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A Narrative Description of Contemporary Negotiations between the Canadian Pacific Railway and Five Indian Bands regarding Land Taxation and Land Tenure Rights in British Columbia

by

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ABSTRACT

A Narrative Description of Contemporary Negotiations between the Canadian Pacific Railway, Five Indian Bands and the Government of Canada regarding Land Taxation and Land Tenure Rights in British Columbia

by Kari Giddings

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This case study provides an analysis of the settlement negotiations over a property taxation dispute related to land tenure between the Canadian Pacific Railway (CPR), five First Nations, and the Government of Canada. The case analysis is informed by a historical review of the relationship between the parties, qualitative interviews with key stakeholders, and theories in negotiation, identity negotiations, face negotiations, critical Aboriginal theory and intercultural communications. The analysis found:

1. time and effort was expended by the socially dominant railway in building trust and inclusion to gain an agreement;
2. evidence of successful interactive, cross-cultural communication and identity negotiation; and
3. a process that acknowledged and respected the differences between Western and Aboriginal paradigms and that incorporated elements of both worldviews.
4. a number of more specific key components contributing to the success of the negotiations.

ACKNOWLEDGMENTS

The author wishes to express sincere appreciation to Canadian Pacific Railway for the financial support in pursuing the Master's program and for allowing access to their files. I'd also like to thank all those involved in the negotiations that were able to share their experience. Thank you to my family for their strong support during the research for this project.

DISCLAIMER

The author is an employee of Canadian Pacific Railway Company ("CP"), but the research, analysis, views, and opinions expressed herein are solely those of the author and not necessarily those of CP.

TERMINOLOGY

The following definitions are from "*Words First: An Evolving Terminology Relating to Aboriginal Peoples in Canada* " published by Indian and Northern Affairs Canada.[1]

Aboriginal peoples - The descendants of the original inhabitants of North America. The Canadian Constitution recognizes three groups of Aboriginal people -- Indians, Métis and Inuit. These are three separate peoples with unique heritages, languages, cultural practices and spiritual beliefs.

Band - A term that is now synonymous with "community," or depicts a local government entity. It is now rarely used in formal reference to a First Nation community. For the purposes of the Indian Act, it refers to a body of "Indians" declared to be a band, or for whose collective use and benefit lands have been set apart or money is held by the Crown.

First Nation - This term came into common usage in the 1970s to replace the word "Indian," which some people found offensive. Although no legal definition of the term exists, it is still widely used. Among its uses, the term First Nations refers to the Indian peoples in Canada. Some Aboriginal communities have adopted the term to replace the word "band."

Indian - Historically, the term "Indian" has collectively described all Aboriginal peoples in Canada who are not Inuit or Métis.

Indian Act - Canadian federal legislation, first passed in 1876, and amended several times since. It sets out certain federal government obligations and regulates the management of First Nations' reserve lands, moneys and other resources. It also sets out the requirements for determining who is an "Indian" for the purposes of the Indian Act.

Tribe - A group of Aboriginal people sharing a common language and culture. The term is used frequently in the United States, but only in a few areas of Canada (e.g. the Blood Tribe in Alberta).

Tribal council: A regional group of First Nations members that delivers common services to a group of First Nations.

[1] *Words First* can be found at <http://www.ainc-inac.gc.ca/pr/pub/wf/index_e.html>. Accessed February 25, 2008.

Aboriginal rights: Rights that some Aboriginal peoples of Canada hold as a result of their ancestors' long-standing use and occupancy of the land. The rights of certain Aboriginal peoples to hunt, trap and fish on ancestral lands are examples of Aboriginal rights. Aboriginal rights vary from group to group depending on the customs, practices and traditions that have formed part of their distinctive cultures.

Aboriginal self-government: Governments designed, established and administered by Aboriginal peoples under the Canadian Constitution through a process of negotiation with Canada and, where applicable, the provincial government.

Aboriginal title: A legal term that recognizes an Aboriginal interest in the land. It is based on the long-standing use and occupancy of the land by today's Aboriginal peoples as the descendants of the original inhabitants of Canada.

Reserve: Tract of land, the legal title to which is held by the Crown, set apart for the use and benefit of an Indian band.

Surrender: A formal agreement by which a band consents to give up part or all of its rights and interests in a reserve. Reserve lands can be surrendered for sale or for lease, on certain conditions.

The following terms also occur in this report.

Easement or right-of-way: An easement or right-of-way is an agreement that confers on an individual, company or municipality the right to use a landowner's property in some way. While these agreements grant rights, they also have the effect of partially restricting an owner's use of the affected portions of land.[2]

Fiduciary duty: The fiduciary duty is a legal relationship between two or more parties (most commonly a "fiduciary" or "trustee" and a "principal" or "beneficiary") that in English common law is arguably the most important concept within the portion of the legal system known as equity. A fiduciary duty is the highest standard of care at either equity or law. A fiduciary is expected to be extremely loyal to the person to whom they owe the duty (the "principal"): they must not put their personal interests before the duty, and must not profit from their position as a fiduciary, unless the principal consents.[3]

[2] Alberta Land Surveyor's Association, Easements & Rights-of-Way, retrieved on March 9, 2008, from http://www.alsa.ab.ca/GeneralInfo/easements.htm

[3] Wikipedia, Fiduciary, retrieved on March 9, 2008, from http://en.wikipedia.org/wiki/Fiduciary_duty

Comprehensive Claims: Comprehensive claims settlements are negotiated to clarify the rights of Aboriginal groups to lands and resources, in a manner that will facilitate their economic growth and self-sufficiency. Settlements are intended to ensure that the interests of Aboriginal groups in resource management and environmental protection are recognized, and that claimants share in the benefits of development.[4]

Specific Claims: Specific claims deal with the outstanding grievances that First Nations may have regarding Canada's fulfilment of its obligations under historic treaties or its administration of First Nation lands or other assets under the *Indian Act*.[5]

Sui Generis: Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. It is true that the sui generis interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true that the interest gives rise upon surrender to a distinctive fiduciary duty obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians (*R. v. Guerin* [1985] C.N.L.R.120, 2 S.C.R.335).[6]

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[4] Indian & Northern Affairs Canada. *Comprehensive Claims (Modern Treaties) In Canada*, March 1996, retrieved on March 9, 2008, from http://www.ainc-inac.gc.ca/pr/info/trty_e.html

[5] Indian & Northern Affairs Canada. *Backgrounder: Specific Claims In Canada*, March 1996, retrieved on March 9, 2008, from http://www.ainc-inac.gc.ca/ps/clm/scc-eng.asp

[6] Status of Women Canada. *Fur Trade to Free Trade: Forestry and First Nations Women in Canada,* April 2004, by Darlene Rude and Connie Dieter, retrieved on March 9, 2008, from http://www.swc-cfc.gc.ca/pubs/pubspr/0662363779/200404_0662363779_5_e.html

ACRONYMS

BC British Columbia

BCTC British Columbia Treaty Commission

CN Canadian National

CPR Canadian Pacific Railway [also known as Canadian Pacific (CP)]

INAC Indian & Northern Affairs Canada-also known as Department of Indian Affairs (DIA)

ITAB Indian Taxation Advisory Board -now known as First Nations Tax Commission (FNTC)

MOT Ministry of Transport

RCAP Royal Commission on Aboriginal Peoples

UBCIC Union of BC Indian Chiefs

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"When you are involved in this file, you wear it. You become part of it. This was the most rewarding thing I've ever done in my career. Because everybody got to win."

Cindy Clarkson, Indian & Northern Affairs Canada
December 12, 2007

Chapter 1: Introduction

On July 4, 2001, the Boothroyd, Cook's Ferry, Matsqui, Seabird Island, and Skuppah Indian Bands located in the Fraser and Thompson River Valleys of British Columbia invited Canadian Pacific Railway (CPR) officials to celebrate at the Seabird Island Reserve and acknowledge the ratification of a settlement agreement to resolve litigation commenced by CPR in 1993. This litigation was based on a taxation dispute over the railway's right of way that eventually challenged and changed CPR's land tenure rights through these reserves. On January 17, 2002, a second celebration including officials from the Government of Canada and Indian and Northern Affairs Canada (INAC) was held at Seabird Island to mark the passing of a newly-created *Property Assessment and Taxation (Railway Right-of-Way) Regulation* under section 83(5) of the *Indian Act*. This marked the completion of all legal steps, including CPR's Quit Claim, Canada's transfer of the lands in question back to reserve status, and the granting of an easement to CPR for the railway right-of-way.

Both Senator Mobina Jaffer and then Chairman of the Indian Taxation Advisory Board (ITAB), Chief Manny Jules referred to the settlement agreements as "landmark". (Canada NewsWire, 2002) The negotiations were so successful that shortly after their conclusion an additional nine BC bands approached CPR to negotiate similar agreements based on what has become referred to as the "Matsqui" model. Five of the nine bands ratified the agreement on the first vote in November 2003 and the last four were ratified on the second vote in March 2004. (Courville, 2004) Similar negotiations continue between CPR and other bands in British Columbia and at this point a total of 14 agreements have been ratified.

As a result of a mixed court decision in 1999 and the negotiations between the parties to settle the issues of tenure and taxation of the land, the stakeholders were able to move the historical colonial relationship of patriarchy and power differentials, into a more equitable, respectful relationship that met both the substantive and identity-related interests of all parties.

