FINAL REPORT

DEALING FOR A '67 STRATO CHIEF: FOLK TYPOLOGIES IN THE FED/PROV NEGOTIATION CULTURE

Submitted To:

The Royal Commission on Aboriginal Peoples

By:

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"...so the judge asked me 'well when did your people arrive here?' and I said 'our clan, we came from the sky.' And the judge asked me again 'when was that?' and I said 'a long time ago..in the ancient time.'

"And the judge wanted to know when, like what year, how long ago and I told him 'I don't know when, thousands and thousands of years' and he kept on at it, suggesting that like maybe we moved here like a hundred years ago, stupid eh? I said to him 'ya right ... maybe we come here from Alberta in 1958, all of us riding in a Pontiac ...' and everybody there laugh like hell, except the judge who went red in the face."

[Informant E: 07/93 in reference to early litigation over Aboriginal fishing rights]

CONTENTS

1. EXECUTIVE SUMMARY

This short document provides a summary of research undertaken in relation to Gitksan and Wet'suwet'en experiences with federal, provincial and third party bilateral negotiation processes. It is the intent of the research to examine real cases in order to gain insight into how these processes were viewed from the aboriginal perspective, especially in relation to judging the relative success of their outcomes.

Five cases were examined: a federal self-government negotiation process, a federal service transfer process, a federal resource co-management agreement, a provincial negotiation process, and a specific third party resource based negotiation process. Through the use of interviews, people who were directly involved in these processes were asked a series of questions to allow them, in an organised way, to provide the researchers with opinions, reflections, anecdotes and conclusions as to how each process progressed. These opinions included whether or not the informants thought the processes were successful in reaching the goals set, and what impediments each of the negotiators saw within each process. An analysis of this information, on a case by case basis, is presented within the paper.

Each of the negotiators interviewed saw several critical variables that can indicate whether or not any negotiative process is structured such that the participants can reach their goals. The goal, according to all, is an implementable agreement. It was further indicated that if the critical variables are missing or suppressed, then the likelihood of reaching an implementable agreement was greatly diminished.

Recommendations are offered at the conclusion of the paper. Informants unanimously agreed that self-government and treaty processes must be driven by central agencies. Line agency mandates are too weak to conclude large or collective processes in reasonable time frames. It was further pointed out that roll-up mandates in relation to the B.C. treaty process (where the mandate for each group is determined by considering estimates for the total settlement of all B.C. claims) was likely to unduly restrict the process by stripping negotiator mandates of the ability to conclude interest based agreements. It was further concluded that movement away from positionally based negotiations to interest based negotiations might have the affect of removing the adversarial air that the processes engender.

2. GENERAL INTRODUCTION

This paper presents a discussion of a research project undertaken by the Office of the Wet'suwet'en Hereditary Chiefs in regard to a contract entered into with the Royal Commission. The report has been structured to provide the reader with a clear way to consider what is a fair amount of quite detailed information about the processes described.

The sections, ranging from the research method to a discussion of the findings, follows an orderly progression. The findings are summarised in the concluding section.

3. METHOD

In doing this work, our research question was: are there any indicators to help determine if a negotiative process will have a successful outcome and if so, how can they be differentiated? This question arose from people's experiences in which some processes succeeded in reaching workable agreements in short periods of time, whereas others seemed as if they would never get there.

It is acknowledged that there many potential elements that come into consideration when attempting to answer this question. Some we can account for through our own reflection, others are still unknowable. We believed that if we developed a reasonable framework through which we could reflect upon the processes, then some practical knowledge and insight could be gained from our experience.

Our perspective in all of the discussions and analysis was that of an aboriginal community or person. Success here means success from that perspective. In a negotiative process, this can broadly be seen as measurable movement in bringing the aboriginal agenda forward through legal recognition. In a specific context, it would be if the negotiating team was successful in concluding a resource or service delivery agreement with a government agency or a third party.

Variables were developed and refined through the initial research phase of the project. In that phase, general interviews were conducted with our informants. These informants, all major players at the table in the negotiative process, were asked what they thought were the essential elements of a successful negotiative process were. The corollary was also asked -- what typifies an unsuccessful negotiative process?. All five informants had plenty to say regarding both of these aspects.

The variables derived from this interviewing processes are discussed in the sections following. What was striking and appropriate to mention in this section is that all of the people asked stated that something akin to "political will" (sometimes expressed as "seriousness", "mandate" or "cajones") was identified as the most important variable affecting the outcome of the process [Informants A,B,C,D,E: 07/93]. Equally interesting is that all of the informants, save one, expressed that they had not been involved in any negotiative process that they would themselves call "successful," though it was admitted that other observers may see it differently [Informant D: 08/93].

Following the interview process, the research team developed variables to be applied to the cases under consideration. The interview process consisted of two stages: a preliminary round and a structured round. In the preliminary round, informants were asked to describe in general terms what their personal experience was in

relation to federal, provincial and/or third party negotiative processes. This technique was used to see if any obvious commonality would surface and also to gain anecdotal data. Once this initial round was complete, the data was considered by the research team and the variables were derived.

This done, a second round of interviews were conducted, this time in a more structured setting. In this process, informants were asked fairly specific questions, using the framework of the developed variables, in relation to each of the cases brought up for examination. The compilation of these responses forms the Analysis section of this paper; the interview guidelines are found in the appendices.

The cases for study were selected because they best represented the full range of experiences of our informants. In some senses, the cases selected can be viewed as a representative sample. The reality is that there have not been a lot of negotiative processes from which people could gain experience. That having been said, most of the processes considered have been on-going for a number of years. Very interesting results were uncovered.

Though the research undertaken was done under the auspices of standard qualitative methods, an enterprising social scientist may well have been able to construct a quantitative measure for this project and subjected our findings to a statistical analysis.

Indeed, this would be possible even for the way we proceeded, which was intentionally non-quantitative. We have resisted the temptation to present a correlative matrix in relation to our data (though we do present a cell chart).

Our informants volunteered. All have had considerable experience in the aboriginal industry and given this, we assert they are representative of the aboriginal negotiator population of the country. Our assertion is the only objective measure of this, however. The informants are briefly and descriptively profiled in the Appendices. There, each has been assigned a letter from the alphabet for ease of discussion and to ensure their anonymity. First, however, a word about informant qualification.

Perhaps the single largest problem in ethnology done in the present, or for any line of serious inquiry that seeks to apprehend or apperceive the human experience, is that of informant qualification. By qualification we mean, does the informant really know what he or she is talking about, and if so, do they present to the researcher what would be considered to be a fair and agendaless representation of the event or response to the interviewer's questions? For the former, given the knowledge of the research team in relation to the research question, we can say without hesitation that those interviewed were indeed knowledgable about the research question. As to the latter, our research bias has been declared already. Knowledge of informant bias allows the researchers to

properly interpret and contextualise the responses, so the greatest practical insight, which is what this paper is about, can be gained.

4. INTRODUCTION OF THE CASES

Anonymity of the informants was ensured through the use of letters or symbols in place of names. Owing to the fact that this paper was researched and written under the sponsorship of the Office of the Wet'suwet'en Hereditary Chiefs, the negotiative processes that have formed the case study cannot be so easily disguised. After discussion, the research team has decided attempt to disguise the cases at all (in attempts to do so, the use of non-specific language and generic nouns and adjectives made communication all but impossible). Where discussion leads to the identification of specific individuals, we have sought to preserve their anonymity. If this paper is widely read and if people find references that they think describe themselves, we apologise.

Case 1: Federal Self-Government Negotiations

In 1989, the Office of the Hereditary Chiefs of the Gitksan and Wet'suwet'en People became engaged in a process of community based self-government negotiations with the Department of Indian Affairs and Northern Development. This process was driven by a federal policy that provided for the development of enabling legislation on behalf of the subject aboriginal group or First Nation that would be federally enacted, and that would, for that group, replace the Indian Act.

Within this policy two streams exist. The stream that this case refers to was outside of the federal Comprehensive Claims policy; this is to say that self-government could and can be negotiated with the federal government in addition to the process of negotiating claim settlements. In British Columbia, this is significant in that self-government, a central pivot in the claims settlement process and an essential element to be covered before the declaration of a treaty, can be negotiated and enacted before the claim is settled. Some informants referred to this policy stream as "... giving us something to do while we wait for the treaty" [Informant A:07/93].

Self-government, while following this policy in general, can also be negotiated as an element in the comprehensive claim settlement

process. In this stream, self-government (considered by the federal government to be an essential element in settling a claim) is negotiated concurrently with other federal prerogatives. Usually, the self-government enabling legislation accompanies the claim settlement legislation to the House. In the first case, the legislation moves to the House independently (and hopefully before) the settlement or treaty legislation.

