NEGOTIATED VS. JUDGE-MADE ABORIGINAL LAW:
BRIDGING THE TWO SOLITUDES

by

Julie Ramona Jai

A thesis submitted in conformity with the requirements
for the degree of LL.M.
Graduate Department of Law
University of Toronto

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ABSTRACT

This paper examines the two streams through which Aboriginal law is currently being developed - through negotiations, and through court decisions. It then analyzes the interaction between these two streams, both positive and negative. It is my thesis that a greater understanding by courts of modern negotiated agreements will provide them with a source of law, and with an understanding of Aboriginal perspectives, which will help them to better bridge the gap between their stated objectives, and the “on the ground” impact of their decisions.

Both negotiated and judge-made Aboriginal law must interact in a more synergistic way if society is to meet the challenges inherent in reconciling preexisting Aboriginal occupation with the current reality of a largely non-Aboriginal population with competing rights and interests. Greater mutual understanding of their respective roles, strengths and weaknesses will help these two streams of law to work together, rather than at cross-purposes.
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INTRODUCTION

The field of Aboriginal law is relatively new, and is evolving rapidly. Within this field, there appear to be two distinct streams of law developing from two parallel processes – modern treaty negotiations, and court decisions. As a result, there are two separate sources of law, both wrestling with the challenge of reconciling the fact of preexisting Aboriginal occupation with the current reality of a largely non-Aboriginal population with competing rights and interests.¹

In my own negotiating experience² in Ontario and the Yukon I have been struck by how limited the court’s impact has been on both the content and process of actual land claims and self-government negotiations. The negotiations, while perhaps initially triggered by fears of an adverse court ruling, tend to be influenced primarily by each party’s articulation of its interests, the perceived benefits of a settlement, and what each party feels will be politically saleable to its constituents. The end result of this bargaining process is a land claims or self-government agreement which all parties have to implement and live with for the foreseeable future.

These negotiated modern agreements, while not based on purely legal considerations, form a body of Aboriginal law, which I refer to as “negotiated Aboriginal law”. Modern day land claims agreements are s. 35¹ treaties, and even self-government agreements which are not yet

¹ This is my description of the practical challenge facing Canadian society today. This differs from what the Supreme Court of Canada has described as the underlying purpose or purposes of s. 35(1) of the Constitution Act, 1982 (being Schedule B to the Canada Act, 1982 (U.K.) 1982, c. 11) in recent cases. Section 35(1) provides: “The existing aboriginal and treaty rights of the aboriginal people of Canada are hereby recognized and affirmed.” Chief Justice Lamer states in Delgamuukw (Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010) that the purposes underlying the recognition and affirmation of aboriginal rights in s. 35(1) are “the recognition of the prior occupation of North America by aboriginal peoples or . . . the reconciliation of aboriginal prior occupation with the assertion of sovereignty of the Crown.” (at para 161, quoting from his earlier judgement in Gladstone (R v. Gladstone, [1996] 2 S.C.R. 723) at para 72.) I believe that the assertion of sovereignty by the Crown may not provide a definitive answer as to legal entitlement to land or governance regimes, that the selection of this date is arbitrary, and in any event, that the practical problem is that there is now a large non-Aboriginal population in Canada which believes in good faith that it has valid title to land, and other rights and interests which are in direct conflict with those of Aboriginal people.

² I was the Director, Legal Services, of the Ontario Native Affairs Secretariat from 1994 to 1996, and Senior Counsel, Aboriginal Law, Yukon Department of Justice, from 1996 to the present, and in these capacities have had the opportunity to participate in many negotiations with First Nations and with Aboriginal people.

³ Section 35 of the Constitution Act, 1982 (Schedule B to the Canada Act, 1982, (U.K.) 1982, c.11) states,
recognized as treaties have the force of law. Negotiated land claims agreements are constitutionally protected, may create a third order of government (as in the Yukon Final and Self-Government Agreements), bind third parties, and can contain terms which prevail over other provisions of the constitution. These agreements reflect practical "on the ground" arrangements reached by Aboriginal and non-Aboriginal governments and form a significant body of Aboriginal law. These agreements come about after a long period of negotiation, discussion and internal consultation by the parties, and therefore come as close as possible to reflecting a consensus among the parties as to how the recognition of Aboriginal rights can best be translated into a workable sharing of land, compensation, law-making powers, co-management, economic development, and other rights. Because of the involvement and necessary agreement of First Nation and non-First Nation governments, these agreements tend to reflect both Aboriginal and non-Aboriginal values.

In contrast to "negotiated Aboriginal law" there is also "judge-made Aboriginal law" as reflected in a growing number of Supreme Court of Canada decisions such as Sparrow, Delgamuukw and Marshall. The case law has traditionally reflected anglo-Canadian legal traditions and values, and until recently has been based entirely on anglo-Canadian legal concepts, although Delgamuukw hints for the first time that Aboriginal systems of law might have some bearing on the process of determining Aboriginal rights. These cases have relied primarily on previous court decisions and legal precedents, and to some extent on academic

"(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
(3) For greater certainty, in subsection (1) "treaty rights" include rights that may now exist by way of land claims agreements or may be so acquired.
(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

4 I have chosen to capitalize "Aboriginal" throughout this paper, except when I am quoting other sources which do not use the capital. I believe that capitalization is appropriate and consistent with the view that Aboriginal people can constitute self-governing nations, or First Nations. Capitals are used to describe members of other nations (e.g. the French, the British, the Chinese, etc.)

8 See Delgamuukw, para. 112 where Lamer, C.J.C. states of Aboriginal title that "its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems" but must be "understood by reference to both common law and aboriginal perspectives." At para. 113 he states that a second source for Aboriginal title is "the relationship between the common law and pre-existing systems of aboriginal law."
commentary, but almost never refer to how parties in similar situations may have decided to settle a matter through a negotiated agreement.

In many ways, court decisions have had little relevance to negotiated arrangements, and it appears that the converse also applies, as courts have referred only rarely to modern day land claims and self-government agreements for assistance in their deliberations. It's almost as if the negotiated agreements and judge-made law are two solitudes, operating on separate but parallel tracks which seldom intersect. Yet both deal with the same subject matter – the reconciliation of Aboriginal rights with the rights of other Canadians.

In this thesis, I argue that increased interaction between negotiated and judge-made Aboriginal law would be beneficial. Court decisions can have a positive effect on modern negotiations by encouraging the negotiation process, clarifying legal rights and increasing the bargaining power of Aboriginal parties, but they can also have a negative effect. Judges could benefit from recognizing that in some cases they have unreflectively modified the legal basis for current agreements when ruling on a historic treaty or Aboriginal rights issue, or made the negotiating context more difficult. They could also benefit by using the principles underlying modern agreements as a source of law when they are trying to develop new principles and approaches to Aboriginal law.

Aboriginal law as reflected in court decisions is evolving rapidly, and “on the ground” negotiations are also proceeding fairly rapidly, yet little has been written on the interaction between these two streams. Both courts and negotiators are struggling with an increasing volume of highly complex disputes arising from Aboriginal rights issues, yet are working largely in isolation from each other. This thesis is intended to be a starting point by making the case for increased dialogue between the judge-made and negotiated streams of Aboriginal law. Perhaps a small bridge between the two solitudes can be constructed.

Chapter One, which is both descriptive and analytical, examines the process of developing negotiated Aboriginal law through modern treaties and looks at the strengths and weaknesses of the negotiation process. Chapter Two continues with a parallel examination of the process of developing judge-made Aboriginal law. Chapter Three reveals the surprisingly limited
effect of modern negotiated agreements on judge-made Aboriginal law, while Chapter Four reviews the more significant impact of judge-made Aboriginal law on modern negotiations. In the concluding chapter, I examine the common challenges facing both negotiating tables and courts, their respective areas of strength and weakness, and opportunities for greater cross-pollination between the two streams, ending with a few practical suggestions for increased interaction.
CHAPTER ONE
NEGOTIATED ABORIGINAL LAW THROUGH MODERN TREATIES:
A STUDY OF THE PROCESS, ITS STRENGTHS AND WEAKNESSES

A. Introduction

This chapter examines the modern treaty-making process, focusing particularly on the ongoing negotiations in the Yukon territory to reach Final and Self-Government Agreements. Section B looks at some of the fundamental issues underlying the negotiations, such as why parties negotiate at all, and the relative benefits of negotiation as compared with litigation. Section C examines process issues relating to negotiations, such as the parties involved and negotiating approaches. Section D summarizes some of the principles which underlie the negotiations, as well as the principles which emerge from the agreements themselves. Section E looks at the results of the negotiation process in the Yukon. The final section begins the discussion of why these modern land claim and self-government agreements can be considered to form a body of “negotiated Aboriginal law”.

After examining the process and underlying principles of negotiated Aboriginal law in this chapter, Chapter Two will develop a parallel analysis of judge-made Aboriginal law, looking at the theoretical underpinnings, governing principles, processes and parties. These two chapters, which are both descriptive and analytical, will provide a basis for comparing and contrasting the two streams of Aboriginal law in later chapters, and will be helpful in understanding my assertion that both streams could benefit from greater interaction with each other. The detailed examination of negotiated Aboriginal law in Chapter One, and of judge-made Aboriginal law in Chapter Two, provide the building blocks for Chapters Three and Four. Chapter Three assesses the limited impact of negotiated Aboriginal law on judge-made Aboriginal law, while Chapter Four examines the impact of judge-made law on negotiated Aboriginal law. In Chapter Five, the similar challenges facing both judge-made and negotiated Aboriginal law are examined, and the lack of connection between the two streams of law is exposed and questioned. A dialogue between the two streams is suggested, so that the experiences of Aboriginal parties and governments in negotiations, and of judges in
litigation, can be brought together in a more complementary way, taking into account the respective strengths and weaknesses of each area.

One of the motivating factors for me in writing this thesis was the realization that there was a large gap between those involved in Aboriginal negotiations, who tend to be more pragmatic, and those involved in more theoretical work, such as judges or academics. I was intrigued by the relative lack of interest by Yukon negotiators in judge-made Aboriginal law, and the corresponding lack of interest in modern negotiated agreements by the judiciary (as evidenced in court decisions). My own bias and experience, which is reflected in this thesis, is as a practitioner, working as legal counsel in the Yukon, and on one file, as Chief Negotiator. By writing this thesis, while simultaneously continuing to practice in the negotiated Aboriginal law field, I am trying to personally bridge the two solitudes which I believe exist between these very separate but related areas.

In preparing Chapter One, I wanted to draw on the perspectives of all three parties to the Yukon negotiation process, rather than relying exclusively on my own more limited and subjective views as a member of the Yukon government’s negotiating team. In order to obtain a diversity of perspectives, I decided to conduct informal interviews with nine individuals, three from each of the Yukon government, the Council for Yukon First Nations, and the federal government negotiating teams. The three individuals who have been involved from the Yukon First Nation side in the negotiations are also citizens of three different Yukon First Nations and therefore bring their perspectives not just as First Nation negotiators, but also as Aboriginal people, to this discussion.

It is worth noting that the interests of the Yukon government and the federal government are quite distinct in these negotiations, and their negotiators have different perspectives. The federal negotiators have a “made in Ottawa” mandate, whereas the Yukon negotiators report to a government which is very much aware that it has to be accountable to the local population, including First Nation and non-First Nation citizens. The federal relationship to the Yukon’s Aboriginal people is influenced by national policy considerations and by its fiduciary obligations and its responsibilities under s. 91(24) of the Constitution Act, 1867,
with less of an interest in the mechanics of solutions which will be administered locally by either the First Nation or the Yukon government.

The interviews were conducted between January and April, 2000. Appendix One sets out the names of the interviewees, while Appendix Two lists the interview questions which were used as the starting point for discussions. The nine persons interviewed are all key players in the Yukon negotiation process with combined experience covering the entire 27 year history of the Yukon negotiations. Some of the interviewees have been able to provide a historical perspective, having been involved at all stages from the inception of negotiations to implementing the agreements.

Since the interviewees have all been involved in the negotiation process for many years and have invested a lot of personal time and energy into this process, they are likely to be supporters of the negotiation process, and therefore one can expect a certain pro-negotiation bias from this particular group. However, some of the interviewees have also been involved in litigation, or have moved on to other careers (for example, one former negotiator is now a judge) which helps to temper this potential pro-negotiation bias. Since this chapter is focused on the modern treaty negotiation process, it seemed appropriate to interview those most knowledgeable about the process as a primary source. Secondary sources, including academic articles, government publications and court decisions have also been used to balance the sources for this chapter.
B. Theoretical Underpinnings and Governing Principles of Negotiated Aboriginal Law

1) Historical Treaties

Historical treaties between the Aboriginal people of Canada and the British Crown began with the Treaty of Albany in 1664. These treaties took on a number of different forms, and changed with shifting power relationships between the British and the Aboriginal nations. Historical treaties were intended to clarify relationships between two culturally different groups, and to set out rights and responsibilities in a way which would facilitate mutual co-existence and respect. However, differences of language, culture, and worldview, time constraints, and other factors often led to different understandings by the parties as to what had been agreed to.

More recently, the negotiation of modern treaties has begun. These modern treaties are also intended to clarify relationships, and to set out rights and responsibilities in a way which will facilitate mutual co-existence and respect between Aboriginal and non-Aboriginal people. Modern treaties, beginning with the James Bay and Northern Quebec Agreement in 1975, are much longer and more complex documents than historical treaties, and are negotiated over a period of years rather than days, with all parties being represented by legal counsel and professional negotiators.

While much has been written about historical treaties, and many judicial decisions have interpreted various provisions of these treaties, there has been little academic commentary about modern treaties, especially the seven treaties involving Yukon First Nations. This

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2 Between le Gouvernement du Quebec, la Societe d'énergie de la Baie James, la Commission hydroelectrique de Quebec, the Grand Council of the Crees, the Northern Quebec Inuit Association, and the Government of Canada, 1975.
3 For example, the Tr'ondèk Hwéch'in Final Agreement (Ottawa: Minister of Indian Affairs and Northern Development, 1998), which came into effect on September 15, 1998, is 510 pages, and the companion Self-Government Agreement (Ottawa: Minister of Indian Affairs and Northern Development, 1998) is 60 pages.
4 There are 14 First Nations in the Yukon. Seven of these have Final Agreements and Self-Government Agreements in effect; the other seven are in various stages of negotiation. The seven with agreements are the Teslin Tlingit Council, Champagne and Aishihik, Nacho Nyak Dun, Vuntut Gwitchin, Selkirk, Little Salmon/Carmacks, and Tr'ondëk Hwéch'in First Nations. The total First Nation population is approximately 7,000, out of approximately 32,000 residents in the Yukon. There has been very little published commentary
chapter will begin to fill some of this gap by describing the modern treaty-making process, with a particular focus on the Yukon experience.

2) Modern Treaties and Self-Government Agreements in the Yukon

To us, a treaty is a sacred instrument. It represents an understanding between distinct cultures and shows respect for each other's way of life. We know we are here for a long time together.5

In some areas of Canada, including the Yukon territory, historical treaties were never signed. While there were early attempts by Yukon First Nation leaders to negotiate with the federal government, the Klondike gold rush made the government reluctant to sign a treaty with Yukon Indians and give them land on which gold might later be found.6 It was not until the 1970's that Yukon First Nation leaders were successful in engaging the federal government in a modern treaty-making process.

On February 14, 1973, two weeks after the release of the Calder7 decision, Chief Elijah Smith led a delegation to Ottawa and met with Prime Minister Pierre Trudeau to discuss the Yukon Indian Claim. The Yukon First Nation delegation presented the Prime Minister with the document "Together Today for our Children Tomorrow",8 which set out a list of grievances, a framework for negotiations, and a vision for the future. The Yukon delegation indicated that they did not want to go to court, although they had a good claim, but would rather negotiate, and the federal government accepted their document as a basis for negotiations. This was prior to the federal government's development of its comprehensive

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6 This statement is in the federal government's own publication, Northwords: Talking About Land Claims, Spring 1999, Yukon Region, Minister of Public Works and Government Services Canada, Whitehorse, Yukon, p.3.


8 The Council for Yukon Indians, Together Today for our Children Tomorrow, A Statement of Grievances and an Approach to Settlement by the Yukon Indian People, originally printed January 1973 (Brampton, Ont.: Charters Publishing Co. Ltd., 1977).
claims policy, and the Yukon claim was the first comprehensive claim accepted for negotiation.9

The negotiation process was slow. Discussions after 1973 "followed a tortuous, difficult, and costly path."10 Changes in political leadership, changes in negotiators, differences of opinions among the First Nations, and inflexible government mandates including an insistence that First Nations surrender Aboriginal rights, all added to the delays in reaching agreement.11 The Council for Yukon Indians (now called the Council for Yukon First Nations) coordinated negotiations on behalf of all Yukon First Nations for a framework which would form the basis for negotiating individual agreements for each First Nation. Finally, in April 1990, representatives of the Council of Yukon Indians, the federal government and the Yukon government signed an Agreement in Principle, which led to the signing of the Umbrella Final Agreement12 and four First Nation Final and Self-Government Agreements in 1993. The Umbrella Final Agreement contains terms which will be incorporated into all of the First Nation Final Agreements, providing a degree of uniformity to the Yukon agreements, while permitting clauses specific to each First Nation to respond to local circumstances.

Unlike the Nisga'a Final Agreement,13 which includes provisions dealing with self-government, lands and resources, and compensation in one document, all of which forms a treaty protected by s. 35 of the Constitution Act, 1982,14 the Yukon Self-Government Agreements are separate documents which do not currently have the status or constitutional protection of treaties. (The Yukon Final Agreements are considered s. 35 treaties, and deal with lands and resources, compensation, co-management and other matters.)

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9 While the Yukon claim may have been the first modern comprehensive claim accepted for negotiation, the first modern treaty reached is generally considered to be the 1975 James Bay and Northern Quebec Agreement, supra note 2. See Matthew Coon Come, "Dishonourable Conduct: The Crown in Right of Canada and Quebec, and the James Bay Cree" (Winter 1996) 7 Const. Forum 79 at 85.
11 Ibid.
13 Canada, British Columbia, Nisga'a Nation, Nisga'a Final Agreement, signed April 27, 1999, in British Columbia, published jointly by Canada, British Columbia and the Nisga'a Nation, received Royal Assent on April 13, 2000. The effective date of the agreement was May 11, 2000.
government's "inherent right" policy, released in 1995, changes previous federal policy and recognizes the inherent right to self-government as an existing right within s. 35 of the Constitution Act, 1982. Negotiations have been underway pursuant to this policy since 1995 between Canada, the Council for Yukon First Nations, and the Yukon, to find a way to give portions of the Yukon Self-Government Agreements the status of s. 35 treaties. These negotiations have not yet reached a successful conclusion. However, for the purpose of this paper, I will refer to both the Yukon Final Agreements and the Yukon Self-Government Agreements in discussing the modern treaties, which form a body of "negotiated Aboriginal law". There is no rational reason for excluding the self-government components of the Yukon agreements from this discussion.

This chapter will focus primarily on the Yukon agreements as examples of modern treaties, with some reference to other modern treaties. The sources for this chapter include traditional academic sources, as well as material from interviews with people involved in the Yukon negotiations. This chapter also draws on my own personal knowledge and experiences as a member of several Yukon negotiating teams since 1996.

3) Why Parties Negotiate

_We can't afford not to settle land claims._

_This Settlement is for our children, and our children's children, for many generations to come._

Tim Koepke, Chief Negotiator for the federal government in Yukon and northern B.C. since 1987, states that the federal government negotiates land claims for three main reasons. First, it is a constitutional obligation. Secondly, the courts are repeatedly saying that the most appropriate way to resolve land claims issues is by negotiation, rather than by litigation. Finally, negotiating is the right thing to do. It is the right thing for governments to do because it is in the public interest to create more equitable conditions in which Aboriginal

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16 I am legal counsel to the Yukon's negotiating team in this negotiation.
17 Tim Koepke, Chief Negotiator for the federal government, quoted in "Why We Settle Land Claims", _supra_ note 6, at 3.
18 _Supra_ note 8 at 17.
societies can develop. It is also in the public interest to redress historical inequities and to create greater certainty with respect to First Nation rights to land and other resources, which then frees up other lands and resources for use by third parties. In the Yukon, governments are also at the negotiating table because of concerns about the potential legal uncertainty as to land ownership. There were never any treaties or land surrenders in the Yukon, and the 1870 Rupert's Land and North-Western Territory Order\textsuperscript{19} which made the Yukon part of Canada requires government to compensate Indians for land, which was never done. Without modern treaties, there is a potential risk that all of the land in the Yukon could be found to be subject to Aboriginal title. Thus, one reason why governments negotiate is to reduce the risk of litigation. Negotiations can clarify land ownership, fulfil legal obligations, and create conditions which will help all residents of the Yukon to co-exist. Negotiations also provide increased flexibility to deal with issues and greater control for the parties in determining their respective rights than do the courts.

First Nation representatives say that they negotiate because they are concerned about their children's future and need to create conditions of social and economic equality so that "the Indian people may develop in harmony with the White society in the years ahead."\textsuperscript{20} The focus is on building for the future, rather than on compensating for all the injustices of the past, as "our grievances are so great that there is no way we can be compensated for what has happened to us."\textsuperscript{21} Instead, the Council for Yukon Indians initiated negotiations as a forward looking step, for their children and their children's children. "So that you will better understand our deep feelings, we will tell you something about our past history; then something about the problems we have today; and finally our thoughts about the future."\textsuperscript{22} First Nation representatives in the Yukon also say that they negotiate because they believe

\textsuperscript{19} Supra note 17.
\textsuperscript{20} This Order, originally called the Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the union, dated the 23rd day of June, 1870, was an Imperial Order, dated June 23, 1870, to the Rupert's Land Act, 1868, (Br. Stat. 1868, c. 105), was renamed as part of the modernization of the constitution, and is listed in the Schedule to the Constitution Act, 1982. Schedule A to the 1870 Order, which was an address to her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada, states, "And furthermore, that, upon the transference of the territories in question to the Canadian government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines." For further background, see Kirk Cameron and Graham Gomme, The Yukon's Constitutional Foundations, Volume II (Whitehorse: Northern Directories Ltd., 1991).
\textsuperscript{21} Supra note 8 at 26.
\textsuperscript{22} Supra note 8 at 7.
that they can get a better deal through negotiations than through the mainstream court system, which they do not trust, and where they run the risk that Aboriginal rights will be constricted.

Negotiations provide an opportunity to increase mutual understanding, to engage in empathic dialogue, to build relationships for the future, as well as to solve problems and work out respective rights and obligations. The next section outlines in detail the benefits and downsides of negotiation as compared to litigation from the perspective of parties involved in the Yukon negotiations. This will be followed by some more general commentary by academics and judges on the benefits of negotiation as a means of resolving Aboriginal claims.

4). Relative Benefits of Negotiation vs. Litigation

a. Benefits of the Negotiation Process - the Yukon Perspective

The treaty proves, beyond all doubt, that negotiations - not lawsuits, not blockades, not violence - are the most effective, most honourable way to resolve Aboriginal issues in this country. 25

Dave Joe, a negotiator for the Council for Yukon First Nations as well as for many individual Yukon First Nations, states that there are four major benefits to negotiating. First, it forces people to re-examine their own values. Secondly, the parties are then forced through the negotiation process to reconcile their values against a different value system. Thirdly, the negotiation process builds capacity in First Nation communities, as well as within governments, and creates ongoing relationships and processes for resolving future conflicts. Finally, the process usually leads to an agreement. Thus, the negotiation process itself, as well as the results it achieves, provide benefits.

John Olynyk, a former Yukon negotiator, agrees that one of the benefits of negotiating is that it leads to comprehensive agreements, which could never have been devised by a court.

While courts can define rights, they cannot deal with the complex issues of co-management,

23 Ibid.

self-government and intergovernmental relations which are set out in the agreements. Thus, one of the main benefits of the negotiation process is that it leads to an agreement that governs a wide range of complicated issues. In addition, the negotiation process increases capacity in First Nation communities and improves relationships between the parties.

According to Daryn Leas, legal counsel with the Council for Yukon First Nations, the negotiation process is more inclusive than court processes and helps to pull members of First Nation communities together, and is empowering. He also indicates that the process can build trust between the parties, as people learn to work together and see that the other parties are also interested in making changes and finding solutions. Improved personal relationships, greater mutual understanding and trust are important legacies of the process, and help in the implementation of the agreements.

Yukon negotiator Ron Sumanik states that the negotiations have created a forum for dialogue with First Nations, and have increased the government’s, and the general public’s understanding of First Nation history, and of the negative effects of white settlement in the territory. The negotiations have given First Nations a voice and increased mutual understanding between the parties. The parties share a lot of information as part of the negotiation process which assists in trust-building and changes each party’s understanding of the world and of each other.

In the view of chief federal negotiator Tim Koepke, a negotiated process is better than litigation because it is better to have people who are locally accountable working out what an appropriate settlement might be than a court which is not accountable. The negotiation process allows for public involvement whereas litigation does not. Locally developed solutions can be customized to meet the needs of the individual First Nation community, and third party interests and other stakeholders can be involved in designing the solution, which will not only improve the solution but also increase support for the solution. Federal lawyer Phil Gibson adds that the negotiation process engages a broader range of government departments (both federal and territorial) than litigation, so there is greater buy in and involvement in the process. It also permits the parties to have greater control over the timing

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25 Supra note 5, at 6.
and process. Negotiations permit greater involvement of First Nation communities, government departments, third party interests, and the public.

Another benefit of the negotiation process is that it is done in stages, over many years, and the passage of time allows all the parties to change attitudes, adjust, and begin to acclimatize to changing realities.\textsuperscript{26} This contrasts with the suddenness and unpredictability of a court decision, which can dramatically change rights and relationships without any forewarning or phase-in period, and can lead to hostile public reactions.

The negotiation process also provides greater flexibility, and more scope for creativity and innovation than would a framework premised strictly on legal rights. While concern about legal responsibilities may initially motivate governments to negotiate, First Nations can obtain more through negotiations than through litigation because the process permits many issues beyond legal rights and entitlements to be addressed. The process also permits the parties to treat each other with respect, and as equals, in a way which court processes do not encourage. One of the objectives of Yukon First Nations was to achieve recognition of their own authority as a self-governing people, and their negotiators feel fairly satisfied that the negotiation process has achieved this result.

The negotiation process provides all parties with more control, and everyone interviewed felt that they could achieve a better result or agreement through negotiations than through litigation. The negotiation process is more holistic and can deal with different values and perspectives in a way which courts cannot.

While different interviewees emphasized different benefits of the negotiation process, they were unanimous in their view that negotiation was preferable to litigation, and none would disagree with any of the benefits suggested by the others and set out above. Both First Nation and Yukon government representatives emphasized the benefits of the process in helping parties to understand each others’ values and perspectives, which will help all parties live more harmoniously together. All those involved in the Yukon land claim negotiations process feel that the process has many advantages over litigation, including the ability to
improve relationships; increased understanding of other perspectives and values; the achievement of a more comprehensive agreement dealing with a range of complex issues; a more holistic approach which can deal with all the issues, legal and non-legal, which are important to the parties; a more inclusive process involving many of the affected people which results in a better product as well as greater support for the product; capacity building in communities; and time to adjust to changing realities.

b. Criticisms of the Negotiation Process - The Yukon Perspective

While the length of the negotiation process has some benefits in that it permits people to adjust to change, the longer that the negotiations continue, the more costly they are. The cost to First Nation communities has been enormous, both in terms of the amount of money they have spent over the last 27 years, as well as in terms of the human resources required to support the negotiations. Many of the best and brightest individuals have been consumed for decades by the negotiation process, removing them from other areas of activity which could benefit their communities.27

The financial cost has been huge. First Nations have had to borrow money from the federal government to support the negotiation process. These negotiating costs are considered advances against the compensation dollars which will be provided as part of the land claims settlement. For the seven Yukon First Nations still negotiating agreements, these negotiating costs (which must be repaid with interest) are consuming a larger and larger percentage of the ultimate compensation. As Hammond Dick, chief of the Kaska Tribal Council recently stated, "our loans for Ross River come to about 60 percent of our total compensation. [If we signed] I'd be pretty much saying, 'Take my land. I'll pay you for it.'"28 Most of the seven First Nations still negotiating are in a similar financial situation, with negotiating loans reaching close to 60 percent of compensation dollars.29 These First Nations are requesting some forgiveness of these loans, and argue that delays by the federal government in getting negotiating mandates approved and other delays beyond the First Nations' control

26 From interview with Phil Gibson.
27 From interview with Daryn Leas.
28 See Nadine Peterson, "New mandate or no mandate", Yukon News, March 1, 2000, at 5.
contributed to the cost and length of the negotiations.\textsuperscript{30} The loan repayment issue has become one of the major impediments to settling the claims of the remaining seven Yukon First Nations.\textsuperscript{31}

First Nation representatives also complain about the inflexibility of governments, and note that the Yukon claim broke new ground in many areas, as federal negotiators were forced to go back to Ottawa and seek changes to their mandate on key issues such as extinguishment of Aboriginal rights. Thus, Yukon First Nations have paid the cost of advancing the federal government’s mandate. Inflexible government mandates or negotiating positions limit negotiating room, and appear to First Nations to be dictating the terms of the treaty. There are also concerns about the varied and potentially conflicting roles of the federal government – as fiduciary to Aboriginal peoples, as representative of the people of Canada including third party interests, and as the banker financing the First Nation negotiations.\textsuperscript{32}

First Nation representatives also feel at a disadvantage because they are only one of three parties at the table, and therefore do not control the agenda, the timing or duration of the negotiations, or the time it takes governments to seek new policy direction. They also state that the negotiation process forces First Nation communities to state their values in “white”

\textsuperscript{30} For example, the Ta’an First Nation is entitled to $16 million in compensation dollars (in 1994 dollars) and has to repay $9 million in negotiation loans according to the negotiators involved. Yukon First Nations have collectively borrowed about $90 million from the federal government for the negotiations.

\textsuperscript{31} This loan repayment issue has some similarities to the request by third world countries for debt forgiveness, for a “jubilee” in the year 2000. For more information on the Jubilee 2000 campaign, see the following web sites: www.jubilee2000uk.org/main.html and www.web.net/~jubilee.

\textsuperscript{32} One of the other major impediments is the loss of the s.87 Indian Act tax exemption, which all Yukon First Nations agreed would end as of December 31, 1998, pursuant to the terms of the Umbrella Final Agreement. However, the seven First Nations without agreements now feel that it is unfair for them to lose the tax exemption before receiving the benefits of the agreements and the compensation dollars, and Carcross/Tagish First Nation is challenging the validity of the loss of the tax exemption in court. Their application for a declaration that s. 87 continues to apply to them was dismissed in the Federal Court, Trial Division, on March 14, 2000. See Carcross/Tagish First Nation v. Canada, [2000] F.C.J. No. 318, File No. T99-99 (F.C.T.D.). This decision is being appealed to the Federal Court of Appeal. The total amount of land, and the total amount of compensation dollars are also of some concern to First Nations, and expectations have increased as a result of cases like Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, hereinafter Delgamuukw.

\textsuperscript{32} On this point, see Eastmain Band v. Canada (Federal Administrator), [1993] 1 F.C. 501 (Fed.CA) at 517 where the court states,

The aboriginal parties further contend that the principle of construing ambiguities in their favour derives from the fiduciary relationship which they contend exists between them and the Crown. Here again, we must be careful not to speak in absolute terms. When the Crown negotiates land agreements today with the Aboriginals, it need not and cannot have only their interests in mind. It must seek a compromise between that interest and the interest of the whole of society, which it also represents and of which the Aboriginals are part, in the land in question.
terms, and use mainstream language and concepts in the negotiations and in the agreements
themselves, so that it is not a true recognition of equality. Changes in political leadership at
the federal and territorial level (and at the First Nation level) can also delay or hinder
negotiations. The life span of a government’s political mandate is usually shorter than the
time required to reach an agreement. An election can spell the end of an agreement which
took years to achieve.

Government representatives acknowledge that there is some unfairness to the process,
because government has much greater resources than do First Nations, and can draw on
experts in many areas while First Nations have limited staff. The limited resources of First
Nations sometimes lead to delays as First Nations require more time to develop positions on
issues or conduct the necessary analysis to respond to an issue. First Nation representatives
feel that financial pressures and power imbalances negatively affect their bargaining position.
However, government negotiators feel that the First Nations have had excellent negotiators
and legal counsel and therefore discussions are taking place on a level playing field.
Government representatives also agree that the negotiation process itself is too costly for
First Nations; in addition, third party involvement in the process is completely unfunded,
and this limits the ability of these organizations to provide meaningful input into the process.

While the requirement to repay negotiating loans is a disadvantage of the negotiation process,
the litigation process is also very costly, and there is no source of funds for Aboriginal
litigation, so the financial disadvantages to litigation are even greater than for negotiations.

All parties agreed that shifting personalities and players hamper the negotiations, and the
length of the negotiation process means that some negotiators will inevitably change,
resulting in the loss of corporate memory and sometimes in the need to redefine common

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33 While this is a valid criticism, there is substantial opportunity in the negotiation process for the parties to hear
from elders, to visit significant places, and to hear things in non-traditional forms. The criticism of having to
use “white” language to state the First Nation’s case applies to a much larger degree in the courtroom. See
Chapter Two for a discussion of this issue.
34 The Taku River Tlingit First Nation in northern B.C., which has spent over $4 million on negotiations and
has not yet reached even an Agreement-in-Principle, is reported to have told to the federal negotiator “At this
rate, we’ll owe you money when an agreement is finally reached.” From interview with Tim Koepke.
35 There is a limited amount of federal funding for test cases, but this is very limited and only a few First Nation
claims meet the eligibility requirements.
understandings that had been reached in the past but forgotten. The length of the process has also meant that certain elements of the Umbrella Final Agreement which were agreed to in 1989 are no longer as attractive to First Nations, as circumstances have changed.\textsuperscript{36} This makes agreement harder to reach.

There is also concern that the emphasis on relationship building and mutual understanding, while positive, has resulted to some extent in a process rather than results-oriented approach, in which parties endlessly agree to processes which will prolong the discussions, without actually leading to a signed agreement. Another concern, which is perhaps attributable more to the management of these negotiations than to the process of negotiating per se, has been the lack of internal discipline with respect to timelines. Much of the progress has been made as a result of externally imposed deadlines, such as the desire to get legislation approving the agreements through Parliament or through the Yukon legislature prior to an upcoming election.