This paper will provide a case study of the process, events and interactions between CPR, a corporate Canadian icon with a history intertwined with the colonization of the country, five First Nations and the Government of Canada to negotiate a successfully-ratified settlement agreement. The negotiations process took a scant two years, an amazing feat given the historical relationship between these parties and the current Canadian context of costly, lengthy and litigious land claim disputes which have been known to drag on for decades.

In analyzing the process, I will draw from various negotiation theorists including Ury & Fisher (1991, 1999, 2007), Colosi (2001), and Gulliver (1979), as well as Fisher's Narrative Paradigm (1984), Ting-Toomey's Identity Negotiation Theory (2005a), Critical Race Theory, and recent research on negotiations in an Aboriginal context. This analysis will contribute positively to corporate Aboriginal relations and the on going treaty and claims negotiations, as well as the narrative and construction of these important and evolving relationships, within Canadian society.

First Nations are currently negotiating self-determination, land claims and business deals with the Canadian and provincial governments, municipalities and corporations. In effect they are rebuilding and reasserting their identities. All Canadians are struggling to understand the current complicated issues of Aboriginal rights and title, as well as the

implications of land claims and how to address the historical context and legacy behind these issues. There is a very real business case for all levels of government within Canada (federal, First Nation, provincial and municipal), corporate Canada and Canadian citizens in understanding what the successful and unsuccessful ingredients in the "Matsqui" process were and how these may be of assistance in future interactions.

As stated by George Erasmus, Grand Chief and Chair of the Royal Commission on Aboriginal Peoples (RCAP), First Nations "have been pressing for fair land settlement to provide the basis of an economically viable life for our people, but we have also insisted on our right to Aboriginal self-government over … our traditional land, resources and people." (Eliott, 2000, p. 26). Developing Aboriginal capacity and entrepreneurship has been identified as key to bringing the socio-economic circumstances of First Nations on par with the Canadian average. By doing so it has been projected that this will contribute untold millions of dollars annually to the Canadian economy (Anderson, 1999; Anderson, Kayseas, Dana, & Hindle, 2004; Canada, 1996; Hindle, Anderson, Giberson, & Kayseas, 2003).

Given the touted success of the "Matsqui" model and reportedly "stronger, better relationships" between the parties (Canada NewsWire, 2002; Canadian Pacific Railway, 2004), an analysis of the negotiation process and model should identify clear components that facilitated the renegotiation of that relationship, while meeting the substantive goals of the parties.

Methodology

The case study presented will be in a narrative format, drawn from historical references, CPR documentation and personal interviews with key negotiating representatives from all three parties. It is my intent to provide an unbiased report, however, the narrative will undoubtedly reflect my own interpretation of the events and understanding of the process through my experience as a white Canadian and CPR employee. It should be noted that the contents of this paper do not necessarily reflect the views of Canadian Pacific.

The methods employed in the research for this paper included a historical literature review, document and records-review of project files supplied by the Real Estate department of CPR, and individual interviews with key stakeholders in CPR, the First Nations, and the Government of Canada. Data from interviews will inform the analysis and provide insight into various stakeholders' personal perspectives, looking back some five years later.

Ethics approval for the research proposal and interview protocol was received from the University of Calgary's Conjoint Faculties Research Ethics Board on August 24, 2007. See Appendix A for the Certificate of Ethics Approval, Appendix B for the Interview Protocol & Questions, and Appendix C for a list of interviewees.

Chapter 2 will provide a literature and theory review of negotiation theory, informed by intercultural communications, identity negotiations, face-negotiations and critical theory. These theories will provide the basis for the case analysis.

Chapter 3 will provide a historical review of the interaction and relationship between CPR and BC First Nations and the Government of Canada. It will also provide the context of the Aboriginal treaty and claims process.

Chapter 4 will provide a narrative summary of the negotiation process that was used to gain a ratified agreement and the enactment of new tax regulations required to facilitate that agreement. The bulk of the research data presented in this chapter will come from the review of CPR files, contextualized and informed by interview quotes from the key players.

Chapter 5 will provide an analysis of the interactions utilizing narrative, identity negotiation and critical theory. Chapter 6 will provide a discussion of key findings in light of relevant literature and theory, as well as recommendations for further research.

Chapter 2: Theory & Literature Review

Negotiation Theory (including Identity Negotiation Theory & Cross-Cultural Negotiation Theory)

According to negotiation theory a positive resolution to long-standing conflicts ensures that substantive issues are agreed upon and the relationship between the parties is maintained or enhanced. In order to "get to yes", the parties require an understanding of the underlying interests that are motivating their own and the other parties' positions (Fisher, Ury, & Patton, 1999).

It is through interactive communication exchange that parties can explore the issues and understand deeper motivations and interests and then problem-solve to meet them in a satisfactory manner. Ury (2007) outlines five common basic human needs that underlie every-day behaviour and conflict as:

- Safety or survival
- Food, drink, and other life necessities
- Belonging and love
- Respect and meaning
- Freedom and control over one's fate

Many, if not all, of these needs and interests were underlying the positions of the stakeholders in the negotiations at varying levels. Both Canadian Pacific and the First

Nations saw the control over the land as an issue of survival and necessity. Given the historical relationship between these two parties and the Canadian government the issues of respect and belonging were key for the First Nations, as well as the other two parties.

The need for respect and belonging are connected to what is termed as identity or identity negotiation. Ting-Toomey (2005) refers to identity as the "reflective self-conception or self-image that we each derive from our family, gender, cultural, ethnic, and individual socialization process". Social identities include cultural or ethnic membership identity, gender identity, social class identity, professional identity and even corporate identity.

As will be seen in the review of the historical relationship, First Nation groups in Canada and British Columbia have been fighting to preserve their identity, culture and land since the early 1800s. The concept of identity negotiation refers to a transactional, interaction process whereby individuals in an intercultural situation or communication process attempt to assert, define, modify, challenge and/or support their own and others' desired self images. The theory looks at ways to enhance identity understanding, respect and mutual affirmative valuation by meeting the basic needs of security, predictability/trust and inclusion in an intercultural context. Given the reported success of the negotiations, it is expected that the socially dominant railway and government expended a fair amount of time and effort in building trust and inclusion to gain an agreement and build a renewed relationship.

Recurrent conflict over substantive or content issues are often linked to relational conflict or threats to relationship and identity (Gulliver, 1979; Ting-Toomey, 2005b; Ury, 1991). Threats to identity usually come in the form of rejection, disrespect, and/or disapproval of the individual or group involved in the conflict. Identity goals are linked to face-saving or face-honouring issues, and by extension to underlying beliefs, and value patterns of the culture and the individuals involved. As long as parties fear that their identity needs will be neglected or negated, they will not be motivated to negotiate. Rothman (2001) notes that often identity-based conflicts contain primary elements that are non-negotiable; however, he asserts that through interactive conflict resolution, there are ways to facilitate constructive dialogue that can lead to a resolve. According to Ting-Toomey (2005) successful identity negotiation in an intercultural negotiation requires culture-sensitive knowledge and competent identity-based communication. Thomas (2002) has stated:

> The outcomes of cross-cultural negotiation are thought to be contingent on (a) factors associated with the behaviour of individuals involved in the negotiation, (b) factors associated with the process of the negotiation, and (c) factors associated with the negotiation situation. (p. 138).

Based on critical theory, conflict resolution processes generally reflect cultural assumptions of those who design them and it is a challenge and skill for competent negotiators to overcome internal scripts and assumptions and address the needs of all parties to gain an agreement.

> Competent intercultural communicators are resourceful individuals who are attuned to both self-identity and other identity negotiation issues… attuned to the structural, historical, and situational scripts in shaping a multifaceted identity. …A competent (identity) negotiator is one who is able to hold two polarized value systems and be at ease with the dynamic tensions that exist between the vulnerability spectrum and the security spectrum in the double-swing dance. (Ting-Toomey, 2005a, p. 229-230).

Relational empathy has been identified by LeBaron as key to intercultural competence, including respect, tolerance for ambiguity, and a spirit of inquiry, flexibility, and adaptability in being able to correct or adjust communication style to keep a process running smoothly (cited in Bell & Kahane, 2004).

In analyzing the interaction between the parties in the Matsqui negotiation process, it is expected that there will be evidence of successful identity negotiation and cross-cultural communication that facilitated the success of the agreement and re-framed the relationship between the parties.

Negotiation & Dispute Resolution in Western and Aboriginal Contexts

Cross-cultural negotiation competence requires recognition and respect of the cultural differences between not only Aboriginal and Western world-views, but also the differences and diversity within and between all the stakeholders, including First Nations, corporations, municipalities and various levels of government. Bauman & Williams (2004) caution against the compartmentalization of culture from other factors that impact the development and implementation of a relevant and responsive decision-making and dispute management system and emphasize the need for a 'match' between models that ensures the 'rights' and 'interests' of the participants and appropriate ways of organizing and exercising authority. They suggest that such a process should "evolve organically from the 'community' affected by the dispute."

Western-based approaches to dispute resolution reflect the liberal democratic tradition and individualistic societal values that focus on personal gain, the linear approach and goal of discrete outcomes (Bell & Kahane, 2004). Some of the potential impacts in utilizing a solely Western-based paradigm identified in the literature include: time pressures leading to hasty decision making; overlooking key participants and stakeholders; and, excessive legal and bureaucratic processes which require funding and resources from Aboriginal groups. All of these pitfalls can lead to the failure of processes and problematizing of Aboriginal peoples, ignoring the contribution of the dominant group's processes to that failure (Bell & Kahane, 2004; Maaka & Fleras, 2005).

