, and constitutional protection for their agreements. However, the most controversial issue for beneficiaries was an agreement to extinguish Aboriginal title in exchange for the settlement package.

Despite a federal government commitment that any additional Aboriginal rights gained through the on-going First Minister Conference (FMC) process would also accrue to Yukon First Nations, some Yukon bands were uncomfortable with the idea of extinguishing their claim to Aboriginal title. The Yukon government, which would have gained considerably from the agreement, was also uncomfortable with it, but for a different reason: the agreement lacked the political certainty Yukon had hoped to obtain through complete extinguishment. In January 1984, both the Yukon Government and CYI relented and initialled the AIP.⁸⁹

⁸⁹ CBC Radio Whitehorse, *Special Report*, March 9, 1988. 7:14 a.m.

The initialling of the AiP was followed by a successful community ratification process and the signing of the AiP in April 1984. Yet, some Yukon First Nation leaders were clearly dissatisfied with the arrangement. Despite a successful ratification process, the deal had been negotiated in isolation from Yukon First Nations' leadership and their constituents. In July 1984, at Tagish, and again in October, dissident Yukon First Nations prevailed at CYI General Assemblies. Ross River, Mayo, Carcross and Kwanlin Dun Indian bands opposed the package. They did not want to extinguish their Aboriginal title and they did not want to share power with the Yukon government. They wanted their own form of self-government. Resolutions were passed demanding the re-negotiation of substantive elements of the AiP. These included extinguishment, land selection, land management, subsistence harvesting, self-government, and provisions for non-status beneficiaries.

At a CYI general assembly in December 1984, only eight of the twelve Yukon bands voted in favour of the AiP, one voted by a slim margin against it, and the other three abstained. Acknowledging that the 1984 AiP no longer had the confidence of Yukon First Nation leadership, DIAND's new Minister, David Crombie, announced there was no longer sufficient basis for a deal or for continuing negotiations,

marking a surprising reversal of events from January 1984, when federal, Territorial and CYI negotiators had initialled the agreement.

The rejection of the 1984 AiP also marked the beginning of a new consensus and political consciousness among Yukon Natives. In rejecting their first major agreement after ten years of negotiations, Yukon First Nations' aspirations had begun to crystallize: the recognition of Yukon First Nation self-government would be a key element in any future land claim settlement. The 1984 AiP did not adequately address the issue of self-government. Yukon Principal Negotiator Willard Phelps believed its failure could be attributed to the existence of separate regional and claims and national constitutional processes:

Here you had a forum which was far more powerful than our land claims forum, involving the Premiers of the provinces and the Prime Minister of Canada, and they were dealing in that forum with exactly the same issues that we were dealing with at the land claims table. It was very difficult for us to achieve any kind of a final settlement or binding settlement or lasting settlement when, at the same time, there was a parallel process going on that, legally, superseded ours.⁹⁰

⁹⁰ CBC Radio Whitehorse, March 9, 1988. 7:39 a.m.

For its part, the federal government was slow to recognize that the mandate under which the 1984 AiP had been negotiated had now been overtaken by broader, national policy interests affecting the principles and process underlying the current federal comprehensive claims policy. Central among these was the issue of constitutional protection for Aboriginal self-government agreements.

...when we started the process back in 1973 or indeed in '78, we never anticipated for a moment that these policies may change and they would change as quickly as they did and so once that happened. Of course, we had to respond to that and the response that we made was essentially we would like to talk about these new options. Canada's response was: "No, simply because the old style agreement that we've got, of which you would agreed to, are reflective of our policies and then if you want a land claims agreement then you're going to have to concede to that." So at that point in time, our people essentially said, no.⁹¹

Anticipating that progress on the CYI claim was possible, DIAND Minister Crombie requested that CYI, Yukon and federal officials work toward developing a joint Memorandum of Understanding (MOU) to serve as the basis for resuming negotiations, linking together a number of related

⁹¹ Dave Joe, CYI Principal Negotiator, Personal Interview, February 16, 1995

processes, including:

- land claim negotiations;
- the devolution of federal responsibilities to the Yukon Government and Yukon Indian bands;
- Indian self-government aspirations;
- the First Ministers Conference process;
- a Yukon constitutional development process.⁹²

In December 1985, at the initiative of the DIAND Minister, CYI, Yukon government and federal negotiators signed an MOU on a process for claims negotiations. The DIAND Minister approved this process, but did not sign it himself because a number of the principles extended beyond the mandate of the existing federal comprehensive claims policy. Also, in December 1985, the federal Task Force to Review Comprehensive Claims Policy (Coolican Report) released its report. Negotiations with CYI would not resume until the federal Cabinet had an opportunity to respond to the sweeping changes to the federal land claim negotiating policy proposed by the report, including the concurrent

⁹² Whitehorse Federal Claims Office, "Memoranda of Understanding on Program Transfers and Constitutional Development", November 5, 1985. File: CYI Self-Government, 4.3.2.

negotiation of land claim and self-government agreements. Even so, the Coolican report did not go as far as the 1985 federal/Yukon - CYI MOU; it fell short of this in not recommending the constitutional entrenchment of local government provisions.

On December 1986, the federal government announced its new comprehensive claims policy, expanding the range of options available for the CYI AiP mandate, including:

- enhanced self-government provisions;
- the use of alternatives to extinguishment and the acknowledgement that Aboriginal rights not directly related to title need not be affected by settlement;
- specified forms of resource revenue sharing;
- participation in instruments of public government with decision-making powers with respect to environmental matters including water, land use and wildlife management;
- expanded non-resident claimant provisions, subject to parameters to be endorsed by federal Cabinet.⁹³

In May 1987, the federal Cabinet instructed that a new mandate for the CYI AiP negotiations be developed. It was to

⁹³ Canada, **A Comprehensive Claims Policy**, Department of Indian Affairs and Northern Development. December 1986.

be based largely on the 1984 AiP, but with modifications consistent with the new 1986 revised comprehensive claims policy. Acceptance by CYI and Yukon of a territory-wide framework for settlement agreement negotiations would be a pre-condition for the subsequent negotiation of individual First Nation settlement packages. Negotiators were given nine months to conclude a new AiP to serve as this Territory-wide framework.

Defining the Key Issues

As early as July 1987, Yukon Government, federal and CYI negotiators began exchanging drafts on a proposed sub-agreement on Yukon Aboriginal self-government. The first government draft was simply a federal discussion paper outlining the general parameters for self-government negotiations. This mandate paper itself had been preceded by many months of internal discussion within DIAND and between DIAND and the federal Department of Justice.⁹⁴

On August 25, 1987, CYI tabled its first draft "Yukon

⁹⁴ Whitehorse Federal Claims Office "General Parameters for Self-Government Negotiation". Discussion paper. File: CYI Self-Government, 4.3.2. July, 1987.

Aboriginal Self-Government" sub-agreement. The document, in broad brush strokes described the major elements of Aboriginal self-government which CYI believed Yukon First Nations should aspire to:

- I. Self-government is an aboriginal right. It is based upon the traditional practice of government, upon traditional occupation of the land, and upon title to the land.
- II. The jurisdiction, powers and responsibilities of aboriginal self-government are inherent; they cannot be derived or delegated from another jurisdiction.
- III. The recognition and implementation of Yukon aboriginal self-government must continue to be negotiated as an integral part of the land claims process; and negotiated settlements pertaining to all aspects of self-government, including fiscal arrangements, must be protected under the Constitution of Canada.⁹⁵

Subsequent federal and Yukon Territorial government counter-proposals were more specific in their content, with each succeeding draft being more elaborate in detail and specific in scope than the former.

⁹⁵ Whitehorse Federal Claims Office "CYI Aboriginal Self-Government". Discussion paper. File: CYI Self-Government, 4.3.2. August, 1987.

By October 1987, despite progress at negotiations, talks between the federal government and the CYI bogged down over limitations imposed by the revised 1986 comprehensive claims policy. CYI was seeking major concessions from Ottawa, including:

- the protection or entrenchment of a land claims and self-government package within the constitution;
- a mixed form of land tenure;
- the retention of Aboriginal rights.⁹⁶

On the question of self-government, the central issue dividing government and CYI negotiators was whether or not such agreements would be entrenched under Section 35(1) of the Constitution Act. In late October, DIAND Minister William McKnight came to Whitehorse to meet with CYI. McKnight told CYI it proposed changes to the 1986 comprehensive claims policy were non-starters:

The reason we are entering into negotiations is to provide certainty to land, both for native Yukoners and all Yukoners...If that certainty - in that land that is turned back to the Crown without encumbrances - is not there, the negotiations process and the very basis and support for them in Yukon will

⁹⁶ Whitehorse Star, October 29, 1987, p.3

disappear very rapidly.⁹⁷

On the question of Aboriginal self-government, CYI felt the federal offer of legislative protection for self-government could be too easily rescinded. As well, government was retreating from its original offer for constitutional protection of local government provided in the 1984 AiP. CYI also argued the new parameters for the negotiation of community-based self-government were too restrictive. The policy appeared more geared to on-reserve bands in the provinces.⁹⁸

As an alternative to a direct approach to entrenching self-government, government negotiators proposed to CYI that if Ottawa would not constitutionally entrench a self-government agreement, CYI should try to spread self-government throughout the final land claims deal. For instance, by including provisions for CYI and Yukon First Nation input into regional and Territory-wide wildlife management boards, Yukon Native people could achieve their goal for the constitutional entrenchment of self-government by indirect means.⁹⁹

⁹⁷ Whitehorse Star, October 29, 1987, p. 3

⁹⁸ Whitehorse Star, October 29, 1987, p. 3

⁹⁹ Whitehorse Star, October 29, 1987. p. 3

In November 1987, after several months of negotiations, government and CYI negotiators began a five-week review of all outstanding claim issues. The assessment was intended to highlight differences in positions so principals could meet in early spring to see if there was a basis for continuing negotiations. As the impasse continued between CYI and the federal government over the issue of constitutional protection for self-government, these discussions took a back-seat to other issues.¹⁰⁰

In December 1987, half-way through the five-week review, Chief Federal Negotiator Mike Whittington suggested that the three sides were very close to agreement. Three outstanding issues separated the parties: constitutional entrenchment of self-government; land quantum and the form of land tenure; and the retention of Aboriginal title. DIAND Minister Bill McKnight said he would be willing to consider an overall package that stretched the comprehensive claims policy in some areas if these could be balanced-off by concessions in others.¹⁰¹

During this first intensive review, the parties made a

¹⁰⁰ **Whitehorse Star**, November 5, 1987, p. 3; "Ibid", November 27, 1987, p.8

¹⁰¹ **Whitehorse Star**, November 5, 1987, p. 3

conscious decision to take a different approach to negotiations. Following months of tabling positions, they switched strategies and instead of contesting positions, began exploring their respective underlying interests and started to look for novel ways to meet these concerns.