Overall, the major concerns with the negotiation process are its length, the amount of resources it consumes, the requirement that First Nations repay the federal government any funds advanced to support the negotiation process, potential power imbalances, changing personalities and inflexible mandates.

c. Perspectives of Academics and Judges on Negotiations as a Means to Address Aboriginal Claims

\textit{The litigation of matters of self-government is open-ended and the outcomes are unpredictable. The legal issues are complex and legal proceedings are lengthy and costly. Moreover, the outcome of litigation is usually more negotiation, as courts have never imposed an agreement on the parties, and perhaps could not because of the nature of third party interests in some of the litigation. It is clearly in the best interests of all parties to come to a negotiation table where an agreement can be reached based on reasoning broader than that permitted by legal doctrine and constitutional remedies. Such an agreement provides the certainty that is so conspicuously lacking in the general law of aboriginal rights.}\textsuperscript{37}

\textsuperscript{36} For example, developments in case law, such as the decision in \textit{Delgamuukw}, have increased expectations and made the package of benefits in the agreements seem less attractive. See Chapter Four for more discussion of this issue.

Peter Hogg and Mary Ellen Turpel argue that issues of Aboriginal self-government are best addressed through negotiations, and are not suitable for resolution by the courts “because only political discussions can adequately address matters of jurisdiction, financing and intergovernmental cooperation. Legal reasoning in the constitutional context is not broad enough to embrace all of these dimensions.”

Sonia Lawrence and Patrick Macklem concur, and outline a series of benefits to negotiation over litigation with respect to Aboriginal disputes generally.

Litigation is expensive and time-consuming. Negotiation permits the parties to address each other's real needs and reach complex and mutually agreeable trade-offs. A negotiated agreement is more likely to achieve legitimacy than a court-ordered solution, if only because the parties participated more directly and constructively in its creation. And negotiation mirrors the nation-to-nation relationship that underpins the law of Aboriginal title and structures relations between First Nations and the Crown. Instead of attempting to exhaustively define the respective rights of the parties at first instance, the judiciary ought to first endeavour to enforce the Crown's duty to consult in a manner that creates incentives on the parties to reach negotiated agreements.

From the perspective of government, there are other more pragmatic benefits to negotiating. Attempts to negotiate an agreement, even if unsuccessful, will help the Crown prove in subsequent litigation that it has behaved in accordance with the honour of the Crown and will also provide information which will help it to understand the issues underlying the dispute. Negotiations provide greater control over the process, which is normally something that governments want — except in cases where government intentionally seeks to defer to the court in order to avoid taking responsibility for a politically controversial issue.

Another reason to negotiate is that negotiations involve Aboriginal people directly, and therefore provide a forum for hearing and incorporating Aboriginal perspectives, which is not easy to do in a court case, where Aboriginal perspectives must be brought in through

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38 Ibid., at 190.
40 If a government were to intentionally avoid negotiations in order to defer a controversial issue to the court to resolve, there is a risk that it would not be meeting its obligations to behave “honourably” with respect to First Nations.
Negotiated solutions can be more creative and comprehensive, and there is more potential for win-win resolutions, rather than the "winner take all" results of many court proceedings. Negotiations permit the parties to consider oral evidence, consult with the many parties who will be potentially affected, and build support for an agreement through the process itself. A negotiated resolution to a dispute does not create the risk that a precedent will be set which affects not just the parties to the dispute, but other parties who did not appear before the court, and who may have very different circumstances. Litigation tends to worsen relationships, rather than build them, making implementation of any court imposed solution more difficult. Litigation tends to exacerbate differences, whereas negotiations focus on finding common ground and building consensus.

Negotiations, like litigation, can be lengthy and costly processes. However, the costs involved in negotiations often result in increased public or community understanding of the issues, and can provide some benefit even if no agreement is reached. Only a negotiated agreement can provide sufficient certainty as to entitlements to lands and resources to result in positive economic benefits by improving the investment climate and ability for third parties to do business. Thus, while negotiations may be costly, the overall cost to the economy of not reaching negotiated agreements is even greater.

The courts themselves seem to agree that negotiating, rather than litigating, is the best approach to resolving complex Aboriginal disputes. For example, Mr. Justice Laforest in Delgamuukw states "I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing

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43 See Christopher McKee, Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future (Vancouver: UBC Press, 1996) at 63 where he states that a Price Waterhouse report in 1989 concluded that the price tag for not concluding treaties in BC would be almost $1 billion in lost investment in the mining and forestry sectors alone.
interests at stake.⁴⁴ Former Chief Justice Lamer in Delgamuukw warned governments to leave the path of litigation and proceed by way of negotiation.⁴⁵


Twenty-seven days following the release of Delgamuukw, the Minister of Indian Affairs . . . drew and recognized the connection between negotiations, and the constructing of a relationship between aboriginal and non-aboriginal people, characterized by mutual respect and recognition, responsibility and sharing. Recognition of the need, and requirement for negotiations, was outlined in the following commitment:

'In this context, and particularly with respect to the working relationship, our commitment to partnership is . . . a commitment to negotiate rather than litigate.'
(at para. 90)

There appears to be a broad consensus in academic literature, and in the courts, that negotiated solutions to disputes based on Aboriginal and treaty rights are preferable to court imposed solutions. However, it is not always possible to negotiate – all the parties must have the political will, the support of their constituencies, and sufficient resources, and there are many situations in which the courts are called upon to be the arbiters in complex Aboriginal disputes. The courts can play a positive role in negotiations, for example, by declaring the existence of rights and urging parties to negotiate. The courts can also unwittingly hinder negotiations, as we will see in Chapter Four. The courts will continue to play a significant role in the resolution of issues involving Aboriginal lands and Aboriginal rights, and thus it is particularly important that they understand the larger context in which they are making these legal determinations. Unfortunately, as we will see in subsequent chapters, courts are generally far removed from the context of Aboriginal communities and the limitations of their own processes make it difficult for them to understand the practical, on the ground implications of their decisions.

⁴⁴ Supra note 31 at para 207.
C. Process and Parties to Modern Treaty Negotiations

Allison Bond\textsuperscript{46} observes that there are five general characteristics of cross-cultural disputes such as those between First Nations and the federal and Yukon governments. These can be summarized as follows:

1. The primary goal in the resolution of a dispute is the establishment or maintenance of a long-term working relationship.
2. The multilateral nature of the dispute requires that the many affected parties to a dispute be somehow considered in the resolution of the dispute.
3. The issues to be addressed must not be too narrowly defined, and the whole dispute must be addressed. Entering into a dispute resolution process does not diminish the multiplicity of issues at stake, but rather, tends to broaden its scope, complicating resolution.
4. Relationships of power must be accounted for, through a process of trust building.
5. Parties will not only have conflicting interests, but also conflicting values, which requires that the parties communicate by empathic dialogue, indicating their respect for and understanding of the other culture’s vision.\textsuperscript{47}

This is a fairly good analysis of the characteristics of the Yukon land claim and self-governance negotiations. In our discussion of the Yukon negotiation process, we should keep in mind these characteristics in order to assess how successful the negotiation process is at responding to these issues.

1) Comprehensive Claims Negotiations

The federal government has divided its negotiations with Aboriginal peoples into three general categories: specific claims, claims of a third kind and comprehensive claims, and has written policies with respect to each of these three categories of claims which apply across Canada.

\textsuperscript{46} See Allison Bond, supra note 24. Allison Bond is now the Assistant Deputy Minister, Negotiations, with the BC Ministry of Aboriginal Affairs.

\textsuperscript{47} Ibid, at 45-46.
The specific claims policy applies to claims made against the federal government with respect to the administration of land and other Indian assets, loss of reserve lands, and claims with respect to lack of fulfillment of the terms of existing Indian treaties (generally historical treaties). Specific claims are the most common type of claim in areas where there are historical treaties, such as Ontario and the Prairie provinces, where Aboriginal parties may be disputing whether the written terms of the treaty negotiated long ago reflect the Aboriginal understanding at the time (for example, whether the unit of measurement in setting out reserve boundaries was miles or French leagues) or, where the terms are not in dispute, the First Nation may be alleging that government has not implemented the terms of the agreement. Claims of a third kind relate to miscellaneous grievances which cannot be settled through the specific claims process.

The comprehensive claims policy applies to claims based upon unextinguished Aboriginal title, where there has been no surrender of Aboriginal title, usually where there are no existing historical treaties with the Crown. Many claims in British Columbia and the territories have been comprehensive claims.

The Yukon land claim negotiations are considered to be a comprehensive claim since there was never any surrender of Aboriginal title by Yukon First Nations. However, the Yukon negotiations began prior to the federal government’s articulation of its comprehensive claims policy and the claim was the first comprehensive claim accepted by the federal government for negotiation. As a result, the Yukon negotiations have not been strictly bound by the terms of the comprehensive claims policy, but are nonetheless influenced by national standards and policies with respect to comprehensive claims. Thus, even though a particular solution may be what works best for Yukon First Nations, and may be supported by the Yukon government, it may not be supported by the federal government if there are concerns about the principle it establishes or the precedent that it could create for other negotiations across the country. The mandate of the federal negotiators in the Yukon is approved by officials in Ottawa, and is constrained by national policy considerations. Some aspects of the

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48 See DIAND, Outstanding Business: A Native Claims Policy (Ottawa: Supply and Services Canada, 1982).
Yukon agreement go beyond what has been agreed to anywhere else in Canada, and federal negotiators are constrained by the need to ensure that the Yukon agreements do not “get too far ahead” of what is happening elsewhere.

There have been many well documented critiques of the federal comprehensive claims policy, and some of these criticisms may be applicable to the Yukon negotiations, but since the Yukon negotiations have been somewhat unique, this chapter will focus on the Yukon negotiations rather than on the overall comprehensive claims policy.

The federal comprehensive claims policy was still under development in the early days of the Yukon negotiations so could not be applied to the early negotiations. Both the Yukon government and Yukon First Nations wanted a “made in the Yukon” solution which met the needs of local Yukon residents, rather than conforming to national policy goals, and this was permitted to some extent. As a result, the Yukon agreements contain several unique features and in some areas go further than any other land claim or self-government agreements in Canada.

In the following sections I will be describing the process and parties involved in the negotiation of Yukon land claims and self-government agreements. The modern treaty negotiation process in the Yukon involves the negotiation of a comprehensive claim with the product being a Final Agreement (basically the “treaty” or land claim agreement) and a separate Self-Government Agreement for each individual First Nation.

50 See Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, vol. 2 (Ottawa: Canada Communications Group, 1996) at 60, where it outlines the three major problems with the comprehensive claims policy as being its lack of acknowledgement of the inherent right to self-government giving rise to s. 35 protection, its requirement of extinguishment of Aboriginal rights, and its exclusion of Metis and certain First Nation claimant groups. In the same volume, footnote 255 beginning at p. 704 lists a number of documents criticizing federal land claims policy.

51 For example, the Yukon Final Agreements do not contain a blanket extinguishment of Aboriginal rights; the Yukon Self-Government Agreements provide First Nations with broad law-making powers similar to those which provinces have pursuant to s. 92 of the Constitution Act, 1982, as well as any Aboriginal rights to self-government; First Nation laws prevail over Yukon laws in the event of a conflict, etc.
2) Parties at the Table and Format of Negotiations

The Yukon negotiations are done on an individual First Nation basis, with representatives of the First Nation, of the Yukon government, and the federal government. These negotiations are based on an overall framework set out in the Umbrella Final Agreement, which was negotiated by the Council for Yukon Indians, the federal and Yukon governments, so there is some consistency, but also scope for variations which reflect the needs of individual communities. There is no facilitator or supervisory body such as the First Nations Summit in British Columbia, or the Indian Claims Commission in Ontario.

The Yukon process, based on the Umbrella Final Agreement, proceeds directly to negotiation of the Final and Self-Government Agreements. Thus, there are fewer formal phases than in the British Columbia treaty process, which involves six stages: a statement of intent; preparing for negotiations; a framework agreement; an agreement in principle; a final agreement; and an implementation plan.52

Although many of the initial meetings to develop the Yukon framework were held in Ottawa, the negotiations with individual First Nations have been held as much as possible in each First Nation community. This permits community members, elders and members of the First Nation negotiating team or caucus to attend negotiation sessions, and results in broader input, as well as more widespread understanding and acceptance of the terms of the agreement. Typically, there will be many people from the First Nation community present at the Final Agreement negotiation table, some of whom will speak and participate actively in the negotiations.

The negotiations are usually held at three separate "tables". The Final Agreement table works towards a Final Agreement; the Lands table develops consensus on which lands will form the settlement lands in the Final Agreement and works out detailed issues involving conflicting third party rights and individual site selections. The Self-Government table negotiates the terms of the Self-Government Agreement. Each table may also create working

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groups to deal with particular issues, such as a technical working group to deal with particular land boundary or other related issues, or a legal drafting group. There will also be a table to develop the implementation plan, which will normally get started towards the end of the negotiations relating to the substantive agreements. There may be some overlap in personnel between the three main tables, but often the parties will have different negotiators for each table, which can lead to confusion and to a lack of integration on issues affecting all three tables. Often, when the parties sense that they are close to reaching agreement, a “closing session” involving the teams for all tables will be scheduled to try to hammer out agreement on all issues in an intensive blitz of perhaps a week.

The timeframe for negotiations is highly variable. In one exceptional case, a First Nation’s Self-Government Agreement was negotiated and agreed to in three weeks.\(^3^\) This haste unfortunately meant that few community members had any understanding of the agreement. At the other extreme, some First Nations have been negotiating for almost two decades. Negotiations spread over a long time period can result in changing personnel, changing mandates, and loss of corporate memory, requiring many things to be re-negotiated that had been agreed to in the past. Lengthy negotiations also increase the cost of the negotiation process.

3) **Negotiating Approaches**

*The adversarial model of negotiations, common to lawyers and litigation, is particularly ill-suited for negotiations attempting to resolve numerous multi-faceted issues affecting different cultures within one community. Adversarial negotiations tend to exacerbate differences, foster mistrust and promote a competitive attitude focused on winning. An adversarial process often produces solutions constituting saw-offs between the respective bargaining strengths and skills of the parties. These solutions may not serve the longtime interests of either party and will certainly prejudice any ongoing relationship if one party felt compelled by the power and not by the reasons of the other party to reach an agreement. In negotiations which will establish a framework for coexisting and sharing a common resource base, all parties must ‘win’ and no one must ‘lose’.\(^4^)*

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\(^3^\) This was the Self-Government Agreement for the Little Salmon/Carmacks First Nation, which the First Nation’s chief wanted to reach agreement on in a very short time period so that he could personally move on and run as a candidate in the upcoming territorial election.

Since about 1984, the parties to the Yukon agreements have consciously tried to use an interest-based approach to negotiations, and to move away from previous positional or confrontational approaches to negotiations. Experts in the interest-based approach were brought up from Harvard University and from the Justice Institute of British Columbia to provide training to all three negotiating teams in the late 1980's and early 1990's. While this was helpful, it was not entirely successful in eliminating the legacy of many previous years of negotiating pursuant to a more adversarial approach, and more work could probably have been done to “untrain” the parties from their years of adversarial negotiating.

All parties do give at least lip service to the interest-based approach, but it is embraced to different degrees at different times by the various parties. Elements of positional bargaining and a horse-trading approach (focusing on initial high demands, then trade-offs and changing positions to reach a deal) continue to emerge from time to time. Some negotiators comment that the interest-based process is helpful in exploring issues and interests, but that all parties have “bottom lines” (for example, the Yukon government negotiator may have a cabinet mandate setting out the maximum amount of unpaid property taxes that can be forgiven; the federal negotiator may have a mandate as to how compensation dollar amounts are to be

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55 The interest based approach was pioneered by the Harvard Negotiation Project, and is outlined in books such as Roger Fisher, William Ury and Bruce Patton, Getting to Yes, 2d ed. (New York: Penguin Books, 1991). See also George Adams, “The Changing Role of the Neutral” (1998) Labour Arbitration Yearbook 331 at 333-34, where he states,

Interest-based bargaining . . . is a form of problem-solving bargaining that emphasizes the underlying needs and interests of the parties in contrast to the positions developed to express those interests. It embraces the simple reality that real differences between parties are often much narrower than their respective positions of demands indicate.

Ideally, interest-based bargaining actually uses problem-solving procedures. The parties meet face to face. They express their needs and interests in terms of the problems to be resolved. They then develop together all conceivable solutions to the problems without evaluating those options. This is described in the literature as brain-storming or side-by-side problem solving. Only then do the parties begin to evaluate the options they have generated and they do so by reference to objective criteria. . . The evaluation stage would usually isolate a few of the options as practical, effective and thus possible solutions. It is at this point that the parties may revert to more traditional bargaining techniques in the form of trade-offs and package bargaining, or they may simply 'leap' to a final outcome.

This innovative approach contrasts with the binary nature of positional bargaining which combines evaluation with invention and only looks at two options at any one time. Moreover, these two options are not presented as likely outcomes but as positions or proposals which may be as much a bluff or a threat as a serious offer.

56 From interview with Barry Stuart.
57 Ibid.
escattered in accordance with inflation), and as parties move closer to their bottom lines, it is
harder to be interest-based.⁵⁸

Eventually interests collide with mandates. Once the bottom lines have been ascertained
through interest-based discussions, elements of positional bargaining inevitably emerge.
Throughout the negotiations, the negotiators must do a significant amount of work within
their own negotiating caucuses, to try to maintain a unified front and adhere to an interest-
based approach.

In some cases, the parties have entered into "Letters of Understanding" (LOUs) dealing with
process issues. To some extent, these LOUs fulfil the purpose of the Framework Agreements
used in the B.C. negotiations. However, in the Yukon, these LOUs have generally been
entered into after the negotiation process has already commenced. The LOUs confirm that
the parties are ready to negotiate and have appropriate mandates from their principals;
establish the three negotiating tables described in the previous section; urge continuity of
personnel and deal with who can attend the negotiations; authorize working groups, side
tables and other processes; state that behaviour shall be respectful and principled;
acknowledge that they have different interests; set out information-sharing protocols; outline
the significance of initialing documents; deal with workplans and agendas; and commit to
holding negotiating sessions in the First Nation's traditional territory wherever possible.
These Letters of Understanding do not create legal rights or obligations and merely set out
the intentions of the parties.⁵⁹ Developing good personal relationships, credibility and trust
between the negotiating teams is probably more important than what is set out in a Letter of
Understanding or Framework Agreement.⁶⁰

While all three parties have separate interests, often the Yukon and federal governments hold
joint caucuses prior to the negotiating sessions with the First Nation, and sometimes they
table joint positions on specific issues. This does not happen in other tripartite negotiations
in Canada involving the provinces, as the provinces tend to have more opposing interests to

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⁵⁸ From interview with Jim Bishop.
⁵⁹ See for example, Letter of Understanding between the Carcross/Tagish First Nation, the Yukon Government
and the Government of Canada, signed on May 21, 1996 in Carcross, Yukon.
⁶⁰ From interview with Tim Koepke.
the federal government interests than do the territories.\textsuperscript{61} It is possible that joint caucusing adds to the First Nation's perception that the other two governments are "ganging up" on it; however, this has rarely been expressed as a concern by First Nations, perhaps because there are many issues on which the Yukon supports the First Nation position and not the federal position. The main concern expressed by First Nation representatives is that they are only one of three parties at the negotiating table and are therefore not able to influence the outcome as much as they would like. There are times when either the federal or Yukon government supports the First Nation's position, and acts as a facilitator in trying to assist the other two parties in reaching an agreement.

\textsuperscript{61} From interview with Phil Gibson.
D. Principles Arising from the Negotiation Process and from the Yukon Agreements

Yukon First Nation negotiators see a number of positive principles which underlie the negotiation of the Yukon Final and Self-Government Agreements. The first principle is that of respect for a government to government relationship, which recognizes the ability of First Nations to make decisions for their people. The negotiations also recognize the principle of self-government and the right of individual First Nations to govern their people in accordance with their values.

The Yukon agreements also recognize the principle of co-management or co-operative management, and set up a number of management and advisory boards made up of First Nation and non-First Nation people with a common mandate to advise on natural resources or other issues in the territory. The principles of conservation and a sustainable approach to development are recognized, as is the special relationship of Yukon Indians with the wilderness environment. The agreements represent the development of a new social contract in the Yukon, which affects Yukon society as a whole, not just Yukon First Nations.

In addition to mutual respect, there is also an element of reconciliation in the agreements, and a recognition that collectively, all the parties need to begin to build a new kind of society together. In this new society, all parties recognize that other perspectives and voices have value and should be listened to – the principle of mutual consultation also flows from the agreements.

According to former Yukon negotiator Barry Stuart, the agreements demonstrate the principle that all people in the Yukon can live together, and co-exist in a way which respects differences without fomenting racism or creating division. The agreements also recognize that development must be sustainable, and that Aboriginal people must be involved in making decisions about the wildlife and habitat that they depend on. Another principle in the agreements is that they should foster Aboriginal self-government and self-sufficiency over time, but that First Nations should be permitted to take the time that they need to make this transition. He states that the agreements also helped to build ongoing relationships between First Nations and third parties, between Aboriginal and non-Aboriginal people.
The interest-based approach to negotiations which the parties generally tried to follow led to a realization of the importance of understanding the reasons underlying a party’s position, and an increased ability to look beyond positions to underlying interests and concerns, including a better understanding of the different thought processes of First Nation people, and of government and regulatory processes. This encouraged a more holistic approach and enabled the parties to look at context and at the interconnectedness and causal relationships between things.62

The agreements attempt to accommodate existing interests, so that third parties with leases, property, access rights or other rights will not have those rights displaced, recognizing that First Nation and non-First Nation people must co-exist together and that chaos and confrontation are in no one’s interest.

By clarifying First Nation rights to land, resources, consultation, cooperative management, and compensation, First Nations have been empowered as they now have well-defined rights and a clear role. The relationship between federal and Yukon governments and First Nation governments is now based on legal obligations, rather than on discretionary internal policies as may previously have been the case. First Nations are now responsible for governing themselves and are accountable to their own people. The agreements also recognize the importance of the land and of the culture and heritage of First Nations people.

The agreements create an intermeshing of rights as between First Nations and the public. First Nation members have certain rights on Crown land, and members of the public have certain rights on First Nation settlement land, and these rights recognize a need to co-exist rather than to exclude. First Nation members will pay taxes, and First Nation governments

62 See Barry Stuart, “The Potential of Land Claims Negotiations for Resolving Resources-Use Conflicts”, in Monique Ross and J. Owen Saunders, eds., Growing Demands on a Shrinking Heritage: Managing Resource Use Conflicts (Calgary: Can. Inst. of Resources Law, 1992), at 129, where he states that as a result of interest-based negotiations, “the parties increasingly developed a profound sense of the interconnectedness of all aspects of the emerging agreement... Negotiations began to focus on what was necessary to establish a viable social contract embracing all the elements necessary for Indian people to pursue their interests yet live and work in harmony with other residents of the north” (at 137) He also states that land claims negotiations “provide the best opportunity to overcome long-standing rules or policies that fail to reflect the
will be empowered to levy certain taxes, with a view to creating a level playing field with First Nation citizens and governments competing on an equal footing with non-First Nation citizens and governments.

The principle of consultation, including a fairly precise and broad definition of what constitutes consultation, was set out in the Yukon agreements prior to the *Sparrow* decision or other court cases dealing with government's obligation to consult with First Nation on actions which could infringe Aboriginal or treaty rights.

To summarize, there are a number of principles which underlie the negotiating process and the Yukon agreements themselves. These principles include respect for a government to government relationship, recognition of the right of First Nations to govern themselves in accordance with their values and traditions, co-management, sustainable development, recognition of the special relationship of Aboriginal people with the wilderness environment, a holistic approach, consultation and the need for mutual co-existence and reconciliation.

As we saw earlier, there are many reasons why the parties feel that negotiating was a good process for resolving disputes and creating conditions for Aboriginal and non-Aboriginal people to co-exist in harmony in the Yukon. This section set out a number of positive principles which resulted from the negotiations. The next section looks at the results of the negotiation process, from the perspective of both Aboriginal and non-Aboriginal people.

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*interconnectedness of all resources, and fail to link a diverse range of strategies and techniques in managing resources.* (at 131). (Barry Stuart was the Chief Negotiator for the Yukon government from 1984-91.)

E. Results

*We are asking for a fair and just Settlement of our grievances . . . . The Yukon Indian people are trying to think about what would be fair and just. We keep thinking about how we used to be independent and free. We think about being born and raised on land that we always thought of as our land. We remember the diseases that killed so many of our people. We have watched the Whiteman move onto our land without even asking our permission. We have watched the Whiteman destroy parts of our land. We have watched the Whiteman destroy our tralines. We have watched the Whiteman bring in alcohol and prostitution. We watched the Whiteman take away our children and destroy our language and culture. All these things we have seen. These are not folk-tales that we have been told. They are still going on TODAY. How can anyone put a dollar value on what we could consider fair and just compensation[?] It is impossible. Instead, we are trying to decide how our children and their children can have a better life, free from Whiteman ignorance which has led to the unfair discrimination which is all around us.*


As several of the negotiators noted, one of the major advantages of the negotiation process was the result: a comprehensive agreement dealing with lands, resources, self-government, co-management, and with the relationships between First Nation and non-First Nation peoples and governments in the Yukon.

Under the negotiating framework set out in the *Umbrella Final Agreement* and the individual First Nation agreements, Yukon First Nations receive title to 44,000 square kilometers of land (approximately 9% of the Yukon’s total land), in addition to equal participation in a number of Yukon-wide management bodies, such as the Fish and Wildlife Management Board, the Land Use Planning Council, the Surface Rights Board, the Heritage Resources Board and the Development Assessment Board. As noted by the Royal Commission on Aboriginal Peoples, the *Umbrella Final Agreement* "broke new ground, providing constitutional protection for wildlife, creating a constitutional obligation to negotiate self-government agreements, and finding language for the agreement that avoided complete extinguishment of Aboriginal title." The agreements also provide for compensation of $260

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64 Supra note 8, at 35.
65 This compares well with the land set aside for First Nations in southern Canada - less than one-half of one percent. See Audrey Doerr, "Building New Orders of Government - the Future of Aboriginal Self-government" (1997) 40 Can. Public Admin. 274 at 278.
66 Supra note 50, vol. 4, Perspectives and Realities, at 420.
million; the creation of several large special management areas which are protected from
development; fishing and harvesting rights throughout a First Nation’s traditional territory;
forestry harvesting rights; protection of cultural and heritage resources; resource revenue
sharing; and economic opportunities including training. The self-government agreements
which have been negotiated recognize traditional forms of decision-making, and provide
broad self-government powers similar in scope to the powers of provinces, without any
surrender of Aboriginal rights to self-government.

The first four Final and Self-Government Agreements came into force in the Yukon on
February 14, 1995. Three other agreements have since come into effect, so that half of the
Yukon’s fourteen First Nations are now self-governing and have settled their land claim. No
independent evaluations of the agreements have taken place yet.67

However, there are many signs that these agreements have had a positive effect. There have
not been many disputes as to the interpretation of the agreements, and most disagreements
have been worked out between the parties, without resort either to the courts, or to the dispute
resolution mechanisms set out in the agreements.

Relationships between First Nation and non-First Nation people in the Yukon are gradually
improving, as is the socio-economic condition of Yukon First Nation citizens. Co-
management bodies, such as the Yukon Fish and Wildlife Management Board, are making
recommendations which, according to one board member,68 enable First Nations to have
input into what goes on on the land, and will ensure that future generations can drink pure
water and breathe clean air. Equal First Nation and non-First Nation membership ensures
that these bodies will benefit from the values, cultures and experiences of both groups,
resulting in greater understanding by all parties.69

67 This contrasts with Nunavut, where there has been an independent report by Avery Cooper, and an
assessment (“Taking Stock”) by the Nunavut Tunngavik Inc. of the first five years of implementing the
Nunavut Land Claim Agreement. See John Merritt, Nunavut Tunngavik Inc, “Negotiating and Implementing
Treaty Rights: The Example of Nunavut”, paper prepared for the conference “Treaty Making” held in
Vancouver April 13-14, 2000, by the Pacific Business and Law Institute, at 4.9.
68 From interview with Georgina Sydney.
69 For a discussion of resolving culture clashes through co-management bodies, see Michael Robinson and
Lloyd Binder, “The Inuvialuit Final Agreement and Resource-Use Conflicts: Co-management in the Western
Former Chief Paul Birckel of the Champagne Aishihik First Nations, now President of Dakwakakada Development Corp., states,

"The freedom the community has gained in being self-determined is starting to take root. We, as a First Nation, are deciding what laws need to be in place for a strong community. The same is true for a stronger economy to be developed. We no longer need to depend on the federal government for so many of the community's needs."

There have been a number of economic development initiatives which have increased employment opportunities for citizens of self-governing First Nations, and educated First Nation youth are returning to their communities to take up positions in their own governments which had previously not existed.

The Yukon’s Chief Medical Officer states that “the single biggest factor in improving the health status in the Yukon has been the movement through land claims, independence, devolution, letting people decide what they want to do, let people have control over their own resources like the rest of us hope we have.” Dr. Timmermans adds “Clearly, if you have more control over your life, more control over your own resources, more control over your own family, your educational system, health, all that sort of thing, this is a big part of social status and improving that will improve the health in those communities.”

While a huge amount of personal energy and resources have gone into negotiating the agreements, First Nation representatives involved with the first seven agreements feel that it was time well spent, and that the sacrifices of time, land, and other compromises required to reach agreement were worthwhile, as these sacrifices were made for the benefit of all people in the Yukon, for today and for future generations.

Relationships have improved, through a process which included the many affected parties and considered their interests. Issues were not defined narrowly; instead, a lengthy and
A comprehensive process permitted the multiplicity of issues to be considered, and examined in a holistic way. Parties worked at developing trust, and while there were significant power imbalances between First Nation parties and other government parties, good relationships between negotiators assisted in overcoming this obstacle. The process forced all parties to try to understand each others’ different values and worldviews, and to take them into account in developing solutions which work for all parties. The process enabled the particular challenges inherent in cross-cultural disputes to be addressed and resolved in a manner which all parties could live with.

Things have changed in the Yukon, not just for Aboriginal people, but also for non-Aboriginal people, who are now subject to joint management structures, and to consultation and governance requirements that force them to take into account the perspective of Aboriginal people throughout the Yukon. There is a greater awareness of the fact that there are other values, histories and cultures which must be accommodated. These changes have been achieved without blockades, without violence, and without any significant litigation. In the process, perceptions have been changed, relationships have been built, and many of the racist assumptions of the past have been dispelled. While the inadequacy of the compensation dollars continues to be an issue, the parties appear to be on their way to realizing the vision articulated by Chief Elijah Smith in 1973: “a fair and just settlement of our grievances... [so that] our children and their children can have a better life.”

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71 Both statements from Dr. Frank Timmermans, as quoted on CBC Radio News, Whitehorse, Yukon, 7:30 am, May 26, 2000.
72 Supra note 8 at 35.
F. Negotiated Aboriginal Law

The Yukon Final and Self-Government Agreements were brought into force by Yukon and federal statutes, which state that these agreements bind third parties, and prevail over all other federal and Yukon laws. The Final Agreements are also recognized as constitutionally protected treaties pursuant to s. 35(3) of the *Constitution Act, 1982* and therefore prevail, not only over other laws, but also over any provisions of the *Charter* which may be inconsistent with the treaty rights. Recent cases, such as the Carcross-Tagish First Nation case relating to tax exemptions, and cases involving the *James Bay and Northern Quebec Agreement,* have confirmed that the Yukon Final Agreements, and modern land claims agreements generally, have the “force of law”, even if these words are not specifically used in the legislation bringing them into force. As a result, the Final and Self-Government Agreements negotiated by Yukon, federal and First Nation negotiators have statutory force and the terms of these agreements will override inconsistent provisions in other statutes and, in the case of the Final Agreements, inconsistent provisions in the *Charter.*

According to a representative of the Nunavut Tunngavik Inc., the Nunavut Inuit intentionally structured the *Nunavut Land Claims Agreement,* and the federal ratification legislation, in order to allow the Inuit to make plausible arguments that the agreement has a three-fold character so that rights under the agreement can be enforced as contractual rights, as statutory

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75 See s. 25 of the *Charter,* which states that “[t]he guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada. . . .”
77 *Cree Regional Authority v. Canada,* [1991] 3 F.C. 533, and *Cree School Board v. Canada (Attorney-General),* [1998] 3 CNLR 24. See also *Quebec (A.G.) v. Cree Regional Authority,* [1991] 3 CNLR 96 at 96 where the Federal Court of Appeal stated that the *James Bay and Northern Quebec Agreement* was not just a contract but was legislated into effect, and that “[t]he legislative rather than purely contractual nature of the Agreement is also evident from ss. 22 and 23”.
78 Federal negotiators were opposed to stating that the Yukon agreements would have the force of law in the federal legislation. Apparently one of the concerns is that this might increase the likelihood that statutory rules of interpretation, rather than contractual rules, would be used in interpreting the agreement. However, the *Nisga’a Final Agreement* is expressly said to have the force of law so it appears that the federal position on this issue has changed.
79 Minister of Indian and Northern Development and the Tunngavik, *Agreement between the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada* (Ottawa, 1993).
rights, and as constitutionally protected treaty rights. The Yukon First Nation negotiators support this approach and in addition, argue that some of their rights can also be enforced as Aboriginal rights, since Yukon First Nations did not completely surrender Aboriginal rights in their agreements. As a result, although the Yukon Self-Government Agreements do not yet have the status of s. 35 protected treaties, the law-making powers of Yukon First Nations set out in the Self-Government Agreements are arguably not just an exercise of delegated federal power, but also an exercise of their continuing Aboriginal rights, which benefit from the protections of ss. 25 and 35 of the Constitution Act, 1982. Yukon First Nations have broad law-making power under the Self-Government Agreements, similar in scope to that of the provinces, and are recognized as a third order of government. In the event of an inconsistency, laws passed by Yukon First Nations prevail over laws passed by the Yukon government.

Thus, the agreements create a framework for governance in the Yukon which changes intergovernmental relationships and sets out rights, entitlements and obligations which are binding not only on Yukon First Nation governments, but also on Yukon and federal governments, and on third parties. The agreements negotiated in the Yukon have statutory, and in some cases, constitutional force. These agreements have been developed over many years, through an inclusive process with a large amount of input from the people most affected by the agreements, the Yukon First Nation citizens. The agreements reflect First Nation values and perspectives, and come about as a result of compromises and sacrifices which were agreed to in order to meet the common goal of improved relationships and equitable sharing among Aboriginal and non-Aboriginal people. Through these negotiations, a body of law has been developed which sets out workable arrangements for mutual co-existence of Aboriginal and non-Aboriginal peoples, and which embodies principles agreed to through the involvement of Aboriginal peoples themselves. This body of negotiated

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80 See John Merritt, supra note 67 at 4.8 and 4.12.
81 Under the Yukon Self-Government Agreements, there is no surrender of any Aboriginal rights to self-government, so Yukon First Nations have the detailed self-government rights set out in the agreement plus whatever Aboriginal rights they can prove. Under the Yukon Final Agreements, Yukon First Nations surrender Aboriginal rights to non-settlement land, and Aboriginal rights on settlement land to the extent that they are inconsistent with the Final Agreement.
82 Yukon First Nations with Self-Government Agreements have certain areas of exclusive jurisdiction (set out in 13.1 of their agreements), as well as concurrent law-making powers in other areas, which are either citizen-based (13.2) or land-based (13.3).
Aboriginal law has developed in the Yukon and elsewhere in Canada, and many of the principles which characterize the Yukon agreements, such as respect, recognition, cooperative management, and consultation are also common to other modern treaties.