Aboriginal peoples employ a wide variety of traditional dispute resolution techniques that display characteristics of a collectivist society, including emphasis on community, kinship, consensus, and the desire to restore and maintain harmony. They are mindful that decisions may have repercussions for those directly involved, as well as future generations (Bauman & Williams, 2004; Lowe & Davidson, 2004).

> Things are never 'finished' in Indigenous communities. Whilst processes will vary from place to place, decision-making in most, if not all Indigenous societies is a continuous social process that has an expectation of change, and a need for frequent affirmations of contracts and decisions. Decisions are not static moments. (Bauman & Williams, 2004, p. 6).

Given the continuous nature of Aboriginal social processes, both Fisher (1996) and Rothman's (2001) interactive conflict resolution approaches to negotiations would appear to be a good fit for cross-cultural negotiations between Western and Aboriginal parties.

Recent research shows that there are three emergent modes of dispute resolution processes between Aboriginal parties and Western-based societies:

1. Western-based paradigms such as arbitration, negotiation, conciliation, mediation, and facilitation;
2. Indigenous paradigms, calling for rejuvenation and reclamation according to the culture and custom of the Indigenous party involved; and
3. A combination of the two paradigms. (Victor, 2007; Bauman & Williams, 2004)

According to Victor (2007), Western-based paradigms tend to value objectivity, neutrality and impartiality, while Indigenous paradigms allow for a mediator or facilitator that is involved on a personal level; has first hand knowledge of the issues; and is tied to the community and culture. The Indigenous paradigm would allow for an elicitive approach, "requiring the mediator to take the lead from the parties involved and recognizing the process as both a functional and political one" (Kahane, 2004, p 47, cited in Bauman & Williams, 2004).

> It does not impose a formula or process upon the disputing parties; rather it takes the lead from them in terms of timing, place, communication styles, and who is to be involved in the resolution process. (LeBaron 2004, p. 20, cited in Bauman & Williams, 2004)

Certainly, the earlier approach of litigation did not end up in a satisfactory resolve for either the CPR or the First Nations. Given the reported success of the negotiations, the case analysis will likely identify a process that acknowledged and respected the differences between the Western and Aboriginal paradigms. The process was likely flexible enough to find a way to incorporate elements of both paradigms, thus meeting the substantive and identity/relationship needs of the parties.

The reported success of the negotiations between CPR, the five First Nations, and the Government of Canada indicates that the substantive and identity needs of the parties were met and a new, more equitable relationship evolved out of the process. In summary and based on the above review of the theory and literature around negotiations and cross-cultural communications, it is expected that the case analysis will identify:

1. time and effort expended by the socially dominant railway in building trust and inclusion to gain an agreement;
2. evidence of successful interactive, cross-cultural communication and identity negotiation; and
3. a process that acknowledged and respected the differences between Western and Aboriginal paradigms and that incorporated elements of both worldviews.

The next chapter will provide the context and historical background of the negotiations in order to provide a better understanding of the substantive issues requiring resolution, as well as the evolution of the relationship between the parties.

Chapter 3: Historical Review

A review of the history between the BC First Nations and the Canadian government and the Canadian Pacific Railway will provide an understanding of the evolution of the issues to be resolved, as well as the legal and relationship challenges that had to be overcome in the negotiation process in order to gain an agreement. A timeline of key events is included in Appendix D and a map of the area in question in Appendix E.

Thompson & Fraser River First Nations and BC & Canada

Long before the first Europeans set foot on North America some five hundred years ago, the Indigenous people's sophisticated social structure allowed for trade and commerce among the different tribes, nations and confederacies. Negotiation was needed in order to gain access to or through territory, and for goods of importance. Trade played an important social role amongst the numerous First Nations (R. Fisher, 1977; Miller, 1991).

When Europeans landed, the Indigenous people welcomed the opportunity to trade for goods they had never seen before and were unable to manufacture. Up until the late 1700's the two cultures built commercial partnerships and experienced mutual benefit, with the Aboriginal people holding the power of access and survival over Europeans. In many cases during the formative years, the relationship was guided by the foundational principles of peace, friendship, and respect. These principles were enshrined in the first formal treaties between the groups. The relationship between First Nations people and Europeans changed following the

passing of the fur trade and a new period of settlement and progressive white dominance over the Aboriginal peoples commenced.

As we know, the First Nations eventually lost control of the land, and with Confederation in 1867 the Canadian Government adopted a policy to assimilate Aboriginal people into mainstream white society, utilizing many mechanisms which effectively destroyed much of the First Nations' culture, traditions, language and ways of being. These acts removed any power or ability they had to continue commercial partnerships and self-sufficiency (Maaka & Fleras, 2005; Royal Commission on Aboriginal Peoples, 1995).

The situation in British Columbia was unique to First Nations land title claims and will be described below. It is this legacy that the five BC First Nations have been challenging since before the railway was built. It is also the cause of the taxation court cases.

Colonial administration on the west coast of North America was established in 1846 on Vancouver Island, and in British Columbia in 1858. At that time, Vancouver's Governor James Douglas signed a series of small treaties with the goal of ensuring full rights of European settlers in British Columbia. He also established several small residential reserves for First Nations people and allowed them to claim land as any incoming settler. These reserves did not follow the model or precedent set in the east regarding the size of reserves and they were significantly smaller. According to Fisher (1997), the BC gold rush of the 1860's ended the Douglas treaty process.

Joseph Trutch, Chief Commissioner of Lands and Works, became Lieutenant Governor of the province of British Columbia when it joined the Confederation of Canada in 1871. Trutch held the European belief that any land that was not physically occupied and was not "developed", should be open to all comers – "if territory was occupied in a regular way, Aboriginal possession was recognized, and therefore had to be extinguished before settlement could proceed" (Coates, 1998, p. 11).

Many of the First Nations in British Columbia resided in small, seasonal camps and the concept of permanent occupation was not one to which they adhered. While Douglas had understood that the First Nations "had precise concepts of territorial boundaries", Trutch denied that they had any rights to the land at all and reduced the land allocation per person for new reserves, moving to "constrain and push aside the First Nations people in British Columbia"(Coates, 1998, p. 11; Fisher, 1977).

Fisher (1977) provides an overview of Trutch's policies and notes that the First Nations hoped that with BC entering into Confederation a new policy would be adopted towards them. However, unlike the majority of white British Columbians, they were not consulted and were specifically excluded from the ability to vote. Fisher (1997) recounts how "Clause Thirteen of the Terms of the Union" effectively maintained the status quo of assigning "considerably less than liberal" tracts of land to First Nations.

One of the interesting dynamics and connections to the railway at the time was the influence Joseph Trutch had over Prime Minister John A. MacDonald, "the Father of Confederation",

Minister of Indian Affairs, and proponent of the transcontinental railway. In fact Trutch wrote to Prime Minister Macdonald, stating:

> The Canadian treaty system as I understand it will hardly work here—we have never bought out any Indian claims to the lands nor do they expect we should—but we reserve for their aid and benefit from time to time tracts of sufficient extent to fulfill all their reasonable requirements for cultivation or grazing. If you now commence to buy out Indian title to the lands of British Columbia – you would go back on all that has been done here for 30 years past and would be equitably bound to compensate the tribes who inhabited the district now settled and farmed by white people equally with those in the more remote and uncultivated portions. Our Indians are sufficiently satisfied and had better be left alone as far as a new system toward them is concerned. (Trutch to John A. Macdonald, October 14, 1872, as quoted in Dennis Madill, British Columbia Treaties in Historical Perspective, p. 37 and cited in R. Fisher, 1977, p. 13).

A petition by 110 Indian leaders of the lower Fraser River area was sent in 1874 protesting the arbitrary way in which the British Columbia government had located and divided their reserves and the fact that their cultivated land was not protected against encroachment by whites. They stated they had attempted to adopt the white man's ways by turning to farming but had received no redress to their concerns or complaints. Similar grievances and feelings were expressed all through BC (Coates, 1998; Fisher, 1977; Union of BC Indian Chiefs, 2005).

Despite various initiatives to prevent the federal government from intervening in the dealings with First Nations, eventually the province of British Columbia came to an agreement with the federal government to establish a commission that would examine Indian lands and allocate according to individual situations, rather than a set acreage. The Commission established to examine Indian lands between 1876-1880, was made up of A.C. Anderson and Archibald McKinlay, Hudson's Bay men representing Canada and BC respectively, and a man named Gilbert Sproat. By 1878 the Commission was made up solely

of Mr. Sproat who stayed on until 1880. According to records, during this period of time there were many rumours regarding potential Indian uprisings, and the mood and anger of settlers towards the Commission was dark.

During this same time period there was a meeting of a number of the tribes from the Fraser and Thompson River Valleys, the Nicola Valley, and the Similkameen area, likely including the five bands in question. According to Fisher (1977), the meeting was held at the town of Lytton and the bands agreed to set up a council to administer a set of regulations designed to foster the education of their children, improve the sanitary and medical facilities in the villages, subdivide arable land on an individual basis, reduce the number of non-working days, abolish the potlatch, and to levy fines for drunkenness and gambling. Fisher (1977) states that records indicate that the European settlers were horrified that such a "confederation" would be considered and did all they could to oppose it, writing to the Prime Minister of Canada. The BC government continued to carve off pieces of reserves or land holdings that were not seen as productive. Canada was developing and planning dozens of railway projects and new towns, and the First Nations people and their landholdings were seen as an obstacle to progress.