This federal process reached the stage of Agreement in Principle about one year before the writing of this Report. It remains there now, while details relating to its ratification, funding transfers and issues relating to laws of general application and order of government are being debated in cabinet. We fully expect to see this legislation in the federal house in the next sitting (or at least sometime before the treaty is declared).

This process was selected as a case because it represents a kind or type of process (leading to our folk typology) that is common in federal bilateral negotiations, but severely problematic from the aboriginal perspective. Community based self-government negotiations led by DIAND are held under the auspices of a "government policy", yet are led by a line agency. Thus, in the federal order of departmental precedence, DIAND is obligated to gain concurrence from other line agencies affected or perceived to be affected by the self-government legislation. Other agencies, depending on their dispositions toward the policy, the department,

the aboriginal groups, or the individuals leading the consensus building process, may be accommodating or unaccommodating at their convenience. Though government derived, the mandate of DIAND in such negotiations is ameliorated by agency precedence to the point that the mandate can become thoroughly mired in its own layers. This point was focused on in various ways by our informants [Informants A,B,C,E: 06/93].

Case 2: Federal Health Care Transfer Negotiations

Two federal processes can be seen as early and meaningful attempts to bring about practical self-government for groups with developed capacities and infrastructures: DIAND devolution and Health and Welfare's Medical Services Branch (H&W's MSB) transfer processes. The DIAND devolution process allowed for resources and FTE's to be transferred from DIAND field offices to aboriginal control. The MSB transfer process has proved to be reasonably successful and popular, in as much as a number of groups across the country have engaged the process. The efficiency of the policies and the processes are subject to discussion below.

For the Gitksan and Wet'suwet'en, the first issue that had to be dealt with under the MSB transfer was policy. The initial self-government process with DIAND maintained that medical services, being a federal responsibility, would be transferred with and under the same legislation as the self-government enabling legislation. It further provided that the transfer agreement with MSB would be made under a subsidiary agreement.

H&W had no policy to transfer medical services under a self-government process. The GitWet process with H&W began as a stand-alone agreement policy that was already in place. This policy provides for some transfer of services and responsibilities under

extremely restrictive environments. It can be argued that the policy is unduly restrictive and perhaps needlessly avuncular, based on the assumption that given the chance, most aboriginal groups would default on the agreement and spend the money on things other than what MSB maintains it should be spent on [Informant A: 07/93; Informant D: 08/93].

Nevertheless, the process was pursued with some vigour, especially in the initial stages, and an agreement to enter into preparatory negotiations was concluded. This was not as easy as it appears. It required two things: a visionary approach by some officials at H&W and the development of a new, or supplementary policy, by which MSB services could be transferred under the auspices of a self-government agreement but implemented outside of that agreement. It is an aside, albeit an important one, that some eight months or so after the process of preparation and negotiation began, we were sent a copy of the H&W policy supplement. It demonstrated that government agencies could respond to the wishes of aboriginal communities in terms of policy modification, with something that was short and workable and that apparently did not require Treasury Board approval.

H&W provides us with a good example of a policy and process that, though it is separate from all other agencies, can work with other agencies. Notwithstanding the fact that the policy is, in flavour, less than complimentary to the abilities of most aboriginal

communities, the people that administer the policy have the ability to see that they should, in their capacity, serve the community interest. This they have done. This variable -- that of "operator discretion" -- is a critical element; it is the inclusion of an element of practicality where none exists, or where that which exists fails to connect properly with community requirements. This element will be discussed in the following section related to variables under the category of "will". The will of the operators in the micro context, or of governments of any order in the macro context, as will be pointed out, in relation to the negotiation of an agreement or in the praxis of it (that being its implementation and follow-up) were found to be critical elements in our research and in the formation of our typologies [Informant C: 06/93].

Case 3: The Aboriginal Fishing Strategy

The Aboriginal Fishing Strategy (AFS) must have been effective because it caused considerable controversy. This indicator is used here as a measure of general effectiveness of any policy brought forth into the aboriginal community - controversy usually indicates a shift in the status quo. The AFS is a specific kind of policy that is somewhat related to that of H&W's MSB downloading, but is different in quality.

The AFS is related in as much as it is a line agency policy and thus a line agency negotiative process. Although it requires cabinet ascendancy to be brought into action, it is a process which is agency driven, in this case by the Department of Fisheries and Oceans. It is different from the H&W policy and from the self-government policy in that it deals with resources rather than services. From a political perspective, this type of initiative is much harder for government to deal with because it will have an effect, real or perceived, on third parties. Services devolved to aboriginal jurisdictions are not seen to have such an effect [Informants A,B,C,D,E: 08/93].

The AFS was born out of Sparrow, a Supreme Court of Canada decision that affirmed the aboriginal right to the fisheries resource. The AFS is viewed by the federal government as an interim measure

policy. This means that any agreement reached under the AFS does not serve to define the right in the context of treaty settlement; it serves, rather, to provide a context for the inclusion of aboriginal people in the process of fisheries management (and commercial harvest, especially inland) prior to the settlement of treaty interests.

To a certain extent, the DFO came to the table *tabula rasa* wherein we tried to gain some understanding of the limits that the Department was prepared to go in these non-treaty discussions. We began the negotiations with our position being that the Department should devolve its entire prerogative to us. We agreed to the premis that the Minister of the Department could retain the ultimate power in terms of conservation, and that everything lesser than that should be included in an agreement with us. In this case that turned out to be the agreement extending until 1999 [Informants A,B,C: 06/93].

It should be noted that our position has always been that even if a government agency says that a process is not meant to define rights (or title to land), the said process may do just that [Informant A: 06/93]. We enter all processes from the position that such things will have that effect because, for better or worse, we are profoundly aware of the process of law in relation to aboriginal rights and title.

As this is the case, we treat all processes as if we are in a treaty process. Whether it is self-government, health care responsibility transfer, or the negotiation of interim agreements in relation to the aboriginal right to the fisheries resource, we develop and negotiate an agreement that can be rolled over into the treaty proper. This is to say that for the AFS, notwithstanding the restraints of the policy that is brought to the table by the Department of Fisheries and Oceans, we sought an agreement that could be most easily turned into a lasting agreement. Thus we were able to obtain through this process an agreement that laid out for immediate implementation what we feel a final settlement would look like. What we did not do in this agreement was place ourselves in a position whereby the negotiative process entered into in the present could be used against us in the future to define through litigation what the aboriginal right to the fisheries resource was in absolute numbers. We did not and do not in agreements bind ourselves to any quantum of fish [Informant D: 09/93].

The fact that we were able to do this in an interim agreement is the result of several factors. These factors, or variables, will be considered in the next section. The two most important variables to leave the reader with as we move into the next descriptive section are "will" and our belief that the first [aboriginal] group into a negotiative process is able to set the policy [Informants A,B,D,E: 07/93].

Case 4. Bilateral Processes with British Columbia

It has been said by some in government that the Gitksan and Wet'suwet'en are a litigious lot. Events of the past and of the present would make it hard for us to deny this. We have never, however, entered into a litigation without first having exhausted all other mechanisms for reaching an agreement. Our principles of negotiation, our point of departure, are well known to everyone. We have never kept our positions at negotiation a secret. Indeed, we have always been up front with all parties on the other side. We do not feel that it is reasonable for us to accept the provincial or federal government as having some sort of natural precedence over us, and if this is felt by the other side as an indication of truculence, extremism or litigiousness, then we are indeed guilty.

Under the current political regime, the province of British Columbia has sought on two occasions a process by which the two parties might negotiate a discontinuance to the main title action Delgam Uukw et al v The Attorney General. The first occasion took place prior to the our case succeeding to the British Columbia Court of Appeals, and the second before the case moved to the Supreme Court of Canada. In both attempt no agreement was reached(the action has not been discontinued). The reason for the failure, on both occasions, forms a central point of focus of this paper in the next two sections.

Both of these processes were entered nto between t e M n stry o Aboriginal Affairs in right of the province and the Gitksan and Wet'suwet'en. The point in each case was to develop a process of negotiation whereby the province would agree to a framework that was of sufficient scope and sincerity that it would allow us to choose a negotiative route over that of litigation. The attempts took place in the context of efforts to legitimize the Treaty Commission in the eyes of the aboriginal community within British Columbia [Informants A,B: 10/93].

The political position on the part of the province was as follows: the government felt that the image of the province to the aboriginal people in B.C. would shift from dubious to legitimate if the bad boys of the land claims business agreed to come to the table and suspend the suit. This is a reasonable surmisation if we recall that the reason that the Gitksan and Wet'suwet'en initially proceeded to court was the fact that the government of the province had refused, on policy, to negotiate for years. For the Gitksan and Wet'suwet'en to enter into a negotiative process with the province could be seen to be serving as a litmus test of the relative legitimacy of the provincial negotiation policy [Informant A: 10/93].