- CYI's primary concern was not to lose any Aboriginal rights which might be linked to Aboriginal title. By not extinguishing Aboriginal title they felt they would be better placed to benefit from any future constitutional protection afforded self-government arrangements. They also saw a larger role for themselves in Yukon political life than that which was proposed in the 1984 AIP one government model:

The second thing that we attempted to do was ensure that we'd be involved in the process that would define how Yukon would evolve in the future so that we would not be sort of hived-off to only reserve lands, lands set-aside or, indeed, settlement land, and that our involvement in Yukon society after and during our completion of our land claims agreement...our people would be involved in all facets of Yukon society.¹⁰²

From the federal perspective, the interest in settling

¹⁰² Dave Joe, CYI Principal Negotiator, Personal Interview, February 16, 1995

the claim was twofold: because of its constitutional responsibility for Aboriginal people, it couldn't turn around in a land claim process and give Yukon Native people as little land as possible; yet, it also required certainty in respect to land tenure and access to public lands after land claims. This dual responsibility transformed itself into a broader government strategy, supported by Yukon, of trying to find ways for Yukon Natives to protect their traditional way of life other than by means of outright ownership of vast tracts land.¹⁰³

In January 1988, Chief Federal Negotiator Michael Whittington discussed in more detail the approach to negotiations taken by the parties at the table:

We've decided, in this claim, around the table with the three parties involved, we've decided that the confrontational type negotiations really doesn't work very well. So, what we've tried to do here is to engage in a process of negotiation where we are very open with each other....what we're trying to find is not the minimum to give to native people but, rather, to attempt to find a balance which is fair to all parties concerned.¹⁰⁴

¹⁰³ Whitehorse Star, December 1, p.5, 1987; CBC Radio Whitehorse, 12:30 p.m., December 3, 1987

¹⁰⁴ CBC Whitehorse, 7:19 a.m., January 13, 1988

CYI negotiators had similar expectations for an integrative agreement. Looking back on the process, CYI negotiator Dave Joe has observed:

...from '86 onwards, the parties decided to say: "look we've spent about twelve years in the process stage trying to work out a comprehensive land claims agreement. Perhaps we should use another form." So the parties back then included, on behalf of the Yukon, Barry Stuart; on behalf of Canada, Mike Whittington and we all agreed that it would make sense to adopt a process which all of the parties agreed would be a fairly productive process and that process was facilitated initially by workshops which we all held and we got in the hot shots from Harvard who said you know, here's a new style and new terms of how to work out an agreement. It was called interest based negotiations. So we all employed those concepts and as a result it just moved on from there. So the process sort of went back and forth from "we don't trust you" to a point to where there was a process in place where we said: "let's cooperate on this."¹⁰⁵

If CYI and government negotiators agreed on the general approach to negotiation, it did not mean they saw eye-to-eye on all issues. Because of the stalled FMC process, the federal government was reluctant to make any commitment in regard to constitutionally entrenching self-government

¹⁰⁵ Dave Joe, CYI Principal Negotiator, Personal Interview, February 16, 1995

arrangements. For its part, CYI believed the existence of an adequate land base was critical to the future operation of Aboriginal self-government:

You cannot have a government without land. What we want is a fair package and we feel the compensation and the various elements of the package will balance and in the end will not only provide us with tools and what we require for self-determination, self-sufficiency, but will benefit other Yukoners.¹⁰⁶

In January 1988, both government and CYI negotiators revisited the subject of the framework agreement for Aboriginal self-government. On February 17, 1988, a federal revision to CYI's second draft self-government framework agreement saw the elaboration of First Nation powers to include law-making with respect to their settlement lands and citizens:

- laws of a local nature;
- laws for the general welfare and development of Yukon First Nations;
- the administration of the First Nations affairs and the internal management of the First Nation;
- laws relating to spiritual beliefs;

¹⁰⁶ CHON-FM, Interview with Richard Sidney, CYI Vice-Chair, Land Claims. January 13, 1988, p.2

- health and education;
- taxation and revenue.¹⁰⁷

Generally, all parties were concerned that a forthcoming federal election call could delay the claim and perhaps scuttle any progress made to date. An awareness of this possibility helped motivate parties to press ahead with negotiations with a view to reaching an Agreement-in-Principle before the election. Such an agreement, the parties felt, would be binding on any newly elected government. With this goal in mind, federal and CYI negotiators developed a schedule that would see the next phase of negotiations completed by the end of March or early April 1988.¹⁰⁸

With the government team again setting deadlines, CYI for its part also began to raise the stakes. The process for interim protecting lands selected by Yukon First Nations was not working as quickly as had been expected. CYI became increasingly critical of land alienation proceeding at the same time as the negotiations were under way. With an eye to the new April deadline, CYI threatened to resort to court

¹⁰⁷ Whitehorse Federal Claims Office. "CYI Self-Government". Discussion paper. File: CYI Self-Government, 4.3.2, February 17, 1988

¹⁰⁸ CBC Radio Whitehorse, February 8, 1988, 12:30 p.m.

action if the federal Cabinet did not agree to resume negotiations quickly following its review of the CYI-AiP draft sub-agreements negotiated to date.¹⁰⁹

By late February 1988, negotiators announced a deal had been reached on a financial compensation package very similar to the one agreed to in the 1984 AiP. The Chief Federal Negotiator observed that a deal on taxation was almost complete, one that would see a single tax system for all Yukon. As well, the broad outlines for self-government arrangements had been developed, including a mixture of exclusive band controls and shared responsibility for municipal services. However, the issue of the constitutional entrenchment of self-government remained problematic.¹¹⁰

In March 1988, the federal Cabinet responded negatively to proposed AiP sub-agreements on general provisions and Yukon Aboriginal self-government. This rejection was followed by renewed attempts at the national level by the Assembly of First Nations to convene a follow-up meeting to the failed March 1987 First Ministers conference. Evidently, CYI was under significant pressure from national Native

¹⁰⁹ Whitehorse Star, February 9, 1988, p.3

¹¹⁰ Whitehorse Star, February 26, 1988. pp. 1-2

organizations to remain steadfast in its demand for the constitutional entrenchment of a right to Aboriginal self-government.¹¹¹

The federal negotiating team received a cool reception from their Ottawa constituents following their failed first attempt to obtain Cabinet approval of an AIP sub-agreement of self-government. In the wake of Cabinet's rejection, new negotiating instructions were issued. In future, CYI self-government drafts were to be forwarded to Ottawa for review and comment prior to a response being tabled. If this was not possible due to time constraints, then drafts might be withdrawn to be corrected or totally changed. Recalling his reaction to these demands, the Chief Federal Negotiator observed:

I came in as Chief Federal Negotiator with a healthy dose of scepticism about the department itself....I was basically reporting to Bill McKnight through Richard Van Loon. Public servants were suppose to tender advice as things went along, but quite likely I would have disagreed with them. I wasn't prepared to do what I was told by officials who had been there for decades.¹¹²

¹¹¹ CBC Radio Whitehorse, February 2, 12:30 p.m.

¹¹² Whittington, Michael, CYI Chief Federal Negotiator, Personal Interview, January 30, 1995.

At the same time as important differences between the federal and CYI positions began to appear, tension between the parties began to increase. CYI Chairperson Mike Smith publicly chastised the Chief Federal Negotiator for statements that land withdrawals for First Nations might not necessarily be selected for land claims purposes. Again, there were threats of court action by CYI.¹¹³

On May 31, 1988, in Dawson City, DIAND Minister McKnight announced that the deadline to conclude an AiP would be extended to July 1, 1988. Shortly after, CYI negotiators and principals were called to a final round of negotiations in Ottawa. At this final round, CYI Chair Mike Smith identified six outstanding issues:

- land quantum;
- the type of land ownership Yukon Indians will have over settlement lands;
- the concept of Indian self-government
- financial compensation for Yukon Indians;
- what Aboriginal rights would be extinguished in the claim;

¹¹³ CBC Radio Whitehorse, April 20, 1988, 7:42 a.m.

- taxation of Indian people.¹¹⁴

At this juncture, the federal side used the opportunity to use threatening tactics of its own in a bid to hasten agreement. A DIAND spokesperson said the Minister had suggested to CYI that, if they could not reach agreement on an AiP by the end of the week, funding for the CYI claim would be ended and allocated to other Aboriginal groups.¹¹⁵

After a day-long negotiating session, the parties were close to agreement. Yukon Government Leader Penikett identified the remaining issues on the table as financial compensation and what laws of taxation were to apply to Yukon Indian people. As to the issue of First Nation's retention of Aboriginal title to lands, DIAND Associate Deputy Minister, Richard Van Loon sketched the broad outline for an agreement:

There is a basic understanding that is agreeable to all parties that aboriginal title should remain on settlement lands but there is some debate about what that means and the way we could give effect to that.¹¹⁶

¹¹⁴ Whitehorse Star, June 23, 1988. p.2

¹¹⁵ Whitehorse Star, June 29, 1988. p.5

¹¹⁶ Whitehorse Star, June 30, 1988. pp.1-2

It was also agreed during this session that Yukon First Nation self-government agreements would not be considered Community-based Self-Government arrangements, nor would they be land claims agreements within the meaning of Section 35 of the Constitution Act(1982), but the possibility of their future entrenchment as constitutional self-government arrangements would remain open.

Reflecting on the substantive progress that had been made, DIAND Minister McKnight agreed to extend the deadline for a final agreement until after the CYI General Assembly in mid-July, 1988. Meanwhile, negotiations in Ottawa continued. An agreement on land quantum was reached, essentially augmenting the existing quantum by providing the mixed style of land ownership sought by CYI.¹¹⁷ Yet, as the new deadline approached, another obstacle emerged: the Yukon Government was pressing for the inclusion of a federal buy-out of Yukon First Nations' Indian Act section 87 tax exempt status as a condition for signing the AIP.

CYI initially balked at the proposal, while for its part the federal government rejected buying out the

¹¹⁷ Whitehorse Star, July 12, 1988. p.3

exemption at the price demanded by CYI. After all parties had stated their positions, it became clear the make-or-break issue for agreement on the AiP would come down to a question of what constituted fair value for the tax exemption buy-out. At this point, all parties took a pause from negotiations to consult with principals and constituents, and to review options for agreement.