This chapter has focused on the process and principles underlying negotiated Aboriginal law. The next chapter will look at the very different processes and principles underlying judge-made Aboriginal law. Chapters Three and Four will examine the interaction between these two streams of law, and the final chapter will provide some suggestions for increasing the dialogue between judge-made and negotiated Aboriginal law.
Appendix I: Persons interviewed for Chapter I


5. Daryn Leas, legal counsel, Council for Yukon First Nations, and a citizen of the Tr’ondëk Hwech’in First Nation, has worked on negotiations as legal counsel to First Nations since 1994, and has been an observer of the process “all my life”. (Interviewed February 16, 2000.)

6. Georgina Sydney, negotiator for the Teslin Tlingit Council, 1982 to present, for self-government issues including justice negotiations. Also a citizen of the Teslin Tlingit Council and a member of the Yenyedi clan. Currently also a member of the Yukon Fish and Wildlife Management Board. (Interviewed April 20, 2000.)


8. Phil Gibson, legal counsel, federal government, 1987 to present. (Interviewed April 7, 2000.)

Appendix II: Questions used in interviews

1. Could you describe your involvement in the Yukon treaty negotiation process? How long have you been involved and in what capacity?

2. Which First Nation agreements were you involved with?

3. Do you think that using a negotiated process was better than litigation?

4. What were some of the benefits of the negotiation process? What are some of your concerns or criticisms with respect to the negotiation process?

5. Did you use a particular form of negotiation? Could you summarize the key elements of the negotiating approach that you followed? Was there a formal agreement setting out the agreed upon negotiating process?

6. Were the Yukon negotiations and the agreements that were reached affected by court decisions? If so, how?

7. What are some of the important principles which you feel flow from the negotiation process?

8. What are some of the important principles which flow from the agreements?

9. Do you think court decisions have been consistent with the direction that negotiated agreements have been going in?

10. Is there any thing that you think courts could learn from the agreements?

11. Is there anything which you would like to comment on, based on your experience with the negotiation process or with the implementation of the Yukon agreements?
CHAPTER TWO

JUDGE-MADE ABORIGINAL LAW:

A STUDY OF THE PROCESS, ITS STRENGTHS AND WEAKNESSES

A. Introduction

In this chapter, I will examine how judges make law, both in a general sense, and specifically in the field of Aboriginal law, with a view to determining some of the sources of judge-made law. I begin by looking at some of the principles underlying judicial decision-making, then move on to examine the actual process and mechanics of reaching decisions and drafting judgements in the Supreme Court of Canada. This chapter will also look at influences on judicial decisions, at different approaches to making law, and at the role of the judge as lawmaker.

By analyzing how judges make decisions in the evolving area of Aboriginal law, and the particular challenges which characterize the Aboriginal law field, I hope to demonstrate how difficult it is for judges to rely on traditional sources of law, with the result that judges are put in a position of “inventing law”. This argument will lend support to my thesis, which is that judges should have reference to what works on the ground, rather than simply pulling ideas out of thin air, when developing judgements which will shape the future of Aboriginal law.
B. Theoretical Underpinnings and Governing Principles of Judge-made Law

1. Principles of Judging

It is a maxim among these lawyers that whatever hath been done before may legally be done again; and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind. These, under the name of precedents, they produce as authorities to justify the most iniquitous opinions.¹

Judges have developed a series of principles or legal norms over the last few centuries to create a framework for judicial decision-making and ensure that it is more than just a subjective exercise. These principles help to guide judges in their decision-making, can increase the predictability of decisions, and may also help to increase public confidence in the judiciary.

According to Justice Brennan of the United States Supreme Court, two of the earliest checks placed on judicial discretion were the requirement for a public explanation of the results (reasons for judgement) as well as the recording of precedent.² The doctrine of stare decisis, which treats precedents from courts as binding on the same, or lower courts, provides a strong guide for judges, and increases the predictability of decisions. It can be a mechanism by which courts respect the established expectations of a community.³ However, adherence to the doctrine of stare decisis has been diminishing in the last few decades,⁴ and it is no longer considered to be a binding doctrine, but merely a strong principle or guideline in the Supreme Court of Canada.⁵ Even if one pays lip service to stare decisis, there are still many

³ See Lee Epstein and Jack Knight, The Choices Judges Make (USA: CQ Press, 1998) at 164. See also Gerald Postema, “On the Moral Presence of Our Past” (1991) 36:4 McGill L.J. 1153, where he argues that one of the reasons why precedent should have any moral authority is because it is based on a community’s shared past and shared expectations. However, he adds that it is important to be open to not following precedent and to taking a critical approach to history. “If members are to take their community’s history as normative for their dealings, that community must own up to its past, look back at the roads not taken and the suffering it has caused and hold itself accountable for them.” (at 1180)
⁵ See H. Patrick Glenn, ibid, at 286, and Bora Laskin, “The Institutional Character of the Judge”, Lionel Cohen Lectures, 17th Series, The Hebrew University, Jerusalem at the Magnes Press, 1972 at 17 where he states that stare decisis “is no longer an article of faith in the Supreme Court of Canada, but it still remains a cogent principle there.” Beverley McLachlin has suggested that “stare decisis should not be adhered to as strictly in constitutional cases where correction comes only through the onerous constitutional amendment process” as
ways of deviating from precedent and creating judge-made law. A number of techniques are set out by former Chief Justice Bora Laskin, such as using obiter dicta to give notice of pending changes in judicial law, using prospective overruling to avoid following a precedent which a court feels is likely to be overruled, writing a concurring opinion to propound new legal doctrine, or using a strong dissent. It may also be possible for judges to distinguish cases in order to avoid following precedent, to not mention precedents which otherwise might apply, to take note of a precedent authority but declare it to be per incuriam, or to narrowly construe the ratio of the case so as to justify not following the case’s obiter dicta.

Where precedents are not available or are not helpful, judges may reason from principles or general standards, rather than from the ratio of prior cases, and evaluate the legal consequences and implications of accepting the principle on future cases. For example, the court might appeal to the general principle that the purpose of constitutional rights is to protect individuals from legislation encroaching their rights in order to override a provision in the Criminal Code. However, in reasoning from principle judges will usually have to refer to standards, such as “public policy” or “fairness” which are open to a variety of interpretations, providing a fair amount of latitude to the judge.

Another principle which is sometimes followed is that of sua sponte, a norm which discourages the creation of issues, and favours deciding only what is necessary for the case. Former Supreme Court Justice Bertha Wilson describes the sua sponte principle when she states that one of the tensions in judicial decision-making is “the tension between the


See Bora Laskin, ibid.

See Ian Greene, et al, Final Appeal: Decision-making in Canadian Courts of Appeal (Toronto: James Lorimer and Co. Ltd., 1998) at 127, where Supreme Court of Canada judges indicated that “they would not hesitate to overrule a ‘bad precedent’” and three out of five judges “stressed the need for following precedents that are both fair and helpful; those that were not could likely be distinguished in some way.”


This example is from Roland Case, ibid. at 91, where he refers to R. v. Bryant.

Sua note 3 at 162-4.

'deciding only what is necessary for the case' approach and the approach that views the Court in the role of overseer of the development of the jurisprudence.' She appears to favour the latter view of the court's role, quoting former Chief Justice Laskin's statement that the Supreme Court of Canada's main function is to oversee the development of the law in the courts of Canada. This view of the court's role is of course subject to criticism by those who believe that courts should stay out of policy-making and stick to an incremental decision-making approach to the common law.

Justice Wilson describes three further tensions in judicial decision-making: the tension between the desire to do justice in the individual case and the desire to rationalize the development of the jurisprudence; the tension between trying to achieve certainty in the law while at the same time ensuring its adaptability to changing social conditions; and the tension between remaining true to the judge's individual opinion while trying to reach consensus with the other judges on the panel to enhance the credibility of the Supreme Court as an institution. How judges resolve these tensions will depend largely on their own personal backgrounds and philosophies, which are discussed in the next sections.

A judge's view as to the appropriate role of the judiciary in society (creator of law; discoverer of law; declarer of law; in dialogue with the legislature) will have a profound impact on the way in which she makes a decision, and the extent to which she will exercise her discretion to create new law. Numerous commentators have noted that the role of the judiciary has expanded as a result of the Charter of Rights and Freedoms, which has arguably changed the balance of power between the three branches of government. This expanded view of the role of the judiciary tends to favour lesser adherence to the traditional norms of *stare decisis* and *sua sponte*, and greater scope for creative decision-making and judicial lawmaking.

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14 *ibid*, at 234.
16 See *supra* note 13 at 228-238.
making. However, greater participation in law-making and policy-making has led to increased scrutiny of judges and greater calls for judicial accountability. Judges must balance a more "activist" role with the need to maintain the credibility of the court and uphold public confidence in the judiciary.

Judges are also constrained by certain conventions which limit how they exercise their power. Chief Justice McLachlin suggests that there is a convention that judges do not carry their functions further than is constitutionally necessary, that judges cannot function in furtherance of a particular political or social agenda, and that there are inherent limitations on the jurisdiction which is conferred upon them. Underlying these conventions is the tradition of judicial impartiality and independence.

2. Approaches to Interpretation

Consciously or subconsciously, judges bring their philosophies of judging to bear on their judgements.  

In law, as in all other things, we shall find that the only difference between a person without a philosophy and someone with a philosophy is that the latter knows what his philosophy is.  

There are many different ways of categorizing approaches to interpretation. Justice Wilson contrasts the textual approach, which relies on accepted techniques of statutory interpretation, including seeking to determine the legislative intent, with the contextual approach, which emphasizes the context in which the dispute arose rather than the text itself. She questions the value of using the largely fictional notion of legislative intent when "the Charter has

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18 The following definition of judicial activism comes from Sterling Harwood, Judicial Activism: A Restrained Defense (Bethesda, MD: Austin and Winfield, 1996) at 2:

Roughly speaking, activism involves four phenomena or practices in adjudication:

1) refusing to take an attitude of judicial deference (i.e., respect) for legislative or executive power or judgement;
2) relaxing requirements for justiciability (e.g., relaxing requirements for standing to sue);
3) breaking precedent (i.e., failing to follow stare decisis); and
4) loosely or controversially construing constitutions, statutes or precedents (e.g., an interpretation venturing beyond any plain meaning of a statute).


20 Bertha Wilson, supra note 13, at 238.


22 Bertha Wilson, supra note 13, at 245.
explicitly designated the Court as the forum for choosing from among a variety of policy options" and states that a contextual approach allows the court to relate the text to the context of the dispute in order to uphold the underlying social values set out in the text. James Boyd White contrasts a traditional examination of the plain meaning of the text, with an intentional approach, which pierces the language of the text in order to look at the supposed goals of those who drafted it, and with the “expounding the constitution” approach used by Justice Brandeis.

Judges may combine approaches in one judgement. For example, in the Marshall decision on the right of a Mi’kmaq Indian to fish for eels based on the terms of a 1760 treaty, Justice McLachlin suggests that it may be useful to approach the interpretation of a treaty in two steps. First, study the words of the treaty to determine their facial meaning to decide on possible interpretations of the clause (a textual approach). Secondly, consider these possible meanings in light of the historical and cultural context (a contextual approach). Finally, in light of the above, consider what the parties intended and try to choose a meaning which is consistent with these intentions (an intentional approach). Justice Binnie for the majority placed less emphasis on the text and suggested that extrinsic evidence was as important as the wording of the treaty, and that after looking at all the evidence, the court should choose the interpretation of the parties’ common intention which best reconciles the interests of the parties. These slightly differing interpretive approaches yielded dramatically different results.

Judges may choose to use one approach over another in order to achieve a particular result in the circumstances of a given case. For example, it has been suggested that the “intentional” approach “is a mode of interpretation that is invariably invoked in order to evade the difficulties presented by the language that the drafters have given us.” One could argue that this comment applies to Justice Binnie’s approach in the Marshall case. Ted Morton and

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23 Supra note 13, at 247.
26 Supra note 25 at paras. 82-84.
27 Supra note 25 at paras. 9-14.
28 See James Boyd White, supra note 24 at 135.
Rainer Knopff argue that judges use original intent only where it suits their policy preferences, so that "far from being a constraint on judicial discretion, original intent has itself become a matter of judicial discretion."  

What I have hoped to do in this short section is simply illustrate the impact that different interpretive approaches can have on a decision. This is not intended to be a comprehensive analysis of the different approaches, or categories of approaches that judges may follow.

3. The Influence of Personal Characteristics on Judge-made Law

While judges may say that they are governed by legal norms such as sua sponte and stare decisis, and interpret the law based on approaches ranging from a textual to a contextual approach, they will generally acknowledge that a great deal depends on their own sense of justice, their perspective on the role of the judge, and their personal life experience.

We know that judges are not (yet) representative of society at large in terms of their gender, race, cultural or class background. Judges are still predominately male, white, non-Aboriginal, and from relatively affluent backgrounds. In addition, the qualifications required to become a judge likely result in a certain amount of both self-selection and selection by others to choose persons exhibiting the characteristics thought to be most appropriate for a judge. Thus, the judiciary may over-represent not only certain groups in society, but also certain personality types. For example, an analysis of over 1300 judges in the United States using the Myers-Briggs Type Inventory (a widely used personality test) revealed that the majority of judges are introverts who are "not likely to be swayed by popular opinion or

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30 See Ian Greene, et al, supra note 7 at 36 and 102, where the authors note that appellate judges surveyed appear to put more weight on personal qualities than legal expertise in commenting on what makes a good judge.

31 The recent study by Ian Greene, et al, supra note 7 at 24 and 33, noted that three quarters of Canada's appellate judges are male, and at least 94% of them were white. John Borrows notes that there are only sixteen Aboriginal judges in Canada, none of whom sit on an appellate court. (See John Borrows, "Sovereignty’s Alchemy: An Analysis of Delgamuukw v. British Columbia" (1999) 37:3 O.H.L.J. 537 at 557 (footnote 102)). Even the law clerks at the Supreme Court of Canada are "overwhelmingly white and affluent" - see Lorne Sossin, "The Sounds of Silence: Law Clerks, Policy Making and the Supreme Court of Canada" (1996) 30 UBC Law Rev. 279 at 285. See also Bertha Wilson, “Will Women Judges Really Make a Difference?” (1990) 28:3 O.H.L.J. 507.
On the “thinking-feeling” axis, the vast majority of judges were found to be “thinking” as opposed to “feeling” decision-makers.

However, many judges acknowledge that subjective feelings do play a major role in judicial decision-making. Justice Brennan stated that it is important to recognize that there is a dialogue between thinking and feeling inherent in the process, and that “the judge who is aware of the inevitable interaction of reason and passion, and who is accustomed to the conscious deliberation and evaluation of the two, is the judge least likely in such situations to sacrifice principle to spasmodic sentiment.” According to this argument, self-awareness, including an awareness of the many influences on one’s own decision-making, is one of the prerequisites to good decision-making.

Therefore, judges should be aware of their own personal predispositions, which may lead them to follow precedents or rather, create new ones; to resolve the four tensions Justice Wilson described above in one way rather than the other; to favor the accused or the crown in criminal cases; to decide a case on primarily rational or on emotional grounds; to seek to make new law and policy or to be deferential and try to decide the case on as narrow grounds as possible; to look at a case from a purely legal perspective or to consider the practical implications of the decision. Where a judge falls on the pendulum between each of these dichotomies will have a profound effect on how they decide a case, especially in areas where the law is unsettled such as the Aboriginal law field.

Judges will also vary in what they regard as a just outcome in a case, based on their own personal sense of justice or injustice. They will vary in their legal philosophies, for example, in the extent to which they believe that the law is objective or indeterminate and changeable depending on the context. They will vary in their worldviews and in their

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33 Supra note 2 at 11-12.
34 See Peter McCormick and Ian Greene, supra note 8, at 256 where they note that some Court of Appeal judges appear to be pro-Crown and others pro-accused and suggest that judges should examine these statistics to learn about potential unconscious biases.
conception of what constitutes an ideal society. Some judges may consciously be strategic decision makers, who try to predict the preferences of others to shape their decisions to be as immediately effective as possible,\textsuperscript{36} while others will make their decisions without regard for the opinions of others. Some judges will be policy-seekers, who view the role of the court as setting policy as much as law, while others see their role as being strictly legal. Some will be very sensitive to the socio-economic and political environment, while others will try not to be influenced by these external concerns.

The new Chief Justice of the Supreme Court, Justice Beverley McLachlin, says she views the Supreme Court’s decisions as part of a dialogue with elected officials. She also appears to be concerned with the practical results of court decisions, and stated that “it is essential to good judging that the rule be sensitive to consequences, and judges, when they make rulings, give some thought to how their rulings are going to fit into the institutional matrix of society.”\textsuperscript{37} “Our courts must operate in the real world” and judges “must stay in touch.”\textsuperscript{38} As we will see below, this sensitivity to the real world impact of court decisions may be particularly important in cases involving Aboriginal issues.

4. Sources of Law

*The authority of the legal actor is never self-established, but always rests, at least in argument, upon prior texts, which provide the standards that govern the authority they establish. This means, among other things, that the legal speaker must always look outside himself for his source of authority.*\textsuperscript{39}

In this section I would like to look at the traditional sources of law to which judges refer. This task is made easier by the fact that at the beginning of all recent Supreme Court of Canada decisions, there is a list setting out the sources to which the court had reference in its deliberations. In Aboriginal cases, these sources generally fall into one of the following categories: previous decisions of Canadian courts, jurisprudence from other jurisdictions, constitutional documents such as the *Constitution Act, 1982*, statutes and regulations, legal

\textsuperscript{36} See Lee Epstein and Jack Knight, *supra* note 3.
\textsuperscript{39} *Supra* note 24 at 96.
texts, historical information about Aboriginal peoples, reports (such as the *Report of the Royal Commission on Aboriginal Peoples*), and academic commentary (journal articles, etc.). There has been an increase in the references to foreign laws, and to international human rights law in recent years.40

The primary source for recent Supreme Court of Canada decisions in Aboriginal law cases appears to be prior decisions of the Supreme Court of Canada, and academic commentary. Articles by academics have been particularly influential in key cases such as *Delgamuukw*,41 where the court was struggling to find support for new concepts for which there were no existing precedents. For example, Chief Justice Lamer in *Delgamuukw* sets out a new principle that an Aboriginal group asserting Aboriginal title must establish that it occupied the land at the time at which the Crown asserted sovereignty. To support his choice of the date of sovereignty as the relevant date, Lamer C.J. cites articles by Brian Slattery and Kent McNeil, and notes that this approach has support in the academic community.42

Noticeably absent from the list of sources considered by the Supreme Court in Aboriginal law cases is any reference to modern day treaties or self-government agreements, or to any texts or academic articles dealing with modern day treaties. Thus, although judges are grasping to find external sources to support newly evolving doctrine in the area of Aboriginal law, they are not referring to contemporary agreements between governments and First Nations as a source of law.

5. Uniquely Challenging Factors to Judge-Made Aboriginal Law43

Some commentators have suggested that the role of the judiciary in creating judge-made law should be limited to areas where the judiciary has developed a special expertise, in fields

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41 *Delgamuukw v British Columbia*, [1997] 3 S.C.R. 1010, hereinafter “*Delgamuukw*”.
42 *Ibid*, at para. 145. Note however that Justice Lamer appears to have misinterpreted these academics as supporting the date of assertion of sovereignty as the date at which Aboriginal people must establish Aboriginal title.
43 I am using the term “*Aboriginal law*” to mean the body of law relating to Aboriginal peoples and Aboriginal rights and interests as developed in the Canadian common law system. Confusion can result as there are also Aboriginal systems of law which have been followed by First Nations for generations. To minimize confusion
where judges have frequent involvement and familiarity such as the rules regarding confessions. Conversely, in areas where judges will have little related experience, for example, with respect to Aboriginal people, they should refrain from creating new law.

One of the challenging characteristics of Aboriginal law cases is the extent to which they deal with complex social facts which are unique to Aboriginal peoples and which are generally remote from the experiences of Canadian judges. Thus, following this argument, judges should be particularly cautious about judicial law-making in the area of Aboriginal law as they do not have specialized expertise in the area.

Another distinctive characteristic of Aboriginal law is the speed at which it is developing and evolving. When I entered law school, there were no courses in Aboriginal law at my law school, as it had yet to emerge as being sufficiently important, or as having a sufficient body of case law, to merit a course of its own. The key cases affecting Aboriginal and treaty rights have been decided in the last decade, and the modern era of Aboriginal law decisions arguably only began in 1973 with the Calder decision. Many earlier cases were decided on the basis of racist assumptions about the inferiority of Aboriginal people, and therefore have

I will refer to these latter systems of law as First Nation legal systems, although the Supreme Court of Canada has described these as “aboriginal legal systems”. (See Delgamuukw, supra note 41, at para 112.)


See Peter Russell, supra note 44, at 87-8, where he states that with respect to Indians, the court’s mandate and capacity for intelligent law-making is quite limited. It may be that the people who have, to use again Chief Justice Deschêne’s phrase, ‘the peculiar advantage of daily contact with the realities of [Indian] life’, are the Indians themselves. Policies which enable Indians to develop their own communities, on their own land, in their own way, would, I believe, lead to a far better method of law-making in relation to Indians, than reliance on the judicial decisions of the Supreme Court.

Patrick Macklem has described four complex social facts as constituting indigenous difference. These four factors, namely, Aboriginal cultural difference, Aboriginal prior occupancy, Aboriginal prior sovereignty, and participation in a treaty process, form the basis for the unique constitutional relationship between Aboriginal people and the Canadian state. For an elaboration of these ideas, see “Indigenous Difference and the Constitution of Canada” (Toronto: UofT Press, 2000) [forthcoming].

The small number of Aboriginal judges on the bench adds to the difficulty judges face in understanding Aboriginal difference; neither their own personal experience, or that of their colleagues, is likely to be of much assistance.

Dale Gibson argues that judges should be more explicit about the influence of policy and political considerations on their decisions, and be more aware when issues are inherently unsuited for judicial determination. “It would therefore be desirable for the Canadian courts to consider the desirability of a full-blown ‘political questions’ principle, by which matters like the aboriginal rights questions put to the Supreme Court of Canada in the Calder case could be overtly side-stepped on the ground that they are more appropriate for political than for juridical settlement.” See Dale Gibson, “The Real Laws of the Constitution” (1990) 28:2 Alta. L. Rev. 358 at 381.

I entered law school in 1977 and studied at Osgoode Hall Law School, York University.

limited value as precedents. Therefore, there are few precedents to assist judges as they struggle to develop new precedents which will shape the future of this rapidly evolving area of law.

Pre-1982 case law is of only limited assistance because constitutional protection of Aboriginal rights only came about in 1982. The wording of the constitutional protection itself creates additional challenges for courts dealing with Aboriginal law cases. Section 35 of the Constitution Act, 1982 sets out in very general terms the requirement that existing Aboriginal and treaty rights should be recognized and affirmed, without defining either Aboriginal or treaty rights. The courts have said that they should take an expansive approach to interpreting s. 35, yet there is little in the way of legislative history or case law to assist in determining how to conduct this interpretive process.

Rapidly changing social attitudes, reflected in instability in the law, cause conflicts between approaches to judicial decision-making to become more apparent, making it more difficult for judges to arrive at their decisions, and to come to consensus around those decisions. As a result, it is not surprising to see that there have been strong dissents in many of the key Aboriginal cases decided by the Supreme Court of Canada, such as Justice McLachlin’s dissent in the Marshall case, Justice L’Heureux-Dubé’s dissents in Van der Peet and NTC Smokehouse, Justice McLachlin’s dissents in Van der Peet and NTC Smokehouse, and

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51 For a general discussion of the outdated assumptions underlying older Aboriginal case law, see Catherine Bell and Michael Asch, “Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation”, in M. Asch ed., Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference (Vancouver: UBC Press, 1997) at 38-74. It is arguable that these assumptions and biases have become institutionalized in legal doctrine and unknowingly continue to influence all current cases which rely on these precedents.


53 See R. v. Sparrow, [1990] 1 S.C.R. 1075 at 1106 where the court states that s. 35 should be construed in a purposive way, and “it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded.”

54 See for example the comments of Sir Roger Omrod, Lord Justice of Appeal, in “Judges and the Processes of Judging”, Holdsworth Club Presidential Address, March 7, 1980, England, at 191 where he states, “The conflicts of opinion which do arise, occur where the law is in an unstable state. Destabilization can be produced in various ways but, in general, it happens when the law gets too far behind social or economic changes. Sooner or later, in these days sooner, the disparity affects the judges, or some of them, and sets up the tensions and anxieties which I have tried to describe.”


57 Supra note 55.
Justice McLachlin’s dissent in *Nikal.* 58 The instability of this area of the law is also illustrated by the three separate judgements (with a three/three tie plus a third judgement) rendered in the ground breaking *Calder* 59 case. The lack of consensus and rapid evolution of the law make decisions hard to predict. 60 The federal government’s apparent lack of preparedness for the Supreme Court of Canada’s decision in *Marshall* is therefore not surprising, as both the trial court and the Nova Scotia Court of Appeal decisions were overturned by the Supreme Court.

The lack of judicial consensus, and the absence of societal consensus around how to resolve some of the most challenging social issues facing us today puts judges in a particularly tough situation – they know that any decision they make will likely be controversial and that they are unlikely to be able to reach consensus themselves around one judgement, yet they cannot duck the issues which are brought before them. The description of law as a “locus of conflict” with a host of competing interpretations 61 seems particularly apt to the field of Aboriginal law.

The case load of Aboriginal cases before the Supreme Court has been rising dramatically, 62 as Aboriginal people are no longer prevented from bringing lawsuits to claim their rights 63 and are becoming more assertive. Increasing success in the courts encourages further Aboriginal

59 Supra note 50.
60 See Ian Greene et al, supra note 7 at 121 where the authors state “The Supreme Court has been criticized in recent years for producing too many separate concurring decisions . . . a slight majority of judges does not see [this] as a major problem. From their perspective, the law is always in a state of flux, and too much rigidity mitigates against fairness and justice.”
61 See Allan Hutchinson, *Waiting for CORAF: A Critique of Law and Rights* (Toronto: U of T Press, 1995) at 72. See also William Brennan, supra note 2 at 22, “. . .the principles of due process teach us that these great questions admit of no static solution. Each age must seek its own way to the unstable balance of those qualities that make us human, and must contend anew with the questions of power and accountability with which the Constitution is concerned. If we progress, it is only because we are sensitive to the complexity of these tasks, and do not take refuge in the illusion of rational certainty.”
62 In an interview in *The Globe and Mail,* February 6, 1999, at A1 and A4, Chief Justice Lamer stated that “Section 15 and aboriginal rights and treaty rights are going to be the main challenges the courts will have to deal with” in the next few years. In an interview with *Le Devoir,* January 11, 2000, at A4 (“Le juge Lamer sur . . . les droits autochtones”), he indicates that he delayed his retirement from the Supreme Court in order to be able to deal with some of the difficult Aboriginal issues before the court and in order to be able to draft the judgement in *Delgamuukw* himself. As of March 31, 1999, the federal government was named in over 1800 lawsuits relating to Aboriginal people. (See Erin Anderssen and Heather Scoffield, “The Legal Logjam that has Ottawa Spooked”, Oct. 30, 1999, *The Globe and Mail*, A1 and A14.)
63 From 1927 to 1951, s. 149A of the *Indian Act,* R.S.C. 1927 c. 98, made it illegal for Indians to hire lawyers to pursue legal claims.
Aboriginal understandings are also uniquely challenging because the disputes usually arise from the clash of two completely different worldviews, and sometimes, two different systems of law. Aboriginal people have questioned the value of even using the mainstream court system as a vehicle through which to further their rights, as it requires trying to fit Aboriginal values into concepts that can be recognized by a foreign system. There are risks to trying to effect change within a system which is premised on fundamentally different values, and staffed with people trained in a different legal system and worldview. When a court makes a decision, the decision not only resolves a particular dispute, but also validates or authorizes one form of life - one kind of reasoning, one kind of response to argument, one way of looking at the world and at its own authority - or another. Whether or not the process is conscious, the judge seeks to persuade her reader not only to the rightness of the result reached and the propriety of the analysis used, but

65 See Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Difference" (1989-1990) 6 Canadian Human Rights Year Book, 3-45, at 37 where she asks Why is it necessary to continue to try to fit Aboriginal cultural differences and historic claims into the categories and concepts of the dominant (European culture) in some form of equivalence in order to be acknowledged? There is a contradiction at work . . . between, on the one hand, wanting to accept Aboriginal peoples as distinct peoples, and, on the other hand, requiring that distinctness be expressed through something called Aboriginal rights defined by Canadian law and accepted in courts whose process and decorum reflect a different cultural system. [emphasis in original]
to her understanding of what the judge - and the law, the lawyer and the citizen - are and should be.66

It is particularly challenging for one legal system to pass judgement on disputes where one party to the dispute has a fundamentally different worldview, and to maintain a sense of legitimacy and fairness. Who is the reader or audience which the court must persuade in such a case? How does the court deal with the fact that there may be several audiences, with polarized views and positions? How does the court justify making value laden decisions when it represents the values of only one of the parties to the dispute?

A further difficulty facing the courts in Aboriginal cases is the difficulty of fashioning an appropriate remedy, when the case may have widespread social and economic ramifications well beyond the impact on the litigants before the court. As Justice McLachlin has said, "decisions on social policy issues may affect thousands if not millions of people who may have had nothing to do with the lawsuit" and the courts are not well equipped to anticipate the potential implications of their decisions.67

In light of these challenges68 – the lack of specialized expertise of the judiciary in Aboriginal issues; the lack of precedents; the rapidly evolving nature of Aboriginal law; the vagueness of the constitutional provisions; the absence of judicial or societal consensus; the different value systems associated with Aboriginal people and with the mainstream justice system; the difficulty of fashioning remedies; and the increasing case load of Aboriginal cases which courts cannot avoid – courts need to be very clear about the basis on which they are making decisions in order to maintain respect for judicial decision-making in this area. They may need to look beyond the traditional sources of law to new sources which better reflect the “on the ground” realities of Aboriginal and non-Aboriginal people in Canada.

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66 See James Boyd White, supra note 24 at 101-2.
68 These challenges are similar, but in fact greater, than the challenges facing the judiciary in Charter cases. See Beverley McLachlin, supra note 12, where she describes the three challenges facing the judiciary in Charter cases as being the absence of precedent; the open-textured (vague) language of the Charter; and the necessity of making value based decisions.
6. **Is Aboriginal Law Invented Law?** 69

The media has been filled with vociferous critiques of both the *Delgamuukw* and *Marshall* decisions, 70 with accusations with respect to both cases that the Supreme Court of Canada had overstepped its role and "invented" the law by coming up with conclusions which were not easily traceable to concrete sources (such as the wording of the 1760 treaty with the Mi'kmaq in *Marshall*, or the "inherent limitation" concept in *Delgamuukw*) with negative consequences, such as the so-called "lobster wars" on the east coast. These criticisms should be taken seriously, whether valid or not, because they strike at public confidence in the judiciary and at the perceived legitimacy of the court's role in adjudicating Aboriginal issues with serious social and economic consequences.

Given the evolving nature of the law, and the limited availability of useful precedents, judges have had to be fairly creative in deciding recent Aboriginal law cases. They are having a difficult time relying on sources external to themselves as determining or shaping their decisions. As Justice McLachlin has said, "*rules of construction, stare decisis and the doctrine of precedent are of limited value when one is not only confronted by new issues, but required to make fundamental value choices in deciding them.*" 72 The Supreme Court is

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70 See for example, Gordon Gibson, supra note 69 on *Delgamuukw*; Ian Hunter, "Cleaning Up the Lobster Mess" *The National Post*, October 28, 1999, A19, where he states regarding the *Marshall* decision, "*Judges meddle in politics, invoking half-baked policy nostrums, but when the mess they created requires to be cleaned up, they have long since retreated to airless courtrooms.*"; William Thorsell, "How to Keep the Supreme Court from Fishing Off Parliament's Dock", *The Globe and Mail*, October 16, 1999, A25; Tom Flanagan, "The Marshall Ruling Puts Western Canada's Economy in Jeopardy", October 7, 1999, *The Globe and Mail*; Brian Tobin, Premier of Newfoundland, blames the Supreme Court of Canada, stating "*[t]he court has a responsibility to make themselves aware of how the fishery works. And if there is anarchy today, and there is a measure of anarchy in New Brunswick, in Nova Scotia, the Supreme Court of Canada has to take responsibility for that*" as quoted in Rory Leishman, "*Supreme Blindness*," *The National Post*, October 6, 1999, A18; Jeffrey Simpson, "In the Fishery Verdict, a Win for Chaos", *The Globe and Mail*, September 30, 1999.

71 See *Delgamuukw*, supra note 41, at paras. 126-128, where Chief Justice Lamer introduces the concept of the inherent limitation on the use of the land, with no authority for this proposition, other than that "it seems to me that these elements of aboriginal title create an inherent limitation on the uses to which the land . . . may be put" (at para. 128).

72 Beverley McLachlin, *supra* note 5 at 579.
"increasingly openly addressing issues of policy . . . to be sure that the decision is not only one which is legally justifiable, but one which is workable in our society."\(^7\)

The nature of Aboriginal law makes judicial decision-making particularly challenging, as we noted in the last section. Judges have not been able to simply rely on precedent, and formalist methodologies do not provide the means to resolve these disputes or to deal with the larger conflicts, such as dueling worldviews and changing social attitudes. In this context, judges developing new law are more likely to be accused of being judicial activists, and criticized for assuming too great a role in policy-making.

In order to deal with this crisis of legitimacy, judges must seek new sources outside themselves in order to support and justify their decisions. While they have been turning increasingly to academic commentary, and occasionally, to non-Canadian sources such as international human rights law, they are still grasping at straws to find sources to provide the theoretical justification for rapid changes to legal doctrine. This fuels criticisms that Aboriginal law is "invented" law – not just creative and innovative, but arbitrary and lacking any external foundation outside the judge herself. Judges are straining to find external sources of law, as well as to find ways of staying in touch with the real world and more accurately predict the practical effects of their decisions. Perhaps they should be considering "on the ground" sources such as modern land claim and self-government agreements to assist them with these challenges.