In 1879 the BC government informed the Commission that it would not recognize reserves that had not been surveyed according to the regulations laid down in the *Land Amendment Act* of that year. "In the end, not a single reserve laid out by the reserve commission was approved by the Provincial Chief Commission of lands and works" (R. Fisher, 1977, pp. 197-198). All the good land had been given to settlers before the Commission arrived, or settlers were allowed to purchase the land even after the Commission had reserved it for the

First Nations, and whites continued to run cattle on the Aboriginal land. Despite protesting these events, Sproat came to realize, "no government of the province will effectually recognize that the Indians have any rights to land. If it is possible to deprive them of their land, or prevent them from getting a bit of land, it will be done"(Fisher, 1977, pp. 197-198).

Sproat was forced to resign from the Commission in 1880. Around the same time, Trutch returned to political life and was appointed Dominion Agent in British Columbia on Railway Matters. By then, plans for the transcontinental railway were underway and land was being expropriated from First Nations and settlers for its construction. Trutch told Prime Minister J.A. MacDonald that the Indians had never used the reserves laid out since 1871, except as hunting grounds, and were unlikely to be used. Trutch appointed his brother-in-law, Peter O'Reilly, as the new Reserve Commissioner. O'Reilly revised Sproat's work, again reducing reserves and common lands established for the Indians for their farm stock.

The year 1885 saw the completion of the CPR and, according to Fisher (1977) while white property owners were paid for land taken by the railway, the First Nations people did not receive any payment from either government. That same year the highly traditional potlatch, a complex set of practices and ceremonies around governance and spirituality, and the cornerstone of BC First Nation's society, was banned by the Canadian government. By 1891, Aboriginal people constituted less than one-third of the total BC population due to continuing growth of settlers and decline of the population resulting from various factors, including illness.

As can be seen from the preceding review, the British and colonial governments did not acknowledge the First Nations' claims to their traditional territories and original reserves, and in fact worked towards reducing their territories, as well as key components of their cultural identity.

Canadian Pacific Railway & the Canadian Government

The Canadian Pacific Railway was founded to physically link the British colonies in North America from coast to coast and entice British Columbia to join the new confederation of Canada. As part of the contract entered into with the Canadian government under John A. MacDonald and pursuant to The *CPR Act* of February 16, 1881, the company was granted generous terms, including $25 million in cash and 25 million acres of land across the continent in a belt along what was to be the railway.

Section 36 of the *Indian Act* at the time provided that "[n]o reserve or a portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown …" . Section 35 of the Act states that if any railway passes through a reserve "belonging to … any band of Indians", the railway company must pay compensation to the Receiver-General for the use of the "band of Indians for whose benefit the reserve is held." [7] Article 12 of the Contract imposes an obligation on the government to extinguish "Indian title".

> [t]he Government shall extinguish the Indian title affecting the lands herein appropriated, and to be hereafter granted in aid of the railway.[8]

[7] *Canadian Pacific Railway v. Matsqui,* (1999) p. 62. Section 37 has become section 35 of the current Indian Act, and is commonly referred to as the "taking" or "expropriation" provision.

[8] *Canadian Pacific Railway v. Matsqui,* (1999) p. 77.

Therefore the Canadian government had a key role and fiduciary duty in dealing with both the CPR and First Nations according to the legislation at the time.

The transcontinental railway was completed on November 7, 1885. Through savvy business planning and the strategic settlement of the land, CPR soon became a highly successful and diversified company involved in land settlement and sales, shipping and tourism, making many investors rich (Innis, 1923, 1971). The company has become indelibly linked with the history and settlement of Canada.

The building of the railway through the small reserves located on terraces above the Fraser and Thompson Rivers in British Columbia often ended up with the railway right-of-way usurping and bisecting what little land had been allotted to the First Nations. The construction of the railway impacted their ability to access the river for fishing, get produce to market, access water for irrigation, and for other purposes.

While railway officials may not have been involved directly in the decision-making of the government with regard to First Nations territory, the laying of the tracks compounded the BC government's impact on First Nations. By the time the railway was being built, earlier BC governments had imposed the farming way of life on the small reserves. With the construction of the railways, fields, orchards, homes, and fishing and hunting territories were destroyed (Schuurman, 2000).

First Nations Assert their Position

The First Nations did not accept the loss of their land and utilized the Western judicial processes to progress their claims, with the Fraser and Thompson Valley Bands very much involved. According to the Union of BC Indian Chiefs (2005), during the early 1900's various Indian tribes and bands formed coalitions to fight for their land. The Indian Rights Association, the Interior Tribes, and the Nisga'a Land Committee sent various statements of facts, claims, declarations and petitions to then Prime Minster Laurier and the Department of Indian Affairs, demanding treaties, enlarged reserves, and compensation for lost lands. Prime Minister Laurier sought a legal opinion on the validity of Aboriginal title and land claims in BC. The opinion indicated that much of the land was subject to unextinguished Aboriginal title and that Canada had a responsibility to pursue a legal land claim against BC on behalf of the Indians. However, BC Premier McBride protested that Aboriginal title could not be decided in court as it would have disastrous effects on BC's financial standing and jeopardize investment in the province. Premier McBride travelled to London to request and receive agreement on a policy of non-interference in BC (Union of BC Indian Chiefs, 2005).

This policy reinforced the belief and fear that the Province had to protect the interests of corporate investors over First Nations' interests. The public perception of land claims has continued since the early 1900s and has influenced the approach of Canadian businesses such as the CPR in dealing with First Nations. This belief has perpetuated ongoing land

claims and court battles and has indeed influenced investment in the province, as well as inhibited economic independence of the First Nations[9]

After meeting with a number of Indian bands in 1910, Prime Minister Laurier passed an Order-in-Council proposing to take the Indian claims to the Exchequer Court of Canada. Unfortunately, the Order sat with the Department of Justice for a year and by the time it was reviewed, Laurier was no longer Prime Minister. The dispute continued between BC Premier McBride and the new Prime Minister Borden, resulting in the proposal being formally set aside in 1911.

In 1912 the Prime Minister established a Royal Commission to review the work of the Indian reserve commissions and hear evidence from Indian Chiefs and their communities, as well as third parties, to adjust the Indian reserves in BC. The issue of Aboriginal Title was excluded from the Commission's mandate, which was headed by J. McKenna, and became known as the McKenna-McBride Royal Commission (Union of BC Indian Chiefs, 2005).

At that time the Canadian National Railway (CNR) was being built through the Fraser River canyon, again cutting through the Indian reserves. In 1913 during the construction of the CNR, a slide at Hell's Gate on the Fraser River curtailed native fishery and decreased wild game, leading to famine in native communities. Reports in local newspapers at the time indicated that the belief was that First Nations people had over-fished and they were blamed

[9] It should be noted that in February 2005, the Premier of British Columbia "committed to a process with the First Nations provincial leadership to openly discuss how we can establish a new relationship." (Union of BC Indian Chiefs, 2005)

for the impact on the salmon canneries at the mouth of the Fraser River (Schuurman, 2000; Union of BC Indian Chiefs, 2005).

In addition, the construction of Highway Number 1 and utility corridors cut into reserve land, again with little or no compensation to First Nations. Understandably, the relationship between the provincial/federal governments, the railways and the First Nations was acrimonious. See Appendix E for a map of the Fraser River area, railways, highway and First Nations locations.

The McKenna-McBride Commission released its Final Report in 1916, establishing new reserves, and confirming, increasing or reducing existing reserves. Valuable reserve land was reduced and cut-offs amounted to over 36,000 acres of land mostly in the southern and interior territories of BC. After an assembly at the Spence's Bridge Indian Reserve and large intertribal meetings throughout BC, the Allied Tribes Association drafted and presented a statement to the BC premier, rejecting the McKenna-McBride recommendations and emphasizing Indigenous territorial ownership (Union of BC Indian Chiefs, 2005).

In 1920 Canada passed the *British Columbia Indian Lands Settlement Act* to allow implementation of the McKenna-McBride recommendations and settle BC Indian land issues. In 1926 the Allied Tribes again petitioned Canadian Parliament, and Neskonlith Chief William Perris traveled to England to petition King George V. In 1927 Canada amended the *Indian Act* to make it illegal to obtain funds or legal counsel to advance Aboriginal Title cases. At that point access to Western justice systems by First Nations was cut off and the UBCIC website states that Indigenous resistance went underground.

In the 1930's agreements were reached between Canada and BC to transfer title to Indian reserves in BC to Canada. In addition, Canada transferred all land inside what was known as the Railway Belt and Peace River Block back to BC, except for the right-of-way land that was inside Indian reserves. BC claimed all roads running through Indian reserves and five percent of reserve lands for public works. The land transfers and claims between BC and Canada again complicated issues for the First Nation land claims and meant even less land on the small reserve lands allotted by the BC government.