Between July 18 and 21, 1988, at CYI's annual general assembly at Little Salmon, review of the land claim Agreement-in-Principle package, now 95% complete, was the main issue on the agenda. With little hesitation, the gathered assembly ratified the agreement with delegates voting 59 in favour, none against and seven abstentions. Ratification of the nearly complete AiP gave CYI Chairperson Mike Smith the green-light to continue negotiations with the federal government.¹¹⁸

A wave of euphoria followed the announcement of the Assembly's endorsement of the AiP. First Nations looked forward to future First Nation negotiations toward concluding an Umbrella Final Agreement as a precursor to the final and self-government agreement negotiations. Gifts were

¹¹⁸ CBC Whitehorse, July 21, 1988, 5:30 p.m.

presented to CYI Assembly participants, including Hudson Bay blankets. These were symbolic, CYI negotiator Dave Joe suggested:

...it's rather appropriate that it's a Hudson Bay blanket. If it wasn't for the Hudson Bay Company that got the grant from the Crown in 1670 and gave it back to the Crown in 1870, and said: "All we did during the previous time was take furs from the Indians; we are not going to be responsible for compensating them for their land." If it wasn't for that clause, and the Hudson Bay Company and their legacy of blankets and beaver skins, a lot of us probably would not be here today. So thank you, Hudson Bay Company.¹¹⁹

Yukon Government Leader Tony Penikett, an enthusiastic supporter of the agreement, heralded the ratification of the AiP as a new "social contract" between Yukon Indian people and non-Native Yukon society.¹²⁰ CYI Chair Mike Smith observed that the agreement had won First Nations 16,000 square miles (41,500 square kilometres) of land representing almost 9 per cent of the Yukon's total land mass. They would retain 10,000 sq. mi. (25,900 sq. km.) for settlement lands, while extinguishing some but not all of their rights to their traditional territories.

¹¹⁹ CBC Radio Whitehorse, July 22, 1988. 7:19 a.m.

¹²⁰ Whitehorse Star, July 22, 1988, p.7

TRADITIONAL TERRITORIES and SCHEMATIC SETTLEMENT LAND QUANTUM for the VUNTUT GWITCHIN FIRST NATION, THE FIRST NATION OF NACHO NYAK DUN, THE TESLIN TLINGIT COUNCIL and CHAMPAGNE AND AISHIHIK FIRST NATIONS¹²¹

¹²¹ Whitehorse Federal Land Claims Office. Traditional Territories and Schematic Settlement Land Quantum. 1993

TRADITIONAL TERRITORIES IN THE YUKON¹²²

¹²² Whitehorse Federal Land Claims Office. Traditional Territories in the Yukon. 1988

CYI Vice-Chairperson for land claims, Richard Sidney, however, noted a significant amount of internal work lay ahead for the CYI leadership. The issue of taxation and resource revenue-sharing, and aspects of the deal relating to the incomplete financial compensation package, remained to be negotiated:

There are a number of options for deciding on the distribution of money and the allocation of land. These options have been discussed internally and will be an internal decision made by the CYI with the involvement of the band Chiefs.¹²³

The DIAND Minister also observed, soon after the CYI Annual General Assembly, that despite having past a major test by ratifying some elements of the proposed framework agreement, a lot more work would have to be completed before the agreement would be ready to take to the federal Cabinet. In mid-September land claims negotiations were re-started and negotiators were given two weeks to make as much progress as they could on remaining issues. A key question was how First Nations would exercise self-government powers both on and off settlement lands. .

¹²³ Yukon News, July 22, 1988. pp.1,3

Federal Cabinet reviewed progress made on the Yukon AiP in mid-October. Chief Federal Negotiator Michael Whittington estimated consensus had been reached on 18 to 20 sub-agreements, minus the contentious issues. Commenting on the next steps in the process, he observed:

I think the questions are fairly simple
....so that, when the principals get
together, they are going to be talking
turkey...how much money and things like
that...when it comes to that, it's very
much a political negotiating process and
not something you need a whole lot of
hired hands around for.¹²⁴

A month later, on November 8, 1988, federal, Territorial and CYI negotiators initialled the first complete version of a new Yukon land claim AiP. Agreement was reached on financial compensation and taxation issues and CYI made a major concession by agreeing to give up its Indian Act section 87 tax exempt status on reserve lands and lands set-aside. Aboriginal self-government would be dealt with through an agreement identifying explicit subject-matter for subsequent negotiation. However, the issue of constitutional protection for self-government agreements remained outstanding.

¹²⁴ CBC Radio Whitehorse, October 7, 1988. 7:30 a.m.

MAY, 29 1989: AGREEMENT-IN-PRINCIPLE

- \$242.6 million in compensation;
- 16,000 square miles of Settlement land over which aboriginal title is retained;
- participation on various land and wildlife boards and committees;
- a list of subject matter to be addressed during the negotiation of individual Yukon First Nation Self-Government Agreements;
- federal ratification of an Umbrella Final Agreement or UFA to include provisions common to all Yukon First Nations.
- the requirement for YFNs to complete transboundary claims is waived;
- completed First Nation final agreements to contain processes with time limits and appeals, and agreements to avoid the duplication of benefits.

Figure 3: Canada, Council for Yukon Indian: Agreement-in-Principle, May 29, 1989. Department of Indian Affairs and Northern Development.

In summary, while parties to the AiP discussed a broad range of issues, some in specific detail, the end product of the AiP process simply reflected what the term itself implied: an agreement-in-principle. These agreements identified the subject matter and jurisdictional parameters available for negotiation, as well as the identity of those who would be party to the agreement. Apart from the financial compensation package, the identification of resources for implementing claim arrangements would be left to future final agreement and self-government negotiations. The entire AiP mandate negotiating process was one concerned

with identifying a viable range of subject-matter for future negotiation. The goal had been to submit a package to principals that would meet with their approval, in anticipation of receiving new instructions which in turn would lead to substantive negotiations.

Identifying Needs and Interests

With the new AiP in place, the stage was set for the negotiation of an Umbrella Final Agreement, a process document that would outline the broad, territory-wide provisions to be incorporated into all fourteen Yukon First Nation final agreements. At the outset, parties decided to continue to expand upon previous arrangements for more extensive community involvement in the negotiating process.

During this new phase of negotiations, the first four First Nations to negotiate their final land claim agreements (Nacho Nyak Dun, Champagne-Aishihik First Nations, Vuntut Gwitchin and Teslin Tlingits) would receive direct contribution funding for negotiations.¹²⁵ As well, Yukon First Nations with common interests would research and

¹²⁵ Whitehorse Federal Land Claims office, "Notes from a meeting of P. Cadieux and CYI. File: CYI Self-Government, 4.32. February 23, 1989.

negotiate proposals together. CYI would play a coordinating role in this arrangement, with a view to representing other First Nations yet to come to the negotiating table, limiting any potential duplication of effort while achieving greater economy in utilizing resources.

During the negotiation of a new 1984 AiP, CYI had appointed two regional negotiators to represent First Nation interests at the negotiating table. In this new round of Umbrella Final Agreement (UFA) negotiations, community negotiators would lead discussions on behalf of each First Nation and the negotiations themselves would take place in First Nation communities. Former regional negotiator Dave Joe was appointed Chief Negotiator for the CATCO negotiating coalition of Champagne and Aishihik First Nations, Vuntut Gwitchin First Nation and the Teslin Tlingit Council. First Nation of Nacho Nyak Dun negotiations would be led by Toronto lawyer Richard Salter. Parties also decided that the negotiation of self-government agreements would parallel the final agreement negotiating process, with two sets of negotiations taking place at the same table, but with each agreement being treated as a separate document.¹²⁶

¹²⁶ Whitehorse Federal Land Claims Office, "Proposal for Funding", Memorandum from CYI. File: CYI Self-Government, 4.3.2., December 1, 1988.

Between January and March 1989, the three parties continued to negotiate, even as they took stock of their positions. Government and CYI negotiators began a process of internal consultations in Whitehorse and Ottawa with a view to developing a long term strategy for the up-coming negotiations. For the government negotiators, a number of significant events had occurred with regard to their negotiating mandate and the outlook of their constituents.

In November 1988 and February 1989, the federal Conservative party and Yukon New Democratic party (NDP), respectively, were re-elected for second terms in office. Agreement on a Yukon land claim AiP figured prominently in the Yukon NDP's re-election campaign, whereas Native land claims, generally, had not been a major issue in the national election of a federal Conservative government. The NDP saw this victory as a clear endorsement of its efforts to conclude an AiP, a mandate which had not been tested since the Yukon NDP assumed office in 1986.

Also, in February 1989, the CYI met twice with the new Conservative Minister for DIAND, Pierre Cadieux.¹²⁷ The

127 Whitehorse Federal Land Claims Office. "Meeting with DIAND Minister Pierre Cadieux", Whitehorse. Briefing Notes from CYI Land Claims Department. CYI Self-Government, 4.3.2. February 23, 1989

second meeting on February 23, 1989, in Whitehorse, provided CYI with a forum to present a list of grievances about federal negotiating practices, together with its expectations regarding the upcoming round of negotiations. CYI continued to press the DIAND Minister for clarification of the federal Conservative government's position on the constitutional protection of self-government agreements, as well as plans for devolution and the political development of the Territory.¹²⁸

In Ottawa, during this same period, the Self-Government policy group within DIAND began reviewing potential negotiating issues and from an earlier CYI-federal "rolling draft", started to identify certain key issues for the upcoming round of negotiations. By March 1989, negotiating guidelines had been developed in response to these issues and endorsement for these positions obtained from the Interdepartmental Steering Committee on Community-based Self-Government (ISCSG).¹²⁹

During this process, the Whitehorse federal and Yukon

¹²⁸ Whitehorse Federal Land Claims Office, Yukon Media Summary, CHON-FM, March 7, 1989.

¹²⁹ Whitehorse Federal Land Claims Office. "Self-Government Rolling Draft Issues", File: CYI Self-Government, 4.3.2. February 25, 1989.

government negotiating teams noted some positions proposed in the new ISCSG guidelines were inconsistent with the Yukon land CYI AIP and Cabinet negotiating mandate. They began to question Ottawa about inconsistencies between these documents and the new CBSG guidelines. In particular, they noted proposals for negotiating only delegated powers for First Nations and adopting a Sechelt-like model for financial arrangements was out-of-step with what had been previously discussed with Yukon first Nations and subsequently endorsed by Cabinet as a negotiating mandate.¹³⁰

As self-government negotiations proceeded, the Ottawa Self-Government Negotiating Branch increasingly began to express an interest in playing a stronger role in formulating negotiating positions. Various procedures were also devised to deal with novel proposals arising at the CYI self-government negotiating tables. Consistent with directions sent a year earlier, the branch insisted that draft positions were to be screened by Ottawa and ISCSG,

¹³⁰ Whitehorse Federal Land Claims Office, Letter to Michael Whittington from Barry Stuart, File: CYI-Self-Government, 4.32. April 18, 1989

prior to the tabling of documents with First Nations.¹³¹

These new reporting requirements demanded an increased effort on the federal negotiating team's part to ensure the effective communications with Ottawa were maintained. However, with the important exception of an on-going dialogue among the Chief Federal Negotiator, the Associate Deputy Minister for DIAND and the DIAND Minister, the resources and expertise necessary to perform this important role were lacking.¹³² The process of bringing the expectations of principals and constituents into line with those of the Chief Federal Negotiator, in the form of obtaining a negotiating mandate, had been accomplished with the initialling of the November 1988 CYI AiP. Yet, the question of how to interpret and implement the Cabinet negotiating mandate for self-government, and who would make these interpretations - the policy-designers in Ottawa or the Chief Federal Negotiator in the Yukon - remained unsettled. If negotiations were to move forward, the mandate of the Chief Federal Negotiator had to be clarified.