C. Process and Parties in Developing Judge-Made Aboriginal Law

1. Process and Parties in the Supreme Court of Canada

When litigants appear before the Supreme Court of Canada, the court will have received the parties' factums and perhaps a book of authorities. The court will also have access to the decisions and records of the courts below. The lawyers for each party will have a maximum of one hour each for oral argument. There is no opportunity for viva voce evidence, although on rare occasions an expert's affidavit might be filed by one of the parties. If there are intervenors, they will have a maximum of 15 minutes of oral argument to supplement their written materials.

Provincial and territorial governments can intervene as of right on constitutional questions. Other parties must apply to intervene and must demonstrate that they have an interest in the matter in dispute and that they can offer a unique perspective on the issues. Generally, in Aboriginal cases before the Supreme Court of Canada, lawyers appear representing the parties (usually one party representing Aboriginal interests, and a government party or occasionally a private sector company which is in conflict with the Aboriginal party) and a few intervenors (often these are other Aboriginal organizations or First Nations, occasionally provincial or territorial governments, and often industry or other organizations representing non-Aboriginal interest groups). These intervenors are limited by the 15 minute rule (and may get even less time) and cannot call witnesses. Thus, the parties must rely to a large extent on their written argument and the record from the courts below.

On rare occasions, the court can appoint an amicus curiae to make an argument which the court feels is not being adequately addressed by the parties. Judges often discuss the case

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75 The Supreme Court Act, R.S.C. 1985, c. S-26 provides in s. 53(7) that the court in its discretion can request any counsel to argue the case with respect to any interest affected for which counsel does not appear. While this clause appears in the section on references, the Supreme Court has appointed amicus curiae in cases other
with their law clerks and may receive research or other assistance from them in drafting their judgements. It is generally considered inappropriate for judges to consider specific information which has come to their attention outside the court process in making their decisions, other than information which would be publicly available through research.

Once the case has been heard, the Supreme Court judges on the panel will meet privately in conference to discuss the case and express their tentative views. Normally, judges speak in order of reverse seniority, beginning with the most recently appointed judge. This early discussion indicates whether a unanimous judgement is possible, or whether there will be one or more judgements. It is at this initial conference that one judge volunteers, or is chosen by the Chief Justice, to write the majority opinion. Once the majority draft is done, the other judges study it, and decide whether or not they can concur. If one of the judges decides to dissent, the judges wait until the dissent is available before deciding about concurring. Time pressures on the court, which hears an average of 120 appeals per year (plus many more applications for leave to appeal) will increase the tendency to trust one’s colleagues and concur, rather than take the time to write a separate judgement.

2. Inherent Limitations of the Process

When we come into what might be termed the ‘socio-economic area’, we must ask what tools judges have with which to act. . . . The empirical data are, therefore, not available in the ordinary run-of-the mill case to assist us in assessing the effects of a particular so-called ‘creative’ decision. Compare that with a Parliamentary Committee, which has the opportunity for hearings where the interests affected are permitted to present their points of view. There is debate; there is questioning; there is the benefit of experts; there are people who are knowledgeable in the field; there is the reaction of those who are most affected. Many of these judgements we make are going to affect not only the litigants, who are before us, but many other people right across the land.

than references where an interest or perspective was not being adequately addressed by the parties before the court.

76 See Lorne Sossin, supra note 31.
77 These figures are from Eugene Meehan, “Supreme Court of Canada: Process and Advocacy” supra note 74 at 2.
78 This paragraph is largely a summary from Bertha Wilson, supra note 74, at 236-8.
This statement, made by Justice Dickson of the Supreme Court of Canada in 1976, applies with even more force today. Cases involving complex socio-economic issues have increased greatly, yet the process and materials before the Supreme Court of Canada remain quite limited. Judges are faced with decisions having major policy implications and raising complex social issues, yet have few research resources at their disposal. They are primarily dependent on the material presented to them by the lawyers arguing the case, the record below, any relevant case law, and academic commentary. If they are lucky, they have had the benefit of argument by intervenors representing specific interest groups. Justice McLachlin states “There is a very real question whether courts, which lack the resources for gathering and collating information and opinion available to the legislatures, are the best institutions to decide complex social policy questions.” She goes on to note that, whether they are prepared on not, courts must now deal with these complex social policy issues. She suggests that the Supreme Court of Canada may want to consider the reception of evidence to deal with this concern, stating that “if judges are to be expected to make policy decisions, they must be provided with the material upon which those decisions should be based.”

Increased participation by intervenors can assist in bringing more interests before the court, and can also assist in legitimizing the court’s increasing involvement in social policy issues, going some way to “solving the counter-majoritarian problem which some see as inherent in judicial power.” But even with good representation of intervenor groups before the court, the only people appearing before the court (as well as the judges themselves) will be lawyers trained in the Euro-Canadian legal tradition. This is very limiting, in light of the Supreme Court’s own recognition that Aboriginal rights “must be understood by reference to both common law and aboriginal perspectives.” If the court is to place equal weight on the “perspective of the aboriginal people claiming the right . . . [and] the perspective of the

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80 See Peter McCormick and Ian Greene, supra note 8 at 245, where they state that “in general, judges are not encumbered with an abundance of social research to assist them in making their decisions. What are their decisions based on, then? . . . Their interpretation of the evidence will depend, to some extent, on the totality of their background experiences.”

81 Beverley McLachlin, supra note 67 at 683.

82 Beverley McLachlin, supra note 38 at 585-6.

83 Bertha Wilson, supra note 13 at 243.

84 Justice Lamer in Delgamuukw, supra note 41 at para. 112.
common law", it is arguable that it will need exposure to more than written documents and oral arguments by lawyers trained in the Euro-Canadian legal perspective. How will judges come to understand the perspectives of Aboriginal people, and how will they determine the best balance between common law principles and principles based on Aboriginal traditions and laws? How will judges find out about the principles which are important to Aboriginal people in agreements which they have recently negotiated?

Earlier sections of this chapter examined principles and approaches to judicial decision-making as well as sources of judge-made law. I have tried to demonstrate that these theoretical underpinnings are of only limited assistance when courts are faced with Aboriginal law cases, which create a number of unique challenges for judges. In addition, Aboriginal cases often require an examination into Aboriginal perspectives, First Nation legal systems, and Aboriginal culture. Aboriginal culture is oral in nature, and Aboriginal understandings are not easily reduced to writing, let alone to the format of factums and the restrictions of common law rules of procedure. If judges are to do a balancing, as Chief Justice Lamer suggests, between common law principles and Aboriginal principles, between a system they use daily and understand well and a system which is foreign to most lawyers and judges, they may well require some assistance from outside the traditional sources of Aboriginal law. I believe that modern land claims and self-government agreements between governments and First Nations provide one potential source which, until now, has been overlooked by the courts.

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85 Justice Lamer in Van der Peet, supra note 55, at paras. 49 and 50, quoted in Delgamuukw, supra note 41 at para. 81.
CHAPTER THREE
THE EFFECT OF NEGOTIATED ABORIGINAL LAW ON JUDGE-MADE LAW

A. Introduction

The last two chapters discussed the processes and principles involved in the two main streams of Aboriginal law – negotiated law which arises from modern treaties, and judge-made law which arises from court decisions. This chapter, and the next chapter, will examine the relationships between these two streams of Aboriginal law and the impact that each has on the other. The purpose of this chapter is to outline the effect, if any, of modern negotiated agreements on recent court decisions in the Aboriginal law area; the reasons behind their minimal influence thus far; and what their potential contribution to judge-made law might be.
B. The Lack of Impact of Modern Treaties on Judge-made Aboriginal law

Since the early 1980's, Supreme Court of Canada decisions have listed in detail the materials that they have referred to in reaching their decisions at the beginning of their judgements. This is a helpful tool for researchers, and enables us to determine whether the Supreme Court has referred to any modern land claim or self-government agreements when considering issues relating to Aboriginal or treaty rights. After examining recent key cases, such as Sparrow,1 Sioui,2 Van der Peet,3 Pamajewon,4 Delgamuukw5 and Marshall,6 it is apparent that the Court has not referred to any modern agreements in developing new law with respect to Aboriginal rights, self-government, or the interpretation of rights under historical treaties.7

While the court has not explicitly considered modern treaties in developing the common law with respect to Aboriginal and treaty rights, there are some areas in which modern agreements may have had an indirect influence on courts. For example, if courts are aware that negotiators are in the process of developing frameworks to deal with complex issues like self-government, it may make it easier for them to refrain from ruling on these issues and defer to the negotiation process. The fact that there are known to be other solutions or processes available to deal with a problem can provide the court with an “out” and enable it to take a more restrained approach, rather than developing new law to redress the situation.8 Thus, the existence of modern self-government agreements may be one of the reasons why the court has taken a relatively restrained approach in dealing with self-government issues,

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7 Similarly there has been little reference by lower courts to modern treaties or self-government agreements.
8 For example, in Bhaduria v. Board of Governors of Seneca College, [1979] 1 S.C.R. 395, the Supreme Court of Canada decided not to create a new tort of discrimination because it believed that the existence of provincial human rights codes provided a remedy and therefore it was not necessary to make new law and create a new tort. In the Court’s view, the provisions of the Ont. Human Rights Code indicated that the legislators intended to occupy this field in this area, to the exclusion of the courts. Dale Gibson, in “The Real Laws of the Constitution” (1990) 28:2 Alta. L. Rev. 358 at 377 comments “Courts are loathe to be drawn into disputes with which they are not well equipped to deal. An issue may hinge upon factors that are highly political in nature, or are otherwise alien to customary legal norms . . . In such circumstances, it is not surprising that courts sometimes seek to avoid making decisions.”
which are complex and involve many political and practical matters outside the court’s traditional areas of expertise.\(^9\)

In other areas, courts may incorporate principles which have developed from modern agreements, which have become known to courts through secondary sources such as academic papers or the report of the Royal Commission on Aboriginal Peoples.\(^10\) Negotiators in the Yukon\(^11\) argue that many of the principles established in recent cases such as *Sparrow* and *Delgamuukw* were already anticipated in the Yukon agreements, and it is possible that the agreements may have had an indirect influence\(^12\) on the court’s endorsement of principles such as consultation and acceptance of oral evidence. Since the agreements are negotiated on the basis of more than simply legal rights, the parties have been able to consider evidence which would not meet the strict rules of evidence in a court of law. As a result, oral evidence as to the location of traditional lands, hunting camps, trading routes, and other significant places was accepted in negotiations, long before the Supreme Court’s rulings in *Van Der Peet* and *Delgamuukw* adapted the ordinary rules of evidence to accept oral evidence in the adjudication of Aboriginal claims.\(^13\) In this way, the agreements anticipated and perhaps influenced the evolution of the law. Examples of principles which arise from the agreements which could perhaps have been used by the courts are set out in section D.

Finally, courts may urge the parties to negotiate, and intentionally write court decisions at a general, abstract level,\(^14\) forcing the parties to either negotiate or re-litigate to obtain a ruling

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\(^9\) For example, in *Delgamuukw*, the Supreme Court chose not to deal with issues of self-government but to leave them for determination at trial. (See para. 171).


\(^11\) From interviews with negotiators - see Chapter One, Appendix One.

\(^12\) It is difficult to trace how ideas are transmitted from one context to another in the absence of a clear paper trail. Perhaps through informal contacts, or speakers at conferences discussing the principles in modern agreements, ideas such as that of consultation prior to infringement of a legal right became part of the legal consciousness for practitioners in the Aboriginal law field. It would also have been well-known to anyone involved in land claim negotiations that oral evidence was being accepted in those negotiations, for example, as to areas of traditional use and cultural significance, and the practical merits of this approach may have gradually influenced judicial decision-makers. The mechanisms by which ideas are transmitted and a critical mass of thinkers is transformed would be an interesting topic for a subsequent research paper.

\(^13\) *Delgamuukw*, supra note 5 at para. 105.

\(^14\) Herb George (Satsan), Hereditary Chief and Speaker for the Wet’suwet’en Nation, suggested in his oral remarks at the Pacific Business and Law Institute “National Conference on Delgamuukw”, February 12-13, 1998, Vancouver, BC, that the court’s “intentional ambiguity” was not necessarily a bad thing, as it might encourage negotiations.
on their specific fact situation, as in *Delgamuukw*. This approach permits a dialogue between the litigation and negotiation processes, with courts setting out legal principles or recognizing the existence of substantive rights in a way which potentially influences negotiations (see Chapter Four on this point) but leaving the practical details to be worked out by the parties at the negotiating table. If the negotiations are unsuccessful, the parties have the option of returning to court, creating an opportunity for interaction between the negotiation and litigation processes.

Thus, there are some areas in which the very existence of the process to negotiate modern treaties (of which the courts can take judicial notice) may have an influence on the way in which courts write their judgements and perceive their role in the overall process, and it is possible that some of the principles in modern agreements have indirectly influenced the court in its development of Aboriginal law. However, it is surprising that there has been no more direct influence of modern treaties on judge-made Aboriginal law, when the issues at stake in negotiations and in court cases are the same – the reconciliation of the pre-existing rights of Aboriginal peoples with the current reality of a largely non-Aboriginal population with competing rights and interests. The next section examines some of the possible reasons behind the judicial reluctance to consider modern agreements as a source of Aboriginal law when they are wrestling with related issues themselves.
C. Reasons Why Modern Land Claim and Self-government Agreements are Rarely Referred to by Courts

I attempted to read the Umbrella Final Agreement for Yukon Indians. While I have some years of experience as a practicing lawyer and as a judge, I must say that I found the document convoluted and very difficult to follow. I understood what a presenter meant when he said one would need to be a lawyer or a negotiator who has been involved in the negotiation of a treaty to be able to understand it.\(^{15}\)

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Unfortunately, modern land claim and self-government agreements tend to be extremely lengthy, complex, and detailed documents.\(^{16}\) It is so difficult for the average reader to understand all the interrelated parts of the agreement, and to understand the agreement as a whole, that it is often hard to determine whether the overall settlement is fair. As Judge Barry Stuart, former Chief Negotiator for the Yukon government has said, "since most parts of the agreement are interconnected, reading any one part of the agreement cannot afford a proper appreciation of whether the overall settlement fairly addresses all interests. Consequently, for the constituencies of all parties to believe the agreement will be fair, they must be able to believe the process creating it is fair."\(^{17}\) Thus, the fact that the agreements are designed to be comprehensive and deal with many complex issues in as much detail as possible, combined with the often convoluted drafting, make the agreements less accessible to readers and less likely to be referred to with any confidence by either academics or judges.

Another reason why courts may not have considered modern agreements in recent cases is that their process generally limits them to considering material brought before them by the parties.\(^{18}\) If none of the parties to the action bring forward material setting out how


\(^{16}\) For example, the Selkirk First Nation Final Agreement (Ottawa: Minister of Public Works and Government Services, 1998) is 462 pages in length.

\(^{17}\) Barry Stuart, "Land Claims Agreements as a Mechanism for Resolving Resource-Use Conflicts", in Monique Ross and J. Owen Saunders, eds., *Growing Demands on a Shrinking Heritage: Managing Resource-Use Conflicts* (Calgary: Canadian Institute of Resources Law, 1992), 129 at 144.

\(^{18}\) The common law doctrine of judicial notice sets out a number of situations in which judges can take judicial notice of a particular fact or state of affairs without that material being brought before the court by the litigants. John Sopinka states that the doctrine is limited to "facts which are (a) so notorious as not to be the subject of dispute among reasonable persons, or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy." Unless these criteria are present, "the judge cannot judicially notice a fact within his personal knowledge even if it has been proved before him in a previous case." See J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992)
contemporary negotiations have resolved issues, it is unlikely that the court will look at such material on its own initiative. The following comments by former Chief Justice Lamer in *Delgamuukw* illustrate the court’s difficulty in dealing with self-government issues in the absence of more practical assistance from the parties:

> The broad nature of the claim at trial also led to a failure by the parties to address many of the difficult conceptual issues which surround the recognition of aboriginal self-government. The degree of complexity involved can be gleaned from the Report of the Royal Commission on Aboriginal Peoples, which devotes 277 pages to the issue. That report describes different models of self-government, each differing with respect to their conception of territory, citizenship, jurisdiction, internal government organization, etc. We received little in the way of submissions that would help us to grapple with these difficult and central issues. Without assistance from the parties, it would be imprudent for the Court to step into the breach. In these circumstances, the issue of self-government will fail to be determined at trial.19 [my emphasis]

Lawyers bringing cases to court involving Aboriginal rights issues might serve their clients better if they brought forward material indicating how complex issues like self-government have been successfully dealt with on the ground in current agreements. However, lawyers dealing with Aboriginal rights issues in the litigation context are often not the lawyers who deal with Aboriginal issues in negotiations, and this separation in legal practice between litigators and negotiators20 further reduces the likelihood that the litigators will be conversant with the modern agreements and bring them to the attention of the courts.

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at 976 and 985. However, the parameters of what may be judicially noticed are expanding. For example, Madame Justice L’Heureux Dubé notes that social science research is now being judicially noticed in family law cases in Canada. See Claire L’Heureux-Dubé, “Re-examining the Doctrine of Judicial Notice” (1994) 26 *Ott. Law Rev.* 551. Also of interest are the comments of Chief Justice Lamer in *R. v. Siou* [1990] 1 *S.C.R.* 1025 at 1050, where he indicates that he has done some independent historical research in this treaty rights case, stating,

> I am of the view that all the documents to which I will refer, whether my attention was drawn to them by the intervener or as a result of my personal research, are documents of a historical nature which I am entitled to rely on pursuant to the concept of judicial knowledge . . . The documents I cite all enable the Court, in my view, to identify more accurately the historical context essential to the resolution of this case.

This statement seems to provide a potential opening for courts to take judicial notice of the principles underlying modern treaties and self-government agreements.

19 *Supra* note 5 at para. 171.

20 For example, in most governments, there is a separate branch which is responsible for dealing with litigation of Aboriginal disputes, and this litigation group may have only limited contact with the lawyer who was advising on the negotiation process. This is particularly common in large governments like the federal government where there is significant legal specialization and the legal counsel doing the litigation are often located in a different city from the counsel to the negotiator. The lawyers handling negotiations may have little contact with those handling the litigation, and in fact, may not see eye to eye according to reports. See Rick Mofina, “Handling of Native Claims Deemed ‘Dysfunctional’”, *The National Post*, June 5, 2000, which reports on an internal report called “Re-engineering of DIAND Litigation” outlining conflicts between DIAND and
Academic commentary on modern land claim and self-government agreements has also been fairly limited, and while the *Nisga'a Final Agreement* is now getting widespread attention, the agreements north of 60 (many of which go much further than the *Nisga’a Final Agreement*) have been virtually ignored by academic commentators. The reasons for this may include the complexity of the agreements, noted above; the fact that they apply to distant lands which are sparsely populated and seem to have little connection with the south; and the view that the conditions that permit these agreements to succeed are very different from the prevailing conditions in more southerly parts of Canada. The limited treatment of modern agreements in the academic literature is unfortunate and is a missed opportunity, given the Supreme Court of Canada’s increasing reliance on academic commentary as it struggles to develop new approaches in the evolving field of Aboriginal law. A body of literature discussing modern treaties would assist the court in bridging the gap between its conceptual theories and “on the ground” realities.

There have only been a few cases in which courts have had to deal with the interpretation of modern treaties and self-government agreements, which have primarily been in the Federal Court, so judges in the ordinary course of their work do not examine modern agreements and therefore have little opportunity to develop familiarity or comfort with them. The lack of academic commentary to mediate and interpret the agreements exacerbates the problem.

One way in which the gap between modern agreements and judge-made law could be reduced would be through interventions by governments with land claim and self-government agreements in cases where a court’s discussion of an Aboriginal or treaty right could potentially impact on the interpretation of a modern agreement. For example, the

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Department of Justice lawyers. In private practice there is also generally a distinction between barristers who specialize in litigation and solicitors who end up being involved in negotiations.

21 *Canada, British Columbia, Nisga’a Nation, Nisga’a Final Agreement*, published jointly by Canada, British Columbia and the Nisga’a Nation, received Royal Assent April 13, 2000.

22 For example, there is only one academic article which has discussed the Yukon agreements in any detail, Peter Hogg and Mary Ellen Turpel, “Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues” (1995) 74:2 Can. Bar Rev. 187. Current texts on Aboriginal law devote little if any space to modern treaties.

23 This was noted in Chapter Two, *supra*.

24 See Chapter Four, Section B(2) for a discussion of these cases.
*Sundown* case which found that the building of a cabin was reasonably incidental to Mr. Sundown’s hunting rights under a historical treaty could potentially affect the interpretation of modern treaties by creating an argument for expanding hunting rights to include the building of accessory cabins. However, no northern governments with modern treaties intervened in this case.

There are a number of possible reasons why governments have not intervened in cases which could potentially affect the interpretation of their agreements. One reason is that these governments are focused on implementing their agreements and maintaining good working relations with the First Nation parties to the agreements. If the government were to intervene, it might have to take a position in favour of restricting the Aboriginal right in order to protect the integrity of the negotiated agreement, which would be politically unpopular and potentially have a negative impact on relations with First Nations.

Another constraint on intervening relates to resource restrictions. As a practical matter, the northern territorial governments are small, have few legal and other resources, and in some cases, such as that of the Nunavut government, are putting all of their energies into making government, and the land claims implementation process, work. Northern governments, by virtue of their long history of negotiating, are also more oriented towards negotiating than litigating. Finally, negotiators within territorial governments tend to view judge-made Aboriginal law as being of only limited relevance to their jurisdictions, as the comprehensive

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26 The Quebec government did intervene in this case. It is a party to a modern land claim agreement, the *James Bay and Northern Quebec Agreement*. It has been involved in frequent litigation with respect to this agreement and has an adversarial relationship with the First Nation parties to the agreement. It is likely that the Quebec government would be less concerned about the negative First Nation relations implications of intervening than the northern territorial governments might be. Other governments with modern treaties like the Yukon would also have been concerned about the possible implications of this case on their agreements, and would want to ensure that the original intent of the agreement was maintained, rather than changed by a subsequent court ruling based on a completely different fact situation. However, for a government to intervene and argue that under their agreements, the right to hunt does not include any right to build an accessory cabin, would have been perceived negatively by First Nations, who already express concerns in current negotiations that governments will later try to construe the agreements as narrowly as possible. While subsequent court rulings could affect the interpretation of modern treaties in ways which are positive for the government parties, or positive for the First Nation parties, or neutral, and thus could warrant interventions by any parties to modern treaties, I suspect that there will a reluctance to intervene because of intergovernmental relations concerns, particularly where there are still ongoing treaty negotiations with some First Nations, as in the Yukon.

27 For example, the *Delgamuukw* decision affected the interpretation of Yukon Final Agreements, as discussed in Chapter Four, Section C.
agreements in place provide the overall framework setting out respective rights and responsibilities, and they are therefore less likely to be concerned about intervening in court cases. As a result, there is little opportunity for courts to see the potential impact of their decisions relating to Aboriginal rights or historical treaties on modern agreements. Courts have therefore not had the opportunity to compare existing agreements with their own evolving theories around Aboriginal rights.

There is a legitimate concern about importing concepts developed in one fact situation to a different fact situation, which might lead to a reluctance to consider concepts developed in a particular First Nation's agreement when a court is considering the rights of another First Nation. However, courts do develop broad principles which they then apply to like situations, and they are doing this already in the Aboriginal law field.\textsuperscript{28} While the application of any general principle to a specific case without examining the unique circumstances of the case and the appropriateness of applying the principle would be wrong, the history of the common law itself illustrates that it is essential to create some principles at a general level to guide the development of the law.\textsuperscript{29} As a result, there is no reason for excluding consideration of principles developed through negotiated agreements as a possible resource for judges when dealing with Aboriginal law cases.

A final concern might be that negotiated agreements are based on more than just legal rights. The agreements must be supported by all parties and be politically saleable to their constituents, must be consistent with government policy (which they can help to shape), must address any perceived legal risks and liabilities, must address the specific needs and priorities of the Aboriginal community, and must deal with historic grievances and hopes for the

\textsuperscript{28} For example, the Supreme Court developed the "integral to the distinctive culture" of an Aboriginal people as the test regarding what is necessary to establish the existence of an Aboriginal right, and this test, developed in the context of fishing in \textit{Van der Peet}, has been applied in a number of very different contexts, such as gaming. The \textit{Sparrow} test (setting out what the government must do in order to justify infringing an Aboriginal right) was extended by the court in subsequent decisions to apply to infringements of treaty rights.

\textsuperscript{29} The history of the common law illustrates the ways in which courts have developed general principles to help guide the application of the law to similar situations. For example, Mr. Justice Blackburn, in \textit{Rylands v. Fletcher} (1868) L.R. 3 H.L. 330 made a general statement that people who brought items onto their property which escaped and harmed others would be liable for the damage caused. In this way, he grouped previously unconnected cases of liability and clarified the rule governing future cases through the articulation of a principle. (See R.F.V. Heuston, \textit{Salmond on the Law of Torts} (London: Sweet & Maxwell, 1977) at 314-17 on this point.) See also Roland Case, \textit{Understanding Judicial Reasoning} (Toronto: Thompson Educational Publishing Inc., 1997) at 76-101.
future. Thus, policy, politics and law are all intertwined in the development of the agreements. This is different from court decisions, which, at least on the surface, are based primarily on legal considerations. However, as we saw in Chapter Two, Aboriginal law is evolving rapidly, and simply following legal precedent has not provided all the answers for judges developing new principles in Aboriginal law. Courts are aware of the social and political environment in which they are making decisions, and do seek to be sensitive to the practical, real world impact of their rulings. As a result, it would not be inappropriate for courts to consider some of the principles developed through the negotiation process.

To summarize, there are several possible reasons why modern treaties and self-government agreements are rarely referred to by courts and have had only a minimal impact on judge-made Aboriginal law. These include the complexity, length and inaccessible drafting of the agreements themselves; the fact that the parties to the litigation rarely bring these agreements to the attention of the court; the limited academic literature dealing with modern agreements; the relatively small amount of litigation dealing with the interpretation of the agreements themselves; the fact that governments with modern treaties have rarely intervened in Aboriginal rights or historical treaty cases which could potentially affect their agreements; the concern about importing concepts developed in one fact situation to a different situation; and the concern that negotiated agreements deal with more than simply legal considerations. Some of these factors could be changed (for example, litigators could bring material relating to modern agreements to the attention of the court; governments could intervene more) but one of the most important changes has to be a recognition that modern land claims and self-government agreements are a valuable resource to which judges should be referring when developing new approaches in the field of Aboriginal law. The next section will outline some of the potential contributions which negotiated agreements could make to judge-made law in order to illustrate the value of modern agreements as a source for judges wrestling with developing new law.

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30 See Chapter Two, Section B (3) for commentary by the Chief Justice on this point.
D. Potential Contributions of Negotiated Aboriginal Law to Judge-made Aboriginal Law

Modern treaties and self-government agreements are useful documents for a number of reasons. First, as we saw in Chapter One, they developed through a process involving First Nation representatives as equal partners at the negotiating table, and First Nation values and perspectives were necessarily taken into account in the negotiating process and in the final agreement. Secondly, they illustrate what First Nation and non-First Nation parties have found to be a workable accommodation of their interests in the real world. They demonstrate some of the practical solutions which are available to meet the needs and interests of all the parties. The agreements also have demonstrable support – they must all be ratified by a majority within each First Nation community, and be ratified by governments through some formal act, often involving Parliament. As a result of the inclusive process by which they were developed, and the fact that the final product must be agreed to by all parties and then be ratified by their constituent authorities, these agreements have a moral authority which court decisions lack.

As noted by Kelly Gallagher-Mackay, 

*The Supreme Court speaks of using Aboriginal rights to reconcile the prior presence of Aboriginal societies in North America with the Crown's assertion of sovereignty. Reconciliation, if this is not to be a code word for unilateral imposition, necessarily must imply outcomes that are reasonable by a standard that has received acceptance from Aboriginal societies as well as present government. In order to accomplish that kind of reconciliation, the Court must be willing to look outside its own jurisprudence, which is culturally specific, to find standards against which they can measure the outcomes of their decisions.*

The Supreme Court appears to have recognized the need to do more than unilaterally impose mainstream western values on First Nations in this reconciliation exercise. Chief Justice Lamer stated in *Delgamuukw* that "the aboriginal perspective must be taken into account alongside the perspective of the common law." But while courts have come a long way by at least recognizing this principle, they have not yet demonstrated an ability to actually take into account the Aboriginal perspective, and indeed, the limitations of their own process.

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32 *Delgamuukw*, supra note 5 at para. 149.
make this a rather challenging task. As contemporary management consultants might remark, “they are talking the talk, but not yet walking the talk”.

The time seems ripe for courts to begin to look at modern land claims and self-government agreements as a source of principles, perspectives and approaches which have proven to be workable on the ground, and which have the input and support of Aboriginal people. Modern agreements, as a result of the process through which they were created, inevitably include and balance both the Aboriginal perspective as well as the perspective of the mainstream society as represented by governments. Through this sharing of values and perspectives, all parties have grown and been enriched. While the final products – the rather lengthy and inaccessible agreements – may not be the ideal medium to communicate the benefits of the process through which they were created, the principles derived from the agreements can be useful to courts, and should become accepted, along with traditional sources like academic literature, as a source of Aboriginal law.

Many principles recently recognized by the courts had in fact already been incorporated into the negotiation process or into land claim and self-government agreements. For example, the requirement that governments consult with Aboriginal people as one of several steps in order to justify an infringement of an Aboriginal right was set out in the Yukon Umbrella Final Agreement with respect to hunting and fishing rights prior to the Sparrow decision. Another principle set out in the Yukon agreements is that of reconciliation, and the understanding that collectively, all parties need to live together and to build a new kind of society together to reconcile their differing needs and interests. This principle was embodied in the agreements prior to Chief Justice Lamer’s statement in Van der Peet and Delgamuukw that the basic purpose of s. 35(1) is “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. Let us face it, we are all here to stay.”

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33 John Borrows makes a similar observation with respect to the Supreme Court’s inability to do what it says it wants to do, in “Sovereignty’s Alchemy” (1999) 37:3 O.H.L.J. 537, where he notes that the Supreme Court “despite its claims otherwise, is defining the content of Aboriginal title by reference to traditional activities” at 571-72.

34 See 16.3.3.2 of the Umbrella Final Agreement (Ottawa: Supply and Services Canada, 1993). Consultation is a defined term in the Umbrella Final Agreement with a very precise meaning.

35 Delgamuukw, supra note 5 at para. 186.
The Yukon *Self-Government Agreements* also recognize the right of individual First Nations to govern themselves in accordance with their own values and traditions. For example, the preamble to the *Teslin Tlingit Council Self-Government Agreement* states,

*Whereas Teslin Tlingit have decision-making structures based on the traditional Tlingit clan system and are desirous of maintaining these structures; the Parties wish to support and promote the contemporary and evolving political institutions and processes of the Teslin Tlingit Council; the Parties recognize and wish to protect a way of life that is based on an economic and spiritual relationship between Teslin Tlingit and the land; the Parties wish to protect the cultural, political and economic distinctiveness and social well-being of the Teslin Tlingit...*  

This short excerpt from the preamble illustrates a number of principles set out in modern agreements which the courts would do well to examine. One principle (recently recognized in the *Marshall* decision) is that the relationship between Aboriginal people and the land has an economic, as well as a spiritual aspect. Another important principle is the recognition that while First Nation governments may be grounded in traditional values and customs, these political institutions and processes are not frozen in time, but should be allowed to evolve, just as institutions and practices in mainstream society are permitted to evolve over time. A third principle is the recognition that there are existing self-government structures in many Aboriginal societies, and that Aboriginal self-government should build on these structures. A final principle set out in these preambular clauses is the recognition of Aboriginal distinctiveness or difference, and the desirability of protecting this

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38 In addition to the recognition of this principle in the preamble, the *Teslin Tlingit Council Final Agreement* recognizes priority rights for the Teslin Tlingit with respect to economic opportunities and government employment in their traditional territory (Chapter 22); resource royalty payments for minerals, oil and gas revenues in the Yukon (Chapter 23); priority, and in some cases, exclusive harvesting rights in their traditional territory (Chapter 16); recognition of heritage sites, trails and routes and some priority employment with respect to these sites (Chapter 13) etc.
39 Under the *Teslin Tlingit Council Self-Government Agreement*, s. 10, the Teslin Tlingit determines its own constitution which sets out its governing bodies, decision-making processes, etc. This can be changed at any time by the Teslin Tlingit in accordance with their constitutional amending procedure. The Teslin Tlingit constitution currently provides for a system of government using the traditional clan system, with five clans divided into the Wolf and Crow moieties. Thus, their government is grounded in their traditional values and customs but is not frozen in time.
40 This is recognized in the first preambular clause of the *Teslin Tlingit Council Self-Government Agreement* quoted above, and the current Teslin Tlingit government very much builds on these existing, traditional self-government structures - see *ibid*.
distinctiveness. The agreement itself arose from a process in which Aboriginal perspectives were recognized and respected as equal to those of non-Aboriginal people, and, with respect to issues such as the way in which self-government would be exercised, Aboriginal perspectives have priority. These are important, and in some cases, revolutionary principles, which illustrate the changes that have taken place since the days when the Canadian government pursued a policy of assimilation towards Indians, and did not recognize an Aboriginal right to self-government. Some of these principles have not yet been recognized by the courts, and the agreements provide a potential source for future directions in the court's development of Aboriginal law.

Chapter One, Section D, set out a number of principles arising from the Yukon Final and Self-Government Agreements, which add to the items noted in the preceding paragraph. While these principles are not binding in any way on courts, they are useful as they illustrate what is needed in a practical sense to achieve the reconciliation which the court is striving to foster through its decisions.

For example, the agreements recognize the right of First Nations to self-government, and the importance of setting up institutions which recognize the right of individual First Nations to govern their people in accordance with their values, not the values or institutions of mainstream society. The agreements also recognize that for reconciliation to work, accommodations must be made not only by Aboriginal people, but by the dominant society as well, and that mechanisms for dialogue, mutual consultation, and in some cases, co-operative or joint management should be established to permit the process of mutual understanding and accommodation to occur. The agreements recognize that non-Aboriginal

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41 Many provisions of the Teslin Tlingit Council Final and Self-Government Agreements are intended to recognize and protect the cultural, political and economic distinctiveness of the Teslin Tlingit. The whole self-government system is based on the traditional form of government of the Teslin Tlingit, and is very different from mainstream government structures (for example, many decisions are made by clan representatives or clan leaders, rather than by all citizens, so it is different in its approach to democracy from western governments). The Teslin Tlingit government has broad law-making powers on its settlement land, and with respect to its citizens throughout the Yukon (see s. 13 of the Teslin Tlingit Council Self-Government Agreement) and through its legislation it can express its distinctiveness. There are many provisions in the Teslin Tlingit Council Final Agreement which also recognize and provide for the expression of Teslin Tlingit distinctiveness - from place names and heritage sites (Chapter 13) to co-management bodies composed of equal First Nation and government appointees - which permit the First Nation's values, priorities and worldview to be considered on an equal footing with mainstream perspectives.
societies have much to learn from Aboriginal societies and that Aboriginal and non-Aboriginal perspectives are equally valid.