It was following World War II and the establishment of the United Nations that Canada appointed a Joint Special Committee to examine Indian policy in Canada. In 1951 Canada revised the *Indian Act* guaranteeing civil rights for Indians, allowing the pursuit of Aboriginal title through the legal process. Again, a policy of aggressive assimilation was introduced in 1969 by the Trudeau government and the Union of BC Indian Chiefs was formed to review and counter that policy.

In 1972 the UBCIC presented a claim to the Prime Minister and, following the *Calder v. Attorney General* of BC Supreme Court decision recognizing the Nisgaa's First Nation title to their land, the Prime Minster established the Office of Native Claims and a comprehensive claims process for Aboriginal title and the specific claims process for reserve lands.

Throughout the 1970s, 80s and 90s the BC Indian Bands continued to file comprehensive and specific claims and litigation. In 1982 Aboriginal treaty rights were included in the *Canadian Constitution* and the Canadian government established the *Royal Commission on*

Aboriginal Peoples in 1991. The Commission's final report was issued in 1996, recommending a redistribution of political authority and economic resources to reform the relationship between Canada and Indigenous peoples. It also recommended a policy that recognizes Aboriginal rights and emphasizes shared ownership and jurisdiction over land. (Royal Commission on Aboriginal Peoples, 1996; Union of BC Indian Chiefs, 2005) A number of BC and Supreme Court decisions were taken in the 1990s and early 2000s impacting Canadian and BC Indian policy. These decisions emphasized the Crown's fiduciary duty to, and the requirement for consultation with, First Nations. As a result, these decisions have impacted the processes that corporations and First Nations must follow in developing business opportunities and partnerships together.[10]

CPR & First Nations' Claims

Over the years CPR has been and continues to be a party to First Nation's specific claims regarding issues around railway takings, unlawful expropriation, inadequate compensation, mineral rights, etc. (Indian & Northern Affairs Canada, 2007). The company's approach to claims by First Nations had been through litigation. As noted by both the First Nations and the various legal counsels interviewed, the Matsqui negotiations and agreement were a major reversal of approach for the company to negotiate, settle, and give up title to land believed to have been legitimately acquired over 100 years earlier.

There continue to be cultural and power differentials, as well as the ever present reminder and daily impact of living communities cut in half by a transportation/utility corridor, that

[10] R. v. Sparrow, 1990; Delgamuukw v. British Columbia,, 1997;

continue to impact the relationship between CPR and the Boothroyd, Cook's Ferry, Matsqui, Seabird Island, and Skuppah Indian Bands located in the Fraser and Thompson River Valleys.

> The effects of administrative and assimilative control on the Aboriginal psyche … remain a great source of bitterness in the collective memory of the First Nations of British Columbia and, combined with the anger over the long denial of Aboriginal title, produce a sense of injustice in the modern Aboriginal consciousness that cannot be easily placated (Woolford, 2005,p. 53).

It is interesting to note that several of the First Nation Chiefs mentioned in the interviews for this project that generations of family members had been involved in fighting for their land and rights, and that these same family members had also worked for the railway. One interviewee noted that the knowledge his father had gained working at the railway gave him in-depth knowledge of the impact of the railway on the reserve land and of the operations of the company and proved very useful in the negotiations.

As pointed out by Ting-Toomey (2005), competent negotiators are mindful of the factors that shape the dynamics of the negotiation process, including the historical and situational scripts shaping the conflict and the parties' multifaceted identities. Canadian Pacific representatives indicated that once they entertained the idea of a negotiated settlement, they sought out a facilitator with legal expertise and background in Aboriginal history and relations in John Olynyk. Both CPR and the First Nations representatives attributed much of the negotiations success to the knowledge of First Nations' worldviews and history, as well as interpersonal and legal competence of CPR's legal counsel, John Olynyk, and the three First Nations' legal counsel, Leslie Pinder, Graham Allen, and Art Pape.

The Matsqui Legal Decision

In 1985, an amendment was made to the *Indian Act* with the addition of Section 83 allowing for taxation by Indian Bands of third parties operating on reserves. In 1989, the Indian Taxation Advisory Board (ITAB) was established to advise the Minister of Indian Affairs & Northern Development on bylaw approval and property taxation matters, and the province of British Columbia passed the *Indian Self Government Enabling Act*, vacating the tax field.

As a result, 19 BC bands developed and had the ITAB approve property assessment and taxation by-laws. They then issued property tax assessments to the railway for the right-of-way traversing the reserve lands. The railway, believing it held fee simple over the land based on the Letters Patent and the *Canadian Pacific Railway Act* of 1881 and the fact that it was already paying provincial taxes, refused to pay these assessments and applied for a judicial review of the notices of assessment. In 1995 a test case was heard in the BC Supreme Court involving First Nations Matsqui, Cook's Ferry, Seabird Island, Boothroyd and Skuppah.[11]

The trial judge found that the notices of assessment were invalid on the basis that the rights-of-way traversing the reserves were held by Canadian Pacific in fee simple determinable, and therefore were not considered lands within the reserves and were outside of the taxing authority of the bands. The judge also concluded that the tax by-laws were discriminatory in

[11] *Canadian Pacific Railway v. Matsqui Indian Band* et al, 1995

that only property interests of non-Indians situated in the reserves were made subject to taxation.

On appeal, the Bands argued that the lands were reserve lands because the *Railway Act* of 1888 prohibited the alienation of lands vested in the Crown. The *Indian Act* imposed limitations on the disposition of reserve lands at the time of conveyances, and that the federal government's authority was limited to the granting of an easement, not fee simple title. The railway argued that Parliament had "expressed a clear intention, through the adoption of the *Canadian Pacific Railway Act* , to extinguish Indian title with respect to Canadian Pacific's right-of-ways running through the appellants' reserve lands." It argued that the *Canadian Pacific Railway Act* of 1881 negated the provisions of the *Indian Act* or the *Railway Act* and that the lands were indeed fee simple.[12]

In January 1999 two of the three Judges of the Federal Court of Appeal ruled that CPR only had rights to operate equivalent to a license, rather than a fee simple interest in the land. Thus, the railway rights-of-way fall within the reserves and are therefore taxable by First Nations. One of the judges dismissed the appeal regarding the right-of-way on other grounds, leaving an uncertain ruling. With regard to the issue of discrimination, again there was a split decision with one judge finding that taxation of non-Indians was discriminatory. These different decisions caused confusion and uncertainty for both parties as to how a

[12] *Canadian Pacific Limited v. Matsqui Indian Band*, 1999, p. 77.

further appeal to the Supreme Court would be decided. For a review of the legal rationale in the decision *Canadian Pacific Limited v. Matsqui Indian Band*, see Appendix F.

In late 1999, railway and the five BC bands decided to seek a negotiated settlement rather than risk an uncertain Supreme Court ruling that could potentially jeopardize the land tenure of CPR's right-of-way and/or the tax exemption status of First Nations on reserve. The settlement required:

> 1) a change of approach and mind-set for the railway;
>
> 2) cross-cultural and political negotiations, addressing technical issues and manoeuvres in order to convey land back to the Crown, adding it to the reserve lands and creating an easement; and
>
> 3) the creation of specific regulations to address taxation concerns – the technical aspects of which had never been done before. These will be discussed in detail in the next chapter.

Milroy (2002) points out that First Nations and Aboriginal groups have expressed interest in resolving claims through mediation-assisted informal negotiation and other forms of alternative dispute resolution, rather than the more adversarial processes of courts or tribunals, but that there is often a need for an adjudication option as an incentive for negotiations. In the Matsqui case, the spectre of further legal costs, and a hearing and decision by the Supreme Court was a motivating factor for both sides. The negotiations described in the next chapter allowed for opportunity to understand each other's interests, acknowledgment of the past and the forging of a new relationship.

Chapter 4: The Matsqui Negotiations – A Case Study

This chapter will provide a narrative description of the negotiations and events that led to the two celebrations at Seabird Island Indian Reserve in 2001 and 2002. The description is based on a review of CPR files, documents provided by INAC, and interviews with CPR, First Nations and INAC representatives and their legal counsels.

Moving from Litigation to Negotiation

Following the 1999 Court of Appeal's mixed decision described previously, the bands could appeal to the Supreme Court of Canada. In October 1999, Canadian Pacific's Real Estate and Legal Services groups held a conference call to discuss whether to continue to defend their position or look at a possible settlement. According to the notes from that meeting, (CPR meeting notes, November 22, 1999) there was strong concern expressed over the potential loss of fee simple title and the implications of operating the railway through the reserves without owning the land. There was also discussion over whether there was a possibility of damages owed by the Federal government if the company did not hold fee simple title as per the *Canadian Pacific Railway Act* of 1881.

Internal documentation and executive briefing notes indicate the company was very cognizant of the changing legal landscape with regard to dealings with First Nations and there was discussion of the need for building new relationships. Management was also very aware of the potential negative ramifications of a further court decision that could usurp the control CPR had over the right-of-way and its operations within the reserve territories.