131 Whitehorse Federal Land Claims Office, **Memorandum from Self-Government Negotiations Branch**. File: CYI-Self-Government, File 4.3.2. March 31, 1989.

132 Whittington, Michael, Chief federal Negotiator. **Personal Interview**, January 30, 1995.

On March 31, 1989, in a letter to the CYI Chief Federal Negotiator, DIAND's Assistant Deputy Minister for Self-Government set out the Chief Federal Negotiator's role and obligations with respect to his departmental constituents in Ottawa. These instructions emphasized his responsibility for coordinating and ensuring the compatibility among various aspects of the land claim and self-government agreements. Among these tasks was responsibility for overseeing the development of various pieces of federal and Territorial legislation to give effect to land claim and self-government agreements.¹³³

As a representative negotiator, the new feature of the Chief Federal Negotiator's mandate was the implied task of harmonizing the policy interests of CYI, the Yukon Government and Ottawa's departmental constituents. The CYI Chief Federal Negotiator was now to play the role of mediator or facilitator among these groups. Ultimately, one of these tasks, that of communicating between the Yukon federal negotiating team and various federal constituent departments in Ottawa, was only met when a staff person from DIAND's Self-Government Negotiating branch was seconded to the Whitehorse Federal Land Claims office to fulfil this

¹³³ Whitehorse Federal Land Claims Office. Gagnon to Whittington. File: CYI Self-Government 4.3.2. March 31, 1989

function.¹³⁴

As the Whitehorse federal negotiating team was preparing to negotiate, the Yukon government was also pressing ahead with its own policy review. Generally speaking, Yukon's approach to self-government issues was still evolving and its internal negotiating organization reflected this ad hoc approach, with different groups at different times taking the lead in developing negotiating positions:

....Negotiators who were working on self-government, up to the UFA, and were developing some concepts about jurisdiction and the way jurisdiction might be expressed, weren't always the persons who were familiar with the 1987 work, in the context of negotiation discussions between the negotiators among parties ...that work began to well-up and take hold a little bit, and in a sense get displaced by some internal thinking, policy work by Deputy's.¹³⁵

As negotiations proceeded, the CATCO coalition's negotiating strategy also began to evolve and they began to

¹³⁴ Whittington, Michael, Chief federal Negotiator. *Personal Interview*, January 30, 1995.

¹³⁵ McTiernan, Timothy, Principal Negotiator, Yukon Government. *Personal Interview*, February 23, 1995.

develop what was to become a common legal and political framework for three of the first four First Nation final and self-government agreements:

...we would build upon the concept that if you got a section or two up in Old Crow, the concept was to consolidate section one and two in Champagne/Aishihik and do steps three and four at Haines Junction, and then if necessary take that and get steps five and six down in Teslin....it worked quite well amongst the first four, certainly amongst the first three in those terms, and so that's sort of how CATCO evolved as part of that process and that was very important.¹³⁶

In March 1989, a number of changes occurred at CYI. The chairperson of the Council for Yukon Indians, Mike Smith, abruptly resigned, not one-third of the way into his three-year term. This was followed by the election of Judy Gingell as CYI's the first woman chairperson. Amid growing disenchantment with CYI's coordinating role in negotiations, CYI's executive established a task force to decide what the future role of CYI should be after a land claims settlement was complete.

On May 29, 1989, the CYI, DIAND Minister and Yukon

¹³⁶ Dave Joe, CYI Chief Negotiator, Personal Interview. Whitehorse, February 17, 1995.

Government leader signed a Yukon Indian land claim Agreement-in-Principle. Despite occasional threats of legal action or to withdraw from negotiations, in retrospect all parties had benefited from an early, prior agreement among negotiating teams to pursue a collaborative or interest-based approach to negotiations. Throughout the AiP negotiations, the need for parties to deal effectively with inter and intra-organizational communications surfaced time and again as a key issue confronting parties. The task that now lay ahead for negotiating teams was to explore in greater depth those issues that had been identified in the process of negotiating the CYI AiP, and identify options for concluding, on a chapter-by-chapter basis, a Territory-wide land claim Umbrella Final Agreement.

Generating Ideas and Problem-solving

The March 1989 federal Cabinet ratification of the CYI AiP served to officially kick-off the next round of negotiations. However, negotiators had decided early on in the negotiation of self-government arrangements that it would be necessary to deal with some issues outside of a self-government negotiating process. These issues, such as the administration of justice and taxation agreements, were

either too complex or contingent on future events to be satisfactorily resolved within the limited time-frame available for concluding Yukon First Nation self-government agreements. Other ways would have to be found to address these.

One approach taken was to create working groups to research, advise and recommend on various options for self-government arrangements. Ad hoc working groups often took shape in the context of a particular negotiating session that itself had been designated as a "working group session". During such sessions, direct negotiations were put aside in favour of having a broad discussion about what principles and concepts parties wished to see reflected in various sections of the agreement. For example, a self-government working group session held in Mayo, April 12, 1991 with Nacho Nyak Dun First Nation led to a wide ranging discussion of self-government and district government concepts, helping negotiators identify issues that were of critical importance to reaching agreement.¹³⁷

Working groups were also formed with a view to clarifying legal drafting and technical or procedural

¹³⁷ Whitehorse Federal Land Claims Office, "Self-Government Negotiations". Lackowicz to Hanson. April 30, 1991.

elements of agreements. These groups, which might consist of legal counsel for parties, constituent department representatives or persons with expert knowledge in a given subject area, would undertake to review questions concurrently with on-going negotiations. They provided advice to the self-government negotiating table on how to proceed in the form of options and recommendations that might otherwise have required months of protracted negotiations to sort out.¹³⁸

The "workshop" format was also used to develop both concepts and language for incorporation into agreements. For example, in April and June 1989 two workshops were held in Vancouver and Haines Junction, respectively, to address specific self-government issues. For example, at the second conference, at the request of CYI Chief negotiator Dave Joe, workshop moderator Paul Tennant reworked a draft of the proposed Champagne-Aishihik Self-Government Agreement broadening the scope of self-government powers with respect to local government. As Tennant later reported:

¹³⁸ Dave Joe, CYI Chief Negotiator, *Personal Interview*. Whitehorse, February 17, 1995.

I have re-organized and consolidated some of the provisions, and added some powers, but only the sort that local governments ordinarily have in Canada....I have steered away from the notion of "exclusive" powers versus "concurrent/joint agreement" powers - and for two main reasons: i) even so-called exclusive powers can usually be expected to require joint agreements with Government if there is to be effective implementation; ii) in developing and exercising the so-called concurrent powers as set out in the 27 June discussion paper the First Nation would have remained dependent upon Government - and this despite the fact the powers in question are perfectly ordinary local government powers in the Canadian context.¹³⁹

The re-worked draft proposed incorporating new features, such as an advisory body for non-First Nation members and joint planning with neighbouring municipalities. These technical changes were subsequently incorporated as a first cut at defining the scope of First Nation jurisdictional powers within the Champagne-Aishihik First Nations Self-Government Agreement. Another technique for dealing with complex issues was, with the general agreement of all parties, to defer their consideration for future negotiations. Though this procedure did not arise with any frequency until near the conclusion of self-government

¹³⁹ Whitehorse Federal Land Claims Office. Letter from Paul Tennant, University of British Columbia, to Gerry Hutchings. File: CYI Self-Government. 4.3.2., July 18, 1989.

negotiations, it proved an invaluable aid to negotiators and helped frame the substance of the compromise that emerged between First Nations and government. In such instances, the drafting of legal text capable of giving comfort to all parties was of paramount importance.

During the summer and fall of 1989, parties devoted themselves to a process of elaborating their interests with respect to subject-matter identified in the AiP for self-government. For the federal government negotiating team, this process entailed two-to-three intensive negotiating sessions in communities, followed by government caucuses in the Yukon, and less frequent but intensive ones in Ottawa. Throughout this period, the parties identified many key self-government issues that were potentially problematic. However, it became apparent it would be impossible to complete the process without first developing an outline of what a self-government agreement might look like.¹⁴⁰

In March 1990, national constitutional issues related to self-government began to overtake discussions at the negotiating table. Coincident with this, after a delay of

¹⁴⁰ Whitehorse Federal Claims Office. "Yukon land claims and Self-Government: Reconciliation." File: CYI Self-Government, 4.3.2. July 28, 1989; "Ibid", "Comments on Discussion Paper on Nacho Nyak Dun Self-Government". File: CYI Self-Government, 4.3.2. September 26, 1989

more than two years, federal Cabinet re-affirmed its decision of March 1988 that Yukon First Nation self-government agreements would not receive the same level of protection under the Constitution as their land claim agreements.¹⁴¹ This precipitated a political response from both CYI and the Yukon Government.

On March 28, 1990, in a presentation to the House of Commons Standing Committee on Aboriginal Affairs, CYI outlined its position on self-government, asking for constitutional protection of such agreements outside the current Meech Lake constitutional process. The logic of CYI's position was that it had never extinguished its Aboriginal rights or title to the Yukon Territory, therefore the federal government should not oppose its desire to have its self-government agreements constitutionally protected and it should not have to await the outcome of the Meech Lake constitutional process.

CYI asserted that Canada's exclusive authority and jurisdiction in the Yukon and the Northwest Territories meant there was no constitutional or legal impediment to its entrenching Yukon First Nation self-government agreements in

¹⁴¹ Whitehorse Federal Land Claims Office. Yukon Media Summary. February 19 - March 2, 1990

the Constitution. Moreover, CYI also asserted that section 35(1) of the Constitution Act(1982) already affirmed an Aboriginal right to self-government. Finally, the Yukon Government supported CYI's goal of having First Nation self-government agreements constitutionally entrenched. As evidence in support of this last assertion, CYI tabled a letter from Yukon Premier Penikett supporting the constitutional entrenchment of Yukon First Nation self-government agreements.¹⁴²

On March 31, 1990, after an all-night bargaining session, CYI, federal and Yukon negotiators announced agreement had been reached on all outstanding issues which were unresolved at the time of the signing of the May 29, 1989 CYI AiP. When the AiP was unveiled a month later, despite much fanfare in the local press, the only change made was the provision of some additional funds for training; there were no substantive changes in the federal government's position on the constitutional protection of self-government or land quantum.¹⁴³

¹⁴² Whitehorse Federal Land Claims Office. "Notes on a presentation by Dave Joe to the Standing Committee on Aboriginal Affairs". File: CYI Self-Government, 4.3.2. March 28, 1990.