The agreements also recognize that the long term goals should be to improve relationships between Aboriginal and non-Aboriginal people, and foster self-sufficiency in Aboriginal communities through economic development, training, and self-government. They also recognize the interconnectedness of all things, and the need to encourage a holistic approach rather than a narrow, sector by sector approach. The agreements also recognize the importance of respect for First Nations as self-governing, accountable bodies, and the importance of maintaining the distinct culture and heritage of Aboriginal people, including their spiritual and economic relationship with the land.

Thus, the agreements set out a very different approach from the approach espoused by the courts in recent cases such as Pamajewon and Van der Peet, where rights were characterized in a very narrow way, and any self-government right with respect to gaming or right to commercial fishing had to be grounded in specific, almost identical past practices, with the result that the rights were virtually frozen in the past, rather than permitted to evolve over time. Numerous commentators have criticized the compartmentalized, narrow approach taken by the Supreme Court in these decisions, which is very much at odds with the holistic approach taken by the parties to modern land claim and self-government agreements.

Consider how some of the principles from modern agreements discussed above might have influenced the outcome if the court had taken them into account, for example, in the Van der Peet case. At issue in Van der Peet was the right of the Sto:lo to exchange fish for money or goods. The Sto:lo had a history of harvesting and trading salmon caught on the Fraser River for centuries, well before the date of sovereignty in 1846. The majority judgement, written by then Chief Justice Larner, upheld the trial judge’s decision and found that the appellant had not demonstrated that the exchange of fish for money or other goods met the test of being

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integral to the distinct culture of the Sto:lo. In dismissing the claim of the Sto:lo to an Aboriginal right to trade fish, Lamer, C.J.C. relied more heavily on the perspective of the common law, than on the perspective of Aboriginal people. His judgement was criticized in a dissent by Madame Justice L’Heureux-Dubé. Her dissenting judgement, which would have recognized an Aboriginal right of the Sto:lo to trade fish for sustenance purposes, is much more consistent with the principles set out in modern agreements than the judgement of Chief Justice Lamer.

For example, L’Heureux-Dubé’s dissent emphasizes that the perspective of the Aboriginal people on the right in question must be considered, in her view, even more than equally with the perspective of the common law,43 which contrasts sharply with Lamer’s view that the Aboriginal perspective must be “framed in terms cognizable to the Canadian legal and constitutional structure.”44 She also advocates a more holistic approach to determining whether or not a practice meets the test of being integral to a First Nation’s culture, criticizing the majority approach as considering “only discrete parts of aboriginal culture, separating them from the general culture in which they are rooted.”45 Instead, she argues that “all practices, traditions and customs which are connected enough to the self-identity and self-preservation of organized aboriginal societies should be viewed as deserving the protection of s. 35(1).”46 The “integral to a distinctive culture” test as applied by Lamer, C.J.C., requires separating out and distilling which things are distinctive from the things that are typical of all societies. This is contrary to the holistic approach which characterizes the Aboriginal worldview.

In addition to the principles that a holistic approach should be taken, and that aboriginal perspectives must be considered at least equally, the Yukon agreements recognize that First Nation rights are not frozen in time but will evolve as conditions change. This ability of rights to evolve over time is recognized by Madame Justice L’Heureux Dubé in her “dynamic

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43 Van der Peet, para. 145.
44 Van der Peet, para. 49.
45 Van der Pee, para. 150.
46 Van der Peet, para. 162.
rights” approach, which contrasts with what she considers to be a “frozen rights” approach taken by the majority in Van der Peet.47

A final principle set out in the Yukon agreements which may have some application to the Van der Peet situation is the recognition that for reconciliation to take place, accommodations must be made, not only by Aboriginal people, but by the dominant society as well, and that mechanisms for dialogue and consultation need to be established to permit this process of mutual understanding and accommodation to occur. This principle was not explicitly applied in any of the judgements, although the dissenting judgements in Van der Peet would have recognized the right of the Sto:lo to harvest fish and exchange them for money or goods, which would have created an opening for Aboriginal people to have a greater share of the harvest, requiring accommodations to be made by the dominant society and mechanisms for dialogue to be created.

While the process for developing negotiated agreements is very different from the process involved in developing judge-made Aboriginal law, this example illustrates the potential application of the principles arising from modern negotiated land claim and self-government agreements to court decisions dealing with Aboriginal rights issues.

Modern land claim and self-government agreements do not form precedents which the courts must follow, but they do illustrate the fundamental principles which the parties have found necessary to achieve reconciliation and harmonious co-existence in the real world. These principles from negotiated agreements should be regarded as a source of Aboriginal law by the courts, and can provide courts with the legitimacy that they need, since the agreements are based on the consent of Aboriginal people and illustrate what the parties have found to be a workable accommodation of their respective interests. Courts have indicated that Aboriginal as well as non-Aboriginal perspectives must be taken into account in working towards reconciliation,48 and modern agreements provide a much needed window into Aboriginal perspectives. Greater understanding of modern agreements would also assist the

47 Van der Peet, paras. 166-173.
48 See Delgamuukw para. 81, for example, where Lamer, C.J.C., quoting from Van der Peet states that “a court must take into account the perspective of the aboriginal people claiming the right . . . while at the same time taking into account the perspective of the common law such that true reconciliation will, equally, place weight on each”.
courts in determining how to define their own role, so that court decisions could be fashioned in such a way as to encourage, rather than impede negotiations. Judges could draft their decisions using the principles from modern agreements as a reference point, asking themselves if their reasons for judgement are consistent with the goals which the parties have articulated in successful negotiations, such as a holistic approach and mutual respect, or will work at cross-purposes to what the parties would likely agree to in a negotiation.

Thus, modern treaties and self-government agreements could provide a useful reference for judges struggling with developing new Aboriginal law, and assist the court by illustrating what is workable in a practical context, and what has received the support of both Aboriginal and non-Aboriginal parties "on the ground". While the specific details of individual treaties may not be essential reading, judges could benefit from an overall understanding of the principles underlying modern agreements and the scope of issues they deal with. The very complexity of modern agreements, particularly when dealing with issues such as intergovernmental relations and allocation of law-making authorities, could be instructive by giving courts an idea of areas which should perhaps be left to negotiations rather than dealt with in court decisions. Through an increased awareness by judges of modern agreements, negotiated Aboriginal law could inform judge-made Aboriginal law, and the two streams could begin a dialogue with each other.49

This chapter has focused on the effect of modern treaties and self-government agreements on judge-made law, which has been quite minimal thus far, and suggested that the potential contributions of negotiated Aboriginal law are being seriously overlooked by courts. The next chapter examines the much greater impact of judge-made law on negotiated Aboriginal law, which is deliberate in some cases, and accidental in others. The final chapter will consolidate the arguments in favour of increased interaction between these two streams of Aboriginal law, and suggest specific mechanisms for bridging the gap between these two solitudes.

49 There is an existing literature discussing the dialogue between courts and legislatures, and a similar dialogue could take place between courts and modern negotiations. On the former topic, see Peter Hogg, "The Charter Dialogue Between Courts and Legislatures" (Spring 1997) 35 O.H.L.J. 75.
CHAPTER FOUR
THE EFFECT OF JUDGE-MADE LAW ON NEGOTIATED ABORIGINAL LAW

A. Introduction

This chapter builds on Chapter One, which examined the contemporary negotiation process, and Chapter Two, which examined the process whereby judges develop Aboriginal law, and looks at the interface between the two, namely, the influence of judge-made law on the negotiation of modern day treaties.

While judge-made Aboriginal law may be developing with little reference to negotiated Aboriginal law, as we saw in Chapter Three, court decisions have had a somewhat greater impact on negotiated land claim and self-government agreements. Some of these effects may be intentional on the part of the courts, such as a desire to encourage the negotiation process, while others, such as changes to the interpretation of the substantive rights set out in agreements, may be unintentional. This chapter will illustrate some of the potential problems resulting from the fact that judicial decisions are often made without much awareness of their impact on modern land claim and self-government agreements, or on the negotiating environment. By examining the impacts of court decisions on contemporary negotiations, both intended and unintended, this chapter helps to build the case for greater dialogue between judge-made law and negotiated Aboriginal law.

Section B examines the ways in which judge-made law can affect modern negotiated agreements, examining the impacts of three categories of cases. Section C is a detailed case study examining the specific impact of the Delgamuukw decision on the Yukon agreements. Both sections illustrate that judge-made law can affect negotiations in either positive or negative ways, and sometimes the impacts are unintentional. This lends support to my thesis that judge-made and negotiated Aboriginal law must interact in a more synergistic way in order to meet the challenge of reconciling Aboriginal and non-Aboriginal interests.
B. Ways in Which Judge-Made Law can Affect Negotiated Aboriginal Law

There has been very little analysis or academic commentary on the effect of judge-made law on contemporary negotiations. In this section, I will attempt to fill part of this gap by examining recent Aboriginal law cases to determine their effect, if any, on the negotiation of modern day treaties.

I have divided the cases into three categories: cases dealing with historical treaties or with Aboriginal rights issues; cases interpreting modern treaties; and cases relating to the contemporary negotiation process itself. These cases illustrate some of the ways in which case law can theoretically affect modern treaties, for example, by affecting the rules used to interpret treaties, by declaring the existence of substantive rights which may increase the leverage of First Nations or add to the substantive package or rights being negotiated, or by encouraging negotiations. Courts can also enforce the terms of modern treaties or rule on the fairness of the negotiating process itself. Thus, even though courts and negotiators are acting independently and two separate streams of Aboriginal law are developing, there is some interaction between judge-made law and negotiated agreements.

1. Cases Interpreting Historical Treaties or Dealing with Aboriginal Rights

There are a number of cases interpreting historical treaties, such as the recent Supreme Court of Canada decision in Marshall,\(^1\) which set out principles which could be of assistance in guiding or influencing the process or content of contemporary treaty negotiations. In addition, cases dealing with Aboriginal rights, such as Sparrow\(^2\) and Delgamuukw,\(^3\) which set out substantive rights and legal principles relating to Aboriginal peoples, may also have an influence on modern treaties.

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a. **Interpretive Principles**

In the *Marshall* decision, Justice Beverley McLachlin, (dissenting, but not with respect to these points), summarized the principles set out in previous cases by the Supreme Court of Canada governing treaty interpretations as follows:

1. *Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation.* . . .
2. *Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Aboriginal signatories.* . . .
3. *The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed.* . . .
4. *In searching for the common intention of the parties, the integrity and honour of the Crown is presumed.* . . .
5. *In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties.* . . .
6. *The words of the treaty must be given the sense which they would naturally have held for the parties at the time.* . . .
7. *A technical or contractual interpretation of treaty wording should be avoided.* . . .
8. *While construing the language generously, courts cannot alter the terms of the treaty by exceeding what 'is possible on the language' or realistic.* . . .
9. *Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context.* (references omitted.)

This summarizes the key principles set out in a number of Supreme Court of Canada cases from 1983 to 1999. In addition to these condensed principles, another principle suggested by the majority decision in *Marshall* is that extrinsic evidence should be considered by the court to clarify or fill in terms of the treaty which would otherwise not make sense. This is based on two principles not specifically enumerated by Justice McLachlin: that extrinsic evidence may be used to provide a more accurate understanding of the nature of the bargain negotiated, and that treaties should be interpreted in a flexible manner.

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4 *Marshall*, para 78.
5 *Marshall*, paras. 9-14. This seems to potentially conflict with McLachlin's principle #8, but presumably it is a matter of degree.
The *Van der Peet*\(^7\) and *Delgamuukw* decisions, which involved Aboriginal rather than treaty rights, suggested that courts should “*take into account the perspective of the aboriginal people claiming the right . . . while at the same time taking into account the perspective of the common law such that true reconciliation will, equally, place weight on each*”.\(^8\) *Delgamuukw* also suggests that oral history evidence should be accepted as valid evidence in Aboriginal rights litigation.\(^9\) These principles may well be applicable to treaty interpretation as well, as the Supreme Court has often applied the same principles to both Aboriginal and treaty rights.\(^10\)

In the *Marshall* case, the court was dealing with a historical treaty dating back to 1760. Justice McLachlin, in setting out the above-noted principles for treaty interpretation, does not say whether they apply only to historical treaties, and the issue of interpretation of modern treaties was not before the court. The question of whether these principles apply to modern treaties is an interesting one. It is still unclear what interpretive principles will be used to analyze modern treaties, and different results may ensue depending on whether one applies the interpretive rules from contracts, from international treaties,\(^11\) from historical treaties, or from statutes.

The preexisting body of law relating to historical treaties between Aboriginal people and the Crown would seem to be a logical starting point for the interpretation of modern treaties. There are a couple of cases, however, which suggest that some of the principles applied to

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\(^8\) *Delgamuukw*, at para 81, quoting from *Van der Peet*.

\(^9\) *Delgamuukw*, at para 105.

\(^10\) For example, the *Badger* and *Côté* cases ([1996] 1 S.C.R. 771 and [1996] 3 S.C.R. 139) confirmed that the *Sparrow* justification test applies to infringements of treaty rights as well as to infringements of Aboriginal rights. The Supreme Court also applies the justification test to provincial legislation thereby opening the door to justified infringements of Aboriginal and treaty rights by provinces as well as by the federal government. In general, the Supreme Court does not seem to be overly aware of the distinctions between Aboriginal and treaty rights and tends to apply the same principles to both without appearing to consider the differing nature of these rights. On this point, see Leonard Rotman, “Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test” (1997) 36:1 *Alberta Law Review*, at 149.

\(^11\) Some have argued that treaties with Aboriginal people are like treaties between nations in international law. The possibility of considering international treaty law in interpreting First Nation treaties was touched on by the Supreme Court of Canada in *Simon v. R.*, [1985] 2 S.C.R. 387 at 404. See also Grand Council of the Cree’s, *Sovereign Injustice: Forcible Inclusion of the James Bay Cree and Cree Territory into a Sovereign Quebec*, (Nemaska, Quebec: October 1996) at 281ff. See also Kelley Yukich, “Aboriginal Rights in the Constitution and International Law” (1996) 30:2 UBC Law Rev. 235.
historical treaties may not be appropriate for interpreting modern treaties. In *Howard*,\textsuperscript{12} a 1994 decision of the Supreme Court of Canada, the court was dealing with the interpretation of the 1923 Williams Treaty. While this is not really a modern treaty, the court made some interesting comments with respect to the interpretation of this somewhat more contemporary treaty, and stated,

*The 1923 Treaty does not raise the same concerns as treaties signed in the more distant past or in more remote territories where one can legitimately question the understanding of the Indian parties. . . . The Hiawatha signatories were businessmen, a civil servant, and all were literate. In short, they were active participants of the economy and society of their province. The terms of the Treaty and specifically the basket clause are entirely clear and would have been understood by the seven signatories.*\textsuperscript{13}

The Federal Court of Appeal, examining the interpretation of the 1975 James Bay and Northern Quebec Agreement in the *Eastmain Band*\textsuperscript{14} case, states that different principles apply to the interpretation of modern treaties.

*We must be careful, in construing a document as modern as the 1975 Agreement, that we do not blindly follow the principles laid down by the Supreme Court in analyzing treaties entered into in an earlier era. The principle that ambiguities must be construed in favour of the Aboriginals rests, in the case of historical treaties, on the unique vulnerability of the Aboriginal parties, who were not educated and were compelled to negotiate with parties who had a superior bargaining position. . . . In this case, there was simply no such vulnerability. . . . All of the details were explored by qualified legal counsel in a document which is, in English, 450 pages long.*\textsuperscript{15}

The Court further states that "while the interpretation of agreements entered into with the Aboriginals in circumstances such as those which prevailed in 1975 must be generous, it must also be realistic, reflect a reasonable analysis of the intention and interests of all the parties who signed it and take into account the historical and legal context out of which it developed."\textsuperscript{16}

\textsuperscript{13} Supra note 12 at 306-7.
\textsuperscript{14} Eastmain Band v. Canada (Federal Administrator), [1993] 1 F.C. 501 (Fed. CA).
\textsuperscript{15} Ibid, at 515.
\textsuperscript{16} Ibid, at 518.
These comments suggest that some of the principles set out by Justice McLachlin in *Marshall* would not necessarily apply to modern treaties. For example, the principle that treaties should be liberally construed and ambiguities or doubtful expressions be resolved in favour of the Aboriginal signatories likely would not apply to a modern treaty, since First Nations are represented by lawyers and professional negotiators. The principle that a technical or contractual interpretation of the treaty should be avoided may also have less weight given the amount of detailed legal drafting involved in modern treaties. However, the seven remaining principles set out by Justice McLachlin still appear, in theory, to be valid for modern as well as historical treaties. For instance, it appears reasonable that in searching for the common intention of the parties to a modern treaty, the integrity and honour of the Crown would still be presumed. The court should still be sensitive to the unique cultural and linguistic differences of the parties. Treaty rights should not be interpreted in a rigid way which is frozen in time. (See principles four, five and nine above.) These principles do not depend as much on an assumption of Aboriginal vulnerability as on a recognition of Aboriginal difference. They also recognize the unique responsibility of the Crown with respect to Aboriginal people which continues today. Thus, some of the principles used to analyze historical treaties may continue to be used by courts in interpreting the language of modern day treaties.

The principles of treaty interpretation set out in common law, to the extent that they are known, may be taken into account by the parties in the negotiation of modern treaties. In some cases, the parties have specifically tried to agree by treaty that a common law presumption will not apply. For example, section 2.6.3 of the Yukon *Umbrella Final Agreement* states,

*There shall not be any presumption that doubtful expressions in a Settlement Agreement be resolved in favour of any party to a Settlement Agreement or any beneficiary of a Settlement Agreement.*

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17 See John Borrows and Leonard Rotman, *Aboriginal Legal Issues, Cases Materials and Commentary* (Toronto: Butterworths, 1998) at 192 for a discussion of the canons of treaty interpretation, where the authors suggest that the applicability of these principles to modern treaties depends upon what the bases of the canons are, “inequality of bargaining power? Lack of aboriginal understanding of English and legal concepts such as land surrenders? the parties’ different understandings of language and concepts? the nature of the relationship between the parties?”

18 *Umbrella Final Agreement*, Council for Yukon Indians, (Supply and Services Canada, 1993), hereinafter *Umbrella Final Agreement*. There is a similar provision in the Nunavut Land Claim Agreement (see section
This clause, which specifically rejects the second principle set out by Madame Justice MacLachlin, has been described as the "anti-Norwegijick" clause by some negotiators, as it was drafted to prevent the principle from Norwegijick and other cases (that ambiguities should be resolved in favour of the Aboriginal parties) from applying to the treaty. This clause demonstrates the desire of all parties to ensure that the terms of the agreement will be interpreted in a normal contractual way without the court applying any special interpretive gloss which could affect the rights under the treaty in an unintended way. In a sense it shows that the parties have more confidence in their own ability to clearly set out what they wish to agree to than they do in a court subsequently attempting to apply treaty interpretation principles to the agreement.  

The Yukon Umbrella Final Agreement also provides that none of the parties shall challenge the validity of any provision of the agreement, and that if a provision is found to be invalid by a court, the parties shall make best efforts to amend the agreement to remedy the invalidity. It further states that the Final Agreements shall be interpreted "according to the Interpretation Act, R.S.C. 1985, c. I-21, with such modifications as the circumstances require." This could suggest that the drafters might have wanted the treaty to be interpreted using principles of statutory interpretation, although parties to private contracts may adopt by reference the interpretive rules in the Interpretation Act without having statutory interpretation principles apply. The Nisga’a Final Agreement does not use this approach,

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2.9.3 of the Agreement between the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada (Ottawa: Minister of Indian Affairs and Northern Development and the Tungavik, 1993), which states, "There shall not be any presumption that doubtful expressions in the Agreement be resolved in favour of Government or Inuit." The Gwich’in Comprehensive Land Claim Agreement (Ottawa: Minister of Indian Affairs and Northern Development, 1992) has a similar provision in section 3.1.20. The Nisga’a Final Agreement (Canada, British Columbia, Nisga’a Nation, 1999) contains a similar provision in section 57.


20 It was the federal government which insisted on this clause being inserted in the agreement; so it is arguable that it is a product of unequal bargaining power. However, First Nation representatives were not opposed to this clause being included.

21 Supra note 18, section 2.8.2.

22 Supra note 18, section 2.8.3. The Nisga’a Final Agreement, supra note 18, contains a similar provision in section 19.

23 Supra note 18, section 2.6.6.

24 In the case of First Nation of Nacho Nyak Dun v. Furniss [1998] 2 C.N.L.R. 17, the Yukon Supreme Court used the Interpretation Act provisions to determine that the provisions of the Nacho Nyak Dun Final Agreement should be given "fair, large and liberal construction and interpretation as best ensures the attainment of the objects of the agreement". (at 24)
but sets out a number of fairly detailed interpretive rules, similar to some of the rules in the Interpretation Act, within the agreement itself. The detailed provisions in the Yukon Umbrella Final Agreement and in the Nisga’a Final Agreement suggest that the parties wanted to set out as much of a framework for interpretation in the agreement itself as possible.

An advantage to setting out rules of interpretation in the treaty is that it reduces the risk that common law principles of interpretation, which may evolve in unforeseen ways, will later be held to apply to a treaty which was not even under consideration in the case establishing the principle. Setting out rules of interpretation in a treaty provides some protection from the inadvertent application of rules (devised by courts to apply in another context) to the treaty under negotiation. The parties may prefer to have the traditional well known judicial approaches outlined in Chapter Two (e.g. textual, contextual, intentional) apply to the interpretation of their treaties rather than the more rapidly evolving principles which may be applied in an Aboriginal law context. As we will see later in this chapter, courts have generally not adhered to the interpretive principles developed for historical treaties when confronted with interpreting modern day treaties and have tended instead to use the traditional approaches to interpreting contracts, focusing on the intention of the parties and the wording of the agreement.

b. Substantive Rights, Legal Principles and Bargaining Power

In addition to setting out interpretive principles which could affect the interpretation of a modern land claim or self-government agreement, court decisions interpreting historical treaties or ruling on Aboriginal rights may also affect contemporary negotiations in other ways. In this section, I briefly examine some of the key Supreme Court of Canada Aboriginal law cases which could affect negotiations, either by declaring the existence of

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25 See sections 56-58, and the other General Provisions in the Nisga’a Final Agreement, supra note 18.
26 This issue has arisen in negotiations in which I have been involved with Yukon First Nations. First Nation representatives have sometimes indicated that they have greater trust in the parties at the table negotiating now than they do in future court decisions, and therefore wish to put more in the treaty to reduce the risk of some future court decision adversely affecting their rights. On the other hand, they generally do want to retain the benefit of future court decisions which might potentially expand the scope of Aboriginal rights.
substantive rights, thereby increasing the bargaining power of Aboriginal parties, or by setting out legal principles to flesh out s. 35 rights.

The 1973 Calder decision had a huge impact on land claims negotiations in Canada. In this case, the Nisga’a argued that they had Aboriginal title to their traditional lands in the Nass Valley and that this title had not been extinguished. While the case was lost on technical grounds, the Supreme Court judges split three-three on the crucial issue of whether Aboriginal title continued to exist, and six judges held that Aboriginal title had existed at least until the assertion of British sovereignty. This decision prompted the federal government to reconsider its position and forced it to recognize the possibility that Aboriginal title to land might still continue to exist, leading to the development of policy in favour of negotiating land claims. The Calder decision is widely credited with being the critical event which kick-started the era of modern treaty negotiations, and the Supreme Court of Canada takes credit for this, stating that “it took a number of judicial decisions and notably the Calder case in this court (1973) to prompt a reassessment of the position being taken by government.”

Another example of a court decision which recognized and declared the existence of substantive rights for First Nation people is the Sparrow case, which recognized an Aboriginal right to fish for sustenance and set out limits on the government’s ability to infringe such rights. Sparrow is also an example of a case in which the Supreme Court used the sui generis nature of Aboriginal rights as an opening to set out new principles and be creative.

The Supreme Court of Canada has said in a number of cases that aboriginal rights are sui generis, unique and without parallel. In Sparrow, the court stated that “[c]ourts must be

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28 See Sparrow, at 1104. Justices Lamer and LaForest continue on the same page as follows, “In light of its reassessment of Indian claims following Calder, the federal government on August 8, 1973 issued a ‘statement of policy’ regarding Indian lands . . . the statement went on to express, for the first time, the government’s willingness to negotiate regarding claims of aboriginal title.” See also Christopher McKee, Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future (Vancouver: UBC Press, 1996) at 26-28.
29 See Justice Dickson in Simon v. The Queen, [1985] 2 S.C.R. 387 at 404: “An Indian treaty is unique; it is an agreement sui generis which is neither created nor terminated according to the rules of international law.” See also R. v. Sioui, [1990] 1 S.C.R. 1025 at 1038 where Justice Lamer quotes this passage.
careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgement in Guerin, supra, at p. 382, referred to as the 'sui generis' nature of aboriginal rights."30 The court also stated in Sparrow that s. 35 of the Constitution Act31 should be given a large and liberal interpretation in favour of Aboriginal peoples32 and emphasized the government's trust-like fiduciary relationship with Aboriginal peoples. Thus, while the federal government continues to have legislative powers over Aboriginal people in the post-s. 35 era, "these powers must, however, now be read together with s. 35(l). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights."33 The justification test set out by the court in Sparrow requires that there be a valid legislative objective, and that the special trust relationship with Aboriginal peoples be respected, which requires that there be consultation, the minimum infringement possible, and compensation for infringement, where Aboriginal rights are infringed.

The justification test created by Sparrow, which has some similarities to the justification test established by the court with respect to s. 1 of the Charter,34 is an illustration of the scope of the court's creativity in reading in new limits when dealing with sui generis Aboriginal rights. There were many other possible approaches to justification which the court could have taken, including a reading of s. 35 rights as much more absolute and less open to "justified" infringements by governments.35 In addition to establishing this justification test, the Sparrow case recognized an Aboriginal right to fish for sustenance in the circumstances of the case.

30 See Sparrow, at 1112. See also infra note 108 on the dangers of the sui generis approach and the increased opening that this provides for courts to be more creative as to the nature and content of those rights.
31 Section 35(1) of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.) 1982, c. 11, provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."
32 Sparrow, at 1106, where the court states that "it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded."
33 See Sparrow at 1109.
The *Sparrow* case did affect the treaty negotiations in the Yukon and resulted in some change to the actual wording of the *Umbrella Final Agreement*. Soon after the release of the *Sparrow* decision in 1990, representatives of Yukon First Nations, the Yukon government and the federal government held a three-day meeting in Ottawa to discuss their respective assessments of the decision, and discuss how its principles might be incorporated into the harvesting provisions in Chapter 16 of the agreement. With the assistance of well-respected legal counsel, the federal government was eventually convinced by First Nation and Yukon government representatives to add the *Sparrow* principles to the *Umbrella Final Agreement*, in the following sections:

16.3.3 *The exercise of rights under this chapter is subject to limitations provided for elsewhere in Settlement Agreements and to limitations provided in Legislation enacted for purposes of Conservation, public health or public safety.*

16.3.3.1 *Any limitation provided for in Legislation pursuant to 16.3.3 must be consistent with this chapter, reasonably required to achieve those purposes, and may only limit those rights to the extent necessary to achieve those purposes.*

16.3.3.2 *Government shall Consult with the affected Yukon First Nation before imposing a limitation pursuant to 16.3.3.*

The *Delgamuukw* case, which will be discussed in more detail in Section C, is an example of a case which might potentially affect negotiations in several ways: by declaring the existence of rights; by setting out legal principles; and by encouraging negotiations. In *Delgamuukw*, the Supreme Court of Canada unanimously recognized the existence of Aboriginal title, and defined its content as being similar to fee simple with a few important differences. It also set out, but did not apply, a test for establishing the existence of Aboriginal title. *Delgamuukw* also expanded the grounds for justifiable infringements by governments of Aboriginal and treaty rights, which may include rights established through the negotiation of modern treaties.

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36 This meeting occurred in November 1990 in Ottawa. The information in this paragraph is based on interviews with the negotiators involved at the time – see Chapter One, Appendix One.

37 Ian Binnie was retained by the Yukon government, Peter Hogg and Rick Salter were retained by the Council for Yukon Indians.

38 *Umbrella Final Agreement*. The *Sparrow* decision also resulted in some delay in finalizing the *Umbrella Final Agreement* since these issues had to be worked out. Note that the draft agreement had already contained provisions regarding consultation prior to *Sparrow*. 
In addition, it explicitly encouraged the parties to negotiate and suggested that negotiations are the best way to resolve these types of disputes.

The *Marshall* case, discussed earlier in the context of interpretive principles, is also an example of a case establishing principles which could affect modern negotiations. In *Marshall*, the Supreme Court recognized that the accused had a subsistence right to fish commercially for eels to earn a moderate livelihood, based on a 1760 treaty between the Mi’kmaq and the British, and relied on extrinsic evidence to supplement the written words of the treaty and give effect to the common intention of the parties. While this decision was initially interpreted very broadly by some parties as providing a general harvesting right for Mi’kmaq people to earn a moderate livelihood, an unprecedented clarification released by the Supreme Court\(^39\) (on the occasion of a request for a rehearing of the case by the West Nova Fisherman’s Coalition) indicated that the case was limited to the specific context of the eel fishery, and that both federal and provincial governments have the power to regulate the exercise of a treaty right where they can show justification. The court seemed particularly concerned with its earlier ruling being taken out of context, and stressed that “*the factual context . . . is of great importance, and the merits of the government’s justification may vary from resource to resource, species to species, community to community and time to time.*”\(^40\)

In addition, if government is planning to regulate the exercise of the right, “*the nature and scope of the duty of consultation will vary with the circumstances.*”\(^41\) Thus, one of the useful principles flowing from *Marshall*, and *Marshall II*, is the importance of contextualization, rather than looking at rights or restrictions on those rights in the abstract. However, it is unclear how far the Supreme Court will take this approach. The common law is based on the development of general principles which are then applied to similar cases, so it is unlikely that the scoping down approach suggested by *Marshall II* will be strictly adhered to, as this would limit the role of judges in developing the common law.

In the *Marshall* case, the Court looked beyond the words of the treaty and considered extrinsic evidence as to the likely common objectives and understandings of the parties. The Court recognized the economic component of the agreement in its judgement. Arguably, the

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Court has "strengthened the position of aboriginal people particularly in relation to the economic component of those rights whether they are characterized as aboriginal right to title or provided for in a treaty." Recogntion that "the inescapable economic component of aboriginal rights must be reflected in rights provided for in a treaty" is another potential principle from Marshall which could be used to guide modern negotiations.

In this section, I have briefly reviewed some of the leading Aboriginal law cases. These cases, dealing with Aboriginal rights or with historical treaties, can affect modern treaties in a number of ways. They can help to kick start the negotiation process by forcing parties to reexamine the assumptions on which their positions were based. A change in the legal landscape (for example, the recognition after Calder that Aboriginal title might exist) can bring previously unwilling parties to the negotiation table, making it more likely that a treaty will come about. Courts can also declare the existence of substantive rights (e.g. the nature of Aboriginal title, as in Delgamuukw, or an Aboriginal right to fish, as in Sparrow), which can influence future government policies and increase the leverage of Aboriginal people. Court decisions can also establish principles (as in Marshall and Delgamuukw) which may influence the interpretation of treaties or of Aboriginal rights.

2. Cases Interpreting Modern Treaties

There have only been a few cases interpreting modern day treaties, which means that only a few judges (mostly in the Federal Court, Trial Division or Federal Court of Appeal) have had any reason to look at the terms of modern treaties and to try to understand how they work.

41 Ibid. at para. 43.
43 Ibid.
44 Hamar Foster assumes that this is the role of the courts - see "It Goes Without Saying: Precedent and the Doctrine of Extinguishment by Implication in Delgamuukw et al v. The Queen" (1991) 49:3 The Advocate, 341 at 352. A recent example of the influence of the courts in getting parties to negotiate is a case involving the Mi'kmaq in Nova Scotia, who signed a participation agreement with respect to a natural gas pipeline project two months after the Federal Court ruled that the project had failed to adequately consider aboriginal interests when it built a 1,040 km. pipeline linking Sable offshore energy development with markets in the U.S. See Kevin Cox, "Nova Scotia Mi'kmaq sign deal to get share of pipeline work", Dec. 21, 1999, The Globe and Mail, A5.
Many modern treaties contain internal dispute resolution mechanisms, such as mediation provisions potentially leading to arbitration, which reduces the need for recourse to the courts. However, provisions such as these which limit the exposure of judges to modern treaties make it less likely that they will become familiar with them and therefore less likely that they will be aware of the potential implications of their decisions on modern treaties.

The few cases in this area generally relate either to the Nunavut Inuit or to the James Bay Cree. The James Bay Cree signed what is considered to be the first modern treaty or land claims agreement in 1975, the *James Bay and Northern Quebec Agreement*. This agreement was drafted under severe time constraints with the looming threat of the construction of the James Bay hydroelectric megaproject. Unlike most subsequent treaties, the James Bay agreement does not contain its own dispute resolution mechanism, which has required the Cree to resort to the courts to deal with concerns with the interpretation or implementation of the agreement. The James Bay Cree consider many terms of the treaty to be inadequate, but have had difficulty in getting the federal and Quebec governments to comply even with the existing terms. As recently as 1998 the federal and Quebec governments argued (unsuccessfully) that the agreement was not a treaty, only a contract. The Cree initiated a number of legal proceedings in order to ensure that the treaty provisions would be implemented as intended and that government commitments would be met. They

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45 See for example Chapter 26 of the Yukon *Umbrella Final Agreement*, which deals with dispute resolution and establishes a Dispute Resolution Board as well as setting up mediation and arbitration processes. In the Yukon, there have been no cases to date for the Dispute Resolution Board to deal with. Some (see Chapter One interviews) argue that this is a good thing, and shows that the parties have been generally able to work out issues among themselves and find solutions without going to mandatory mediation or arbitration.

46 This agreement was brought into effect by the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32 and by parallel Quebec legislation, *An Act Approving the Agreement Concerning James Bay and Northern Quebec*, S.Q. 1976, c. 46.