Legitimacy of the process can be judged practically by whether or not the said negotiative process actually leads to the implementation of a workable agreement or an agreement that has, in

praxis, the power that it should have in the minds of at least some of those who put it together. This is the test for all processes; the results must work.

The legitimacy of a process must also be considered from a more political perspective. It is up to each aboriginal group that contemplates a negotiative process to decide for itself whether or not the process that is offered has the potential to conclude an agreement that is meaningful and workable. What is meaningful and workable to one group might not be so for others. Where the major issue of treaty comes to the table, where the contemplated processes will be actually mandated to define issues such as aboriginal title and rights and present these in a legal and meaningful way in a treaty instrument, a different set of criteria seems to be required.

Such is the nature of this paper. Judging, from the aboriginal perspective, the relative merits and motivations of one negotiative process over another, with one group or government as opposed to another, is not easy. So, in the spirit of the great academic ethnologists and cross-cultural workers that have come before us, this paper has been developed to give the reader some insight into how this process works among us. It is a deliberate process, as we shall see in the next sections.

Case 5: A Third Party

We have initiated in several circumstances direct negotiations with third party stakeholders. To date, these negotiations have been confined to the resource sector, though it is conceivable that they might extend beyond this at a later time. In general, such processes have been acute, specific, motivated and, in one case at least, rather visionary. The term visionary applies here because the third parties saw for themselves the merit of seeking agreement with an aboriginal interest, even if governments or their agencies did not at the time [Informant D: 08/93].

In third party negotiations that have resulted in workable agreements within relatively short time frames, the critical variable has been motivation or will [Informant D: 08/93]. These parties have been motivated to find at least temporary solutions to problems that have destabilised their business interests.

It is not lost on us that one of the most efficient ways of getting the serious attention of any third party interest is through the wallet. Blockades, embargoes and the like are effective in getting attention in the short term and, in some cases, in initiating dispute resolution mechanisms. However, lasting agreements are only possible when the bitter acrimony that accompanies direct action and application for injunctive relief give way to dialogue and

cooperation. (There is a reason why all Gitksan and Wet'suwet'en Watershed Authorities (GitWet conservation service) vehicles are four-door trucks: the test of AFS co-management is if GWWA personnel and DFO personnel can ride around all day in the same vehicle without fighting).

The third party case for consideration here is a negotiation process carried out between Repap Inc., a major forest license stakeholder in our area, and a Gitksan house (a house being the extended, matrilineal kinship unit that holds collective title to the land and resources among the Gitksan and Wet'suwet'en - there are about 90 houses in total). Repap inherited its forest license from the now long dead (in the forestry sector) B.C. crown corporation Westar.

Westar was not a great arbiter of the aboriginal right, and was also not a proponent at all of anything that would have amounted to sustainable forestry [Informant A: 08/93]. The Gitksan and Wet'suwet'en have systematically acted against Westar in terms of injunction applications, judicial reviews, blockades, and other direct action. In the midst of Repap taking over Westar's assets, the Delgam Uukw decision came down from the B.C. Supreme Court, which was not very favourable to us and which has been reversed by the appeal court) which really made things ambiguous.

Notwithstanding the initial Delgam Uukw decision that stated that

rights and title had been extinguished, Repap apparently made a critical strategic decision, recognised that the aboriginal people in the area would not accept such a decision, and understood that unless were proactive they would be on the front line to bear the brunt of aboriginal reaction [Informant D: 08/93].

Repap saw that they must find a way of normalising local relationships with the aboriginal people, notwithstanding the law or the forest policy of the provincial government. The province would not go out of business in the face of a sustained blockade: Repap would [Informant A 06/93].

This understanding brought Repap to the table with a Gitksan house. A negotiation process ensued. The bottom line was this: the Gitksan house was motivated to reach a point of cooperation based on the reality that Repap would not go away, that direct action as a technique of forcing compliance or even recognition was not a viable option, and that Repap was not the proper entity with which to attempt to resolve the larger issues [Informant D: 08/93]. Given that Repap's interests were cooperatively motivated, and thus not necessarily coincidental with those of the province, the Gitksan house and Repap moved to see if there was room to negotiate a co-existence agreement based on interests rather than positions.

In a relatively short time frame (about six weeks) both sides had identified their interests, agreed somewhat as to what they were,

agreed to principles of consensual dec s on mak ng, and executed an agreement. For its type, the agreement is a good one in that it is implementable. The critical factor of will was present in both sides to the negotiation process and, thus, an agreement was reached [Informants A,B,C,D,E: 06/93-09/93].

5. THE VARIABLES

The variables that could possibly determine the outcome of any negotiative process are legion; some are direct, some are very indirect, and still others may have no plausible connection at all. Those that we developed are practical. That is to say, that which seems to be required, from the experience of the informants from all the processes in which they have been involved, and that make sense when placed in a logical and practical context, are the ones we will use to complete the analysis section of this paper.

Clearly, we thought, one of the critical factors must be motivation. In order for a timely agreement to be reached it seems obvious that both sides must be motivated to reach it. In breaking down the factors that we have encountered in the negotiative process that seem to relate to motivation, we have come up with the four variables presented below. Let us now define each of them for the purpose of this project.

1. Will

Do you want to reach an agreement? If so, how badly? This point seems obvious, but can become quite complex. In each of the cases the will of each party entering into the negotiative process has been examined and analysed. Will is closely related to motivation in that it seems to form an operative part of negotiation.

If we were to offer advice to other First Nations contemplating entering into a negotiative process with a government or third party for the first time, we would suggest that an analysis of the "will factor" is probably the most indicative of how long it is likely to take to conclude an implementable agreement. Once again, though, the concept of will as a variable in the process is two-sided. While our analyses centres on the will of a government (or of a third party), the will of the aboriginal group is equally as important in the overall scheme of things.

2. Policy Coherence

Do both sides to the negotiative process understand the policy that they are operating under? Is the policy subject to change through the course of negotiations? Again, this point seems obvious on the surface, but is not when considered in more depth.

One aspect of this variable is "communicative competence." Do both sides understand each other sufficiently to be able to reach an agreement? A negative response to this question can be a real problem, especially when one is part way through a process and it becomes apparent that the operating assumptions are not shared by both sides.

Further to this is the understanding of the policy proper. Not only is it required that the policy be understandable, but it must be understood. We have seen many cases at the table where major disagreements have arisen because a policy has been interpreted differently, not only by each side, but by negotiators on the same side. The result is not just chaos, but real losses of time at the table.

The corollary to this conundrum should also be considered. This point relates to a situation where circumstances bring two sides together to negotiate without a set policy. In such cases where the

intentionality of the process is shared by both sides, a policy can be quickly developed that both sides well understand (since they develop it themselves at the table). In such cases, the result is usually a fast agreement, if all the other factors can be brought together.

3. Mandate

What is your bottom line? Mandate is critical to achieving agreement. However, it has been our experience that governments do come to the table without a clear mandate, or with a mandate so layered that in requires several changes of negotiation teams to come up with an agreement [Informants A,B,D: 08/93].

We have found that mandates tend to change in context with other seemingly fluid variables at the table. From a governmental perspective, mandates tend to change when the aboriginal side at the table outstrips the government mandate in the first few rounds. The result is stalled processes while the mandate is re-evaluated. If one is the first group through a process where a policy is new and untried, or largely unformed, the mandates also tend to be rather ambiguous.

However, where there is clear motivation and a clear simple policy, if both sides come to the table ready and willing to reach an agreement, they come armed with clear mandates. We have found that mandate and will are inextricably linked, one being dependent on the other, though the nature of the dependency is not always clear.

4. Process

How do we go about reaching an agreement? Federal government policies often come with processes attached. Process seem to be part utilitarian and part customary; the mixture of the two can produce partisan or unworkable processes. We have found this to be a key variable in the determination of time through to completion in the comprehensive claims process.

In many respects, process is the manifestation of the whole string of variables: will, policy and mandate. It does not, however, have to make any sense. This is to say that the process can be wholly divorced from the other factors. We believe we can identify at least one good explanation for this.

Processes are usually developed first on a theoretical basis. We have seen this in British Columbia recently with the advent of the Treaty Commission. The theory and the practice are not always aligned, and further problems arise in the development of internal processes. We have also seen processes developed that are transparent, workable and very pragmatic.

6. CASE ANALYSES

Introduction

The cases are presented below, each with the identified variables. At the top of each section is a question that relates to the variables. This question is only partly rhetorical. What we have done is extrapolated from our informant responses what the collective answer to these questions would be, from the informants' point of view. This was done to create a tally sheet so that the reader might be able to see at a glance just how the cases and variables compared. This tally sheet is presented in the discussion following.