¹⁴³ Whitehorse Federal Land Claims Office. Yukon Media Summary. June 18 - July 13, 1990

At a July 1990, the CYI general assembly at Brooks Brook, the negotiation of self-government once again took a back seat to the issue of the land quantum and financial compensation.¹⁴⁴ Again, wide-spread dissatisfaction was expressed with respect to the quantum available and the method used for land allocation. In September, CYI suspended negotiations out in sympathy with the Mohawks' armed struggle at Kanehsatake. Then, in October 1990, in the aftermath of the Kanehsatake debacle, the federal government increased its offer of land quantum associated with land set-aside.¹⁴⁵ The offer provided a face-saving opportunity for CYI to get back to negotiations. In January 1991, CYI Chairperson Judy Gingell called a special general assembly to endorse these changes. With the last major impediment to completing the Umbrella Final Agreement process removed, the only remaining issue was the question as to what form Yukon First Nation self-government would take and whether or not it would be constitutionally protected.

¹⁴⁴ Whitehorse Federal Land Claims Office. Yukon Media Summary. CBC Radio, August 8, Yukon News August 6 - 10, Whitehorse Star, August 13-17, 1990

¹⁴⁵ Whitehorse federal Claims Office. Yukon Media Summary. CBC Radio, August 10, September 25 & 26, CHON-FM, October 1990.

Summary

During negotiations leading up to a new CYI Agreement-in-Principle and preliminary sessions toward developing a Territory-wide Umbrella Final Agreement, the parties began to reap the benefits of their earlier decision to adopt a collaborative approach to negotiations. For Yukon First Nations, this collaborative approach helped create the necessary pre-conditions for a First Nation negotiating team to emerge, in the shape of the CATCO alliance. Similarly, cooperation among First Nation negotiating teams enabled the Chief Federal Negotiator to get at First Nations' common interests and concerns more quickly, and led to a more coherent and consistent explanation of these interests to departmental constituents in Ottawa.

Increased sharing of information among parties also led to the explicit use of networks of expert advisors, as adjuncts to the negotiating table. Negotiators could request and receive options and recommendations from joint working groups. This greatly assisted the resolution of complex technical issues while allowing negotiators to press ahead on other matters.

Cooperation among negotiating teams not only led to

formal networking among constituent advisors, but also served to bring negotiators to focus on the limited time-frame that was available for concluding an agreement. This consideration led negotiators to contemplate how a variety of issues might be dealt with strategically, through the use of process clauses. With these tools in place, and with a view to the limited time left for concluding a First Nation self-government agreements, negotiating teams turned their attention to the substantive issues involved in shaping a proto-type Yukon First Nation self-government agreement.

Chapter 5

NEGOTIATING A DRAFT MODEL SELF-GOVERNMENT AGREEMENT

In 1990, the general parameters of what might be included with a Yukon First Nation self-government agreement were laid out for negotiating teams in the form of preliminary drafting guidelines for self-government legislation. These were similar to the rolling drafts of proposed self-government agreements parties had used to guide negotiations at the table from time-to-time. The purpose of the self-government legislation in relation to the land claim final agreements and settlement legislation was clarify the relationship between "rights", as defined in section 35(1) of the Constitution Act (1982), and institutional arrangements provided for in self-government agreements to give effect to First Nation jurisdictional powers.

The preliminary drafting guidelines for self-government legislation suggested that Yukon First Nations would themselves develop their own constitutions, containing the necessary detail to allow First Nations to be recognized under the proposed federal legislative framework. At the

same time, First Nation constitutional government would provide the basis upon which a First Nation could enter into self-government arrangements with other governments, as arrived at through negotiated agreements. As well, these negotiations would serve as the process by which First Nations would identify which legislative powers they wished to include within their jurisdiction.

The preliminary legislative drafting guidelines also suggested First Nation constitutions were not to be stand alone documents. Instead, they would be linked to and would be an essential requirement of the self-government agreement, and would be consistent with it. Unlike the Sechelt model, they would not require the Governor-in-Council to approve future changes. Also, they would contain what in non-claims community-based self-government agreements was normally found in the self-government agreement: procedures for a First Nation to review and amend their own constitutions.¹⁴⁶

Shaping an Agreement on Self-Government

CATCO had been particularly interested in discussing

¹⁴⁶ Whitehorse Federal Land Claims office. Memorandum to George Dapont from Simon McInnes. CYI-Self-Government, 4.3.2. January 16, 1990

how government viewed the legislative powers of First Nations. Champagne and Aishihik Chief Negotiator Dave Joe had expressed concern that First Nations were being guided toward establishing contractual or delegated arrangements in areas of First Nation jurisdiction. As well, CATCO was interested in hearing government's views on paramountcy, how the potential for concurrent federal, Yukon and First Nation laws would be reconciled, and the effect any constitutional protection which might be afforded self-government would have on laws passed by a First Nation.¹⁴⁷ Based on these considerations, a working paper on Yukon First Nation self-government arrangements was prepared.

At the July 18 and 19, 1990 CATCO negotiating session in Haines Junction, parties reviewed the latest draft self-government agreement and discussed the possibility of developing a prototype or model agreement. In September 1990, negotiations were suspended during the Oka crisis, but resumed in November. Again, at these sessions, issues relating to jurisdiction continued to dominate discussions. During the suspension of negotiations, the Self-Government Negotiating Branch in Ottawa began to formulate questions on jurisdictional issues respecting the implementation of CYI

¹⁴⁷ Whitehorse Federal Land Claims Office. Memorandum to M. Whittington from E. Hanson. File: CYI Self-Government, 4.3.2. July 13, 1990.

self-government. Prominent among these, parallelling CATCO's concerns, were issues with respect to the scope of First Nation legislative powers, how concurrent jurisdiction for Yukon and First Nations was to operate, together with options for financing First Nation self-government.¹⁴⁸

In January 1991, after reviewing the scope of proposed jurisdictional arrangements for First Nation self-government, it became apparent that if the legislative base for self-government was to be wider than just settlement lands, Yukon's agreement would be necessary. Yet, while questions of concurrent jurisdiction and financing First Nation self-government were inextricably linked, both were highly technical issues requiring consultation with experts in these respective fields. In response, negotiators struck the first of two important self-government technical working groups. The first working group was asked to review and prepare draft language on First Nation legislative jurisdiction. Peter Hogg, professor and constitutional lawyer who had been retained by CYI as counsel for purposes of legislative drafting, took the lead in drafting.

¹⁴⁸ Whitehorse Federal Land Claims Office. "Yukon First Nation Issues". Self-Government Negotiating Branch. CYI Self-Government, 4.3.2. February 27, 1991

A number of reviews of draft legal language were produced by the legislative jurisdiction technical working group and circulated to parties. These eventually resulted in a consensus which found its way into a proto-type Self-Government Agreement "rolling draft". The issues addressed in this drafting exercise responded to questions about the operation of concurrent jurisdiction, paramountcy of First Nation laws and Yukon Laws, inconsistency or conflict of laws, and possible spill-over effects.

As the issues surrounding questions of jurisdiction came into sharper focus, the Yukon negotiating team became more insistent that parallel issues respecting the financing of First Nation self-government should also be dealt with and proposed creating a technical working group to review financial issues. On February 26, 1991, in a meeting with DIAND Associate Deputy Minister Richard Van Loon, Yukon Principal Negotiator Douglas McArthur presented a study proposal on the subject of financing self-government. Yukon argued the study was necessary because the underlying fiscal framework for Yukon First Nation self-government was unclear.

Given the differing state of affairs within Yukon First Nations, Yukon argued, there was likely to be a wide

variation in approaches taken and distribution of responsibilities among governments. As well, there were questions about the capacity of First Nations to resource self-government, among them the question of how concurrent taxation by Yukon First Nations, the Yukon Government and the federal government would operate on settlement lands. The Yukon Government also wished to know whether assuming jurisdiction over taxation of settlement lands also entailed a reciprocal obligation to fund First Nation program and services?¹⁴⁹

Although the Yukon negotiating team, within its own caucus and in discussions with its constituent departments, had come to feel comfortable with the list of powers that First Nations would have, the fundamental question remained as to how these agreements would be resourced, and how these resourcing arrangements would work.¹⁵⁰ Yukon believed that whatever the federal policy framework for financing First Nation government was to be, it should be acceptable to the Yukon Government. After discussion among government negotiators, it was decided a review of options and

¹⁴⁹ Whitehorse Federal Land Claims Office. "YTC Issues raised at Self-Government discussions", Note to file. File: CYI Self-Government, 4.3.2. November 27, 1990.

¹⁵⁰ McTiernan, Timothy, former Assistant Deputy Minister, Land Claims Secretariat, Government of Yukon. Personal Interview, February 23, 1995

recommended approaches for a First Nation self-government fiscal framework should take place. It would take the form of a second technical advisory group to the self-government negotiating table with participation from all three parties, including Robin Boadway, a professor at Queen's University, acting as advisor to the committee.¹⁵¹

From First Nation's perspective, the negotiation of a sound financial base for their self-government was also of critical importance. Generally speaking, each First Nations' share of financial compensation was destined to be managed in perpetual trusts. Besides limited Indian Act funding for existing program and services, the only immediate prospect for additional income was interest from compensation fund investments and whatever other revenue might be generated from economic development activities. This appeared to some to be a slim base from which to fund First Nation programs, both on and off settlement lands.

Generally speaking, complex issues regarding jurisdiction and financing created an incentive for negotiators to explore the use of process clauses as a means

¹⁵¹ Whitehorse Federal Land Claims Office. "Self-Government Finance Study: Some Preliminary Thoughts" Douglas McArthur. File: CYI Self-Government 4.3.2. February 15, 1991

for resolving issues and obtaining agreement. Process clauses not only allowed negotiators to defer difficult decisions to future negotiations, but also provided an opportunity for negotiators to give structure to the emergent intergovernmental relationship among parties.