47 See Robert Mainville, "The James Bay and Northern Quebec Agreement", in Monique Ross and Owen Saunders eds., *Growing Demands on a Shrinking Heritage: Managing Resource-Use Conflicts*, (Calgary: Canadian Institute of Resources Law, 1992) 176-187, and Matthew Coon Come, "Dishonourable Conduct: The Crown in Right of Canada and Quebec, and the James Bay Cree" (1996) 7 Constitutional Forum, 79-85, for the sources of the information in this paragraph. See also Matthew Coon Come, in Frank Cassidy, ed., *Aboriginal Self-Determination* (Winnipeg: Oolichan Books and The Institute for Research on Public Policy, 1991) 114-118 at 115, where he states, "We negotiated the James Bay and Northern Quebec Agreement because we did not have a choice. Through the agreement, which we signed under the duress of losing our lands and our way of life, we thought that we had managed to regain control. . . . In fact, we did make some progress under the agreement, but everything that we have done has required continued court actions and confrontation."

48 See Matthew Coon Come, *supra* note 47 at 81 where he states "Is this treaty perfect? Far from it. It is inequitable, and few of its provisions treat us justly. It has been interpreted in a narrow and mean-spirited way, rather than according to its spirit and intent as we understood it. We are forced to wait decades for its promises to materialize. We have to go to court endlessly to enforce its terms. But it is a treaty, nevertheless."
also launched a court action, and an international lobbying campaign, to block the proposed
Great Whale River hydroelectric project, which would have flooded huge areas of their
traditional territory, in order to generate electricity for export to the United States. Cases
involving the James Bay agreement include Quebec v. Canada (National Energy Board),
Quebec (A.G.) v. Cree Regional Authority, Cree Regional Authority v. Robinson, Cree
School Board v. Canada, Eastmain Band v. Gilpin, Eastmain Band v. Canada, and
Canada v. Grand Chief Matthew Coon Come. These cases have generally confirmed that
the James Bay agreement is a treaty, and that the federal and Quebec governments are
required to live up to and implement the provisions of the treaty. In these cases, the courts' conclusions were based on a straightforward reading of the text of the agreement. Despite frequent procedural motions by the federal government regarding, for example, the appropriate court to hear the issue, the James Bay Cree have been successful in using the courts to order governments to comply with their treaty. Justice MacGuigan in the Federal Court of Appeal, expressed his concerns about the procedural wrangling by quoting with approval the words of the Federal Court Trial Division Judge, as follows:

*I feel a profound sense of duty to respond favourably [and confirm the court's jurisdiction]. Any contrary determination would once again provoke, within the native groups, a sense of victimization by white society and its institutions. This agreement was signed in good faith for the protection of the Cree and Inuit peoples, not to deprive them of their rights and territories without due consideration.*

In Cree School Board v. Canada, the Cree challenged an agreement between Quebec and Canada which excluded the Cree from any involvement in determining the funding for the Cree School Board. The Court concluded that the Canada-Quebec agreement violated the terms of the James Bay and Northern Quebec Agreement, noting that clause 16.0.23 specifically requires the Cree to be involved in determining the funding formula. This case was decided mainly on the basis of the wording of the agreement, and the Court applied a

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53 Supra note 49.
54 [1987] 3 C.N.L.R. 54 (Que. Prov. Ct.).
55 Supra note 14.
57 Supra note 51, at 90.
textual approach in the same way as if it were interpreting a contract, although the Court noted that the agreement was a treaty.\textsuperscript{59}

The Inuit of Nunavut reached a land claims agreement, the \textit{Nunavut Land Claims Agreement}\textsuperscript{60} with the federal government in 1993. Among other things, this treaty establishes the Nunavut Wildlife Management Board, which provides advice to the federal Fisheries Minister with respect to the total allowable catch of turbot in particular zones. In April, 1997, the Minister announced turbot quotas including the amounts to be allocated to the Nunavut Inuit. The Nunavut Inuit’s share was decreased (while the shares of other groups increased) and the Nunavut Tunngavik Inc. brought an action to set aside the Minister’s decision on the basis of non-compliance with the treaty. This action succeeded in the Federal Court Trial Division,\textsuperscript{61} as well as on appeal to the Federal Court of Appeal,\textsuperscript{62} which agreed that the \textit{Nunavut Land Claims Agreement} requires the Minister to give special consideration to principles of adjacency and interdependence, and to consult with the Wildlife Management Board. The Federal Court of Appeal applies an intentional approach to interpreting the treaty, stating that “[a] \textit{purposive} interpretive of Article 15.3.7 evidences an intention of the parties to the Agreement to establish a principle of equity, not one of priority, \textit{in the distribution of commercial fishing licences within Zones I and II}.\textsuperscript{63} The court adds that Article 15.3.7 imposes a duty on the Government to give special consideration to the adjacency and economic dependence principles.\textsuperscript{64}

In a more recent case\textsuperscript{65} brought by the Nunavut Inuit regarding the turbot quota in the Davis Strait area, the Federal Court Trial Division rejected the Nunavut Inuit’s arguments that the Minister had not complied with the treaty, as the Minister appeared to have considered the relevant principles, and quoted the earlier decision of the Court of Appeal that “\textit{there should

\textsuperscript{59} Supra note 49.

\textsuperscript{60}This case is also discussed in Sonia Lawrence and Patrick Macklem, “From Consultation to Reconciliation: Aboriginal Rights and the Crown’s Duty to Consult” (2000) 79:1 Can. Bar Rev. 252 at 268.

\textsuperscript{61}This agreement, \textit{the Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty The Queen in Right of Canada}, was brought into effect via federal legislation, the \textit{Nunavut Land Claims Agreement Act}, S.C. 1993, c. 29.


\textsuperscript{64} Supra note 62 at 643.

\textsuperscript{65} Supra note 62 at 644.

\textsuperscript{66} \textit{Nunavut Tunngavik Inc. v. Canada} (Sept. 30, 1999), FCTD #T-1135-98 [unreported].
be no intervention of this court unless it is apparent that the Minister failed in applying the Nunavut Land Claims Agreement".

There has also been one case in the Yukon launched by the Vuntut Gwitchin First Nation pursuant to their Final Agreement. The Vuntut Gwitchin were concerned about the potential effects of oil exploration in their traditional territory, and therefore brought an action for judicial review, alleging that the federal government had breached Chapter 12 of their treaty by granting a land use permit to Northern Cross (Yukon) Ltd. Their application for judicial review was dismissed by the Federal Court Trial Division and the Federal Court of Appeal, based on the finding that the procedure used in granting the permit complied with the requirements of the treaty.

These cases, though few in number, give us some clues as to how courts will interpret modern treaties, and what they see their role as being with respect to modern treaties. It is possible that this role will vary depending on the treaty, since some treaties set out their own dispute resolution mechanisms and make greater efforts to reduce the possible future role of the court in interpreting the treaty terms. The context in which the treaty was negotiated, the circumstances of the negotiation, the degree of vulnerability, and the relative power of the parties, may also be taken into account by a court in deciding how far it should go in exercising its discretion and how much it will read into the treaty provisions. It is also

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66 Supra note 65 at para. 60.
67 There is one other case, First Nation of Nacho Nyak Dun v. Furniss, [1998] 2 C.N.L.R. 17 (Yukon S.C.) in which the First Nation sought a declaration that its settlement land was not encumbered by a pre-existing lease. The federal government brought a motion to dismiss the application on the basis of lack of jurisdiction of the Supreme Court. This motion was dismissed in the judgement noted above, but the main action for a declaration did not proceed. There is also an action brought by the Carcross/Tagish First Nation seeking a declaration that s. 87 of the Indian Act continues to apply to it until it signs a Final Agreement. This dispute relates to the interpretation of the Umbrella Final Agreement, the effect of the terms of Final Agreements of other First Nations on third parties, and the effect of the two pieces of federal legislation bringing the agreements into effect. It is not really a case dealing with the interpretation of a modern treaty per se, as the Carcross/Tagish First Nation does not have a treaty. This application for a declaration was denied by the Federal Court, Trial Division, in CTPN v. Canada [2000] F.C.J. No. 318, Court File # T-909-99.
70 The dispute in the case focused on different interpretations of certain sections of the Final Agreement, basically a legal interpretation issue, and therefore a court ruling was sought, rather than using the dispute resolution mechanisms in Chapter 26 of the agreement.
71 See Sovereign Injustice, supra note 11, at 252-5, for a list of circumstances indicating the conditions of duress under which the James Bay Cree feel their treaty was negotiated. These include the fact that
possible that the interpretive approach followed by the court will depend on the specific issue before the court. For example, if the issue is how to calculate a time period set out in a modern treaty, the court will likely approach it in the same way that it would approach time limits in a statutory enactment, particularly if the treaty, like the Yukon Final Agreements, specifically incorporates the rules in the Interpretation Act. However, if the issue is the interpretation of the scope of a right, such as access to job opportunities in the public service, the courts may treat it as a question of contractual interpretation and focus more on the intentions of the parties as expressed in the agreement. An issue relating to the powers of a body established under a treaty and the scope for review of their decisions may be determined on the basis of administrative law judicial review principles. If the issue is a lack of compliance with the treaty by the federal government, a court may be more likely to look at principles used in interpreting historical treaties such as the duty of the Crown to behave honourably.

The cases on modern treaties to date seem to indicate that courts will only intervene where a clear breach of the treaty is evident and that they will limit their comments to the narrow issues in dispute (i.e. applying the *sua sponte* principle). Modern treaties are quite detailed and complex, and the courts seem content to defer to the text of the treaty as evidence of the parties' mutual intention. In the cases noted above, courts have generally reached their decisions through a close reading of the treaty provisions, taking a textual approach, and have not strayed into more inventive approaches. They have generally not referred to the interpretive principles which have developed with respect to the interpretation of historical construction of the hydro mega-project was continuing while negotiations where occurring; that litigation was not a realistic alternative because by the time the case reached the Supreme Court of Canada the project would be completed; the federal government was threatening to cut off funds which the Cree relied on to defend their rights; social conditions in Cree communities were desperate; the Cree were forced to accept structures, institutions and principles which did not reflect Cree law, culture or belief. Query whether these conditions would constitute bad faith bargaining based on the standards suggested by more recent cases, such as *Delgamuukw, Gitanyow* and *Chemainus*, which are discussed in the next section of this Chapter. These conditions of duress provide a basis for the Cree to argue that more generous interpretive principles should apply to their treaty than, for example, to the Yukon Final Agreements or the Nisga'a Final Agreement. In some ways, the situation regarding judicial review of modern treaties is analogous to the situation with respect to administrative tribunals - tribunals have specialized expertise, and their decisions will be open to judicial review to varying degrees depending on the drafting of their enabling legislation (privative clauses for example), the degree to which they have unique expertise which the court does not, and the overall context. Modern treaties may be interpreted differently by the courts depending on the extent to which they have expressly attempted to set out their own interpretive rules in the treaty, the conditions under which the treaty was negotiated, and other factors unique to the context of the particular treaty.
treaties set out in the previous section. This is probably for the best, since the jurisprudence relating to historical treaties is based on Euro-Canadian legal understandings which still incorporate old ethnocentric assumptions of Aboriginal inferiority, despite statements in recent cases rejecting this approach.\(^2\)

Perhaps it is a measure of their success that the drafters of modern treaties have managed to create a product which speaks for itself, and which limits courts to their more traditional role of interpreting law rather than creating judge made law. In cases involving historical treaties, which were ambiguous, vague, and drafted by one party, courts have often had to look beyond the document to determine the true nature of the document.\(^3\) Modern treaties are much closer to achieving the goal of having the whole bargain set out in the words of the treaty itself.\(^4\) They form their own body of negotiated Aboriginal law – an area in which the judiciary generally lacks specialized expertise. As a result, both the need, and the potential rationale, for judicial activism are absent with respect to the interpretation of modern day treaties and courts have responded appropriately with greater deference to the documents themselves.

3. Cases Specifically Relating to the Negotiation Process

One of the most direct ways in which courts can affect the contemporary negotiation process is by ruling on the negotiation process itself. The opportunity to address this issue usually arises where one party brings an action before the court challenging the validity of the negotiation process being followed. There are a number of recent cases in this category.


\(^3\) See for example, R v. Sioui, [1990] 1 S.C.R. 1025 at 1049 where Justice Lamer states that “the ambiguity arising from this document thus means that the Court must look at extrinsic evidence to determine its legal nature.”

\(^4\) This is not to say that the treaty documents are simple to understand or easy to read - the amount of detail and length of treaties, as well as the interrelationships between various parts of the agreements, means that it takes a
The Nunavik Inuit were in the middle of treaty negotiations with the federal government and had signed a Framework Agreement when they discovered that a national park was about to be created, without their involvement, in an area which they were claiming in nearby Labrador. They initiated an action for a declaration requiring the federal government to consult with them prior to establishing a park in the area under claim. The Federal Court, Trial Division, in *Nunavik Inuit v. Canada (Minister of Canadian Heritage)*\(^\text{75}\) agreed that the federal government had a responsibility to consult and negotiate in good faith with the Nunavik Inuit its claim to Aboriginal rights in certain parts of Labrador before establishing a park in that area. The court set out several principles relating to the negotiating process, and stated that “it is the role of the court to assist and further the negotiating process. Where the federal government has agreed to negotiate claims, the public anticipates that the claims will be resolved by negotiation and settlement.”\(^\text{76}\) It is interesting to note the court’s extension of its own role to facilitate negotiations in addition to its traditional role of adjudicating disputes, declaring rights, and interpreting textual provisions.

A recent high profile case on the treaty negotiating process involved the attempt by the Gitanyow First Nation to block the Nisga’a treaty in British Columbia. The Gitanyow sought a declaration that Canada and British Columbia are obliged to negotiate a treaty in good faith and that they were in breach of that duty by reaching an agreement with the Nisga’a that includes land to which the Gitanyow claim they have Aboriginal title. British Columbia and Canada argued that the negotiations were occurring in the context of the B.C. Treaty Commission (BCTC) process, a process to which all parties consented, which is supervised by the statutorily created Treaty Commission, and should not be interfered with by the courts. The British Columbia Supreme Court in *Gitanyow First Nation v. Canada*\(^\text{77}\) examined the genesis of the BCTC process and the steps in the process. Referring to the *Sparrow* case, Williamson J. stated that the fiduciary obligation of the Crown is incorporated in s. 35 of the *Constitution Act*, and that

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concerted effort to understand them. Simpler drafting of modern treaties is something that all parties should work on. See Chapter Three, Section B for further discussion of this point.

\(^{75}\) *Nunavik Inuit v. Canada (Minister of Canadian Heritage)* [1998] 4 C.N.L.R 68, Federal Court, Trial Division.

\(^{76}\) *Ibid.* at 97.

the longstanding fiduciary relationship between aboriginal peoples and the Crown, involving as it does the honour of the Crown, and recognized and affirmed as it is in s. 35 of the Constitution Act, cannot be displaced simply because the Crown and First Nations enter into negotiations concerning aboriginal title and/or rights. 78

The court rejected the argument of both governments that the court should not interfere in the negotiating process, and stated that "while the court should be chary of interfering in the process itself, it is appropriate for the courts to assist in determining the duties of the parties involved in that process." 79 Thus, the court took a somewhat interventionist approach and suggested that courts have a role in supervising negotiations.

The court held that while there is nothing requiring the Crown to negotiate a treaty in the first place, once governments enter into negotiations, they are obliged to negotiate in good faith, and a declaration to this effect was issued. The duty of good faith is not clearly defined by the court but is said to include the absence of any appearance of sharp dealing, disclosure of all relevant factors, and negotiation without oblique motive. This decision is being appealed by the B.C. and federal governments who are concerned about the potential involvement of the courts in overseeing the negotiation process. 80

In another British Columbia Supreme Court case, Chemainus First Nation v. BC Assets and Lands Corp. 81 the court commented on the duty to negotiate as follows,

*I wish to make it clear, though, in my opinion there is no legal duty to negotiate or reach agreement. However, once the government commences negotiation with First Nations, in my view it is a furtherance of its fiduciary duty. It must negotiate in good faith. I do not restrict that expression to lack of fraud or misrepresentation. In my view the good faith component imports a duty on the Crown as fiduciary to genuinely negotiate with the claimants, that is, without oblique motive. There is no duty to

78 Supra note 77 at para. 40.
79 Supra note 77 at para. 63.
80 Another case dealing with the duty to negotiate in good faith has recently been launched with respect to transboundary claims in the Yukon. In an action brought in the Federal Court, Trial Division, on June 29, 1999, the Kaska Dena Council will be arguing that the federal government has breached its fiduciary duty to negotiate the settlement of the Kaska Dena Council's transboundary claim in the Yukon, by refusing to negotiate with due diligence and in good faith, refusing to provide adequate negotiation funding, disposing of lands and resources without consultation, etc.
agree nor is there a duty to negotiate endlessly as either party may terminate the process, it appears, at will.\textsuperscript{82}

These cases elaborate on Chief Justice Lamer’s comment in the Delgamuukw case that “the Crown is under a moral, if not a legal, duty to enter into and conduct these negotiations in good faith.” The Gitanyow and Chemainus cases suggest that while the Crown is not under a legal duty to enter into negotiations, once they have begun, governments are under a legal obligation to conduct the negotiations in good faith, and the courts are willing to supervise these negotiations to the extent of making a declaration as to what the good faith standard involves, and whether it is being met. It is still not very clear as to what the good faith standard means in the context of Aboriginal negotiations, for example, the extent to which the principles of good faith bargaining from the labour negotiations field will be imported into negotiations with Aboriginal people. Some lawyers are making the argument that principles from union management negotiations should apply,\textsuperscript{83} and we will likely see further cases elaborating on this issue.

A somewhat unusual action has also been launched by the B.C. Liberal party\textsuperscript{84} challenging the Nisga’a treaty. It is unusual in that the B.C. Liberal party is not a party to the treaty negotiations but is seeking to use the courts to assist it in its opposition to the treaty. The B.C. Liberals argued that a provincial referendum is required to approve the treaty under the B.C. referendum legislation,\textsuperscript{85} on the basis that the treaty constitutes an amendment to the

\textsuperscript{82} Supra note 81 at para. 26.

\textsuperscript{83} See for example, Stuart Rush, “Aboriginal Title in British Columbia: An Update on the Duty to Consult and the Duty to Bargain in Good Faith”, conference materials presented to a conference on Canadian Aboriginal Law 1999, organized by the Pacific Business and Law Institute, Sept. 23-24, 1999, Vancouver, B.C. Rush argues that good faith standards, like those established by the Australian National Native Title Tribunal in Walley v. Western Australia (1996) 137 A.L.R. 561 and In the application of Taylor on behalf of the Nyamal People, unreported, WF96/4, Aug. 7, 1996, Sumner, C.J., which are similar to the principles established by labour relations boards in Canada, should be applied to treaty negotiations. The National Native Title Tribunal determined that lack of good faith negotiations are suggested where one party adopts a rigid non-negotiable position, shifts its position just as agreement seems in sight, fails to make proposals, delays or stalls negotiations, etc. However, see Stephen Kelleher, “Treaty Negotiations and the Duty to Bargain”, materials for Pacific Business and Law Institute Conference, Treaty Making, April 13-14, 2000 Vancouver, BC, where he argues against Mr. Rush’s view, stating “I am not convinced that the courts have imposed a duty to bargain or that the duty to bargain from labour law should be imported unquestioningly into treaty negotiations. There are both similarities and differences . . .” at 2.12.

\textsuperscript{84} Campbell v. British Columbia. A preliminary motion was heard in the BCSC and reported at [1999] 3 C.N.L.R. 1. The BCSC began hearing the main action itself on May 15, 2000. See infra note 86 for the citation for the main action.

\textsuperscript{85} The Constitutional Amendment Approval Act, RSBC 1996, c. 67.
constitution. The application also alleged that the proposed agreement is inconsistent with the terms of the constitution as it provides the Nisga’a with powers granted under ss. 91 and 92 of the Constitution Act, 1867, and does not permit non-Nisga’a citizens to vote, contrary to s. 3 of the Charter. Mr. Justice Williamson of the B.C. Supreme Court dismissed the application and concluded that the Nisga’a treaty, and the legislation bringing it into effect, are constitutionally valid. This case illustrates the potential use of the courts by parties wishing to derail modern treaties even before they come into effect. The constitutional argument and court challenge enabled the B.C. Liberals to argue that their opposition to the treaty was not simply ideological, but was based on legal concerns and a desire to ensure that the population is consulted, which may have added to the credibility of their position in the public’s view.

These cases dealing with the contemporary negotiation process, though few in number, suggest that the courts are willing to set common law standards regarding the negotiation process and will be available to assist parties to a negotiation if those standards are not met. The source of these standards is not entirely clear, and modern treaties or protocols dealing with the negotiation process have not been referred to by the courts. Instead, it appears as if these standards have been largely "invented" or pulled from thin air based on the judges’ own experiences and sense of fair play. Thus, a more activist approach seems to be evident in cases with respect to the negotiation process itself, than with the cases we looked at earlier dealing with the interpretation of modern treaties. Perhaps this is because courts have had more experience in dealing with process issues in a wide variety of fields, from labour law to criminal law and constitutional due process and fairness guarantees. In contrast, they may feel that they have less specialized expertise when it comes to navigating the complex provisions of modern land claim agreements and therefore may take a less activist approach with respect to modern treaty interpretation.

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86 Mr. Justice Williamson’s reasons for judgement were released on July 24, 2000, in the action Campbell et al v. AG BC/AG Canada and Nisga’a Nation et al. (Court file # 2000 BCSC 1123)

87 In the treaty negotiating process, there are often protocols dealing with the negotiation process. These may be set out in memorandums or letters of understanding, or in a Framework Agreement. These agreements cover process issues including what the parties agree is fair in terms of the negotiating process. These would be a potential source of standards as to what constitutes negotiation in good faith in an Aboriginal negotiation context. These documents have not been cited by the courts as sources for the rules they have laid out regarding good faith bargaining.
C. Case Study: Impact of the Delgamuukw Decision on the Yukon Treaty Negotiations

In the last section, we examined some of the leading Aboriginal law cases, and noted the ways in which court decisions could, in theory, influence modern treaty negotiations. They could declare the existence of substantive rights, which might theoretically influence the content of modern treaties. Declaring the existence of rights can also increase the leverage of First Nations in negotiations or even kick start the negotiations where governments were previously reluctant to come to the table. Court cases could set out interpretive principles, which negotiators might take into account and factor into their current negotiations. They could also enforcing compliance with the terms of modern treaties, or set minimum standards for the negotiation process itself. In this section I would like to move from the theoretical to the practical and examine the issue of how these Aboriginal law cases are in fact influencing modern treaty negotiations.

In order to focus the issue, I would like to examine in some depth the impact of the December, 1997 Delgamuukw decision on the negotiations which are currently underway in the Yukon Territory. The Delgamuukw decision expressly supports negotiations as the mechanism for settling Aboriginal land claims, and the decision has been widely regarded as a “win” for Aboriginal people, yet as we will see below, the actual on the ground impact of the case thus far has been to hinder, rather than facilitate, treaty negotiations in the Yukon.

1. The Yukon Land Claim Negotiations

There are 14 First Nations in the Yukon representing six linguistic and cultural groups. In 1993 the Council for Yukon Indians (now the Council for Yukon First Nations) signed the Umbrella Final Agreement on behalf of Yukon First Nations, along with the Government of Canada and the Government of Yukon.

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88 See Delgamuukw, supra note 3 at para 186, where Lamer, C.J.C. states “[u]ltimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgements of this Court, that we will achieve . . . ‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown’.”
The Umbrella Final Agreement is not a legal agreement; it expressly states that it does not create or affect any legal rights. However, it is a very detailed document which sets out the parties’ intention to negotiate Yukon First Nation Final Agreements in accordance with the detailed model set out in the Umbrella Final Agreement. Yukon Final Agreements include the entire text of the Umbrella Final Agreement, as well as specific provisions relating to the particular Yukon First Nation; thus the terms of the Umbrella Final Agreement become part of the treaty once a Final Agreement is ratified and brought into effect and become legally binding. The Yukon Final Agreements contain a chapter on self-government, which indicates that a separate self-government agreement is to be negotiated by the parties. The self-government negotiations usually occur at the same time as the land claim (Final Agreement) negotiations but may take place at a separate negotiating table.

The negotiations are not based on legal rights, but on what is required to reach a workable accommodation of First Nation and non First Nation interests. As a result, First Nations are not required to prove Aboriginal title to a defined area of land, or even to set out the boundaries of the area over which they assert Aboriginal title. Instead, all First Nations tabled maps setting out the areas which they have traditionally used, and these traditional territories were accepted as a starting point for negotiations. Similarly, in the self-government negotiations, the list of First Nations jurisdictions which was agreed to was not based on case law recognizing the Aboriginal right to self-government in certain areas (which would have been a very short list), but was based on what the parties felt was reasonable and workable.

The major benefit and motivating reason (other than the general desire to redress historical injustices and meet moral or legal obligations) for the Yukon government to negotiate Final Agreements is to achieve “certainty” – clarity over which lands would be First Nation lands.

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90 At 2.1.2.
91 It is likely that Aboriginal title has never been extinguished in the Yukon. There were no historical treaties signed, and nothing of note was done by the federal government indicating a clear and plain intent to extinguish title. It is arguable that there may be even greater constitutional protection of Aboriginal title in the Yukon and some of the other lands subject to the Rupert’s Land Order due to the Rupert’s Land Order of 1870 which referred to compensation for Indian lands. See Jamie Bliss, “No Treaty Signed; No Battle Fought” (1997) 3 Appeal, 53.
91 There were significant overlaps in the traditional territories tabled by the 14 First Nations, and the total area of claimed traditional territory is in excess of 99% of the land mass of the Yukon territory.
(called "Settlement Lands" in the Final Agreements) and which lands would be unencumbered by Aboriginal rights or title and could be alienated by government. This certainty would permit development to occur on the non-Settlement Land and provide a basis on which the agreements could be marketed to the general public as beneficial to all Yukoners.

For First Nations, the major benefits of entering into land claim negotiations are to receive clear title to a defined area of land, financial compensation, self-government powers, co-management powers, harvesting rights, and an end to the restrictions and paternalism of the Indian Act. Respect, and the recognition of First Nations as equal, self-governing bodies have been as important as the land and the money in enabling First Nations to move forward and to participate as equals in Yukon society.

Six Yukon First Nations had negotiated and ratified Final and Self-Government Agreements, which were in effect prior to the Supreme Court of Canada’s release of the Delgamuukw decision and a seventh agreement was in the final approval stages. Just prior to the December 1997 release, there were a further seven sets of negotiations ongoing, with two specifically targeted for completion by the end of 1997. These two negotiations were with the Kluane First Nation and the White River First Nation. Negotiations with the Carcross/Tagish First Nation were targeted for completion by the end of 1998.

The release of the Delgamuukw decision created a flurry of activity, particularly in British Columbia but also in the Yukon. Many Yukon First Nations are related to First Nations in BC or are directly involved in transboundary negotiations for territory in BC (or in claims by

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93 The first four agreements to be reached came into effect on February 14, 1995 and were reached with the Teslin Tlingit Council, Champagne and Aishihik First Nations, Vuntut Gwichin First Nation, and Nacho Nyak Dun First Nation. Two further agreements, with Selkirk First Nation and Little Salmon/Carmacks First Nation came into effect on October 1, 1997. Negotiations had been recently completed with the Tr' on Dek Hwech’in First Nation, and their Final and Self-Government Agreements came into effect on September 15, 1998.
94 With respect to British Columbia, the Minister of Indian Affairs and Northern Development announced the formation of the “Post-Delgamuukw Capacity Panel” on July 7, 1998 to recommend initiatives to deal with lands and resources issues, including capacity building for negotiations, and to deal with increased pressures on First Nations as a result of consultation requirements. On April 15, 1999, the Minister announced that $15 million would be provided over three years to enhance the capacity of B.C. First Nations to participate in lands and resources negotiations and consultations. See DIAND, December 1998, Treaty News, at 5, and B.C. Treaty
BC First Nations for territory in Yukon) and there is a lot of communication and travel across the border. Numerous conferences\(^95\) were held to discuss the potential implications of the *Delgamuukw* decision. Generally, the overall effect of the discussion and review of the decision was to raise expectations for Aboriginal people regarding what they should aim to achieve in negotiations, given that the Supreme Court had indicated that the content of Aboriginal title was similar in scope to fee simple title. Expectations were further raised, and concerns of third parties inflamed, by commentators such as Louise Mandell, who suggested that rather than putting the onus on First Nations to prove Aboriginal title in a particular area, Aboriginal title should be presumed to exist in the entire province of British Columbia.\(^96\)

Several BC First Nations have acted in accordance with this approach and have launched court actions, or published notices declaring the boundaries of their Aboriginal title land.

Negotiators for the Yukon First Nations involved in the negotiating process had to convince their own First Nation caucuses (who advise the negotiating team) that it was still worthwhile to proceed with negotiations under the *Umbrella Final Agreement* framework, despite the hype and increased expectations flowing from the *Delgamuukw* decision. This was a difficult task, as there are always community members who feel that the agreement does not provide enough for First Nations, and who favour litigation or other more extreme methods of dealing with their Aboriginal rights claims. Managing the dynamics within a caucus is one of the main challenges for any negotiator, including government negotiators who similarly face a range of differing views within government. The *Delgamuukw* decision added to the credibility of those within First Nations who had been arguing all along that the “deal” being considered was not sufficiently responsive to First Nation needs. Several negotiations, including the two nearest completion, were suspended or put on hold while internal

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\(^{95}\) For example, to name just a few, the Pacific Business and Law Institute held a “National Conference on *Delgamuukw*” on February 12 and 13, 1998 in Vancouver; the Continuing Legal Education Society of BC held a conference on "*Delgamuukw*: Aboriginal Title Update" on March 25, 1998 in Vancouver; the Native Investment and Trade Association held “A Comprehensive Overview of all Recent Major Legal Developments Including the Landmark *Delgamuukw* Decision” on April 20–21, 1998 in Vancouver.

\(^{96}\) Oral remarks at Pacific Law and Business Institute Conference, supra note 95, and see also conference paper, Louise Mandell, “The *Delgamuukw* Decision”, for the Continuing Legal Education Society of BC conference "*Delgamuukw*: Aboriginal Title Update" held March 25, 1998, at p. 7.2.02, where she states “We ask this question: Who else was here in 1848? Aboriginal nations and governments should assume the existence of Aboriginal title and prepare for a future based on its recognition.” See also John Borrows, “Sovereignty's
deliberations occurred to assess the advisability of continuing. Legal opinions were commissioned from well known academics and lawyers by the Council for Yukon First Nations and the White River First Nation, asking what their chances were of getting more through litigation, in light of Deltaumuiuw, than through continuing the negotiating process. These opinions generally concluded that the package of benefits which would be provided through the Yukon First Nation Final and Self-Government Agreements was superior to what might potentially be achieved through an approach (i.e. litigation) based purely on legal rights and entitlements, even in light of Deltaumuiuw. Both negotiations, as well as others which had been on hold, eventually resumed. There are now tentative agreements in place (subject to ratification) with both the Kluane and White River First Nations but these and other negotiations were delayed significantly as a result of Deltaumuiuw. As of September, 2000, these two agreements have still not been ratified by the parties. Progress on all other negotiations since Deltaumuiuw has been extremely slow and none are ready for ratification.

The main impact of the Deltaumuiuw decision in the Yukon has been to increase expectations, delay and lengthen negotiations and possibly reduce the chances that Final and Self-Government Agreements will be successfully negotiated and ratified. On a substantive

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As of the present date (September 2000), there have still been no agreements concluded with the three First Nations who were close to agreement when the Deltaumuiuw decision was released in December 1997.

Legal opinions were provided by Peter Hogg (now Dean of Osgoode Hall Law School) for the Council of Yukon First Nations, and by Thomas Berger, for the White River First Nation, among others.

These benefits include ownership of Settlement Land, including subsurface rights to mines and minerals on much of the Settlement Land; hunting, fishing and harvesting rights throughout a First Nation’s traditional territory; co-management of natural resources throughout the traditional territory; forestry harvesting rights; joint management boards responsible for advising on land use planning, development assessment, fish and wildlife, surface rights, and heritage resources throughout the Yukon; protection of heritage and cultural resources; financial compensation; resource royalty sharing; economic opportunities including training provisions; broad self-government powers including law-making jurisdiction similar in scope to provincial powers; taxation powers; and no surrender of Aboriginal rights on Settlement Land or of Aboriginal rights in relation to self-government. For further details, see Selkirk First Nation Final Agreement (Public Works and Government Services Canada, 1998) and Selkirk First Nation Self-Government Agreement (Public Works and Government Services Canada, 1998) or any of the agreements of the other six Yukon First Nations with agreements in effect. (These First Nations are listed, supra, note 93.)

The Yukon and federal governments also reviewed their negotiating mandates as a result of the Deltaumuiuw decision and as far as I am aware no significant changes were made.

While it is possible that these delays will ultimately benefit the First Nations through some relief of loan repayment requirements to improve the compensation package, it is unlikely that the net effect, factoring in the costs resulting from the delays, will be very beneficial. Also, while there is a possibility that the First Nations
level, there have been a few changes to the Final Agreements suggested by First Nation negotiators as flowing from the *Delgamuukw* decision, such as increased or more meaningful consultation on land uses anywhere within the First Nation's traditional territory. Some minor changes have been made to specific provisions in the agreements, but overall the substantive impact of the *Delgamuukw* decision on the content of the Yukon land claims agreements has been minimal.102

Another development in the Yukon since the release of the *Delgamuukw* decision has been the initiation of a number of lawsuits by Yukon First Nations.103 Carcross/Tagish First Nation has launched an action seeking a declaration that the tax exemptions set out in s. 87 of the *Indian Act* will continue to apply to the Carcross/Tagish First Nation and its members until it has Final and Self-Government Agreements in effect.104 Since then, the Liard First Nation and the Ross River Dena Council have launched similar actions. There has also been a new action launched by the Kaska Dena Council on behalf of its three member First Nations in northern B.C. alleging that the federal government has breached its fiduciary duty to negotiate in good faith their transboundary claims in the Yukon. This significant increase in litigation has further slowed negotiations. It has drained resources from all parties that might otherwise potentially be used to help reach a negotiated solution. There is also the risk that the federal government will cease negotiations in cases where the litigation deals with the same matter that is under negotiation, based on its own internal policies regarding negotiations during litigation.

102 The agreement perhaps most likely to be affected by the *Delgamuukw* decision was the Nisga'a agreement, which was in draft but not final form when the *Delgamuukw* decision was released in December, 1997. Premier Glen Clark, speaking to University of Toronto law students on October 15, 1998, in response to my question as to the effect of the decision on the Nisga'a negotiations stated that "*to their credit, the Nisga'a people did not change their bargaining position at the table as a result of the decision*" and advised that there were no material changes to the Nisga'a Final Agreement as a result of the *Delgamuukw* decision. (oral remarks, unreported.)