Case 1: Self-Government

Variable 1 - Will

Do both sides wish to reach an agreement? Government:No GitWet Yes

Discussion:

Judging the will of government through its agencies is very difficult. In many cases, the individuals that government presents at such negotiation processes are themselves very interested in reaching agreements [Informant E: 09/93]. This will is often not mirrored by the system or by actions within the government's central agencies. There is no absolute way to measure this variable without experience.

The federal government in particular has developed a culture of negotiation that is designed to perpetuate itself and lead to the continuation of the process. There are many reasons for this, but two will be mentioned here. The first is simplistic and cynical: it is cheaper for a government to negotiate a claim no matter the cost than to actually settle it (remembering that theoretically at least, the money spent by aboriginal peoples in a claim negotiation process is a loan rather than a grant, and thus the money will come

back to the government). So if a government spends two or three million dollars a year for ten or twenty or thirty years on a process just to support the aboriginal side, this is by far cheaper than actually settling a claim (or concluding a self-government arrangement), as the costs of implementing a claim or a self-government regime run into the tens, hundreds and thousands of millions of dollars [Informants A,B,C,D,E: 08/93].

Given governments' terms of office, one can see that the system can make this approach seem rational. In essence, this short sighted attitude, consistent over a score of successive provincial governments, has resulted in the acute claims situation that now exists in British Columbia.

The second problem of will relates to the government negotiators and the process in which they work. Notwithstanding the problems of layered or arbitrary mandates that federal representatives often come to the table with, other factors can be identified. The system is structured such that the negotiators should be actively working to put themselves out of a job. For this reason, at least subconsciously, it can be argued, federal [and provincial] negotiation processes tend to be perpetuated. The same can be said for the aboriginal side in certain protracted negotiations, as we are aware.

The second major point being raised is somewhat more subtle. If

some of us subscribe to certain Weberian insights regarding the organic nature of bureaucracies and their tendencies toward self-perpetuation, this can be used as a heuristic device for the case under consideration. Government processes tend to be perpetuated because the system is so designed. The system appears to have balance when negotiations carry on for their own sake, with no goal and no mandated finishing point in sight [Informants A,D: 08/93].

The self-government process provides us with a clear example of this interpretation. The government constantly wants to bring settled issues back to the table to avoid coming to a conclusion. This has being going on for over eighteen months, following the reaching of an agreement in principle. Even at that point, eighteen months ago, closure had to be invoked. It was reported that our negotiator said at the table to close the round "... that's it, were finished, we're stopping this right here. You guys don't known how to conclude this process. I'm telling you we have reached an AIP. You go home now and start preparing the MC (memorandum to cabinet)..."[Informant B: 07/93].

Though the MC was prepared (or is still in preparation) the federal representatives never believed that the process was over. They still don't [IBID].

Variable 2: Policy Coherence

Is the policy coherent? Government No GitWet No

Discussion:

We might be putting words in the mouth of the federal government when we answer this question for them. We will attempt to consider in very general terms the self-government policy as it now exists.

We equate coherence with understandability and logic. This might be a simplistic view, but it seems to be a key point of departure. We discussed earlier the relationship between the federal self-government policy and the comprehensive claims policy. Building from this, let us consider the first problem we encountered in dealing with self-government: the isolation of the policy.

In dealing with what DIAND and the federal government apparently saw as a demand from aboriginal communities, it developed a self-government negotiation policy under then minister Mr. Crombie. In order for the policy to be an option for those groups living under treaty, the policy was separated from the claims process and administered by a separate directorate. Even though self-government is a required component of the claim settlement policy, the people

that negotiate the claims proper do not negotiate self-government. We ended up dealing with a group of people that could not tell us what the relationship of the self-government policy was to claims policy. No one initially seemed to know if they aligned, if self-government negotiated on its own had to be renegotiated in the settlement process, or whether the policy under the claims umbrella was different than the independent policy or if they were the same [Informants A,B: 07/93]. If DIAND didn't know, neither did the other government agencies.

We found that the government representatives had not explored and did not understand its own policy. The separation of the policy into at least two directorates (claims and self-government) meant at least two official interpretations, and in some cases they were contradictory [IBID]. The government consistently contradicted itself in what it stated in the title action in court and what it stated at self-government negotiations [Informant A: 07/93]. None of these issues, to the best of our knowledge, has been addressed, and the self-government process is still grinding on toward a conclusion - that being the introduction of legislation into the House of Commons.

Variable 3: Mandate

Do you have a bottom line: Government <u>No</u> GitWet <u>Yes</u>

Discussion:

This is the most important technical variable in all of the negotiative processes in which we have engaged. According to Leach "...it is an obvious truism that you cannot carry on an argument with a man who does not understand what you say..." [Leach 1964:61]. In the equivalent, it is hard to negotiate with a government that seems to have no position, or a changing position.

In the self-government process, the policy uncertainty spoken of in the previous section was compounded by a mandate that was unclear to the negotiator at the table and that was extremely layered [Informant D: 08/93]. For instance, when presented with a policy inconsistency or a question (such as, is the self-government policy driving this process the same as the one under the comprehensive claim process?) the negotiator had to refer to people who were not at the table, or even within the negotiator's directorate. Invariably, the negotiator would end up dealing with some sort of opinion from the Department of Justice in order to address the problem at the table [Informants A,B,D: 07/93].

To some extent, these are problems that are an inevitable result of operating with a new policy. However, internal correspondence from DIAND amply demonstrates that the Department arms its negotiator with the narrowest possible mandates, which either renders the negotiator ineffective simply because they have no power to agree to anything, or which reduces the process to a hollow shell [Informant A: 07/93] because the negotiator refuses to admit that his or her mandate is so restrictive that initial aboriginal positions at the table outstrip it. We have also been in the position where we were asked to take position papers off the table because the federal system had insufficient resources with which to deal with them.

In reflection, the problem seen in the layered mandate approach is a derivative of the will variable. If a government lacks the will to deal with an issue, yet puts up a negotiative process for the sake of politics and appearance, then this layered mandate syndrome can be used as an indicator of that lack of will.

4. Process

Does the process inhibit the conclusion of an agreement?

Discussion:

We have discussed problems that we have found within an overall negotiative process as separate elements. This variable really means to ask if the process as it is structured is responsible for inhibiting or facilitating progress. Given the discussion in the last three sections, the answer here is obvious: inflexible processes inhibit progress while flexible processes facilitate it. There are qualifications, but the point is plainly made.

The whole process of self-government negotiations was developed and brought into implementation in isolation of the people it was meant to serve. This is in keeping with the historical position of DIAND and the federal government in relation to aboriginal people. This relationship can be characterised as fiduciary.

The self-government process was not designed to empower aboriginal communities, nor to be accessible or understandable to them. The policy only makes a modicum of sense, even if the observer has intimate knowledge, both structural and historical, about how the federal government works.

Among the Gitksan and Wet'suwet'en, politics and all major discussions take place not in English, but in the indigenous languages. There are two languages and we own and employ a sophisticated simultaneous translation system. The epitome of the self-government policy and process comes when it is translated into Wet'suwet'en and Gitksanimux. No one, even the translators, understand what it means. It has to be explained through the use of analogy and allegory. The chiefs attending such exhibitions either look at each other in confusion, or laugh hysterically [Informant C: 08/93].

CASE 2: HEALTH AND WELFARE CANADA'S MSB SERVICES TRANSFER

Variable 1: Will

Does each party wish to reach an agreement? Government Yes GitWet Yes

Discussion:

The will of H&W in relation to obtaining agreements under this policy has been demonstrated by the number of agreements they have obtained. Acknowledging that this is a specific service sector only, the process that must be undertaken and the content of it is complex. Personnel, real estate material and legal liability must be unloaded from the federal government to the aboriginal administration. From the federal perspective, such a task requires considerable process. One must also remember that since this process is a service download only, the federal government will always maintain a position final refusal based on its perceived fiduciary obligation.

The issue is one of fiduciary obligation breaking into the realm of paternalism [Informant C: 08/93]. Probably the best examples of paternalistic interaction, from the aboriginal perspective, come from the medical community [IBID]. For the Gitksan and

Wet'suwet'en, both in bringing a holistic perspective to the transfer process and introducing traditional concept and practise, the team reports that the 'Indian Agent' experience in relation to H&W has been kept to a minimum [Informants A,C: 09/93].

Variable 2: Is the policy coherent? Government:Yes GitWet: Sort Of

Policy incoherence comes into the H&W stream firstly in terms of what can and cannot be transferred to the aboriginal administration. The split comes at the difference between 'insured' and 'uninsured' benefits. 'Insured' benefits are those provided to aboriginal people through the auspices of a private insurance company (Blue Cross). They are not available for transfer under a simple policy. 'Uninsured' benefits, those services that H&W provides to aboriginal people directly, are available for transfer. Services provided by the province under agreement between the government are also not available for transfer.