In overview, the specific process clauses incorporated into the first four Yukon First Nation self-government agreements can be categorized according to the type of dispute resolution process identified where parties perceived a need for future resolution of some issue. Figures (4) and (5) gives some indication of the extent to which the first four Yukon First Nation self-government agreements allocate implementation issues to independent decision-making by parties, joint decision-making or third party decision-making processes following ratification of agreements.¹⁵²

On March 31, 1991, parties to the negotiation had agreed on a new deadline of August for completing and ratifying all of the first four First Nation final agreements and self-government agreements. Yet, in the

¹⁵² note: Figure (4) uses the Champagne Aishihik First Nations Self-Government Agreement, signed May 29, 1993, as it is the most up-to-date agreement for purposes of displaying agreement dispute resolution processes.

YUKON SELF-GOVERNMENT AGREEMENT (SGA) - PROCESSES FOR DISPUTE RESOLUTION ¹			
SEPARATE ACTION - JOINT-DECISION MAKING - THIRD-PARTY DECISION-MAKING ²			
separate action tacit coordination	consultation-negotiation mediation-conciliation	arbitration or adjudication	
3.7 defining "Gov't" as set out in SGA	5.1-3 drafting of legislation		
	6.1 amendment and review	6.4 dispute resolution for 6.3 (UFA) 26.3.0	
	6.3 "most favoured nation" status	6.5 dispute re: "most favoured nation" clause	
12.1-3 power to delegate	4.1.3 ratification		
13.1-23 exclusive powers	6.6 five year review (SGA)	6.6.5 amend in accordance with Five Year Review	
7.4 "best efforts" to amend Govt legislation	7.3 parties "best efforts" amend agreement	8.1-12 Interpretation and application of law	
13.4-7 emergency powers amend legislation.		10.1-7 constitution consistent with cgreement	
		13.5 Laws of General Agreement	
	13.6-5.2 administration of justice	13.6-7 expiry date for justice	

Figure 4: Canada, Champagne and Aishihik First Nations, May 29, 1993, DIAND; ²Puritt, G., and Carnevale, P.J., Negotiation in Social Conflict. Open University Press. England. 1993. p.4

YUKON SELF-GOVERNMENT AGREEMENT (SCA) - PROCESSES FOR DISPUTE RESOLUTION¹
(Cont'd)

SEPARATE ACTION - JOINT-DECISION MAKING - THIRD-PARTY DECISION-MAKING²

separate action tacit coordination	consultation-negotiation mediation-conciliation	arbitration or adjudication
14.6 Yukon to share tax room	14.4 laws respecting taxation 14.6.2 provision of local services 16.-17 financial and program transfer agreements	14.7 amend in concurrence with changes to Indian Govt tax policy
20. power to adopt laws of Canada and Yukon	18. Yukon's financial contribution	15. First Nation tax status 19. First Nation revenue 21.1 public registrar First Nation laws
25.14.2 refer land use issues to dispute resolution	21.2 central registry of first Nations laws and constitutions 24.1-5 submit FTA, PSTA or any other dispute to mediation or arbitration	22. prepare and publish financial statements 23. conclude an Implementation Plan
27. establish processes for consulting on regional planning and district governments	29. establish regime for new reserves	25.1 establish joint planning 26.1 establish local service agreements

Figure 5: Carada, 'Champagne and Aishihik First Nations, May 29, 1993, DIAND; Puritt, G., and Carnevale, P.J. Negotiation in Social Conflict. Open University Press. England. 1993. p.4

intervening period optimism about an early completion of a Model Self-Government Agreement package faded as the federal government and First Nations came to logger-heads over the issues of constitutional protection and the financing of First Nation self-government.

In the final round of negotiations leading up to the initialling of the November 29, 1991 draft Yukon First Nation Model Self-Government Agreement most of the major issues as to the future shape of Aboriginal self-government in the Yukon Territory had been decided, including the contentious issues relating to Yukon's sharing of jurisdiction with Yukon First Nations and how this would be implemented. Yet, outstanding issues as to the paramountcy of federal laws, tax arrangements, and from the Territorial side, the status of Yukon Government's exclusive bilateral financial relationship with Canada, remained to be settled.

Equal Exchange, Fair Compromise: Agreement

In August 1991, DIAND Minister Siddon and CYI Chair Judy Gingell once again reviewed progress made toward completing a "rolling draft" of the Self-Government Agreement, agreeing more work still needed to be done. CYI's

workplan proposed completing negotiations, and First Nations and Yukon ratifying the UFA plus four First Nation Final Agreements and Self-Government Agreements by March 31, 1992. Federal Cabinet ratification would follow, with federal legislation to be introduced to Parliament by the fall.¹⁵³

On November 29, at 4:00 a.m. after an all night session in Ottawa, negotiators initialled a draft Model Self-Government Agreement. There was general consensus that the parties had gone as far as they could go:

I think we had reached the point where we had the basis for closing...there had been a lot of hard work and very difficult negotiations, but there was a real sense of accomplishment. We still had some concerns... I think the CYI showed a lot of willingness to listen to those and dispel some of that. The fact that they showed that willingness in the face of grave problems and difficulties convinced our side that we were in agreement.¹⁵⁴

The draft Yukon First Nation Model Self-Government Agreement was a substantive arrangement, intended to give

¹⁵³ Whitehorse Federal Land Claims Office. "Meeting between Gingell and Siddon". Note to file. File: CYI Self-Government, 4.3.2. August 1, 1991

¹⁵⁴ McArthur, Douglas, Principal Negotiator, Yukon Government. Personal Interview. January 27, 1995

constituents and principals a sense of where negotiators were headed. Yet, in early February 1992, to the federal government's surprise, CYI organized a special general assembly and publicly ratified both the Umbrella Final Agreement and draft Model Self-Government Agreement. With this move, the fabric of the Model Self-Government Agreement began to unravel. During the final stages of negotiations, the Chief Federal Negotiator had advised parties that provisions respecting the federal paramountcy of laws, which were already reflected in the agreement, would have to be made explicit. From the federal perspective, revisions would have to be made. The proposed draft Model Yukon Self-Government Agreement was simply a work-in-progress:

It wasn't that there had been a paramountcy clause that gave CYI paramountcy, the problem was there was a list of powers for First Nations, if they occupy a field, then the laws of general application don't apply, but the list was a list of only provincial powers; there was nothing there that was federal. So I said we don't need paramountcy, it's like a section 92; all the federal powers are still there....Justice said no, for greater certainty we want a clause in that says none of this affects federal jurisdiction. I lost that argument.¹⁵⁵

¹⁵⁵ Whittington, Michael, CYI Chief Federal Negotiator. *Personal Interview*, January 30, 1995.

In February 1992, unexpectedly, the federal Department of Finance raised new concerns. A senior official in the department suggested the Chief Federal Negotiator had failed to follow the department's negotiating instructions. Despite having had their own representative on the finance technical working group to help in drafting the taxation section of the Model Self-Government Agreement, federal Finance officials now decided they wanted new language to substitute for the general principles stated in the agreement. Support for such revisions also came from the Yukon Territorial Department of Finance and DIAND's Northern Affairs Program, both of whom were unhappy with the wording in the section dealing with Yukon Government contributions and wished to see it revisited.

On a more philosophic note, the Department of Finance also objected to the Chief Federal Negotiator's open advocacy of the concept that First Nation financial arrangements should not be "needs driven", that First Nations should have to make the same political choices any other governments must make, and that they should have broad powers of taxation, up to and including the ability to levy income tax. This message, Finance officials argued, was contrary to the message being presented in speeches to First

Nation audiences by their Deputy Minister.¹⁵⁶ Beyond rhetoric, the substantive disagreement within the government negotiating team concerned the unresolved question as to how federal obligations to fund First Nation programs and services off settlement lands were to be met.

By April 1992, it was clear. The Yukon Model Self-Government Agreement, initialled on November 29, 1991 by negotiators with great fanfare in the Yukon press, would now have to be re-opened. Re-opening the agreement required the consent of all parties. It could only be done at significant cost to the federal government, yet the federal team could not re-negotiate any major elements of the package without seriously warping the delicate fabric of the agreement. Accordingly, the federal team looked for places to make trade-offs. And, as had been the experience in concluding the CYI AiP, the place to look for concessions at least cost to established federal principles was the financial aspect of the land claim agreement.

In the months preceding the re-negotiation of the draft Model Self-Government Agreement, Yukon Premier Penikett went out of his way to assure Yukoners in general, and

¹⁵⁶ Whittington, Michael, CYI Chief Federal Negotiator. **Personal Interview**, January 30, 1995.

municipalities in particular, that they would be protected from any reduction in the level of services resulting from the sharing of tax revenue with First Nations as a consequence of the agreement:

I want to assure anybody unless any fears or alarmist concerns have been raised on this score, that even the Cabinet of the Yukon Territory has not yet seen the final legal drafting of the documents.¹⁵⁷

DIAND's Associate Deputy Minister Richard Van Loon also attempted to assuage any anxiety created as a result of the Chief Federal Negotiator initialling the model agreement by suggesting that there was no discussion of re-opening First Nation special taxation rights on settlement land.¹⁵⁸

On March 5, 1992, in response to request from government officials, Judy Gingell wrote DIAND Minister Siddon suggesting that CYI would be prepared to consider changes in the Model Self-Government Agreement in return for changes to the Umbrella Final Agreement. CYI was sanguine at the prospect of re-opening the agreement:

¹⁵⁷ CHON-FM, News, February 3, 1992.

¹⁵⁸ CBC Radio Whitehorse, News, March 23, 1992.

....We recognized on our side of the table that the agreement that we thought was an agreement with either Canada or Yukon was not an agreement. So we were always pretty cautious about that we knew that we would have problem with the issue of paramountcy, we knew they would have problems with the issue of direct taxation, as with the issue of administration of justice, and it didn't surprise us that they would kind of claw back and we would have been shocked had they not clawed them back. But we basically had take a sort of pragmatic view in terms of, if they'd agreed to something and they want to take it back, in terms of contract law, and making a deal...saving face among their own caucus...we got Canada to recognize that they could not sort of speak with forked tongue.¹⁵⁹

On May 13, the offer communicated to CYI demanded substantially more than just revisions to wording with the respect to the paramountcy to federal laws. It also proposed changes for alternate wording for the taxation sections with respect to settlement lands, the provision of local services, and the sharing of tax room and taxation agreements where First Nations are performing the functions of governments, and self-government financial transfer agreements. These new demands galvanized the CYI caucus. As

¹⁵⁹ Dave Joe, CYI Chief Negotiator. Personal Interview. February 17, 1995.

the federal negotiating team trooped into negotiations on their first day of negotiations they were met with an ominous sign: the Canadian flag flying upside down outside the Yukon Indian Centre.¹⁶⁰ As CYI Chief negotiator Dave Joe observed:

We had to look at sort of face saving clauses that we could rationalize and explain to our own caucus because most of them were there when we had cut these deals and it would be hard to now go back and say you know, there's no agreement on self government because they want claw-backs on paramountcy, direct taxation, the administration of justice, etc. But there was no equation in our mind about money for these other issues. We never ever took the view that you can accurately quantify money for a right, we never took that view. Instead we said, all right this is not a bad deal, but how can we make it better for our people.¹⁶¹

From the Territorial government's perspective, revisions to the Model Self-Government Agreement were viewed as a cautious re-affirmation of the exclusive bilateral federal-Territorial funding relationship:

¹⁶⁰ Whitehorse Star, May 20, 1992. p.1

¹⁶¹ Dave Joe, CYI principal negotiator. Personal Interview, February 17, 1995.