> We thought we had an unfettered right to the land. We didn't want to give it up. We looked at what we did want, which was the ability to operate. At the time there was a changing of the guard, old players in the company were gone. Finally, we said, "Okay, we have to transfer to fee simple interest." Some Executive members recognized it as a challenge and as an opportunity. We would have the ability to operate in perpetuity and reinvigorate our relationship with the Bands. But we had to convince Canada. (Paul Guthrie, VP, Legal Services, CPR, September 18, 2007)
>
> There were significantly different views in the company on how to approach resolution. Continuing litigation wouldn't do anything to either solve the problem or enhance the relationship between CPR and the First Nation communities. We decided to characterize it differently – from a long term and strategic outlook. The court decisions being made were making it more and more difficult. We had to be practical. The decision levelled the playing field and opened the door for both parties to remove uncertainty. It was an opportunity to find a way for our communities to work together. (John Walsh, VP, Real Estate, CPR, November 14, 2007)
>
> CPR made us go through the expense and hoops before finally conceding to negotiate. CPR's biggest problem was their legal counsel. Once there was a change of lawyers, there was movement. (David Walkem, Chief, Cook's Ferry Indian Band September 21, 2007)
>
> It got so deep, we couldn't quit. We were paying the lawyers so much. The Band Council was not too pleased, but we said it was best to get something out of it. (representative from Boothroyd Indian Band, November 20, 2007)
>
> We had dealt with CP for years and didn't have a particularly good relationship. John Walsh came with a different attitude. I remember his saying he was going out on a limb in working towards this agreement. The railway had to get over their cynicism; the Chiefs had to get over their distrust. They recognized the opportunity and showed real leadership. (Leslie Pinder, Legal Counsel, First Nations, November 21, 2007)

Constructing the Agenda & Building Trust

CPR's original objectives for entering into settlement discussions were articulated in several documents as:

- dealing equitably with all First Nations (negotiating with the first five bands initially),

- ensuring competitive and uniform taxation rates through a railway taxation formula which could be granted in lieu of taxes,
- defining CPR's interest in the land as a statutory right of way falling within Indian reserves, and
- ensuring operating certainty. (CPR e-mail from N. Emmott, November 17, 1999)

A meeting was held on November 22, 1999, with the company's Executive, and they were provided with an in-depth understanding of the history of the land tenure and First Nations claims. As a result, the CPR Executive team approved the plan to move ahead with settlement discussions. A meeting was quickly arranged and held on December 2, 1999, between representatives from CPR, including John Walsh, the Chiefs of the Indian Bands, their legal counsel and Chief Manny Jules of the ITAB. Urgency was required in order to determine within the month whether settlement negotiations were feasible prior to the deadline for the filing of an appeal with the Supreme Court of Canada.

The meeting was held in Vancouver at the offices of CPR's external legal counsel. CPR's internal notes of the meeting (CPR meeting notes, December 2, 1999) indicate that both CPR and the Indian Bands reviewed their objectives and found that they were consistent with each other's. According to several of those present, the Indian Band's and members of their legal counsel spent some time reviewing historical grievances with the railway.

> The historical context was important. The Chiefs and their Council brought up a number of issues the Bands had with CP and our history. They had concerns with the lack of communication and our previous relationship. It was important for them to give their view of the history and relate it. It was difficult to respond, as we weren't personally associated with the history. There were sensitivities over how the land was acquired. Were they properly compensated for the right of way? This was more directed at Canada. We listened and respected what they were saying and understood their feelings. We acknowledged the history. "Let's be forward looking

> and build a new relationship". (Dave Courville, Director, Real Estate, CPR, September 20, 2007)
>
> We didn't know how to deal with them. Do we deal with the lawyer or the Chief? We tried to be very respectful. This was business for us, but they live there. It was a big issue for them. I remember they drew a picture of the reserve and the river with the track in between to illustrate the impact of the railway. We recognized this and respected it, but it was a slow process. (Paul Guthrie, VP, Legal Services, CPR, September 18, 2007)
>
> The First Nations had legitimate concerns over progress of movement on issues generally. We encountered a lot of defensiveness in our first meeting; their lawyers weren't sure where we were coming from. I have to give credit to all three of the lawyers representing their First Nations clients. They are passionate and were advising their clients appropriately. They brought up past injustices and I said I could only talk about the matters that we could address, what I have control over. We can talk about the past but what about going forward? We had to find a way to get to common ground on the basis of a going forward agreement, in realistic terms. Otherwise there was nothing to talk about. It quickly moved from confrontation to collaboration. Both parties recognized neither one of us is going anywhere. We got alignment quickly. (John Walsh, VP, Real Estate, CPR, November 14, 2007)
>
> It was a learning curve for John Walsh. He was cold when he first started but he warmed up. The initial dialogues had lots of rhetoric on the past. He took it well. He would sit and listen to all the historical stuff. He listened and tried to understand, and he gained respect. (Fred Sampson, Chief, Siska Indian Band, November 20, 2007)

As noted in the company's minutes of the meeting, John Walsh acknowledged that Canadian Pacific had "perhaps incorrectly approached things in the past and wanted to have a better relationship as neighbours" (CPR meeting notes, December 2, 1999). He emphasized that he was looking for a forward-looking solution and settlement to the issues. It was also noted that Chief David Walkem of the Cook's Ferry Indian Band had indicated that "he was encouraged and intrigued by the corporate memory that Canadian Pacific had not been a good neighbour" (CPR meeting notes, December 2, 1999).

A technical solution to the land tenure issues was put forward by Chief Manny Jules of the ITAB, suggesting that to avoid involving the province, the land be transferred back to the

Crown. It was agreed that the question of the discrimination issue that CPR had raised in the litigation would be dropped and that CPR would provide an initial proposal by December 10, 1999 (CPR meeting notes, December 2, 1999).

Defining the Issues

A letter was sent to the three First Nations' legal counsel on December 10, 1999, outlining a proposal, subject to senior management approval. On January 25, 2000, a briefing was conducted at CPR for the executive team outlining the historical background, the economic and legal issues and settlement possibilities. According to John Walsh (November 14, 2007), despite some of the executives' reluctance and belief that the company should continue to fight for the land in Court, they were able to gain concurrence to move forward based on the history and lack of evidence of surrender of the lands by the Indian Bands to Canada. The CPR negotiating team was given a mandate to enter into negotiations and obtain a go-forward settlement agreement that would provide certainty of operations and competitive and uniform taxation rates.

On March 31, 2000, the First Nations legal counsel responded positively to CPR's December 10th proposal. However, at a meeting on April 5, 2000, between CPR representatives and the First Nations' lawyers, it was explained that the Bands were uncomfortable with the proposed taxation formula that would be granted in lieu of taxes and the land tenure proposal by CPR. They wanted the land designated clearly as Indian reserve.

> Our mandate was to produce a way so that the Bands had the ability to tax and maintain First Nations' jurisdiction over the land, recognizing CPR's need to operate. (Graham Allen, legal counsel, First Nations, November 21, 2007)

CPR responded on April 14, 2000 in writing, stating that it was open to considering the request. John Walsh, signatory to the letter, specifically added wording to say how pleased he was with the constructive cooperative approach taken by the parties. (Letter from CPR to First Nations counsel, April 14, 2000) The First Nations' solicitor, Graham Allen, responded on April 25, 2000, suggesting ways to achieve certainty of operations and taxation, and the land designation required. He stated that there would be a high reliance on Indian & Northern Affairs Canada and that it will be up to the Band Chiefs and Councils to decide on whether they should proceed.

Technical Challenges & Looking to the Future

On April 27, 2000, a meeting was held with all legal counsel teams to look at the technical challenges of providing CPR with a determinable fee interest in the land. At the meeting it was agreed that implementing a tax regulation under the *Indian Act* to ensure a fair and equitable tax rate would be required. Therefore, a meeting with the Deputy Minister of the Department of Indian Affairs would be set up in the summer of 2000.

The question of back taxes was also raised at this meeting and CPR indicated that if the land issue could be resolved, it was possible something could be done. It was also agreed that a dispute resolution process to deal with future concerns would be included in a settlement document and that CPR would also proceed with a technical survey of the land in question and look for surplus land that could be included. The tone of the CPR meeting notes is

positive and solution-focused and an Agreement in Principle was developed shortly thereafter (CPR meeting notes, April 27, 2000).

At this point, the stakeholders moved into a collaborative effort in ensuring success through a process driven approach that included technical meetings, weekly conference calls and on-going communication with key stakeholders.

On May 12, 2000, Leslie Pinder, legal counsel for several of the First Nations and the Indian Taxation Advisory Board met with each member of the ITAB to provide them with background on the settlement negotiations and the proposal for tax regulations. She was able to gain their support and formal agreement at the next ITAB meeting. In May 2000 another extension for the Indian Bands to file an appeal with the Supreme Court of Canada was granted until September 30, 2000.

Over the next several months, drafts of a potential settlement and right-of-way agreement, as well as a draft tax regulation were exchanged between the parties in preparation for the meeting with representatives of Indian & Northern Affairs Canada. On August 14, 2000, the Indian Bands and CPR legal counsel met with the Assistant Deputy Minister of Lands and Trust Services and a representative of INAC in Ottawa. No notes were made available regarding that meeting, however, it appears that despite being open to the proposal, the government representatives would require assessment of a number of aspects of the potential agreements. The CPR and First Nations lawyers came away feeling less than encouraged (CPR files, 2000).

On August 25, 2000, a letter was sent from CPR's legal counsel to the Indian Bands' legal counsel referring to a commitment to provide a compensation proposal. The letter mentioned CPR's intent to enter into a go-forward settlement and acknowledged the need to compromise given the First Nations' interests and the new relationship between the parties. The letter outlines concessions offered by CPR, including land, a lump sum, and revenues from utility contracts on the right-of-way.