What would the rationale be for this policy? On one hand, H&W might argue that uninsured benefits are the only services transferable to an aboriginal administration because they are the only ones to which they, as an agency, have clear title. Other services offered involve other agencies, or long-term contracts with insurance companies. A second argument might be that in the experience of H&W, most aboriginal groups lack the administration infrastructure (and/or sophistication) to take on the greater burden of these other services and programmes [IBID].

Even if the H&W policy is restrictive along lines to paternalism or protectionism in regard to the insurance companies, the Gitksan and Wet'suwet'en people, in the self-government forum, made a proposal to deal with the entire issue in front of the federal government. Within the self-government process, under a sub-agreement concerning federal funding transfers, we introduced language to the effect of "...any and all monies paid to or on behalf of Gitksan and Wet'suwet'en people by the federal government..." This would have the effect of bringing all federal funding together under an inclusive umbrella, to be dealt with through a transfer process on a government to government basis. Service delivery would simply be subject to delivery sub-agreements.

This proposal met with incredulity and an immediate recapitulation on the part of the line agency representatives at the table of the narrowness of their mandate: this includes the self-government process as well. We were told that such a sweeping (and logical) process must wait ... and wait ... for the "Treaty" process, whatever that is.

Though H&W has one of the better federal policies, we see here that such processes tend to exist on a fine line between devolution and protectionism; the bureaucracy will negotiate devolution only up to a point.

Variable 3: Mandate Do you have a bottom line?

Government: Yes GitWet: Yes

Discussion:

For Health and Welfare, the policy bottom line under MSB transfers was described above; they will only consider for transfer those services that they currently directly administer. Thus, the H&W personnel that interact with aboriginal staff during the process of transfer tend to balk at anything that is more far reaching than the current policy horizons. For instance, if one were to present to H&W a transfer plan that included the absorbtion of provincial services and insured services even at some point down the road, one will meet resistance [Informant A: 09/93].

In previous sections it was stated that H&W did come up with a kind of policy supplement statement that referred to the transfer of all service under a self-government agreement. The problem that was encountered here is that a full transfer of services is only possible under self-government, yet it is requiresd that a self-government agreement be in place before one can discuss these other services. It makes one wonder just how such a process might proceed, when there is resistance inside of the agency when a planning processes brings forth just this contingency.

If restrictive, the H&W transfer policy at least is clear in some circumstances. But it lacks the inherent flexibility to meet the Gitksan and Wet'suwet'en requirements to facilitate a long term, lasting agreement. Given the restrictive policy, it is easier for this agency to issue fairly direct mandates to their negotiators.

Variable 4: Process

Does the process inhibit the reaching of an agreement?

Discussion:

The H&W process does not inhibit the conclusion of an agreement. The policy is narrow, its mandate low level, and thus the process fairly straightforward. It can conclude agreements, and H&W's track record testifies to this.

This having been stated, then other questions are begged. For instance, by whose or which criteria do we judge the effectiveness or relative success of a process? Can we say a process is better than another because it obtains agreements where others seem to fail, even if those agreements do not meet the needs of the community?

These are largely rhetorical questions left to the reader. We have a policy of occupying all tables available to us, even if the policies under discussion are restrictive or inadequate. Policies and processes must be engaged and demonstrated ineffective, otherwise they will only perpetuate themselves. A classic example of this is the comprehensive claim policy operated by DIAND. It is curious, though, that policy is not the subject of direct

discussion anywhere in this paper. That is because we have never engaged it.

CASE 3: DFO's ABORIGINAL FISHING STRATEGY

Variable 1: Will

Does each party wish to reach an agreement? Government: Yes GitWet: Yes

Discussion:

Born of trial by fire, the AFS comes to us as an attempt by government to reconcile the Supreme Court of Canada findings and orders into an operational context. It is also the first time, outside of a treaty process, that we have seen the government actively negotiating with aboriginal people in relation to resource rights and entitlements.

Getting to this point was no small step for both the Government of Canada and the Department of Fisheries and Oceans. In order to implement the AFS, the government had to come up with funding and the Department had to reorganise itself on a scale seldom seen in relation to aboriginal issues. There was considerable resistance to the implementation of the policy across a number of sectors; this resistance can still be seen in the continuing efforts of the fish processors' lobby to push the policy back.

Resistance to the policy change was predictable, though perhaps the level and type of resistance was not anticipated. Given that this was the first real attempt by the government of Canada to make a shift in control of a resource base that was south of the 60th parallel, and given that the fishing industry in B.C. had largely been unfettered for 100 years, some resistence was inevitable.

Why was the government so keen to move in this direction? We can never really know for sure but we can analyse the situation briefly and speculate on reason why, given everyone's experience. The AFS came into being about two years after the Sparrow decision was made. There was considerable wrangling on our part with DFO as to just what the AFS would be. We wanted a self-government type stand alone agreement that would be legislated [Informants A,D: 09/93] In consideration, the Department decided that it could not devolve its legislative (and ministerial) prerogative outside of a sanctioned treaty process.

Our second position had us falling back to a devolution of person years and budgets reminiscent of the DIAND devolutionary policy. In attempting to take this position, we ran into an implementation difficulty - staff of DFO, especially enforcement people, felt that they were negotiating themselves out of a job. We agreed the to grandfather existing staff, set up a parallel organisation and structures and develop a process that could be immediately rolled over into a treaty when such a process might come to pass [IBID].

We also separated the fish. Notwithstanding the interpretations of Sparrow, we made sure that fish taken according to the constitutional right was not confused with any other fish we might take in relation to a commercial sale agreement or the like. By separating the fish, we maintained our position in relation to our right to protect ourselves from being positionally contained by those that would interpret the AFS as defining the right in relation to the resource [IBID].

The federal government has very little to say about aboriginal rights to resources in B.C. save the fish. Virtually everything else we have negotiated with the federal government has been in relation to services. With the treaty process not operating, the AFS was about all they could do. Another factor must also be mentioned. Senior management at DFO wanted to make this agreement successful. Enforcement issues in relation to the aboriginal fishery were becoming more acute each year. The AFS offered an opportunity to address the acute issue, while the Department itself got used to the idea that change was inevitable, especially in relation to a treaty [Informant A: 07/93].

Another very pragmatic point should be mentioned. If the AFS or some similar policy initiative did not go ahead, the Department and the Government of Canada could expect continuing litigation and enforcement orders resulting from aboriginal initiatives to see the law made into policy.

The motivation behind the AFS was pragmatic on the part of the federal government. They had no real choice. From the aboriginal perspective, it was the demonstration that a long term strategy (over many years) of litigation and pressure could result in fundamental shifts to the status quo.

Variable 2: Is the policy coherent? Government:Yes GitWet: Yes

Discussion:

The Aboriginal Fishing Strategy is coherent for us because we have worked closely with DFO in its development. This does not mean that we understand all of it, or even that we agree with all of it; there are many problems.

Notwithstanding the intentionality of the government in relation to the AFS, the question could be asked if the government finds the AFS coherent. It may be controversial, but does government understand it and is this reflected in its implementation? The assessment of its implementation is extremely important, and could itself be the subject of a useful research paper.

We accept that both the Gitksan and Wet'suwet'en and DFO understood the policy and accepted, as far as any communicative interaction can facilitate, the intentions of the other in entering into negotiations. It is valuable to consider the problems that we have run into in regard to finding this out in a practical way.

Two issues have arisen: the nature of fish (and the aboriginal right), and that of aboriginal jurisdiction. We mentioned earlier that DFO seems interested in interpreting s.35 fish (aboriginal

right - as per the Constitution Act, 1982) and those caught and sold pursuant to this policy as the same. We reject this notion because it leads to the definition of the aboriginal right in relation to the resource. It matters not that the AFS is a non-treaty process and thus not seeking to define the nature or extent of the right as per Sparrow. The nature of common law and of federal processes is that accepting this linkage could very well work to ascribe a quantum to the aboriginal right without everyone being wholly aware that this is what is going on [IBID]. This internal policy has become the norm of operation of the Skeena system. The First Nation signatories to the Skeena Fisheries Commission (the pan-local organisation that promotes the aboriginal right and that moves to define the perimeters of aboriginal jurisdiction) avoid at all costs having the right defined in the context of the usufruct described in the context of the Aboriginal Fishing Strategy.

Owing to the fact that the AFS has no mandate to define the nature or scope of the right (accepting the fact that it could), nothing definitive can be said through this policy in relation to the physical limits of aboriginal jurisdiction. Indeed, we are sure that DFO officals can be found who would state for the record that there is no such thing as aboriginal jurisdiction in relation to the AFS or any other policy [IBID]. This reality suggests that there is a jurisdictional element and that this, at the very least, stems from a right to self-government.