103 These lawsuits were motivated by a number of factors, including frustration with the negotiation process, and the relative "win" in the courts for First Nations exemplified by *Delgamuukw*, which made litigation a more appealing option to First Nations.

104 See supra note 67 for the reference to the Federal Court, Trial Division decision in this case. The decision is being appealed by the Carcross/Tagish First Nation to the Federal Court of Appeal. (Under the terms of the *Umbrella Final Agreement*, the tax exemption was to end for all Yukon First Nations and their members on February 14, 1998, which was three years after the effective date of the Final Agreements for the first four First Nations to reach agreements.)
It is interesting that the *Delgamuukw* decision, which was hailed by some as being such a landmark for Aboriginal rights,105 and vilified by others for allegedly giving too much to First Nations,106 has had almost no substantive impact on current negotiations, other than significantly delaying progress by at least a year. It is arguable that the reasons behind the minimal impact of *Delgamuukw* on Yukon agreements are that the Yukon agreements are the most far-reaching of any in the country, and provide rights and benefits which respond relatively completely to the needs of Aboriginal people. Some Yukon negotiators argue that anything new that may have been in *Delgamuukw* was already contemplated and included in the Yukon agreements.107 Is it possible that the *Delgamuukw* decision would be more helpful in a jurisdiction with a less generous framework for negotiations, or no framework at all? In the next section I will explore this issue and review the *Delgamuukw* decision and its potential impact on modern land claims negotiations generally.


a. **What's New in the *Delgamuukw* Decision?**

The *Delgamuukw* decision changed the legal landscape governing Aboriginal rights in a number of ways. Perhaps most significantly, it defined the content of Aboriginal title as being *sui generis*, but with many of the incidents of fee simple title. Chief Justice Lamer states that Aboriginal title is *sui generis* because of its unique source (it arises both from pre-sovereignty occupation and from "the relationship between common law and pre-existing Aboriginal law" (at para. 114)); the fact that it is held communally; and the fact that it is inalienable and cannot be transferred or surrendered to anyone other than the Crown. The content of Aboriginal title includes much of what we associate with common law fee simple title – the right to the exclusive use and occupation of the land for a variety of purposes, not limited to practices that are integral to distinctive Aboriginal cultures. However, there is a unique restriction or inherent limitation on the use of Aboriginal title land, in that it cannot be

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105 See for example, First Nations Summit, "Statement to Ministers Stewart and Cashore Regarding the *Delgamuukw* decision", January 30, 1998, Vancouver, BC.
107 From interview with Barry Stuart and others, see Chapter One, Appendix One.
used in a way which is "irreconcilable with the nature of the group's attachment to the land." (at para. 117). Although Lamer gives two examples of uses which would be considered inconsistent so as to threaten the future relationship with the land (strip mining and use as a parking lot), this concept remains somewhat vague. Presumably it will be up to the judiciary to determine what uses are irreconcilable in future court decisions. If a First Nation wishes to use its Aboriginal title land in a way which is inconsistent with its attachment to the land, it must surrender the lands to the federal government and convert them to fee simple lands.

Chief Justice Lamer also sets out a test for the proof of Aboriginal title: the land must have been occupied by the First Nation prior to the date when the Crown asserted sovereignty over the territory, there must be continuity between the pre-sovereignty and present day occupation, and the pre-sovereignty occupation must have been exclusive. He states that Aboriginal systems of law should be taken into account in establishing occupancy, and repeats the point made earlier in the judgement (see paras. 81, 87, and 112 for example) that true reconciliation of pre-existing Aboriginal occupation and crown sovereignty will "equally, place weight on" the Aboriginal perspective and the common law perspective. This stated emphasis on looking equally to the Aboriginal perspective and the common law perspective is another significant change in the law.

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108 I consider this to be quite paternalistic, and see a trend towards replacing the federal government's oversight of Indian affairs through the Indian Act with oversight by courts who are giving themselves increasing discretion to make decisions in Aboriginal rights cases. The whole sui generis approach is one which opens the door to courts to increase their discretionary power. On this point, see John Borrows and Leonard Rotman, "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36:1, Alta. L. Rev., 9 at p. 37 where they say that one of the risks of the sui generis approach is that "courts can use their discretion to fill in the meaning of sui generis rights without being disciplined by firmer interpretive principles or categories of law".

109 Thus, the Supreme Court has established a similar regime to that set out under the Royal Proclamation of 1763, requiring that Indian land be surrendered to the Crown in order to protect the Indians - in this case, from themselves!

John Borrows comments on this, in "Sovereignty's Alchemy" supra note 96 at 570-71 as follows: The inherent limitation the Court finds attached to Aboriginal lands demonstrates the Crown's feudalistic relationship to Aboriginal peoples... This restriction significantly undermines Aboriginal title because it compels Aboriginal peoples to surrender their lands to the Crown if they want to use them for certain "non-Aboriginal" purposes. While the Court was anxious not to restrict Aboriginal land rights to "those activities that have traditionally been carried out on it", it is difficult to read the Court's inherent limits in any other way.

110 Supra note 3 at para. 147.

111 Supra note 3 at para. 148.

112 The court does not refer in its judgement to what the Aboriginal law or Aboriginal perspective on the points it is dealing with might be. Thus, while the case is useful in standing for the principle that Aboriginal and non-
The court also examines the issue of jurisdiction over Aboriginal title lands, and concludes that Aboriginal title lands, like reserves, are within federal jurisdiction pursuant to s. 91(24) of the Constitution Act, 1867. Therefore, provincial governments cannot legislate with respect to Aboriginal title lands, and cannot extinguish Aboriginal title. As pointed out by Prof. Kent McNeil, the case law relating to Indian reserves holds that provinces cannot regulate the use and possession of reserves, and this case law would logically also apply to Aboriginal title lands. Therefore, provincial laws granting timber licenses, regulating land use planning, or granting title to lands to name a few examples are likely to be invalid and of no effect on Aboriginal title lands. It is possible that territorial laws in these areas may have greater effect as the basis for territorial jurisdiction is delegation from the federal government, and arguably is the exercise of a federal head of constitutional power. However, the overall issue of the provincial and territorial scope to infringe on Aboriginal and treaty rights remains unclear as a result of the Delgamuukw decision.

The court, referring to its previous decision in Adams, places Aboriginal title within a spectrum of Aboriginal rights (at para. 138) with Aboriginal rights not linked to land at one end, rights which are linked to a particular piece of land but which do not include Aboriginal title in the middle, and Aboriginal title at the other end of the spectrum. This is helpful in

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Aboriginal perspectives should be considered equally, the court does not actually put this principle into practice. Similarly, in the Van der Peet case, the court endorses the idea of using Aboriginal law, but does not actually consult it. See John Borrows, “Frozen Rights in Canada: Constitutional Interpretation and the Trickster” (1998) 22:1 Am. Ind. L. Rev. 37, at 60.

113 Although this concept is mentioned in the Van Der Peet case [1996] 2 S.C.R. 507, it is in Delgamuukw that this equality of the two perspectives is really emphasized.


115 There is some confusion within the Delgamuukw judgement itself as to whether provinces have the right to legislate with respect to Aboriginal title lands if their infringement of Aboriginal rights is justifiable. See Kent McNeil, “Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction”, ibid. Kent McNeil argues that provinces should not have the right to justifiably infringe Aboriginal rights or Aboriginal title, despite Lamer’s comments to the contrary in Delgamuukw, stating “given that Aboriginal title is . . . unextinguishable by provincial legislation, it should be uninfringeable by provincial legislation as well. . . . The provinces are barred not only from infringing and extinguishing Aboriginal title, but also from regulating the use of those lands by laws of general application. . . . Even laws like zoning regulations . . . or building codes . . . appear to be inapplicable.” (at 463-64) See also Kerry Wilkins, “Of Provinces and s. 35 Rights” (1999) 22:1 Dal. L. J. 185.

confirming that Aboriginal rights may exist independently of a connection with land and in situating Aboriginal title within the overall category of Aboriginal rights.\textsuperscript{117}

In addition to its pronouncements on Aboriginal title, the other element of the judgement most helpful to First Nations is the court’s recognition and acceptance of oral history as a valid form of evidence in Aboriginal rights litigation. The court reinforces its decision in \textit{Van der Peet} and states that "the ordinary rules of evidence must be . . . adapted in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims".\textsuperscript{118} The lack of acceptance of oral history evidence by the trial judge is significant enough to warrant a new trial in the opinion of the Supreme Court.

The final change in the law wrought by the case is a significant broadening of the power of both federal and provincial governments to infringe Aboriginal title and rights if such infringement is justified. The justification test set out initially in the \textit{Sparrow} case is significantly expanded by opening up the definition of a "compelling and substantial" legislative objective to include a broad range of goals, including the "settlement of foreign populations" (at para. 165) as the types of objectives which can justify infringement of Aboriginal title. This huge opening created by the court for infringements of Aboriginal rights is tempered only slightly by its discussion of the need for governments to act in accordance with their fiduciary duty, to consult with Aboriginal people, and to compensate for breaches of fiduciary duty.

Overall, the changes in Aboriginal law brought about by the \textit{Delgamuukw} case are generally favourable to Aboriginal people. Despite the problems created by the court’s comments on infringement, the decision is an net "win" for Aboriginal people as a result of the broad scope of Aboriginal title set out by Justice Lamer. Although they must overcome the issue of the burden of proof of Aboriginal title, \textit{Delgamuukw} indicates that First Nations would likely do

\textsuperscript{117} Brian Slattery, in "Varieties of Aboriginal Rights" (Oct. 98) 6:4, \textit{Canada Watch}, at 72, argues that the Supreme Court has now recognized two types of Aboriginal rights: generic rights, such as Aboriginal title, and the right of self-government, which have common characteristics based in law rather than on specific historical Aboriginal practices; and specific rights, which are distinctive to a particular Aboriginal group, and which he further subdivides into site-specific rights, floating rights, and cultural rights. See also Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79:2 Can. Bar Rev. 196.

\textsuperscript{118} Supra note 3 at para. 105.
better in Aboriginal title litigation than previously thought. As a result, the decision increases the leverage of First Nations in negotiations, as their “best alternative to a negotiated agreement”\(^{119}\) has improved.

b. **What Elements Could Be Helpful to Negotiations?**

There is very little of specific assistance to negotiators in the *Delgamuukw* decision, as it addresses issues in the abstract without applying them to specific fact situations, and does not deal with many of the subject matters that arise in negotiations. However, the court’s recognition of oral history evidence in Aboriginal litigation, and the details regarding the content of and test for Aboriginal title, provide a somewhat better sense of what the outcome of a First Nation’s case in court might be than was available prior to the decision. This provides a reference against which the benefits of proposed settlements can be measured. Unfortunately, because the court did not apply the principles set out in *Delgamuukw* to a fact situation, it is still very difficult to predict what the outcome of an Aboriginal rights case in court might be and the First Nation still has the burden of establishing that it has Aboriginal title to a particular area. The biggest unknown is the issue of boundaries – over how large an area of land will a First Nation be able to establish Aboriginal title, and what type of historical use will be considered in a particular situation to be sufficient to prove exclusive use for the purposes of Aboriginal title? Since these major issues still remain unclear, it is hard for the parties to weigh the benefits of a settlement package against the expected outcome of a court case. The combination of increased First Nation expectations, but measured against an unknown standard, has made negotiated settlements more difficult to reach, at least in the short term.

There are those who argue that the uncertainty and ambiguity created by the decision was deliberate, intended as a further tool to encourage the parties to negotiate rather than litigate.\(^{120}\) There is some validity to this position, as the Supreme Court in *Delgamuukw* has

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\(^{119}\) The “best alternative to a negotiated agreement” or BATNA is a widely used phrase in negotiations using the “interest based” approach taught at negotiating courses at Harvard University and described in the book *Getting to Yes*, 2nd Edition by Roger Fisher, William Ury and Bruce Patton, (New York: Penguin Books, 1991).

\(^{120}\) Oral remarks of Chief Herb George, Satsan Hereditary Chief and Speaker for the Wet’suwet’en Nation, at the Pacific Business and Law Institute “National Conference on Delgamuukw” on February 12 and 13, 1998 in Vancouver, were to this effect. He suggested that what he described as the court’s “intentional ambiguity” was
now clarified that Aboriginal title exists in BC and by analogy, probably in the Yukon also, that it likely has not been extinguished where there have been no treaties, and that there is a real legal risk if governments do not negotiate with First Nations. While the areas where First Nations may be able to prove Aboriginal title remain unclear, the fact of Aboriginal title can no longer be ignored, and governments would be foolish not to negotiate with First Nations to address that reality and reach an agreement to clarify title. The court states that governments are under a moral if not legal obligation to negotiate. Thus, while the decision does not provide much in the way of specific guidance to assist in negotiations, it does provide a strong push to get the parties to the negotiating table, and suggests that negotiated settlements are a better approach than litigation for Aboriginal title issues. The decision increases the leverage of Aboriginal peoples in negotiations by recognizing the existence of Aboriginal title in the abstract.

There are also some general statements in the decision which speak to changing judicial attitudes and increased respect for First Nations as equals, such as the statements regarding the importance of considering the Aboriginal as well as the non-Aboriginal perspective, and acknowledging that Aboriginal systems of law could be of equal importance to the common law. This is positive in creating a legal environment of respect for First Nations and helps to level the playing field in negotiations. It also suggests that some of the court’s previous decisions on Aboriginal rights, which were based on colonial attitudes of European superiority, may have been overruled by implication as their underlying assumptions of inequality have been rejected in this decision. While these statements are encouraging, it remains to see whether courts really will consider Aboriginal perspectives to be equally valid, and give more than lip service to the concept of respect for difference. These statements, like much of the Delgamuukw decision itself, were made in the abstract, but not actually applied.

121 Supra note 3 at para. 186.
122 For a general discussion of the outdated assumptions underlying older Aboriginal case law, see Catherine Bell and Michael Asch, “Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation”,...
For example, the court did not actually apply First Nation systems of law despite stating that they can be of equal importance to the common law.

c. What Elements Might Be Harmful to Negotiations?

While the ambiguity of the decision and the ensuing legal uncertainty may encourage parties to negotiate, the vagueness of the decision does not assist parties once they are at the negotiating table. Since the court’s principles are set out in the abstract, with little guidance as to how they might apply in a specific fact situation, parties with different interests and perspectives are free to interpret the decision as they wish. As a result, the decision is susceptible to very different interpretations when applied by different people to the same fact situation. For example, one perspective might be that the entire Yukon is Aboriginal title land, since Yukon First Nations say that the territory they traditionally used covers virtually the entire Yukon.\(^{123}\) Another person interpreting the same historical facts might argue that occasional use of the land, for example, hunting in an area once every few years, is not sufficient to ground a claim of exclusive use and occupation, and that the only areas of Aboriginal title in the Yukon are village sites, burial sites and ceremonial sites. There is little in the Delgamuukw decision to assist us in determining which of these contrasting interpretations might be upheld by the court. Instead, the decision has increased First Nation expectations without providing a clear rationale for governments to increase the amount they can offer in negotiations on the basis of legal imperatives. The decision has also alarmed third parties, creating a more polarized environment in which to negotiate, increasing general anxiety in society about the implications of Aboriginal rights, and potentially increasing the backlash against negotiated settlements such as the Nisga’a treaty. In the words of John L. Howard, “what the Supreme Court has done is . . . set up a model that requires determination of multiple issues in accordance with fuzzy, abstract standards on a case by case basis.”\(^{124}\)

From a law and economics perspective, it has been suggested that the Delgamuukw decision will increase the cost of negotiations, or “transaction costs”, by creating ill-defined property

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\(^{123}\) I frequently hear this perspective from First Nation individuals at the negotiating table.

rights, increasing confusion (as different parties will have different opinions as to their respective rights), and reducing the information on which to base rational choices.\textsuperscript{125} Arguably, the decision also continues the paternalism of the \textit{Royal Proclamation} and the \textit{Indian Act}, by prohibiting the sale of Aboriginal title land except to the Crown, and imposing the "inherent limitation" that lands cannot be used in ways which are inconsistent or irreconcilable (as determined by the court) with the group's original attachment to the land.\textsuperscript{126} There are also many inconsistencies and unanswered questions in the decision which add to the uncertainty.\textsuperscript{127} The result of this confusion and ongoing requirement for court clarification and oversight is likely to be an increase in both negotiation and litigation costs in the short term.\textsuperscript{128} The four new lawsuits launched by Yukon First Nations since the release of the \textit{Delgamuukw} decision are a disturbing illustration of this trend.

The \textit{Delgamuukw} decision, by creating an inherent limitation on the use of Aboriginal title lands, has signaled that court decisions may affect the terms of agreements after they have been negotiated and finalized. (See next section for a discussion of the impact on the Yukon

\textsuperscript{125} See Owen Lippert, "Assessing the \textit{Delgamuukw} decision: A Law and Economics Perspective", course materials for the Pacific Business and Law Institute's "National Conference on \textit{Delgamuukw}", February 12 and 13, 1998, Vancouver, BC. The length of the negotiations in the Yukon has certainly increased as a result of the decision, which has increased negotiating costs for all parties significantly and likely reduced the incentive for First Nations to conclude agreements as their negotiating costs are deducted from the compensation dollars.

\textsuperscript{126} See supra notes 108 and 109 for commentary on this new "irreconcilable uses" doctrine.

\textsuperscript{127} For example, as pointed out by Kent McNeil in "Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got it Right?", supra note 114, one inconsistency is that the Court states that provinces cannot legislate with respect to Aboriginal title land, yet they can infringe Aboriginal rights or title if they can show justification. Another inconsistency noted in the McNeil article is the fact that under the infringement scheme set out by the Supreme Court, constitutionally protected Aboriginal property rights have less protection than other property rights which were deliberately not referenced in the constitution. A further inconsistency as argued by John Borrows in "Because It Does Not Make Sense: A comment on \textit{Delgamuukw} v. the Queen", [unpublished draft], is the Court's unquestioned acceptance that the mere assertion of Crown sovereignty is sufficient to displace Aboriginal title. At p. 12 (of the Oct. 28, 1998 draft) he states "\textit{Delgamuukw}'s continuation of imperialism's legacy in the face of its own language promoting morality and justice reveals these internal conflicts." There are also smaller inconsistencies, such as the discrepancy between a reference to governments accommodating Aboriginal interests in forestry by "somewhat reducing" licensing fees for the First Nation holding the Aboriginal title to the land (at para. 167, supra note 3), contrasted with a later reference (at para. 168, supra note 3) to First Nation involvement requiring "significantly more than mere consultation", and perhaps requiring "full consent" before their lands are used by others. The full consent model is significantly different from a model in which the government still retains all power to grant licenses but might lower fees a bit for the First Nation who has Aboriginal title to the land. There are also inconsistencies between the \textit{Delgamuukw} decision and other recent Supreme Court rulings. For example, Brian Slattery suggests in "The Definition and Proof of Aboriginal Title", course materials, Pacific Business and Law Centre conference, "National Conference on \textit{Delgamuukw}", February 12 and 13, 1998, that the Court will likely have to reconsider its choice of the date of "contact" rather than the date of assertion of sovereignty, for culture based Aboriginal rights, as it makes no sense to require a longer history to prove Aboriginal rights than to prove Aboriginal title rights.
treaties). This new concept of an inherent limitation may also limit the federal government’s ability to accept anything other than complete surrenders of Aboriginal title in future negotiations, as any retention of Aboriginal title will necessitate the Crown’s continuing involvement if a First Nation wishes to use the land in an “irreconcilable” way. As a result, much of the extensive work which has been done to seek options to avoid the complete extinguishment of Aboriginal title in modern treaties has potentially been undermined.

d. How Might the Decision Affect Existing Yukon Land Claim Agreements?

The Supreme Court in reaching its decision in Delgamuukw does not appear to have considered any existing modern day treaties, or ongoing treaty negotiations. It thus overlooked a significant potential resource, since modern treaties illustrate what First Nation and non-First Nation parties have found to be a workable accommodation of their respective interests on the ground. Perhaps more seriously, it did not consider the potential implications (either adverse or benign) of its decision on existing treaties, such as the Yukon First Nation Final Agreements.

One of the main benefits and goals of modern day treaties is certainty for the parties – clarity as to their respective rights and entitlements on various clearly defined parcels of land. Under the Yukon First Nation Final Agreements, First Nations have jurisdiction over their “Settlement Land”. By the terms of these Final Agreements, First Nations have rights, obligations and liabilities equivalent to fee simple on their Settlement Land. They also continue to have Aboriginal rights and title on their Settlement Land as these are not surrendered. However, Settlement Land is “deemed not to be lands reserved for Indians within the meaning of section 91(24) of the Constitution Act, 1867, nor a Reserve.” Settlement Land is held collectively by the First Nation, but may be sold, leased or otherwise

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128 See supra note 125.
130 No modern treaties are among the sources listed at the beginning of the judgement.
131 Settlement Land is divided into Category A, Category B and Fee Simple Settlement Land, but for the purposes of this paper I will not distinguish between these various categories. Once all 14 Yukon First Nations have reached Final Agreements, Settlement Land will cover approximately 9% of the total area of the Yukon.
132 Section 5.2.1 of the Umbrella Final Agreement.
133 Section 5.2.6 of the Umbrella Final Agreement.
alienated to any person without any restrictions other than those set out in its own constitution. Once Settlement Land is transferred, any Aboriginal rights and title which may have attached to the land are deemed to be surrendered.\textsuperscript{134}

This carefully crafted regime setting out rights and entitlements as a result of years of negotiations between the federal, Yukon and First Nation governments has now been thrown into uncertainty by the Supreme Court. Under the Final Agreements, rights are those set out in the agreement, and it is not contemplated that government will have further rights to infringe on or abrogate from the treaty rights of Aboriginal people based on case law developments. Yet the Supreme Court's recent decisions in \textit{Côté}\textsuperscript{135} and \textit{Badger}\textsuperscript{136} extended the \textit{Sparrow} "justified infringement" scheme to treaty rights, and \textit{Delgamuukw} has expanded the scope for government infringement without addressing the issue of its applicability to modern day treaties. The net result is that, until there is further clarification by the Supreme Court, both federal and provincial governments may have the power to infringe rights recently agreed to in modern day treaties. This is illogical, and arguably would be a breach, not only of the contract, but also of the federal government's fiduciary duty. It would also not be in keeping with the honour of the Crown, and hopefully governments will keep this in mind and resist the temptation to use their newly expanded power to infringe Aboriginal and treaty rights granted by the Supreme Court.

Another area of concern and confusion created by the \textit{Delgamuukw} decision arises from the discussion of jurisdiction over Aboriginal title lands. The court states that Aboriginal title lands are s. 91(24) lands, and suggests that provincial laws therefore cannot apply to affect Aboriginal title lands. As noted earlier in this chapter, this means that a large number of provincial or territorial laws governing the use of lands may no longer apply to Aboriginal title lands. It is unclear how this will apply in the Yukon, since some parts of Settlement Land are likely to still be subject to Aboriginal title and therefore, based on \textit{Delgamuukw}, would not be subject to territorial laws; yet the Final Agreements specifically "deem" Settlement Land not to be "lands reserved for Indians within the meaning of section 91(24)"

\textsuperscript{134} See sections 5.10.0 and 5.11.0 of the \textit{Umbrella Final Agreement}.
\textsuperscript{135} [1996] 3 S.C.R. 139.
of the Constitution Act, 1867, nor a Reserve.”

It is arguable that despite this deeming clause, Aboriginal title lands in the Yukon are still s. 91(24) lands, as parties cannot contract out or even “treaty out” of the constitutional division of powers.

Therefore, as a result of Delgamuukw, territorial laws relating to land may no longer apply on the parts of Settlement Land over which the First Nation could establish Aboriginal title. In many of these subject areas there are no applicable federal or First Nation laws, so the result would be a legal vacuum – undefined geographic areas within Settlement Land to which no laws affecting land applied. As a practical matter, the Yukon government will likely continue to try to enforce its laws within Settlement Land, but these could be resisted using the argument that the lands are Aboriginal title lands and territorial laws do not apply. The Yukon government may be in a better position to assert that is continues to have law-making powers than a province would, since as a territory it derives its law-making power from the federal government. The potential risk that there is no jurisdiction to regulate the unknown areas subject to Aboriginal title is therefore of even greater concern to provinces, such as British Columbia. This increases the incentive for government negotiators to insist that Aboriginal title be completely extinguished as a condition of entering into a treaty, in order to avoid the potential uncertainty and on the ground confusion created by the Supreme Court’s decision.

A further area of concern created by the Delgamuukw decision is the “irreconcilable uses” limitation which prevents Aboriginal title land from being used in ways inconsistent with the First Nation’s original attachment to the land. Under the Yukon agreements, Yukon First Nations own their Settlement Land and can use it in any way. They are not required to surrender the land to the federal government if they want to mine it or develop it in some way that a court might consider to be inconsistent with their original attachment. Indeed, First Nations would consider such a requirement of surrender to, and approval from the federal

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137 Section 5.2.6 of the Umbrella Final Agreement.
138 It is possible that there may be applicable unwritten First Nation traditional or customary laws.
139 However, if there were a validly enacted First Nation law in place covering the same subject matter as a Yukon law, this law would displace the Yukon law on Settlement Land and the Yukon law would be inoperative. This rule of paramountcy of First Nation laws over Yukon laws is set out in section 13.5.3 of each of the seven Self-Government Agreements in effect in the Yukon. (See for example, the Selkirk First Nation Self-Government Agreement (Ottawa: DIAND, 1998). There are only a few First Nation laws in existence at this point in time, although the number is gradually increasing.
government to be quite objectionable – an unjustified and paternalistic\textsuperscript{140} interference with their rights as self-governing nations to decide what to do with their own lands. Escaping from under the yoke of this federal government paternalism as embodied by the \textit{Indian Act} has been one of primary objectives of Yukon First Nations in the negotiations, and the agreements specifically exclude the application of the \textit{Indian Act} over Yukon First Nations in almost all areas.

Now, as a result of \textit{Delgamuukw}, there is the possibility that Settlement Land subject to Aboriginal title must be surrendered to the federal government in order for the First Nation itself to develop it. There is also the possibility, as a result of \textit{Delgamuukw}'s ruling that Aboriginal title land can only be surrendered to the federal government, that a First Nation wishing to transfer land to a third party will have to first surrender it to the federal government. Counsel for a party receiving land from a First Nation might insist on this as a precaution to ensure that her client receives valid title. Thus, First Nations may not have the control over their Settlement Land that is normally associated with fee simple ownership. Because of the court's newly created limit on Aboriginal title land it is possible that Yukon First Nations now have less than what they had bargained for and agreed to in their land claim negotiations.

Thus, attempts by all parties in the negotiations to create certainty and clarity as to their respective rights have been undermined by the Supreme Court. The \textit{Delgamuukw} decision calls into question the very matters agreed upon by the parties after a long, expensive, and comprehensive negotiating process. This reduction in certainty can only be negative for the negotiating process. The possibility that subsequent court rulings can change the terms of negotiated agreements will reduce the incentive to negotiate. While the parties can try, in their modern treaties, to contract out of certain legal regimes like the \textit{Indian Act}, it is unlikely that they can contract out of Aboriginal rights or court determined division of power rulings. Governments will likely seek complete surrenders from First Nations of all Aboriginal rights in future agreements in order to reduce their risk, and agreements like the Yukon Final Agreements which do not require a surrender on Settlement Land will become rare.

\textsuperscript{140} For a commentary on the paternalistic nature of this surrender requirement from a First Nation perspective, see Gordon Christie, "The Nature of \textit{Delgamuukw}", \textit{Windspeaker}, August 2000, at 4.
Nonetheless, it will be difficult for the parties in a negotiated agreement to completely insulate themselves from the possibility that subsequent court decisions on Aboriginal rights will unintentionally and unreflectively amend their agreements.

3. Conclusion

As we have seen, there has been little if any substantive impact on the Yukon treaty negotiations resulting from the Delgamuukw decision – no new rights have been added to the agreements, based on the decision. Instead, by creating a large expectation gap, the overall impact of the Delgamuukw decision on negotiations has been negative – for the interpretation of existing treaties, for current treaty negotiations, and for future negotiations in the Yukon. Thus, despite the Court’s stated goal of encouraging negotiations, they have made negotiating modern day treaties more complex and more problematic. Why has this come about? One reason is that the Court has ignored modern day treaties, not only as a source of Aboriginal law, but as a body of negotiated rights potentially impacted by court decisions. While there are reasons why it is easy to ignore modern land claim agreements, the reality is that modern treaty rights do interact with common law judge-made Aboriginal rights, and courts as well as negotiators need to take this into account.

Modern treaties are generally long and complex documents, often difficult to fully understand on their own without an overall understanding of the context, and they cover relatively remote areas of northern Canada, and thus arise from a different social, cultural,

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141 There was a greater substantive impact from the Sparrow decision. When Sparrow was released in 1990, negotiations for the Yukon Umbrella Final Agreement were underway, and First Nation negotiators asked that the provisions regarding regulation of hunting and fishing rights be revised in accordance with the Sparrow justification test. As a result, the provisions in s. 16.3.3 regarding limitations on harvesting rights for the purposes of conservation, public health, or public safety, closely mirror the justification test set out in Sparrow. However, Yukon negotiators indicate that much of what was in Sparrow was already in the Umbrella Final Agreement and that the changes which were made were not as major as one might think. (From interviews with Yukon negotiators - see Chapter One, Appendix One).

142 Another example of how a seemingly pro-Aboriginal court decision can have negative impacts on the ground is the decision in R v. Sioui, [1990] 1 S.C.R. 1025. The Sioui decision, although considered a favorable judgement for First Nations, may in fact have had a negative effect on negotiations, as it made governments more cautious in their dealings with First Nations to avoid the risk that any statements they made might be interpreted as a treaty. Thus, there were legal concerns in the Ontario government about entering into the Statement of Political Relationship with First Nation leaders, because of the potential risk that a document which explicitly states that it has no legal effect might nonetheless be interpreted as having legal effect or even be considered a treaty by a future court.
historical and geographic context. There have been very few cases in which courts have been called upon to interpret their provisions, and treaties are rarely cited by counsel. There has been very little academic commentary or analysis which would make it easier to understand the linkages between modern day treaties and current Aboriginal case law developments. There is no tradition of referring to modern land claim agreements to support the development of new legal doctrine in the same way that there is a tradition of referring to previous judgements or academic commentary. Courts may feel that because treaties are based on policy as well as law that they are inappropriate references. Without in-depth analysis, it may be difficult to find analogies between concepts in the agreements and the determinations as to legal entitlement which must be made by a court. There may be concerns about importing concepts developed in one fact situation to a different situation. There may also be a concern that using a modern treaty as a source of new law is a deviation from the principle of *stare decisis*. There are all legitimate concerns, and speak to the need for more dialogue and more analysis of the relationship between judicial decisions on Aboriginal rights and current land claim negotiations. Chapter Five will provide some suggestions for dealing with these concerns and for increasing the interaction between judge-made and negotiated Aboriginal law.
CHAPTER FIVE: CONCLUSION

A. Introduction

It is my thesis that a greater understanding by courts of modern negotiated agreements will provide them with a source of law, and with an understanding of Aboriginal perspectives, which will help them to better bridge the gap between their stated objectives, and the on the ground impact of their decisions. In addition, greater interaction between court and negotiation processes will help to bridge the gap between these two streams of Aboriginal law, both of which face similar challenges. Both court and negotiation processes have an important role to play, and greater mutual understanding will help them to work together rather than at cross-purposes.

Chapters One to Four have analyzed both negotiated and judge-made Aboriginal law and their impacts on each other. Let us now examine the common challenges facing both streams; the structural limitations of courts; and review the arguments in favour of increased dialogue between negotiated and judge-made Aboriginal law. We will then look at specific suggestions for bridging the two solitudes, which could help both processes in meeting their common goal of reconciling Aboriginal and non-Aboriginal interests.
B. Challenges Facing Both Negotiation Tables and Courts

We are at a turning point in Canada. There is growing recognition by both the courts and society at large that Aboriginal people have been treated unfairly, and that Aboriginal rights need to be respected and redefined. Aboriginal law is evolving rapidly, and courts as well as negotiators are struggling to be at the leading edge of this change, writing judgements or negotiating agreements which will hopefully withstand the test of time and be helpful vehicles for the reconciliation of Aboriginal rights with the current reality of a largely non-Aboriginal population with competing rights and interests.

Former Chief Justice Antonio Lamer indicated in a 1999 interview that Aboriginal rights may present the Supreme Court with its toughest test over the next few years. He acknowledged that the court has been struggling, and indicated that he had been so preoccupied with the Aboriginal rights issue that he delayed his retirement from the bench in order to personally craft the reasons for judgement in Delgamuukw.

It is not surprising that the courts are struggling with Aboriginal issues. In Chapter Two, we noted a number of challenges facing courts which are unique to the Aboriginal law field. These include the lack of specialized expertise of the judiciary in Aboriginal issues; the lack of useful precedents; the rapidly evolving nature of the law; the vagueness of the constitutional provisions recognizing Aboriginal and treaty rights; the absence of judicial or societal consensus; the different value systems associated with Aboriginal people and with the mainstream justice system; the difficulty of fashioning remedies; and the increasing case load of Aboriginal cases. These challenges suggest that judges should be particularly careful

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1 In an interview with Le Devoir, January 11, 2000, A4, "Le juge Lamer sur . . . les droits autochtones", former Chief Justice Lamer states that Aboriginal rights are more than what one thought in the past. ("Le droit aborigène, c'est plus que ce qu'on avait dit dans le passé. Dans cet arrêt, il fallait préciser la notion de droit aborigène. Ce qui est différent d'un droit qui émane d'un traité.")
2 In a recent decision, British Columbia (Minister of Forests) v. Adams Lake Band, (May 17, 2000, B.C.C.A. #315), Mr. Justice Hall, speaking for the unanimous Court of Appeal, at para. 12, stated that the law relating to Aboriginal rights and title was a rapidly evolving area of the law in Canada generally, and in British Columbia in particular.
3 Interview with The Globe and Mail, February 6, 1999, A1 and A4, "Lamer Worries About Public Backlash". In this interview, Lamer also stated that "section 15 and aboriginal rights and treaty rights are going to be the main challenges the court will have to deal with" in the next few years.
4 Supra note 1.
5 In addition to these challenges which are unique to Aboriginal law, the regular tensions described by Madame Justice Wilson in Chapter Two, Section B, also seem quite a propos: the tension between the desire to do
about how they go about creating new law in this area, and if they do take an activist approach, they should, at a minimum, have a heightened self-awareness of what they are doing and why. Judges need to be conscious of the role that they are assuming, and aware of the implications of their decisions. They also need to be aware of the sources from which they are deriving judge-made Aboriginal law.