The claw back was viewed in mixed terms by the Territorial government. On some dimensions it was constructive in that it clarified jurisdictional arrangements. Funding relationships could be dealt with more cleanly in the implementation process.¹⁶²

The federal offer to CYI was complex, yet the substantive issues were well understood. This was intended to be the last re-opening of the UFA and self-government agreement prior to the drafting of legislation for Parliament. The proposed offer reflected an important negotiating ritual of cooperation and competition between parties, punctuated by interim agreements; a ritual which had governed CYI negotiations since 1986. The parties mutual acceptance of the necessity for agreement, of equal exchange and fair compromise based on what was known and could be done at a given point in time, reflected a profound change in their negotiating relationship from that which had existed prior to 1986, following the rejection of the 1984 AiP.

¹⁶² McTiernan, Timothy, former Assistant Deputy Minister, Land Claims Secretariat, Yukon Government. *Personal Interview*, April 21, 1995.

Since 1986, the relationship between parties and their understanding of the issues under discussion had grown to the point that preservation of the emergent intergovernmental relationship became a higher priority than the ability of either side to claim victory in a single round of negotiations. It was on the basis of this new understanding, that parties were working towards an integrative agreement, that CYI agreed to re-open the Model Self-Government Agreement. Yet, in terms of Yukon First Nation's pursuit of recognition of a constitutionally protected right to self-government, or the federal and Yukon Governments' goals of legal and political certainty in land claims, little had changed in terms of the parties' primary concerns or interests. What did emerge, however, was a new intergovernmental forum through which they could continue to pursue the e interests in the future.

Almost five months after the November 29, 1991, initialling of the draft Yukon First Nation Model Self-Government Agreement, all parties had agreed to re-negotiate certain aspects of the arrangement. To a great extent, the future shape of First Nation self-government in the Yukon had been decided. CYI negotiators had realized their goal, even though (temporarily in their view) it had been clawed back. Federal and Territorial negotiators had been

successful in selling the agreement to their principals, but the greatest opposition it, and insurmountable in some instances, had come from constituent federal departments.

In review, during the period up to and including the negotiation of the draft Yukon First Nation Model Self-Government Agreement negotiators were able to shift the attitudinal structure of the relationship among parties. In particular, intergovernmental relations among Yukon First Nations and the federal and Yukon governments improved, generally. No longer always competitive, this new cooperative outlook would be exemplified in the first four Yukon First Nation Self-Government Agreements' bias in favour of mechanisms for consultation and negotiation, as opposed to adjudication, for resolving intergovernmental disputes.

Although the basis for Native - government relations in the Yukon changed during the course of self-government negotiations, it was not radically transformed. The absence of a commitment by principals, as reflected by constituent departments, to resolve significant issues such as taxation and federal paramountcy, precluded a complete transformation. As Walton and McKersie note, the effectiveness of negotiators in obtaining agreement is

bounded by the context of their relationship to their principals and constituents:

...the implications which the negotiator's internal control have for integrative bargaining depend upon the tendencies of the principals. If the principals have positive attitudes, are favourably disposed toward problem solving, and have relevant information and preferences, then greater and more diverse participation and influence should increase the effectiveness of integrative bargaining....Only if the negotiator can prevent provocative actions on the part of his own team or principals and only if he has the authority to make the timely gesture of trust or assistance, can he effectively pursue the attitudinal structuring process.¹⁶³

While resolving questions of federal paramountcy, taxation and others issues were critical to the goal of a complete transformation of the underlying basis for Native - government relations in the Yukon, such issues themselves were either tied to broader, federal-provincial interests or were simply too complex to be resolved within the limited time-frame available for completing agreements. Negotiators had no choice but had to take these fundamental issues and set them on the "too hard to do" pile, for resolution

¹⁶³ Walton, R.E., and McKersie, R.B, *A Behavioral Theory of Labour Negotiations*, p.359

another day in another forum.

Denouement

In late May 1992, with the government offer in place, Council for Yukon Indians Chair Judy Gingell announced a leadership meeting to review the proposal, stating to the media that she was confident that the new language of the self-government agreement was acceptable:

I don't feel were are giving up anything here. It's just to clarify what is really meant, a better, clearer understanding by all parties.¹⁶⁴

On May 30, 1992, the CYI, federal and Yukon government negotiators initialled a CYI Umbrella Final Agreement. An all-party news release announced the Yukon Government would proceed with enabling legislation for the land claims and self-government agreements immediately. It was anticipated the federal package would be ready for ratification by Parliament in September or October. Yukon Premier Penikett, speaking to the Yukon Legislative Assembly on the introduction of the legislation, noted the significance of the agreement and its implications for Native - government

¹⁶⁴ CHON-FM, May 25, 1992. 12:00 p.m.

relations in the Territory:

...legislation is the final stage in terms of the politicians role, if you like...the settlement of claims and the implementation of self-government here, marks a real turning point....We will be starting a new chapter of Yukon life with an understanding that is, if you like, a social contract between First Nations here and between non-aboriginal people.¹⁶⁵

With agreement between the parties on draft language to be incorporated into the first four Yukon First Nation Self-government Agreements, parties continued onto the next phase - drafting legislation. Unlike the experience with the 1984 AiP, the timing for ratifying Yukon land claim agreements appeared to be in a state rare harmony with developments in the national constitutional forum. The Charlottetown Accord appeared headed for success in a national referendum, carrying with it provisions for recognition of a right to Aboriginal self-government, including:

- a delay of five years before self-government issues could be taken to court;

¹⁶⁵ CHON-FM, May 25, 1992. 12:00 p.m.

- agreement by Native groups to help finance self government, including through provisions for income tax;
- agreement by governments to seek the consent of Aboriginal people for any future changes to the constitution which could affect their interests.¹⁶⁶

However, in October 1992, the failure of the Charlottetown Accord to give a national "top-down" endorsement for the constitutional entrenchment of Aboriginal self-government appeared to vindicate the federal government's earlier April 1985 FMC commitment to explore the concept of self-government for Aboriginal peoples on a case-by-case basis, by constitutional means and otherwise. In the Yukon, work on completing the first four First Nation final land claim and self-government agreements continued apace, with the first three of four sets of Yukon First Nations agreements initialled in October and November.¹⁶⁷

In November 1992, with the first four First Nation Final Agreements and Self-Government Agreements by-and-large complete, negotiators turned their attention to the task of completing implementation plans and financial transfer

¹⁶⁶ CBC Radio Whitehorse, July 7, 1992. 12:30 p.m.

¹⁶⁷ Vuntut Gwitchin Tribal Council, Nacho Nyak Dun First Nation, Champagne and Aishihik First Nations, and Teslin Tlingit Council.

agreements.¹⁶⁸ That same month, before the Yukon Legislature could pass legislation giving effect to Yukon First Nation self-government and final agreements, the furries also set upon the Yukon New Democratic Party government and it was defeated at the polls.

Federal negotiators had hoped to see the first four Yukon First Nation final and self-government agreements through federal Cabinet by mid-October 1992, but having missed this deadline parties set a new one of mid-December for completing all agreements, with a proposed mandatory Cabinet review in February.¹⁶⁹ On December 10, 1992, in the midst of an Ottawa snowstorm, the Yukon and federal governments and Yukon First Nations reached agreement on implementation and financial transfer arrangements. These included a detailed costing of land claim, Umbrella Final Agreement and Self-Government implementation funding to flow to First Nations and the Yukon Government.

The defeat of the Yukon New Democratic government heralded a period of declining fortunes and controversy for

¹⁶⁸ Whitehorse Federal Claims Office. Letter from Barry Robb to Judy Gingell, May 22, 1992, and, McLean to Robb, File: CYI Self-Government 4.3.2. June 26, 1992; Whitehorse Star, December 4, 1992, p.1.

¹⁶⁹ Whitehorse Star, December 1, 1992

Yukon Government negotiating team. The collaborative approach between the federal and Yukon teams appeared to come to an abrupt halt with the commencement of implementation negotiations. For the Yukon team, this period marked a conjunction of unfortunate events:

...the demise of the Charlottetown Accord, at the same time you had a change in government at the YTG level, and the first serious financial crisis of the Yukon Government since the emergence of responsible government, and the first indication that expectations about implementation dollars for claims weren't going to be realized in real terms, led to a refocus of Yukon priorities on money and hence a perception by some of a withdrawing of the Yukon Government from any ability to serve as an honest broker, to serve as an advocate of Aboriginal rights or act as a partner with First Nations or with the federal government.¹⁷⁰

On March 17, 1993, Yukon legislative assembly ratified two bills giving assent to the **CYI Umbrella Final Agreement** and the First four First Nation Self-Government Agreements, An Act Approving Yukon Land Claim Final Agreements and First Nations (Yukon) Self-Government Act. The Vuntut Gwitchin were the last of the first four First Nations to ratify

¹⁷⁰ McTiernan, Timothy, former Assistant Deputy Minister, Land Claims Secretariat, Yukon Government. Personal Interview, April 21, 1995.

their agreement, doing so in May 1993. On May 29, 1993, an official signing ceremony was held in Whitehorse for all parties to the **CYI Umbrella Final Agreement**, and first four Yukon First Nation Self Government Agreements, Final Agreements and companion agreements.

In early September 1993, a federal election was called, raising the prospect of a further one or two-year delay in the introduction to Parliament of federal Yukon land claims and self-government legislation. On December 1, 1993 the Liberal Party of Canada won a sweeping majority in a federal election. Instantly, the Liberal Party's "Red-Book", and specifically, its policy platform calling for the recognition of an "Inherent Right to Self-Government" held out the promise to Yukon First Nations that at long last their fledgling self-government agreements might be transformed into a constitutional blue-print for a new era of federal-First Nation relations in the Yukon Territory.

Summary

From 1987, onwards, CYI, Yukon and federal negotiators openly advocated an interest-based approach to negotiation, acknowledging at the same time that the negotiating

relationship was usually more competitive than cooperative. Despite this, through a process of successive agreements including in an Umbrella Final Agreement and Yukon First Nation Model Self-Government Agreement, the parties forged a new relationship, one governed both formally and informally by a respect for basic procedural fairness in negotiation.