However, from a practical perspective, we are in the process of determining what that jurisdiction will be while we wait for a treaty. Through a series of protocol agreements, this should be developed a little further for the upcoming fishing season. As to the absolute practical test of GitWet jurisdiction - ask the black marketeers; they suppressed themselves because the didn't want the aboriginal people seizing their vehicles and products. The public is much easier to deal with in these matters than a bureaucracy protecting what it thinks is its exclusive turf.

Variable 3: Mandate Do you have a bottom line? Government: Yes GitWet: Yes

Discussion:

DFO developed a mandate in the field. The fact that its bottom line was developed through experience (as the policy was essentially developed through experience) may be denied by them, but as far as we are concerned it is the secret to the success of the policy [Informants A,B,D: 09/93]. The AFS policy/mandate dynamic is a product of balancing what the aboriginal people had a right to in the context of what they would accept and what the cabinet would endorse, and the ability to contain interest group backlash against the implementation of the policy.

DFO went to find out what the aboriginal community would accept and worked back from that point of view [Informant D: 10/93]. Thus there is a range of complexity in AFS agreements. The scope and comprehensiveness in terms of aligning an interim process such as the AFS with a treaty agreement has been decided to some extent by the capacity of the aboriginal group at the table.

Whether this was a conscious point of departure for DFO or pure fortuitousness could be a point of debate. The net effect, though, is that the group at the table was able to negotiate aspects of

DFO's mandate with them, within the restrictions of an interim, non-treaty and non-defining process. This, in our opinion, is what sets the AFS and DFO's execution of it apart from every other government initiative in which we have engaged.

Variable 4: Does the process inhibit the conclusion of an agreement?

Discussion:

The answer in this case is a qualified no from our perspective. We were ready at the outset of the AFS, some three years ago now, to sign a long term agreement with the Department. They were not ready because of their own process. After some discussion, and after some eighteen months of wrangling and negotiations, we obtained a long term agreement under the AFS that is in effect until 1999. The assumption is that the treaty process will over take us by that point. We have an agreement, and that in some measure is the test of this variable.

This process with DFO was, fortunately driven by visionaries within the Department [Informants A,D: 09/93]. What this meant was that we were able to move past Indian Affairs and Health and Welfare, and the government officials were able to listen to what we had to say and to gain some benefit from our experience. Normally, with an entrenched process and with federal representatives that lack the will and imagination to move to new systems, the process hoops itself [Informants A,B,C,D,E: 06/93-09/93].

Don't get us wrong here. There are some serious problems to be dealt with. The essential and differentiating fact of this process is this: the client group (or some of us, anyway) had an opportunity to influence both the negotiation and implementation processes. Rather than banging heads in a regular process, we got the chance to put together something that we thought would work. To a greater or lesser degree, it does.

CASE 4: BILATERAL PROCESSES WITH BRITISH COLUMBIA

Variable 1: Will Do the parties wish to reach an agreement?

Government: No GitWet: Yes

Discussion:

The Gitksan and Wet'suwet'en proceeded to court against British Columbia because the government refused to negotiate. The Gitksan and Wet'suwet'en do want to reach a negotiated settlement with the province; indeed, no matter the time frame, one must ultimately reach a negotiated settlement at some point. If the treaty process holds little real promise (and it holds none, according to our informants) then a lasting settlement might come through the negotiation of sectoral agreements - the GitWet policy now being employed.

The provincial government might very well want to settle the claim, but it lacks the political will to do so [Informant B:10/93]. This has been amply demonstrated to us on two occasions. On the first occasion, right after the initial Delgam Uukw decision came down, a new government was in office. It wanted to be seen as the great mitigator in the long standing issue of aboriginal rights and title in the B.C., and to differentiate itself from its Social Credit predecessor. The province approached us to see if we would agree to

negotiate settlement with them, as opposed to litigation.

Now the reader must remember that the initial Delgam Uukw decision was not wholly favourable to our cause (the decision at appeal was better). There could have been merit in a negotiative process. We agreed to negotiate, but refused to stop the appeal process or discontinue our action. We negotiated a Memorandum of Understanding (MOU) with the Ministry of Aboriginal Affairs on behalf of the provincial government. The major point of this MOU was a framework for the development of a process leading to a treaty or some other lasting settlement instrument [IBID].

Like DIAND in the federal process, the Aboriginal Affairs Ministry is just a line agency. At cabinet, an important issue arose regarding the transfer of third party cutting rights within the Gitksan and Wet'suwet'en territories. The third party was going out of business and by law, the cutting rights should have reverted to and remained with the province until a settlement was reached. Instead, the Ministry of Forests transferred those cutting rights [informant A: 006/93].

What use is there to negotiating an agreement with a line agency that has no clout at all? Two years later, after the appellate decision on Delgam Uukw had come down and aboriginal title and rights were found to be extant and the province was said to lack the capacity to extinguish them, the same offer was made to enter

into a negotiative process and discontinue the action. We did so again, seeking an agreement with Aboriginal Affairs on behalf of the province. Yet again while we were negotiating a framework agreement with Aboriginal Affairs, the Ministry of Forests issued a cutting permit to a third party on a contentious area that had just been the focus of direct political action [Informant B: 12/93].

Line agencies, if they have the right people involved, can effectively negotiate sectoral agreements. Line agencies, equipped with government mandates for inclusive processes such as treaty settlements, can do nothing without the agreement of other line agencies. The case above gives the acute example. For large, general processes to be effective, the mandate and the sponsorship of the process must come from a central agency. Political will can be judged by the relative precedence that the agency holding the mandate in regard to all other agencies.

Variable 2: Is the policy coherent? Government: No GitWet: No

Discussion:

In this case, there was no policy on the part of the province. This is not just our opinion. Aboriginal Affairs representatives complained of the ineffectiveness of their own policies and processes. Frustration was high; a testimonial to this fact is the inability of the province to attract and keep an adequate number of good personnel in the Ministry.

We do not anticipate the situation improving in the short term. Lack of political will, compounded by restrictive policies in which there is not client participation and a lack of people and resources, is a formula for inertia. The problem is this: intellectually the province wants to settle the treaty; politically, it is worried about re-election.

Variable 3: Mandate: Do you have a bottom line? Government: Yes
GitWet: Yes

Discussion:

Government mandates may or may not be expressed to those that the government sends to the table to act on their behalf. Even when the province approached us on a second occasion with an expressed, written mandate, Aboriginal Affairs' line agency status made success not guaranteed. The mandate expressed through that ministry was clearly not the same mandate that the government held as a whole [IBID].

Thus, the ministry was operating with a mandate that was not reflective of its will. When such a disjuncture appears, the process is bankrupt. The government will simply not support the agreement that it has sent its agents to negotiate. This exacerbates the process at the table and causes problems that are difficult to correct.

Given the situation that we have encountered on two occasions, how would the province now, in the next (inevitable) negotiation process demonstrate to us their veracity? There is no way, except to provide us with a mandate from and administered by a central agency as part of a process which can guarantee a modicum of real

workability. In short, we need to design the process together.

Variable 4: Does the process inhibit the reaching of an agreement?

Discussion:

Given the problems discussed in regard to the examples described, a fair conclusion is that there is no process. Without a process one cannot reasonably expect to reach a conclusion or develop an agreement. This problem is not entirely unusual; there are variants of it. One of the variants comes under the guise of 'discussion with aboriginal people' or 'consultations'. These are simply non-mandated negotiative processes. Much of what goes on under the guise of negotiations takes place without mandates or processes. The result is interesting.

Within the federal and provincial negotiation cultures there is an expectation that the processes engaged with aboriginals will be long, slow and difficult [Informants B.D: 09.93]. We are not entirely sure where this idea comes from, but it has become a self-fulfilling prophesy; people expect that the process will take a long time, so it does. Speeding up a process within this culture is not easy, but it can be done.

What is created is a slow process industry. A veritable legion of people have personal stakes in slowing negotiative processes. Consultants, public servants, and aboriginal people themselves all

make reasonable livings from participating in such charades. Money becomes available, people get paid, position papers and policy papers are passed around, and no conclusion is ever reached. In many cases, the systems do not allow agreement, even if the people involved are motivated [Informant A: 06/93].

Treaties are expensive to settle. A mandateless process or a processless mandate with some money attached keeps everyone busy for a while. This is more successful in some situations than others. For the Gitksan and Wet'suwet'en we left a pointless negotiation table to do something that is no less time consuming but can be just as effective in the end: we sued them.