> CPR believes that its proposal is an acceptable compromise that balances CPR's desire for a going forward agreement with your clients' desire for compensation and recognizes the interest of the communities that will be impacted by the Settlement Agreement. (Letter from John Olynyk, CPR Legal Counsel August 25, 2000).

The company also provided separate letters outlining supporting calculations to assist in providing explanations to each First Nation and the Canadian government. Later in September, when one of the First Nations' legal counsel team requested a description of the tax calculations and schedule of encumbrances to assist in meetings with the individual bands, it was noted by the CPR legal counsel in a follow up e-mail that, "We will need to find a way to provide him with the comfort he needs within the limits of CPR's confidentiality requirements." (E-mail from John Olynyk, CPR Legal Counsel, September 7, 2000)

Gaining Support from Canada

On October 3, 2000, First Nations' legal counsel Graham Allen wrote to the Assistant Deputy Minister requesting his cooperation in moving the settlement forward. On October 10, 2000, the First Nations' legal counsel Leslie Pinder, advised that a new Assistant Deputy Minister of Lands and Trust Services had been named at the Department of Indian Affairs.

John Olynyk, CPR's legal counsel, wrote to the Executive Assistant of the Minister of Indian Affairs on November 1, 2000, to request Canada's "active support in assisting them in concluding and implementing ground breaking agreements in the short time available to them" (Letter from John Olynyk, CPR Legal Counsel, November 1, 2000).

> We negotiated the deal quickly with the First Nations. CPR's primary interest was in a competitive tax rate so Canada's agreement was necessary to enact regulations under the *Indian Act* to limit the taxation rate. This had never been done before. There was a lot of initial scepticism on the part of Canada. They were unsure if they could do it. Rick Simison was able to get it through. (John Olynyk, CPR Legal Counsel, September 11, 2007).
>
> It seemed that the federal government, initially, was going to scuttle it. The Department of Indian Affairs and Justice Department seemed to be trying to screw it up. We got insight into the Government discussions and where they weren't understanding us. We were able to make corrections and dealt with the misunderstandings. (Leslie Pinder, First Nations Legal Counsel, November 21, 2007)

A meeting was held on November 14 and 15 with the First Nations legal counsel, CPR representatives and legal counsel, and representatives from INAC. According to CPR files, both the company and First Nations expressed concern over Canada's lack of response to and support for their request for assistance in implementing the settlement agreement. The government representatives stated that Ottawa's position was that the question of the land should be decided through litigation. John Walsh responded strongly that they were not looking for an opinion on the litigation but rather were looking for assistance to conclude the agreement.

With regard to the tax regulations it was stated by the representatives of INAC that the Minister had some concerns about making binding regulations that could pose future

problems. CPR's notes indicate that there was a softening of rhetoric half way through the meeting, allowing for discussion on the role of INAC and its fiduciary and statutory duty to all First Nations, which in effect meant that it should act as a facilitator to an agreement that would be beneficial to the First Nations. There was further discussion on the technical requirements under section 53 of the *Indian Act* regarding designation of the land, as well as the requirement for consultation with First Nations and other affected jurisdictions.

As a result of and following the meeting, a draft communication strategy was proposed on December 1, 2000, by Leslie Pinder, First Nations legal counsel, to ensure notification of other affected governments and First Nations. On December 15, 2000, Rick Simison, manager of lands at INAC sent an e-mail stating that Canada was willing to "initial any final negotiated settlement" (CPR files, December 15, 2000).

> After the Senior Policy Committee rejected the request, the ADM and Director General responsible within INAC asked me to take it on and try to fix it if possible. I took a phased approach starting with exploratory talks, then negotiations and implementation. This was essentially a tax and title issue. CP wanted certainty in terms of rail operations, title and tax assessment. The First Nations wanted the land recognized as theirs, with tax jurisdiction and revenue from the utility contracts. I had an excellent regional team set up, including Lynda Leming, Cindy Clarkson and members of the Department of Justice. After exploratory discussions starting in the fall of 2000 until, I think, February or so, we had the elements of a deal. I received a full mandate from the Policy Committee and Minister, and we proceeded with negotiations and implementation. We had the whole thing worked out and implemented in 14 months. (Rick Simison, manager, lands, INAC, October 24, 2007)

Shortly thereafter, however, CPR was advised through the Bands' legal counsel that the Assistant Deputy Minister (ADM) of Indian Affairs had misgivings over using tax regulations to settle private litigation and asked that the parties look for an alternative.

On January 1, 2001, John Walsh wrote to the ADM requesting a meeting and support "to create the conditions necessary to conclude the negotiations successfully." He outlined the legal regime and why a regulation was appropriate. He requested confirmation of the terms that would be acceptable to Canada. Mr. Walsh also pointed out that it was Canada who apparently failed to grant fee simple title as intended in 1881 and mentioned the political fallout if the settlement negotiations failed. He explained that there would be irreparable harm to relationships between the First Nations and municipalities in BC, as CPR would be forced to recover the taxes paid to these jurisdictions, all as a result of inflexibility by Canada (letter from John Walsh, VP, Real Estate, CPR, January 1, 2000).

On January 16, 2001, the ADM met with John Walsh and Chief Manny Jules of the ITAB to discuss his concerns and was persuaded to change his mind and agree to move forward with the tax regulation. First Nations' legal counsel sent a letter to CPR's counsel expressing their thanks and congratulations on a successful intervention in Ottawa on January 22, 2001.

> Somehow it turned around. It was an unusual situation where CP was on the side of the First Nations. Canada was concerned about the liability for the original takings. It should have been minimal takings. They were nervous with the schedules and new legislation. John Walsh had to push it upstairs and they committed to the deal. It had to be turned around individually. (Graham Allen, legal counsel, First Nations, November 21, 2007)

On January 23, 2001, CPR representatives met with members of the BC Ministry of Transportation (MOT) to provide them with a history of the settlement agreement. The MOT expressed concern regarding lack of consultation with the Province and this was dealt with based on the tight time frames and the negotiation of the best terms possible. A commitment was made to provide further information as things progressed.

Agreement in Principle

On February 9, 2001, the Department of Indian Affairs Senior Policy Committee met and approved the agreement in principle, subject to review by the Minister. The agreement was signed on February 15, 2001.

On March 2, 2001, John Walsh wrote to the Minister of Indian Affairs and Northern Development, Robert Nault, thanking him and his staff and officials for their assistance in concluding the agreement in principle. Mr. Walsh mentioned that Mr. Nault had made comments earlier in the previous year about the importance of First Nations and the private sector working together and resolving disagreements in a cooperative and forward looking manner. He suggested that the Minister could point to these agreements as an example of cooperation and mutually beneficial arrangements and requested his further assistance, support and encouragement to complete the agreements.

A meeting was held between CPR representatives and Rick Simison on March 15, 2001 to discuss INAC's concerns regarding the proposed agreement. Internal correspondence from CPR indicates that while there was quite a list of concerns and some resistance to the deadlines proposed, Mr. Simison also had solutions and the meeting was very constructive.

A copy of the Matsqui Agreement was signed by the Matsqui Band Chief on March 31, 2001, and includes wording common to all five agreements, as well as specifics regarding the land descriptions and utility contracts, etc.

Ratification & Designation Vote by the Five Bands

In April 2001 several meetings and conference calls occurred between the parties regarding the quit claim and land survey process. Cindy Clarkson, regional conveyancing lead with INAC, developed a work plan to assist with the implementation of the ratification and designation vote.

> I was the regional conveyancing lead and logistics person. I worked with CPR with respect to what lands were involved, coordinating the surveys, the proper legal descriptions and all the encumbrances. I coordinated all the environmental assessments and financial information.
>
> I also coordinated the ratification and designation votes, which were done at the same time. Under the *Indian Act* the bands had to designate the land for the purpose of the right of way. We held all five votes at the same time and had to send out information packages and hold information sessions for the band members ahead of time. In 2000, the legislation was changed to include off reserve band members. They were all over the world and they counted in the electorate. Under the *Indian Act*, you have to have 50% plus one of the electorate vote and then 50% plus one of that group in favour. It is a horrendous logistical process at the best of times, but the First Nations wanted the vote done by June 22nd and the tax regulations done for the end of November so CPR would pay taxes to the First Nations and not the Province. We had to make all band members aware that there was no time for a second vote in order to get the taxes for the next year. The drop-dead date to get the information package out to off-reserve people was May 9th. It was hellish but there was an amazing spirit of cooperation. (Cindy Clarkson, Analyst, INAC December 12, 2007)

On April 20, 2001, a letter was sent to provide an update and outline the settlement from the First Nations Bands to the other BC First Nation taxing bands that had been waiting for the outcome of the litigation and settlement procedure. A copy was sent to Canadian Pacific Railway as a courtesy. The letter stated that the First Nations had fought hard and reached a settlement, which was a victory. The bands emphasized that CPR did not own the land and provided the history and basis of the settlement. The letter went on to say that the

settlement is future oriented and important in that it is a start of a new relationship based on CPR's intention to respect their jurisdiction and community needs and it also indicates the First Nations are willing to compromise and be good neighbours. It states that the agreement is the end to the court case and does not bind the other bands, but that CPR is willing to negotiate with them and that the ITAB is willing to host an information meeting on the agreement. A letter was also sent to the affected municipalities and the BC Minister of Transport, outlining the basis of the agreement (CPR files, April 20, 2000).