In pursuing a broad-based strategy for cooperative negotiations, the parties developed and employed sophisticated negotiating techniques and strategies in their pursuit of agreement. The use of such tactics as manipulation of time-preferences (deadlines) and settings (community-based negotiations), their structuring of multi-tiered negotiations and use of multi-level agreements, together with their use of such organizational strategies as the development of negotiating coalitions, workshops and technical working groups, all showed that parties had become increasingly more sophisticated in their use of negotiating techniques with the passage of time.

In following an interest-based approach to negotiations, one which allowed for the re-structuring of negotiations into its cooperative and competitive elements, parties showed they were not only capable of learning from experience, but also capable of incorporating this acquired

knowledge into their agreements through the use of process clauses. In this way, the major issues they had failed to overcome during the 1984 AiP ratification process (constitutional protection for self-government; extinguishment; and, financing for First Nation programs) were resolved in the 1993 agreements, but were, nevertheless, overcome as obstacles to agreement. In order to bring twenty years of claims negotiations to a close, the parties had to create a new framework for addressing these same issues. This new intergovernmental relationship not only provided a new forum for continuing debate on these same issues, but also provided a way of getting beyond them by recognizing Yukon First Nations as another order of government. This was the parties' major achievement.

CHAPTER 6

CONCLUSION

The evidence in this thesis suggests that, between 1984 and 1994, First Nation and government parties to Yukon land claim negotiations achieved a political accord on a new intergovernmental relationship, as exemplified in their May, 1992 consensus on a draft Yukon First Nation Model Self-Government Agreement. This accord was realized when parties borrowed, derived and created for themselves a custom-tailored set of rules to decide for purposes of negotiating self-government:

- i) what was to count as fair and appropriate procedures; and,
- (ii) having obtained (i) above, what then constituted equal concession and fair compromise.

In examining and reviewing the evidence, the following conclusions were reached in support of this finding.

In chapter one, the question was asked whether the contemporary comprehensive claims process is truly a process of negotiation, some other type of dispute resolution

process, or a hybrid of processes. It also suggested that litigation is the only viable dispute resolution process available to a First Nation where a serious power imbalance exists between itself and the other negotiating parties.

Chapter one noted the current comprehensive claims process offers First Nations two viable alternatives for dispute resolution: negotiation or litigation. The evidence suggests that, in a situation where a serious power imbalance exists and the First Nation is the weaker party (the usual situation) negotiation remains the best option for obtaining agreement. Litigation was observed to be an important tactical consideration, but even then should only be considered as part of what must be a broader, overall strategy of negotiation.

Important evidence in support of this conclusion was found in the Yukon land claim agreement itself. Despite an initial federal insistence that a "final" agreement must include a blanket extinguishment of Aboriginal rights, Cabinet eventually relented, agreeing to accept a partial extinguishment in its place. In regard to this concession, the Royal Commission on Aboriginal Peoples recently observed that the Yukon land claim settlement "stands alone among

modern Treaties".¹⁷¹ It is noteworthy that this concession was achieved without recourse to litigation.

In agreeing to a partial extinguishment of Aboriginal rights in the Yukon, the federal government created momentum for the negotiation of subsequent Yukon First Nation self-government agreements. It did so by holding out to Yukon First Nations the possibility that such agreements might eventually be affirmed as section 35(1) treaty rights under the Constitution by means of a federal-provincial accord, while tacitly accepting that, in lieu of this, affirmation might be achieved through the courts. This approach demonstrated the federal government's commitment to achieving a political accord, while acknowledging the important role played by the courts in recent history in setting the ground rules for failed claim negotiations.

In chapter one, in discussing how First Nations might go about deciding whether to pursue negotiation or litigation, two factors were identified that disputants should consider in choosing among available dispute resolution processes: the nature of the relationship among

¹⁷¹ Canada, *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment*. Royal Commission on Aboriginal Peoples. Minister of Supply and Services. 1995.

parties; and, the relationship between the substantive issues involved and the processes available for their resolution.¹⁷² Following a review of the literature on the theory and practice of negotiation, chapter two suggested this hypothesis could be re-stated by giving priority to the consideration of the first factor: the nature of the relationship among parties. This re-consideration came about as a result of a review of the traditional paradigm of negotiator as "self-interest maximizer".

Following an extensive discussion of the "nuts and bolts" of strategies and tactics for negotiation, it was argued that the traditional paradigm of negotiator as "self-interest maximizer" was incapable of overcoming various negotiating quandaries and dilemmas. Generally speaking, the cause of this failure can be attributed to the traditional paradigm's inability to integrate both the cooperative and competitive elements of negotiation. As an alternative, chapter two proposed adopting an "interest-based" approach to negotiation. While these same dilemmas and paradoxes continue to arise, the "interest-based" model appears better equipped to manage difficulties associated with "mixed

¹⁷² Emond, D.P. "Negotiation Strategies and Dispute Resolution", prepared for United Indian Councils of Mississauga and Chippewa Nations Conference on National Indian Government. October 3-5, 1990. Osgoode Hall Law School, York University. p.26

motive" negotiating settings where both cooperatively and competitively oriented negotiating behaviour takes place. The key to the interest-based model's success was found in the priority it gave to consideration of the existing and future relationship goals of parties. By obtaining an early, prior agreement on these goals, parties were then able to decide what was then to count as fair and appropriate procedures for negotiation.

Chapter two also found that there are three general types of agreement (i.e., win/lose; simple compromise; and integrative agreements). Associated with these agreements are complementary strategies and tactics appropriate to each type of negotiation. This finding supported a second hypothesis, adopted in chapter one, that before selecting a particular process for resolving a given dispute it is important for parties to consider the nature of the issues in dispute in relation to the processes available for their resolution.

For example, chapters four and five offer evidence that the complex, intergovernmental arrangements that are the hallmark of the first four Yukon First Nations self-government agreements could not have been accommodated within a win/lose or simple compromise agreement between

government and Yukon First Nations. Ultimately, these limited goals for agreement were discarded during the CYI AIP mandate negotiations when parties agreed that achieving "finality" with respect to the extinguishment of Aboriginal rights would be subordinated to the task of achieving a Territory-wide, integrated settlement. This breakthrough gave parties the opportunity to consider a more expansive, integrative approach to negotiation, ultimately leading to the signing of the Territory-wide CYI Umbrella Final Agreement.

Chapter three discussed important antecedents to Yukon self-government arrangements found in other Native self-government regimes in Canada, primarily those concluded between First Nations and governments within the context of comprehensive claims negotiations. Also, between 1983 and 1987, a new federal legislative regime for First Nation self-government, conceived with a view to replacing the Indian Act, was seen to have anticipated arrangements that were eventually incorporated into Yukon self-government agreements. This regime, which anticipated that a federal-provincial consensus affirming an Aboriginal right to self-government might not be reached in the near future, was designed with a view to accommodating the eventual constitutional entrenchment of such a right, if and when

such a consensus was achieved.

In retrospect, Yukon self-government agreements are evidence of the success of this "dual" federal strategy. They show the merit of pursuing a "bottom-up" process for negotiating Aboriginal self-government on a regional or geographical basis. Compared to the "top-down" federal-provincial approach, Yukon self-government negotiations offered First Nations the immediate prospect of a form of self-government. Also, it held out the possibility that self-government itself might eventually be affirmed as a constitutional right, by entrenching a right to negotiate self-government as part of their land claim settlement. Finally, such an approach allowed both parties to capitalize on an early opportunity to put behind them the unhappy legacy of Canada's Indian Act.

In chapter four, the case of the negotiation of Yukon self-government was discussed from an historical perspective and in light of the parties' decision to pursue an integrative-type negotiated agreement. The collective decision by parties to commit themselves to an interest-based negotiating process was premised on two practical considerations: other styles of negotiation used in the CYI claim had produced inconsistent results; and, all parties

were committed to pursuing a new, more collaborative negotiating relationship.

Generally speaking, the Yukon land claim negotiations took the form of a multilateral negotiation. During negotiations in community settings, the Chief Federal Negotiator's capacity to act as a mediator and facilitator among the parties, or between parties and constituents, was a significant factor in obtaining the necessary consensus for agreement. The status of the Chief Federal Negotiator as a consultant, independent of federal departmental constituent groups, supported an appearance of fairness and impartiality. As well, the special status of the federal negotiator as an appointee representative of the Crown served to underscore the principals' commitment to reaching agreement. This commitment was actively re-enforced by the principals themselves when, on several occasions, they participated directly in negotiations. These conventions and practices ultimately helped re-structure attitudes and build trust among negotiators, principals and constituent groups. This trust, together with a willingness among principals to set new relationship goals, was a necessary pre-condition to the parties' goal of seeking a more ambitious, integrative form of agreement.

During the negotiation of the draft Yukon First Nation Model Self-Government Agreement, the parties demonstrated a capacity for innovation in their design and implementation of negotiating processes. These novel approaches were successful largely because the parties were able to build upon the lessons learned from their experience in earlier rounds of negotiations. The most important innovation was their decision to adopt an interest-based approach to negotiation. This decision did not preclude parties from engaging in highly contentious, competitive negotiations. Rather, it created a framework in which competitive, contentious negotiation could take place as a prelude to problem-solving, collaboration and, ultimately, agreement.

In chapters four and five it was observed that throughout the self-government negotiating process parties were continuously engaged in a process of identifying and elaborating a set of custom rules for deciding outstanding issues. A similar approach was eventually embodied within each of the first four Yukon First Nation Self-Government Agreements themselves in the form of variety of process-related clauses. This negotiating legacy has contributed directly to the future viability of Yukon land claim agreements by providing parties with a blue-print to guide their future intergovernmental relations.

Despite the appearance of a new framework for Native - government relations in the Yukon, Yukon First Nation Self-Government Agreements still fall short of the ideal, integrative arrangement that parties aspired to as part of their original, informal negotiating accord. The progress made between 1987-1994 in reaching agreement on a broad, new intergovernmental relationship has been a step toward this goal. Yet, time constraints, the difficulty faced by a small claimant group in capturing and holding political attention in Ottawa, and the fact that the parties themselves were not ready to address important, substantive issues, precluded their obtaining a fully integrative agreement.

Success in implementing Yukon First Nation self-government will require a renewed commitment from parties to resolve outstanding issues carried over from the CYI land claim negotiating odyssey. Reflecting on this goal, in light of the CYI land claims negotiating experience, one First Nation commentator has observed: "that trip, like the land claims trip, is not going to be an easy achievement to obtain."¹⁷³

¹⁷³ Dave Joe, CYI Chief Negotiator, *Personal Interview*. Whitehorse, February 17, 1995.

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