CASE 5: Third Party Process

Variable 1: Will Do the parties wish to reach an agreement? Third Party: Yes Gitksan House: Yes

Discussion:

The will to reach an agreement is the driving critical factor that determines if it will be successful. As explained above, the third party and the Gitksan house were well motivated.

A process that does not address the perceived interests of the principals will fail. There is some debate as to whether the standard negotiation maxims and truisms have any application at all within the context of Aboriginal issues. Sometimes they do and sometimes they don't; it depends upon the context. However, whether or not the motivation to reach an agreement comes from self-interest, and whether or not the process is problematic, an agreement cannot be reached without will. This variable appears on the top of our list for that reason.

Variable 2: Is the policy coherent? Third Party: Yes Gitksan House: Yes

Discussion:

Repap and the Gitksan house understand each other well. This was not always the case. The predecessor to Repap, Westar, neither understood nor tried to understand the situation [Informant A: 07/93]. Clearly a choice faces all third party resource interests in B.C. today: they can either be part of the forces of change or they can fight the inevitable. The days of Tree Farm License type tenures are over. Particularly in the northern part of the province, third parties either will learn to interact and deal with their tribal landlords or they will be forced to vacate their interests. In some cases, such as Alcan's Kemano project (in the news of late) the motivation seems to be rather raw. There, as in other cases, when the crown acts against its obligation to aboriginal people, creates and even exacerbates third party liability.

Repap engaged in somewhat classic interest based negotiations, rather than taking a positional stance like governments and all others before them. By engaging in an interest based process, one that both parties designed and agreed to, the company demonstrated that accommodation, even short term can be found. Engaging in such

a process was a demonstration of leadership within the context of third party resource based industries in B.C.

Issues of implementation of the agreement do arise, and there are problems that will take some time to work out. Nevertheless, Repap showed a quality that is distinctly lacking in most other third party situations (and in government for that matter): pragmatism [Informant D: 08/93]. Would not the first party in such an issue be more disposed toward a third party interest that sought accommodation and a new arrangement, rather than an interest that maintained a position of denial while continuing to back the government position?

Variable 3: Mandate Do you have a bottom line? Third Party: Yes
Gitksan House: Yes

The mandate of Repap was to gain some measure of security of access to the resource base, while attempting to normalise relations with the aboriginal interest in the short to medium term [IBID]. Arguably, such a position can be viewed as proactive. Repap was placed between a rock and a hard place. It had an obligation to the provincial government under its forest license agreements. This obligation was presented by them as a point of concern.

The Gitksan house derived its mandate from pragmatism. Repap's plans and licenses clearly violated its extant rights and title. The house would have had a case for an injunction, at least when viewed in retrospect. This deal was made during the period between the original Delgam Uukw decision and that out of the appellate court and, therefore, it was felt that in the short term that to fight Repap in the court was a risk. Therefore the house achieved provisional consensus in making a deal. The deal was based on two points of legal fiction: on the part of the House there was a recognition of some interest by Repap in relation to its timber license.

In essence, Repap joined forces with the aboriginal people against the government. Was this a right or correct choice. Time will tell.

Let us say this though: Repap and another smaller operator have made such choices, and their only remaining concerns are market conditions. Other operators have not done so, and one of them is responding now in court, long with the provincial government, regarding an application for an interlocutory injunction because they failed to negotiate with the aboriginal people from an interest based position.

Variable 4: Does the process inhibit the reaching of an agreement?

Discussion:

In this case, an agreement was reached. Since the process was designed ny the parties at the table, if it had become a problem, they could have been changed or modified as appropriate. This is a major advantage.

In a government process or a tripartite process, there is usually not the opportunity to do this. Such processes are usually extremely rigid, developed over years of bureaucratic interaction, and serve to benefit the government rather than the aboriginal group.

When we insist, as we do, that the processes are cumbersome, unworkable, stupid and ill-conceived, we are branded as rads, crazy, or band-faith negotiators. Experience at the table is the least effective of the variables, it seems, in determining a new process.

If negotiations are positional rather than interest based, and if the process is cumbersome and inflexible, the business will constantly be pinched as a result. Repap's position was nothing short of visionary, and even that did not go near far enough. The

respective governments should consider hiring the Repap negotiator to inform or even lead their own processes. They clearly have nothing to loose and everything to gain.

7. DISCUSSION OF THE FINDINGS

This cell chart summarises the findings presented in the previous sections. It is presented here to assist the reader in considering what we have found through the course of the research.

	Case 1	Case 2	Case 3	Case 4	Case 5
Variable 1 will	N-y	Y-y	Y-y	N-y	Y-y
Variable 2 mandate	N-y	Y-y	Y-y	N-y	Y-y
Variable 3 policy	N-y	N-y	Y-y	N-y	Y-y
Variable 4 process	N-y	Y-y	Y-y	N-y	Y-y
Outcome	?	Yes	Yes	No	Yes

Key: Y= government/third party affirmative

N= government/third party negative

y= GitWet affirmative

n= GitWet negative

?= outcome uncertain

Throughout this paper we have indicated that the most critical variable was that of will. If there is no political will (or the equivalent) on the part of the negotiating parties, a positive outcome or an agreement seems unlikely. It is also true that we have answered in the affirmative in all of the cells for all of the variables.

We have not responded in this way to be contrite. However, in sorting out such a comparative process as this, where we felt the most useful point of comparison to be a simple one, we were led by the average response. In the discussion, we do in fact have several cells that are qualified or where we indicated some ambiguity. These are, of course, the areas where there was not unanimity between the informants.

We have also indicated that positionally based negotiations, where the process is dictated, only achieve agreements if the second party, here we mean the Gitksan and Wet'suwet'en, are motivated to reach an agreement. For the most part, the processes tend to be extremely unbalanced. The first party negotiates from a position of strength in that they control the money and thus the process, and also tend to have control of the legislative prerogative. The process is stacked, to say the least.

Given this situation, if we wish to move ahead we must engage the

processes set before us and work to create others. In some cases, we engaged the negotiative processes to demonstrate that the policies and processes were flawed, and to demonstrate to the court that we were in earnest and sincere in our attempts to bring the outstanding issues toward settlement.

Scope and complexity are not issues that can be used to mitigate the variables. By comparison, the North American Free Trade Agreement should have taken about a thousand years to negotiate if the government's track record in aboriginal issues is anything to judge by. There is simply put, political will on the part of government to deal with or settle the major issues relating to aboriginal people in B.C. Without will, an agreement is not possible. This is true in the case of the bilateral process between British Columbia and the Gitksan and Wet'suwet'en. When lack of will is combined with other problems in process and policy, a pointless, time wasting process is sure to follow.

We are compelled to treat the federal self-government process as an anomaly. Given what was stated previously, this process should fail to produce an agreement. During the time of this research, the government has changed in Ottawa. The new liberal regime has made an interesting (if incomprehensible) statement in relation to aboriginal self-government, indicating that this is high on their agenda and that they wish to se it implemented. If this is so, then perhaps we will be able to change the negative response in the

federal will variable to that of positive. Positive will, as we have seen in other cases, can be enough to allow agreement, even if the policies and processes were ill-formulated. For this reason we have equivocated.

The Gitksan and Wet'suwet'en maintain a policy of taking part in all available processes. Sometimes they work, and sometimes they don't. This study presented only the major and interesting examples. We chose not to dwell on the failure so to not be discouraging. We have enough experience now to say what we think will work and what we think will not.

Given what we have said then, who thinks the Treaty Commission process of negotiating claims in B.C. has a chance of actually producing treaties?

8. SUMMATION

Five case studies were presented each, relating to negotiative process engaged by the Gitksan and Wet'suwet'en negotiating team over the past five years. Four critical variables were uncovered by researchers who interviewed the team members. These were considered in light of their perceived importance in determining the outcome of a process.

It was found that "will" in the political sense was the critical variable in determining the outcome of the process. Without will, the experience of the informants was that the process would lead to no definite conclusion and would tend to perpetuate itself for its own sake.

It was further found that will was directly related to the scope of the mandate given to the negotiator at the table and a determining factor in the rigidity of the process. Where will was high, mandates tended to be less layered and the process of negotiation adaptable to the particular needs to the groups at the table. In short, will tended to relate to interest based negotiations. Where the will seemed to be lacking, governments and their agencies tended toward positional mandates and negotiation stances.

It was also found that line agencies can only practically bring to a negotiation process what they as agencies have legislative control over. In processes such as self-government negotiations and the provincial bilateral process, the nature of the bureaucracy tended to hinder the ability of a line agency to deliver agreements that involved other agencies.

The research indicates that several recommendations be made:

1. Self-government and treaty processes should be driven out of central agencies rather than lines agencies as is now the case, both federally and provincially.

2. Mandates given to central agency negotiators should be of sufficient scope to allow the conclusion of an Agreement in Principle at the table.