Courts have recognized some of their limitations, and in recent cases such as *Delgamuukw,* have been urging governments and First Nations to negotiate, rather than litigate. However, the negotiation process is also facing severe challenges of its own. The process is slow and costly, and can be easily undermined by public backlash leading to lack of political support by governments for the negotiation process, by impatience among certain elements within First Nation communities leading to direct action or litigation, by lack of funding for First Nation negotiating teams, and by court challenges to the negotiation process or the negotiated agreements themselves which divert critical resources away from the negotiation table.

Both court and negotiation processes are struggling to redefine relationships between Aboriginal people and to develop new approaches to Aboriginal law, approaches which foster the reconciliation of Aboriginal and non-Aboriginal rights and interests. Both are facing the huge challenge of blazing a trail in a new area of law, where past precedents are of limited value. Both are also dealing with potential public backlashes, and searching for sources of legitimacy in order to better defend their decisions from a variety of attackers.

In light of the common challenges facing both courts and negotiation tables in dealing with Aboriginal and treaty rights, the very limited interaction between negotiated and judge-made Aboriginal law which we observed in Chapters Three and Four is quite a surprise. Most

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justice in the individual case and the desire to rationalize the development of the law; the tension between trying to achieve certainty in the law while at the same time ensuring its adaptability to changing social conditions; the tension between remaining true to the judge's individual opinion while trying to reach consensus with the other judges on the panel to enhance the credibility of the Supreme Court as an institution; the tension between deciding only what is necessary for the case and taking a broader approach to further the court's role as overseer of the development of the jurisprudence. (From Bertha Wilson, "Decision-Making in the Supreme Court" (1996) 36 U. of T. Law J. 227 at 228).


7 For example, there have been several court challenges to the Nisga'a Final Agreement, by the Liberal Party, by the Gitanyow First Nation, and by a small group of dissidents within the Nisga'a Nation.
striking was the courts’ apparently limited awareness of the potential use of modern negotiated land claim and self-government agreements as a source of law. This lack of awareness of a potential source of Aboriginal law is a missed opportunity, especially given the courts’ structural limitations, the need for new sources of law, and the courts’ expressed interest in considering Aboriginal perspectives.

Increased interaction between negotiated and judge-made Aboriginal law would be beneficial. Court decisions could be more in tune with the reality of what works in practice if they were aware of the current negotiating context and the principles underlying modern agreements. Judges could also benefit from examining the effect of recent court decisions on actual negotiations. Similarly, negotiations could benefit from court decisions, if the latter set out practical principles which could be applied as minimum standards to negotiations.

Since courts and negotiating tables are facing common challenges, finding mechanisms for greater dialogue between these two processes would assist them both in functioning in more complementary ways. Each process has its own limitations, its strengths and weaknesses, and understanding these will help both streams of Aboriginal law to work together in a more synergistic way.
C. **Structural Limitations of Court Processes as Compared with Negotiations**

In Chapter Two we analyzed the process by which judges developed Aboriginal law, and noted some of the limitations of the process. In this section, I focus on three major weaknesses of court processes which are areas of strength in negotiation processes.

1. **Focus on legal rights**

There are many benefits to negotiating Aboriginal rights issues, some of which the courts themselves have recognized. One benefit is that in a negotiation, parties can focus on what is required to reach a workable accommodation, rather than focusing exclusively on legal rights, especially when those rights are still in a state of genesis. As Mr. Justice Laforest noted in his concluding remarks in *Delgamuukw*,

> I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake. This point was made by Lambert J.A. in the Court of Appeal, [1995] 5 W.W.R. 97 at pp. 379-80:

> 'So, in the end, the legal rights of the Indian people will have to be accommodated within our total society by political compromises and accommodation based in the first instance on negotiation and agreement... the legal rights of all aboriginal peoples... form only one factor in the ultimate determination of what kind of community we are going to have' (at para. 207) [my emphasis]

Legal rights inform negotiations, and the parties' respective views as to their legal rights will influence what they are willing to agree to in negotiations. But the parties also recognize that proving and enforcing these legal rights could be a risky and expensive matter. An agreement which provides immediate tangible benefits may be of more value than the speculative outcome of a lawsuit. Therefore, First Nations and governments negotiate on the basis of policy, politics and law as well as other pragmatic considerations.

A negotiated approach has many advantages over an approach based purely on legal rights.\(^6\) One advantage is that the parties can often agree to something as a practical matter in negotiations which they could never agree to as a matter of law. For example, Yukon First

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\(^6\) For a discussion of the role of the law of Aboriginal title in the larger process of reconciling Aboriginal and non-Aboriginal interests, see Patrick Macklem, "What's Law Got to Do With It? The Protection of Aboriginal Title in Canada" (1997) 35 O.H.L.J., 125.
Nations have agreed to accept a certain amount of land as Settlement Land, and to surrender their Aboriginal title on remaining land in the Yukon. This is part of the give and take which they recognize is necessary on all sides to achieve the reconciliation of competing interests which the Supreme Court justices refer to. It would be much more difficult for a First Nation to agree that, as a matter of law, the boundaries of its "Aboriginal title land" covered a certain area which it believed was smaller than the actual area it had used since time immemorial. Similarly, a government could agree in a negotiation that a certain area of land should become First Nation Settlement Land, but would not agree to accept an area of land as "Aboriginal title land" if the area were larger than what could be established in a court of law as meeting the requirements for Aboriginal title.9

Although Aboriginal law is evolving rapidly, it has not yet evolved to the point where Aboriginal perspectives are considered equally with the perspective of the common law,10 and there has been limited constitutional and juridical space for Aboriginal rights within the common law system. While case law developments are improving the situation, the following analogy by Yukon First Nation negotiator Dave Joe still seems apt:

Imagine, if you would, that you were a guest in someone's country, in someone's tent, and that person invited you in. There was a big stew pot sitting on the table, and the person offered some to the guest. Afterward, much to the surprise of the host, the stew pot was empty. This analogy is basically about constitutional powers in Canada. All those powers have been divided up between the provinces and the Government of Canada. As we come forward as First Nations to try to understand what has happened, we look into the stew pot - the residual constitutional powers of Canada - and we are advised that, indeed, this pot is empty. Not only that, we are no longer masters in our own house, or certainly not masters within our own tent. Initially we were the host, and now we are not even the guest.11

Aboriginal law in Canada, despite recent comments by the Supreme Court regarding the need to consider Aboriginal perspectives,12 has basically been considering the legal rights of

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9 As a result, I disagree with the suggestion made by Kent McNeil in "Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got it Right?", Twelfth Annual Robarts Lecture, March 25, 1998, York University, Toronto, Robarts Centre for Canadian Studies, that the boundaries of Aboriginal title land are an appropriate or feasible subject matter for negotiations.

10 See Delgamuukw, para. 81.


12 See Delgamuukw, paras. 81 and 112.
Aboriginal people based on the values, traditions, and legal history of the "guest" in the above analogy. Courts are beginning to realize that the perspective of both host and guest must be considered equally when determining their respective rights, but it has been difficult for courts to do this, as their process does not easily enable them to take into account the perspectives of Aboriginal people. Common law principles such as stare decisis, criticisms of the bench as overly activist when it changes the law, and the commonly held view that court rulings should be based on purely legal (i.e. common law) considerations make it difficult for the law to incorporate Aboriginal perspectives, even where courts are willing.

A negotiated approach enables both host and guest to participate in dealing with the reality that more people need to be accommodated within existing space and resources, and that some system for sharing or allocating resources needs to be developed. Negotiated agreements allow the parties to consider, but not be limited by, the current state of Aboriginal law, and to establish new principles which can be tested on the ground, which might later be used to shape the development of Aboriginal law.

2. Lack of Involvement of Aboriginal People – No Vehicle for Aboriginal Perspective

One benefit of negotiations is that they involve Aboriginal people as equals. Through their active participation, there is an opportunity for the process to be informed by Aboriginal perspectives, values, and systems of law – the very things suggested by the Court as important in Delgamuukw, but which the court was unable to implement on its own.\(^\text{13}\) Negotiations respect Aboriginal people and their ability to make their own decisions about their land,\(^\text{14}\) and free Aboriginal people from having to rely on the "colonizers" courts to pronounce on their rights.\(^\text{15}\)

\(^\text{13}\) The court in Delgamuukw does not refer in its judgement to what the Aboriginal law or Aboriginal perspective on the points it is dealing with might be. Thus, while the case is useful in standing for the principle that Aboriginal and non-Aboriginal perspectives should be considered equally, the court does not actually put this principle into practice. Similarly, in the Van der Peet case, R. v. Van der Peet, [1996] 2 S.C.R. 507, the court endorses the idea of using Aboriginal law, but does not actually consult it. See John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" 22:1, Am. Ind, L. Rev. 37, at 60.

\(^\text{14}\) This point is made by Kent McNeil, supra note 9.

\(^\text{15}\) See Peter Russell, "High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence" (1998) 61 Sask. L. Rev. 247, for a more detailed discussion of this point. He states at p. 247 that while Delgamuukw is a win for Aboriginal people, it is also "a reminder of the subordinate place of native societies . . . and of their dependence on the courts that pronounce upon their rights in that larger society." He outlines the
In contrast to negotiations, there are inherent structural limitations on the court due to its primarily non-Aboriginal composition which make it very difficult for it to appreciate the Aboriginal perspective. Courts also face limitations not only because of their composition, but also by virtue of their process. Judges, and all counsel who appear before them, are trained in the common law legal tradition, which includes rules of construction and interpretation, and principles like that of stare decisis, which are of limited utility when dealing with new areas of law involving complex social policy issues. As we noted in Chapter Two, the Supreme Court is limited in that it does not hear evidence, only arguments by lawyers in a very standardized form, and intervenors are limited to a maximum of 15 minutes. All of these factors make it much more difficult for courts to gain an understanding and appreciation of the Aboriginal perspective.

3. Limited ability of courts to consider material as to the wider context

Not only do court processes limit the ability to hear and to appreciate Aboriginal perspectives on the law and on events that have occurred, but these processes restrict the ability to gather the type of information which governments normally have available when making difficult social policy decisions. As noted by Chief Justice McLachlin, "there is a very real question whether courts, which lack the resources for gathering and collating information and opinion available to the legislatures, are the best institutions to decide complex social policy questions." 16

Many Aboriginal law issues which are before the courts involve complex social and economic policy issues, and court decisions can have major implications with respect to

difficulties for Aboriginal people in finding the "white man's court" to be fair and impartial in deciding "questions relating to the rights of Aboriginal peoples vis à vis the dominant society" (at p. 248). See also Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Difference" (1989-90) 6 C.H.R.Y. 3. See also the references in Chapter Two, footnote 86.

16 There are very few Aboriginal judges in Canada. See Chapter Two, footnote 31 regarding the unrepresentative nature of the bench.

17 See Peter Russell, supra note 15, regarding the structural limitations of courts. See also R.D.S. v. The Queen, [1997] 3 S.C.R. 484 at para. 35, where Madame Justice L'Heureux-Dubé states that "judges, like all other humans, operate from their own perspectives". At para. 42, quoting from Prof. Jennifer Nedelsky, she states "The more views we are able to take into account, the less likely we are to be locked into one perspective... It is the capacity for "enlargement of the mind" that makes autonomous impartial judgement possible."

future resources available to governments and to Aboriginal parties. Yet judges must make their decisions in a virtual vacuum of information, and are limited to considering the information specifically brought to their attention by the lawyers for the parties before them, or public information which they or their staff are able to gather. In contrast, negotiation processes allow the parties to bring a wide range of information to the table, and governments can consult internally and externally to ensure that all the relevant information is being considered.
D. Arguments in Favour of Increased Dialogue Between the Two Streams of Aboriginal Law

1. Potential Impacts of Court Decisions on Negotiations

As we saw in Chapter Four, there were a number of negative impacts of the Delgamuukw decision on the Yukon Final Agreements. These were probably unintended – it is highly unlikely that the court was familiar with the details of these agreements, or that the judges had even turned their attention to the potential impacts of their decision on existing land claim agreements. If they had thought about these issues, it might still have been difficult for them to anticipate the potential impact of their decision on these modern treaties, without an understanding of the agreements and their context. Greater knowledge of the land claims process and the content of modern day treaties would be necessary in order to avoid these unintended negative impacts.19

There were also negative “on the ground” impacts of the Marshall decision, which led to increased hostilities between Aboriginal and non-Aboriginal fishers on the East Coast, including violent and criminal acts in what have been labelled the “lobster wars”. The decision had a negative effect on relationships between Aboriginal and non-Aboriginal people, and did not provide any time period for the parties to adjust to the new legal realities or any suggested mechanism to facilitate negotiation of the inevitable disputes. In my view (and that of the RCMP)20 the reactions to Marshall were predictable, and it is regrettable that the clarifications of Marshall II21 had not been more clearly set out in the original decision. It is also unfortunate that the court’s original declaration of an Aboriginal right to harvest eels in order to earn a moderate livelihood was open to so many varied interpretations, leading to polarized expectations which made negotiated resolutions even more difficult to achieve.22

19 On the positive side, the Delgamuukw decision did bring some greater clarity to the content of Aboriginal title, emphasized the need for consultation and compensation if Aboriginal rights are to be affected, and may have provided an increase in bargaining power to some First Nations.
21 See Mark MacKinnon, “DFO Warned Ruling Could be Trouble”, The Globe and Mail, December 18, 1999, which quotes an RCMP Criminal Intelligence Directorate report as anticipating conflict when the Marshall decision was released, and a separate CSIS assessment that the “biggest potential for conflict remains in the Maritimes over logging and fishing rights.”
On the positive side, this decision did increase the bargaining power of First Nations and assisted greatly in getting the federal government to agree to negotiate harvesting quotas with East Coast bands.

In both Delgamuukw and Marshall, the Supreme Court set out fairly broad principles or entitlements in the abstract without adequately emphasizing the importance of contextualization. Courts should be sensitive to the risks of setting out entitlements in the abstract, or setting out rights in such vague terms that they are susceptible to wildly differing interpretations, generating expectation gaps and creating the need for future clarification by the court. Courts should also be wary of making statements which could affect the underlying legal context for treaties without considering the potential impact of such changes on already negotiated modern treaties.

Therefore, judges need to be aware both on a personal level and on an institutional level of their own predispositions and areas of strength and weakness before making new law in the complex field of Aboriginal law. Court decisions can have a positive effect by encouraging negotiations, clarifying legal rights and increasing the bargaining power of Aboriginal parties, but they can also have a negative impact. Unintended effects of court decisions on modern day treaties can unravel agreements negotiated after decades of bargaining, by changing the essence of the original deal and ultimately, undermining the negotiation process.

An increased awareness of the modern treaty negotiation process would enable courts to understand where it would be most helpful for them to defer to negotiations and where they

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the Supreme Court has ruled is ours." See John DeMont, MacLean's, May 22, 2000 at 22. As noted by Brent Taylor, "Native Fisherman, DFO Acting Within Confines of Marshall Judgment" Canadian Aboriginal Network, accessed online August 28, 2000, at www.canadianaboriginal.com/crime/cremea.htm, "the embarrassing soap opera that has played itself out at Burnt Church is entirely the result of a Supreme Court decision which was so ambiguous that it permitted a wide range of interpretation".

24 For example, following the Marshall decision, will courts have to set guidelines as to what constitutes a moderate livelihood?

25 Courts should not attempt to insert themselves into supervising areas where they have limited expertise. The suggestions by the courts in Gitanyow (Gitanyow First Nation v. Canada, [1999] 3 CNLR 89, BCSC) and Chemainus (Chemainus First Nation v. BC Assets and Land Corp., [1999] 3 CNLR 8, BCSC) that they will somehow supervise negotiations is a concern in this respect. Many negotiators with whom I spoke in the Yukon (see Chapter One, Appendix One interviewees list) indicated that they were concerned about increasing
can most usefully be involved. Since courts have a great deal of discretion, for example, as to how broadly to characterize issues, they can often choose which issues to rule on and in what way. This discretion should be exercised with an awareness of the potential impact of their decisions on modern negotiated agreements and the respective strengths and weaknesses of judge-made vs. negotiated Aboriginal law.

2. Potential Impacts of Negotiated Agreements on Court Decisions

As we saw in Chapter Three, modern negotiated land claim and self-government agreements have had only a minimal influence on court decisions in the Aboriginal law field. However, there are a couple of areas of potential influence. First, the mere existence of a negotiation process may provide courts with an "out" to enable them to avoid ruling on a particular issue and defer to the negotiation process. Secondly, some of the principles in modern agreements have anticipated developments in the law, and these principles may have had an indirect influence on courts through the report of the Royal Commission on Aboriginal Peoples or through academic commentary.

However, negotiated agreements do have several drawbacks as potential sources of Aboriginal law, not the least of which is their length and complexity, and the fact that they relate to a specific First Nation with its own priorities and circumstances. The fact that they are little understood, rarely commented on in the academic literature, and rarely brought to the attention of judges by parties to litigation contributes to their relative obscurity. Most of these obstacles to their use are practical concerns rather than concerns based on principle, and while they help to explain why negotiated agreements are so rarely used by courts, they do not justify this limited use. In fact, as we saw in Chapter Three, there are many principles from negotiated agreements which could be helpful to courts grappling with the development of new approaches in Aboriginal law. The negotiation process provides a complementary mechanism for dealing with many of the same issues facing courts, and this opportunity for beneficial interaction between court and negotiation processes has been largely overlooked.

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26 See Chapter Two for a discussion of the different ways in which judges can exercise their discretion, for example, by choosing greater or lesser adherence to principles such as *sua sponte* and *stare decisis*.

27 See Chapter Three, Section D.
Building on the Strengths of Each Process – Opportunities for Cross-pollination

The strengths of the negotiation process are in precisely the areas of weakness in court processes. For example, courts must in theory consider cases primarily on the basis of legal issues, and we have seen that a purely legal approach has not provided adequate space for the recognition of Aboriginal perspectives thus far. Negotiations can deal with issues from a legal, policy, and political perspective, and thus are not limited by the shortcomings in the current state of Aboriginal law and may in fact be able to advance the development of the law.

The second concern we noted with respect to court processes is that they do not involve Aboriginal people in any significant roles and have limited ability to take into account the Aboriginal perspective. This limitation has been addressed in the negotiating process through the direct involvement of Aboriginal people. The negotiating process provides an opportunity for the parties to meet as equals, to come to an understanding of each others’ needs and perspectives, and to learn to respect these different needs and perspectives. The process is one of dialogue, and is not based on an institution created by one party passing judgement on the other. The negotiation process also focuses on relationship-building. Developing constructive relationships is necessary for the negotiating process, and is also very important for the successful implementation of the agreement, and for achieving the “reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown” which Mr. Justice Lamer states is the basic purpose of s. 35(1).

The final concern noted above with respect to court processes was their limited ability to consider the broader socio-economic and political context in which the dispute they are adjudicating is situated. Judges have indicated that they are only reluctantly taking on the adjudication of social policy issues, as they recognize that they do not have the resources and are not always best positioned to make these determinations, and that they are very sensitive

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28 This is not to say that the negotiating process is perfect - there are many critiques of it, as well as criticisms of particular negotiating processes such as the one set up under the B.C. Treaty Commission. See for example, "Treaty Process on Life Support", *Kelowna Daily Courier*, May 17, 2000, regarding the Union of B.C. Indian Chiefs concerns with the B.C. Treaty process. See Chapter One, Section B, for a general discussion of criticisms of the negotiation process.
to the issue of the appropriate roles of the judicial, legislative and executive branches of
government.\textsuperscript{30} In contrast, the negotiation process involves governments and Aboriginal
communities who can gather the information necessary to make informed policy decisions,
taking into account the legal climate, as well as the socio-economic and political context.
Negotiated agreements are then ratified, which provides evidence of adequate community
buy-in and support, and provides a mechanism to establish legitimacy which courts lack.

The Supreme Court has indicated that in cases involving Aboriginal rights, the Aboriginal
perspective, including First Nation concepts of law, should be considered and given equal
weight with the common law perspective.\textsuperscript{31} The Court has also stated that it supports
negotiated solutions to Aboriginal rights issues.\textsuperscript{32} These articulated intentions are
encouraging and indicate that courts do recognize the need to address some of the structural
limitations described above, and that they also recognize that not all of these limitations can
be addressed through court processes. However, the court has yet to demonstrate that it is
sensitive to modern negotiated agreements and aware of their potential as a source of
Aboriginal law.

Negotiated agreements embody principles agreed to by Aboriginal and non-Aboriginal
parties, which are often ahead of the current state of Aboriginal law.\textsuperscript{33} As courts work to
develop new principles of Aboriginal law which recognize the equal validity of the
Aboriginal perspective and leave behind the biases of the past, they could benefit by

\begin{footnotes}
\item[30] See Delgamuukw, para. 186.
\item[31] See Chapter Two.
\item[32] See Delgamuukw, para 148.
\item[33] See for e.g. Mr. Justice LaForest’s comments in Delgamuukw, para. 207, “I wish to emphasize that the best
approach in these types of cases is a process of negotiation and reconciliation that properly considers the
complex and competing issues at stake.”
\item[33] However, in some cases, notably the James Bay and Northern Quebec Agreement (between le Gouvernement
du Quebec, la Société de la Baie James, la Commission hydroélectrique de Quebec, the Grand Council of the
Crees, the Northern Quebec Inuit Association, and the Government of Canada, 1975), the emerging principles
from judge-made law appear to be more progressive than the principles underlying the treaty. This is one
reason why First Nations involved in current negotiations are reluctant to surrender their Aboriginal rights, as it
means that they may be locked into an agreement that at some point will lag behind future developments in
Aboriginal law. In order to avoid this situation, the Yukon First Nation Self-Government Agreements do not
extinguish Aboriginal rights, so Yukon First Nations will be able to benefit from any future case law which
provides rights in excess of those set out in the agreements. Agreements could also build in review processes
which state that amendments will be considered to take into account future developments in the common law
which are advantageous to Aboriginal people.
\end{footnotes}
reviewing the principles which have been agreed to after lengthy and complex negotiations between Aboriginal and non-Aboriginal people.

Similarly, the negotiation process could benefit from court rulings. As we noted in Chapter Four, courts can recognize a particular Aboriginal or treaty right, thereby increasing the bargaining power of the Aboriginal parties and forcing governments to negotiate. The 1973 Calder decision kick-started modern treaty negotiations, and the Marshall decision forced the federal government to negotiate the allocation of harvesting quotas with East Coast bands. Some of the negative impacts of the Marshall decision could perhaps have been avoided, while preserving its positive effect on First Nation leverage, if the court had suspended the effect of its ruling for a certain time period and suggested that the time be used to negotiate allocation issues, perhaps setting some parameters to guide the negotiations. Greater sensitivity to the modern negotiating context would have assisted the court in drafting its original judgement, perhaps precluding the need for Marshall II.

A second way in which court decisions can be helpful is by changing the legal landscape in a way which forces governments to rethink their policies. For example, the Calder decision forced the federal government to review and revise its policy in light of the new legal reality that Aboriginal title might still exist. Similarly, the Sparrow and Delgamuukw decisions have forced governments to reevaluate their existing policies with respect to consulting Aboriginal people where their rights may be infringed by government actions. This duty to consult arguably requires the Crown to initiate negotiations to reach an agreement with the affected First Nation whenever it seeks to undertake an action which could adversely effect Aboriginal interests.

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35 Despite the suspension, Mr. Marshall’s acquittal could and should have immediate effect.
36 Instead, the court’s declaration of an Aboriginal right to harvest, without dealing with allocation issues or defining a “moderate livelihood” has led to increased polarization and hostility, making negotiated resolutions more difficult. In this environment, with a broad declaration of a right for the 1762 treaty beneficiaries, First Nation members have little incentive to negotiate, and in fact, may perceive any negotiations as a requirement that they “give up something” after having received a broad entitlement from the court. See quote from James Ward, supra note 23 on this point. The Delgamuukw decision similarly set out a broad statement of rights (Aboriginal title) without sufficient specificity (as to what lands might qualify as Aboriginal title lands) which has raised expectations and made negotiations seem less attractive to First Nations, without giving governments a clear basis on which to increase their offer.
37 See Sonia Lawrence and Patrick Macklem, “From Consultation to Reconciliation: Aboriginal Rights and the Crown’s Duty to Consult” (2000) 79:1 Can. Bar. Rev. 252, where the authors develop this argument in some
Another strength of court processes is the fact that they are separate from political processes and can make rulings of law which enable governments to take positions that they would otherwise find difficult to take due to fears of a political backlash. In this situation, the fact that judges can be unilateral and are perceived as ruling purely on the basis of legal issues is an advantage, as this independence insulates them from the political pressures facing governments and enables them to take politically unpopular positions. Court rulings setting out Aboriginal or treaty rights can therefore advance the negotiation process and help government negotiators to provide better offers to First Nations than might otherwise be possible. Court decisions can increase public support for negotiated solutions and create a rationale for governments to enter into negotiations.

Court decisions can also establish principles to assist with the interpretation of modern day treaties, and establish principles and standards to guide the negotiation process, though it should tread carefully in both these areas and be aware of its own limitations. Courts can set out principles regarding legal rights which will help the parties to predict how they might do in court, to enable them to more accurately assess the relative benefits of proceeding by way of negotiation. Courts can also make a determination as to legal rights in order to narrow the scope of issues to be dealt with in negotiations, and can actively encourage the parties to negotiate.

As we have seen, court decisions recognizing the legal rights of Aboriginal people can assist negotiations in several ways. The decision can be the catalyst which brings the government to the negotiating table; it can force governments to revise their policies to take new rights into account, which will often help the parties to reach consensus; it can enable politically unpopular positions to be taken by governments because “the court forced us to recognize this right”; it can narrow the scope of issues to negotiate; and it can increase the leverage of First Nation parties in the negotiations. In some cases, court decisions can affect the substantive content of treaties which are being negotiated, as with the Sparrow decision.18

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18 See Chapter Four, Section B (1)(b).
Court processes can also provide a remedy to Aboriginal people who have not been involved in negotiations when they feel they should have been, or where they feel that the negotiating process has not been fair.\(^\text{39}\)

Thus, there are many opportunities for court and negotiation processes to work in complementary ways, but a greater understanding of each process is needed in order for this interaction to reach its full potential.

E. **Bridging the Two Solitudes: Suggested Mechanisms**

Courts appear to be well intentioned. Recent decisions have revealed greater insight into the inappropriateness of the racist assumptions underlying earlier Aboriginal case law, and the need to recognize Aboriginal perspectives on an equal footing with common law perspectives in order to reach true reconciliation. However, while the Supreme Court has made some encouraging statements, the actual evolution of the law is not entirely consistent with these expressed sentiments of equality. In addition, courts have stated that they wish to encourage the negotiation process and recognize that it is more appropriate than litigation for resolving many Aboriginal issues, yet their decisions have in some cases made the negotiating climate more difficult. How can courts more effectively “walk their talk” and translate intentions into realities?

My thesis is that a greater understanding by courts of modern negotiated agreements will provide them with a source of law, and an understanding of Aboriginal perspectives, which will help them to better bridge the gap between their stated intentions and the on the ground impact of their decisions. In the next few paragraphs I begin to explore practical mechanisms for increasing the interaction between judge-made and negotiated Aboriginal law. These ideas are just a starting point, and can be expanded upon once courts begin to recognize the value of understanding modern land claim and self-government agreements and the potential applications of this knowledge to their own development of Aboriginal law.

\(^\text{39}\) See Chapter Four, Section B(3).
Many of these suggestions are focused on increasing the awareness of judges of modern agreements, as this seems to be the area of greatest need. Treaty negotiators are generally aware of court decisions, though there has been a tendency to view them as only tangentially relevant, as they seem to be premised on a different approach and different principles. However, both negotiated and judge-made Aboriginal law contribute to the overall body of Aboriginal law, and it is time that these two separate streams began to flow together.

One of the obstacles to judicial understanding of modern treaties has been their length and complexity. It would be helpful if there were a textbook or handbook which summarized and analyzed modern land claim and self-government agreements which could be a reference for judges, academics and practitioners. This book could also highlight areas of potential interaction between judicial decisions and modern agreements. No such book currently exists, and in fact, even recent textbooks on Aboriginal law devote little if any space to modern agreements. There is a real need for a book in this area and hopefully someone will take up the challenge and start work on one soon. Similarly, there are few journal articles or other academic writings dealing with modern agreements, and this remains a large gap in the literature.

It would be useful to set up more opportunities for interaction between judges and negotiators working in the Aboriginal law field, perhaps through conferences, which would provide a mechanism for dialogue with the bench, and enable judges to gain an appreciation for what is happening in contemporary negotiations, as well as to understand the impacts of their decisions on these negotiations or on the negotiated agreements. This face-to-face dialogue would help the theoretical to meet the practical and would assist those involved in developing Aboriginal law to see things from other perspectives.

Another possible avenue for increasing judicial understanding of modern negotiations would be through courses on modern treaties offered by the Canadian Judicial Institute. These courses could also provide an opportunity for judges to gain a better understanding of

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40 For example, there is nothing on modern treaties in the law school text, Aboriginal Legal Issues, Cases, Materials and Commentary by John Borrows and Leonard Rotman (Toronto: Butterworths, 1998). The textbook with the most material on modern agreements so far appears to be Shin Imai's Aboriginal Law Handbook, 2nd ed. (Scarborough, Ont.: Carswell, 1999).
Aboriginal perspectives by involving Aboriginal people in the faculty. In addition, holding the courses in self-governing First Nation communities would give judges a real world opportunity to see Aboriginal perspectives and values in practice, and enable Aboriginal people to express their culture and worldview in a more holistic way (rather than being forced to express it only through the written word.) However, it would be important to design the courses in such a way as to ensure that they would not be perceived as affecting the independence of the judiciary, or creating a perception of bias in favour of Aboriginal peoples. There is also a risk that by holding a course in an Aboriginal community, the judges will perceive that community as representative of First Nation communities generally, without gaining an appreciation of the diversity of First Nations or the multiplicity of perspectives. If these risks are not addressed appropriately, it may not be feasible to hold these courses in First Nation communities. However, regardless of location, the courses themselves could certainly be held and carefully designed to avoid these risks.

In the context of specific cases before the court, it would be helpful if governments with modern treaties took the initiative to intervene where court rulings might affect the interpretation of existing treaties or affect the framework for current negotiations. If intervening is not feasible for political or other reasons, provincial and territorial governments could write to the federal government legal counsel involved to set out their concerns regarding the potential effect of a decision on modern treaties, since the federal government is usually a party to these agreements and would have an interest in protecting their integrity.

Finally, courts (especially at the Supreme Court level) could appoint an amicus curiae in major Aboriginal cases to provide representations as to the potential “on the ground” implications of their decision. The amicus would bring expertise on negotiated Aboriginal law which the court, and potentially, counsel appearing before the court, may lack, and could point out potential problems and solutions. Since the amicus would be making representations in open court and filing material which would be available to all parties, this would be a preferable approach to the court using its law clerks or staff to gather information and provide advice in a less open way. However, the issue of who would be selected as the amicus could be controversial. The court would have to be perceived as not “taking sides”
and would therefore have to seek a neutral but knowledgeable individual, someone not viewed as either strongly pro-First Nation or pro-government, who would be respected by everyone. A further challenge would be to find someone who was familiar with modern negotiated agreements and First Nation communities, but who was also knowledgeable about judge-made Aboriginal law, and could speak with authority about both streams of law. Even if someone with imperfect knowledge were appointed, the very fact that they were being appointed to examine potential impacts of the court's decision on modern agreements would bring this issue to the forefront in a way which would not otherwise occur.

Hopefully, once there is greater recognition of the reality that there are now two streams of Aboriginal law, which do affect each other, many more mechanisms will be suggested to facilitate dialogue between those involved in developing negotiated and judge-made Aboriginal law. The suggestions in this section are just a beginning.
F. Conclusion

Reconciliation usually requires that each party to a relationship concede something to the other.41

Both court decisions and negotiated agreements attempt to address the same subject matter: the reconciliation of Aboriginal rights with the rights of other Canadians. True reconciliation requires both sides to change and to give up something – not just the Aboriginal parties – yet courts thus far have focused primarily on what Aboriginal people must give up in order to accommodate the rights of other Canadians.42 While courts have indicated that they wish to take Aboriginal perspectives into account, they have no mechanism for doing so, and thus far have not demonstrated that they can effectively accommodate these perspectives. Modern treaties by their very nature and process do take Aboriginal perspectives into account and the principles underlying these treaties can be a useful resource for courts.

In order to fully recognize Aboriginal rights, society as a whole must be transformed. Rights are linked to relationships,43 and the old relationships of dominance between the settler society and Aboriginal peoples must be changed to relationships of mutual respect and equality. The Yukon agreements recognize this need for transformation, as the land claim and self-government agreements not only bring about self-government for Aboriginal people in the Yukon, but change the overall governance structure for all Yukoners. Court decisions can assist in this transformation, for example, by providing dicta (as in Delgamuukw) emphasizing the equal validity of Aboriginal perspectives and systems of law, or by declaring the existence of Aboriginal rights, thereby encouraging negotiations. Courts can also learn from the transformations which are already taking place in societies in northern Canada and

41 John Borrows, infra note 42.
42 The expansion of the list of government objectives which can potentially justify an infringement of Aboriginal and treaty rights to include “the settlement of foreign populations” (Delgamuukw, para. 165) illustrates the Supreme Court’s willingness to accommodate non-Aboriginal interests at the expense of Aboriginal interests. As noted by John Borrows with respect to the test to establish an Aboriginal right in Van der Peet and other recent cases, “[r]econciliation usually requires that each party to a relationship concede something to the other . . . Lamer C.J.C.’s test compels only aboriginal peoples to give something up in reconciling the assertion of Crown sovereignty with pre-existing aboriginal occupation.” (John Borrows, “Fish and Chips: Aboriginal Commercial Fishing and Gambling Rights in the Supreme Court of Canada” 50 C.R. (4*) 230 at 243.)
43 This concept of rights as relationship has been developed extensively by Jenny Nedelsky. See for example, Jennifer Nedelsky, “Reconceiving Rights as Relationship” (1993) 1:1, Review of Constitutional Studies 1; “Law, Boundaries and the Bounded Self” (Spring 1990) 30 Representations 162.
look at the principles underlying modern day treaties and self-government agreements as a potential source of new law.

Both court and negotiation processes can work together in a more complementary way to meet the common challenge of reconciling Aboriginal and non-Aboriginal interests. Through greater dialogue, we can begin to bridge the gap between these two solitudes, furthering the development of Aboriginal law and fostering true reconciliation.