3. Line agencies should continue to offer interim sectoral agreements.

4. Federal and provincial policy should allow for treaties to be concluded on the basis of a series of sectoral agreements, rather than requiring an aboriginal group to move through a treaty negotiation process if that process is redundant to the progress that has been

made sectorally.

5. Roll-up mandates for the treaty process in British Columbia (that is deriving the mandate for a negotiation process with a specific group from estimates of what the entire treaty picture may look like to someone at DIAND now) should be avoided.

6. Canada, British Columbia and aboriginal people should employ a process of interest based negotiations to define the substance of treaties.

9. REFERENCES

Informant A: Interviews for the Royal Commission Paper 05/93-10/93 Office of Wet'suwet'en Hereditary Chiefs: Moricetown, B.C.

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10. APPENDICES

Appendix 1: Profile of the Informants

Informants

Informant A: male, with over 25 years of active political and negotiative experience on the national, provincial and local aboriginal political scene. Known to hold radical/traditionalist views; completed post-secondary education in an academic stream

Informant B: male, with fifteen year experience in all levels of Indian politics. Considered radical/moderate; completed post-secondary education in an academic stream

Informant C: female, ten years experience at local political level; radical/moderate political views; completed secondary education

Informant D: male, ten years experience at national, provincial and local negotiative and policy development processes. Radical; completed post-graduate education

Informant E: male, fifteen years experience at the local political level, broadly experienced negotiator; radical/traditionalist; completed secondary education

A few notes on the above informant profiles:

1) national means national level organisation or other structure

2) provincial means provincial level organisation or other structure

3) local means within the community

4) radical means sovereigntist

5) moderate means moderate in method rather than moderate in view

6) traditionalist means actively working to remove colonial structures such as those provided for under the Indian Act

Appendix 2: Interview Guidelines

Guidelines A:

Instructions to Interviewer: for each of the processes that we discussed, ask the interviewer to tell you what their role was, what the roles of the others were at the table and what they saw as the major positive and negative factors in each were. Also ask for:

a) anecdotes or funny stories

b) points of frustration

c) how they perceived the federal and/or provincial negotiator

d) their satisfaction with the process

e) whether or not they thought the process was successful

f) how they would change it, from both sides

g) if they saw any one thing that seemed to predetermine the outcome of the process

h) what they think of the proposed provincial treaty process

i) anything else that seems to be relevant

Keep the initial interview to the one hour maximum as we discussed.

Guidelines B:

Instructions to Interviewers: try to elicit specific instructions to the following questions. Use the structured interview technique that we discussed.

a) How important is political will to the outcome of a negotiation process?

b) How important was will in each of the cases? (1 2 3 4 5)

c) Describe the mandate that each negotiator had in each process

d) How important was the depth or clarity of the mandate in each?

e) Did you and the federal and provincial negotiators understand the policy in each case?

f) Did policy seem to shift? Is so, at what point and what was the outcome?

g) Did you ever get the idea that the federal and/or provincial negotiators were told to keep the process going rather conclude an agreement? If so when and what was the outcome?

h) Did the federal and/or provincial negotiators ever say to you that they had no mandate, or no mandate to conclude a process? If so when and what was the outcome?

i) Which negotiations had the most flexible processes? Which had the least and how did that affect each?

j) Did you see nay evidence of non-cooperation between federal agencies (or provincial agencies) in the negotiations? Which ones and what was the outcome?

k) What are the critical differences between the federal, provincial and third parties when

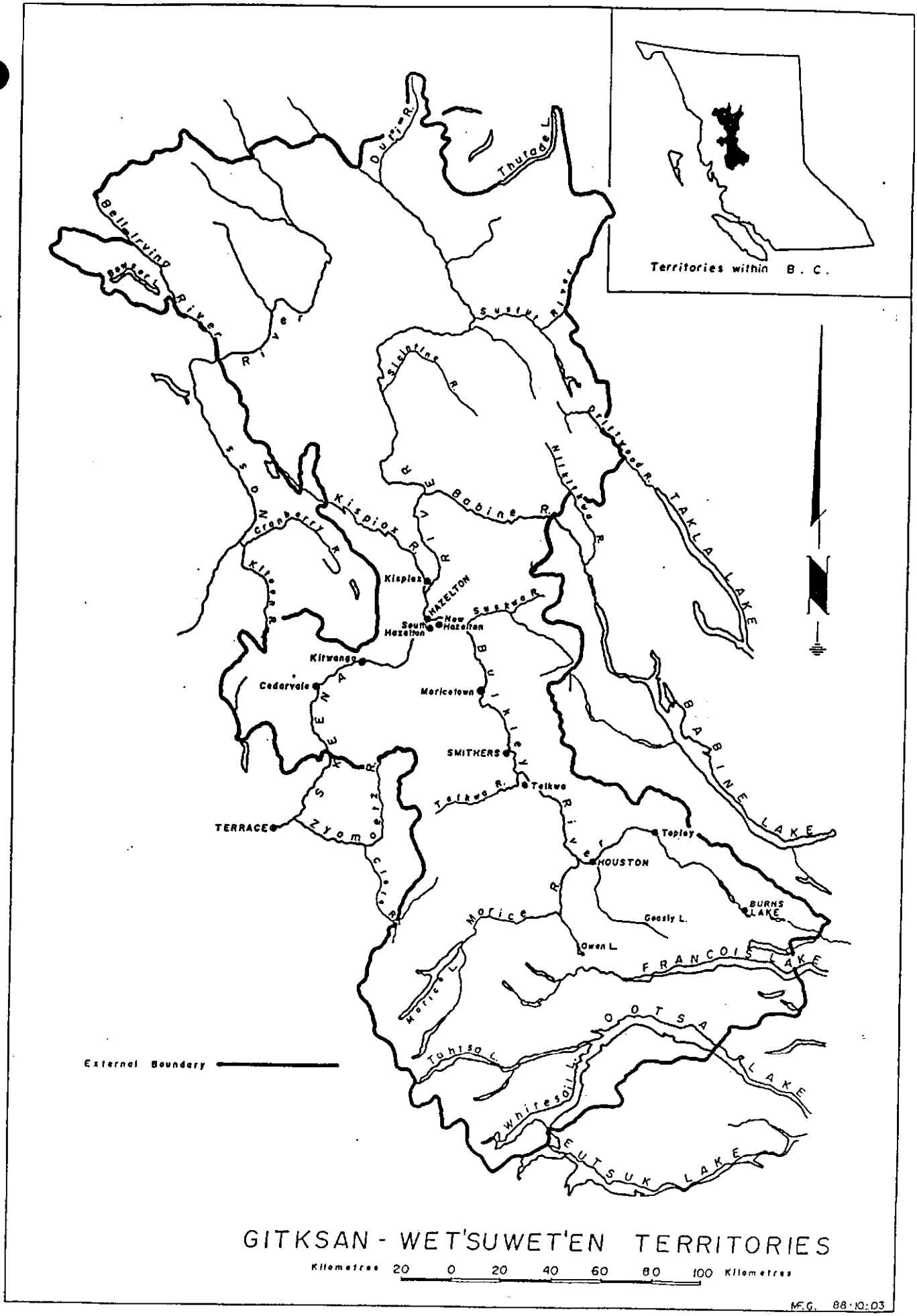
at the negotiating table? How does that relate to the general questions asked of you earlier?

l) Given what you have learned from these processes, what do you think of the proposals on the table in relation to treaties in B.C.? Where do you think the points of strength and weakness lie?

m) What do you think of roll-up mandates and their ability to impede progress in B.C. on the treaty front?

n) Do you think that a research paper on people's experience with negotiations will be useful to others? How and why?

Appendix 3: Map of the Territories


Territories within B. C.
Bell-Irving River
Bowser River
Dutlo R.
Thutade L.
Sustut River
Sikadina R.
Driftwood R.
Nilkitkwa R.
TAKLA LAKE
Babine R.
Kispiox R.
Kispiox River
Cranberry R.
Kisgegas R.
Kispiox
HAZELTON
New Hazelton
South Hazelton
Suskwa R.
Kitwanga
Cedarvale
Moricetown
BULKLEY R.
BABINE LAKE
SMITHERS
Telkwa
Telkwa R.
Bulkley River
Topley
HOUSTON
TERRACE
Zyomeetz River
Morice R.
Morice River
Burns Lake
Goosly L.
Owen L.
FRANCOIS LAKE
Morice L.
Tahtsa L.
OOTSA LAKE
Whitesail L.
DEUTSUK LAKE
External Boundary
GITKSAN - WET'SUWET'EN TERRITORIES
Kilometres 20 0 20 40 60 80 100 Kilometres
M.E.G. 88-10-03