In preparation for the ratification vote to be held on June 22, 2001, the First Nations legal counsel prepared an information package that was mailed out to all Band members in early June. The document provided the history of the court case, an outline of how the settlement negotiations were conducted, the terms of the proposed settlement, the consequences of accepting or rejecting the settlement, and an outline of the referendum and ratification vote process. There was emphasis on building a new relationship with Canadian Pacific Railway and the new forum for conflict resolution. The document includes the statement that (INAC) "had to be involved because of their responsibilities of management of reserve interests under the *Indian Act*" (Information Package, June 2001).

Information sessions were arranged by INAC in June 2001 for all of the Bands where the Bands' legal counsel explained the information package and settlement document.

> I attended three of the information sessions. We explained the agreement and process to the whole community. They all said, "yes". It was tremendous. (Graham Allen, Legal Counsel, First Nations, November 21, 2007)
>
> The Band members asked tough questions. Why were we doing it? We explained we were looking for a way to move on and try to address issues. We compromised on

> issue of back taxes to get a deal. I explained it was the last injustice to get to taxation. (David Walkem, Chief, Cook's Ferry Indian Band, September 21, 2007)

The ratification and designation vote was held on June 22, 2001, and passed with the votes as follows:

Band	Possible Votes	Yes	No	Spoiled
Boothroyd	109	103	0	0
Seabird Island	481	262	9	1
Cook's Ferry	215	155	2	2
Matsqui	112	62	2	0
Skuppah	58	37	1	0

> On the day of the vote we were going around to all the polling stations. There were a few band members in Vancouver and my manager and I met them and took their ballots up for them. Chief Walkem kept in good communication with the other First Nations. He had some of his people come down and track people from other Bands down to ensure they knew about the vote and actually voted because some of the First Nations' votes were very close to not meeting the 50% plus one threshold. (Cindy Clarkson, Analyst, INAC, December 12, 2007)

On June 25, 2001, the First Nations wrote to the Province of British Columbia notifying them of the change in taxation. On the same day, an internal CPR e-mail was sent outlining the result of the votes with a jubilant response from Dave Courville, "Great news. Let's make some history!!" (CPR correspondence, June 25, 2001).

A draft media release was prepared by CPR's Communication & Public Affairs referencing constructive dialogue and cooperation between CPR and the First Nations, and the agreement as evidence of CPR's commitment to improve relationships with neighbours and communities. It stated that avoiding legal action benefits all parties and will ensure mutual understanding and avoid conflict in years to come (CPR correspondence, June 2001).

As can by seen by the foregoing, the negotiations and process were dynamic and interactive. The parties responded to issues in an open, respectful manner, keeping in mind their own and others' interests. The communication, cooperation and trust that were built throughout the process was reflected in the descriptions of the celebrations.

Celebration of Ratification of the Agreement & Designation of the Right-of-Way

On July 4, 2001, a celebration was organized by the First Nations and hosted at Seabird Island Indian Reserve. Representatives of the CPR, First Nations, ITAB and Canadian government were present. An honour procession was held and gifts exchanged.

> There were really no cultural differences in the negotiations. We just took care of the land itself. We showed our culture and traditions at the ceremony. The land is our culture in itself. The ceremony was to break bread and thank everyone. It was a celebration of life through traditional songs. We stand people up and blanket them - a blanket ceremony. We do that with all our students at the end of the year. It is a symbol of letting go of the past year and moving into the next year. (Clem Seymour, Chief, Seabird Island Indian Band, September 21, 2007)
>
> Through the process we learned the importance of the land to the communities and the railway's impact. We gained insight into their world. We always felt very welcome and they were very kind hosts. The celebrations and blanket ceremony were a powerful experience." (Dave Courville, Director, Real Estate, CPR, September 20, 2007)
>
> I remember the ceremonial procession. There was a presentation of gifts. We've had 500 years of trinkets. That wasn't what it was about. We could feel the difference in the room. There was a positive energy and sense of victory. Those wins are rare for us. (Fred Sampson, Chief, Siska Indian Band, November 20, 2007)

On July 10, 2008, Chief Manny Jules of the ITAB sent a letter commending the First Nations, their legal counsel, CPR and the Department of Indian & Northern Affairs Canada

for their hard work, dedication and professionalism. The letter outlined the successful agreement and offered to hold a meeting with the other interested bands.

Implementation of Land Designation & Tax Regulations

The First Nation Chiefs signed the new land designations in July 2001 and on September 19, 2001, the Special Committee of Cabinet approved the pre-publication of the *Regulatory Impact Statement* and proposed taxation regulation in the *Canada Gazette*. The Impact Statement outlined the history, regulations, alternatives and the impact on the interested parties, including Canadian citizens.

> "The agreement will appeal to the fair-mindedness of average Canadians in seeing it as right and proper that this railway corridor, originally expropriated from the First Nations and running through their reserves, is now confirmed as reserve once more, and as a taxable interest that provides much needed revenue to the community. The agreement, to the degree that it is a win-win negotiated settlement for all parties, shows these and other First Nations that the negotiation of long-standing disputes is practical and achievable in a spirit of compromise and goodwill, and supported by the federal government, as opposed to pursuing litigation or other courses that First Nations may choose. Canada, as a whole, benefits because CPR, as a rail company of national importance to the country, achieves commercial certainty through this settlement and tax regulations. The right-of-way is part of CPR's main rail corridor via the Fraser River valley and its continued commercial viability is significant to B.C.'s and Canada's economic health derived from the efficient movement of goods by rail through the Rockies." (Canada Gazette, 2001)

On September 24, 2001, Rick Simison of INAC sent an email to Graham Allen, First Nations' legal counsel, advising that he had secured a $125,000 financial contribution for the five First Nations in recognition of Canada's commitment to the settlement. He noted that the consultation process was complete, having received sign off from the municipalities. He stated that they had implemented the first ever, regulated Indian Taxation Regime, and

referred to it as a significant step forward. This e-mail was passed on by Mr. Allen to Canadian Pacific and was met with the comment that it was great news and Canada's gesture was much appreciated (CPR files, September 24, 2001).

On October 18, 2001, the Governor in Council accepted the new designations of the right-of-way lands as easements. In anticipation of the passing of the tax regulations, plans were made for another celebration at Seabird Island to include the Minister of Indian and Northern Affairs. CPR was approached by the First Nations and agreed to fund the celebration. On November 5, 2001, INAC provided approval of the environmental assessment.

On November 8, 2001, Rick Simison sent an e-mail to the CPR and First Nations' legal teams advising of the passing of the regulations on November 7, 2001, and the signature of the Governor General on that date. He stated, "Congratulations to us all and our First Nation Partners on a major achievement."

The approval of the regulations and registration of the land designation met the 2001 deadline for taxation purposes for the First Nations. On November 21, 2001, the First Nations filed a discontinuance of the litigation and option of appeal with the Supreme Court of Canada and all parties agreed to a release from the confidential obligations surrounding the settlement agreements, with the exception of the schedule outlining revenue sharing. On December 21, 2001, the third parties to CPR's utility licensees were apprised of the agreement.

Celebration of the Historic Taxation Agreement

On January 17, 2002, the second ceremony at Seabird Island was held. A press release was issued that stated that the First Nations bands and CPR were gathering to celebrate a historic taxation agreement and the implementation of the first regulations under the *Indian Act* to assist in the valuation of property and the setting of property tax rates on reserve. The following quotes were contained in the release:

> "We've already held one celebration at Seabird Island to acknowledge the strong "yes" vote for settlement from all five Bands. Now we'll be celebrating again to say 'well done' to everyone involved." Said Councillor Clem Seymour, Seabird Island.
>
> "This agreement is the result of constructive dialogue, collaboration and co-operation between CPR and the five First Nations. It is tangible evidence of the meaningful commitment the railway has made to improving relationships with neighbours and communities." Said John Walsh, VP of Real Estate at CPR.
>
> "This landmark agreement is an excellent example of how working together can lead to innovative solutions that can benefit all parties," said Senator Mobina Jaffer.
>
> INAC, Press Release, January 16, 2002

Despite some postponement of the next round of negotiations with nine other BC Indian bands due to new court decisions requiring analysis, negotiations eventually moved forward following a similar model to the 'Matsqui Settlement Agreement'. Once again a signing ceremony was held in 2004.

When asked how they felt about the process and whether the negotiations were a success, key participants said:

> We got the land back and were officially recognized. All parties walked away feeling okay. No one felt shafted. (David Walkem, Chief, Cook's Ferry Indian Band, September 21, 2007)
>
> I'm very proud of what we've done. Traditionally the government and corporations have looked at the question of certainty through extinguishments of title. When looking at certainty, it is very important to look at what the parties really need. It makes a huge difference. (Leslie Pinder, Legal Counsel, First Nations, November 21, 2007)
>
> The value of the time taken and the process followed during the negotiations with the First Nations and Canada were worth as much or more than the negotiated settlement in that it allowed for the development of a good working relationship between CPR and the First Nations as well as with federal officials in the Department of Indian Affairs and Northern Development. (John Olynyk, Legal Counsel, CPR, September 11, 2007)
>
> There was a willingness to come off long held positions and to open our minds to solutions that work for both parties. By reaching an agreement with CPR, a prominent Canadian company, the First Nations demonstrated that they can do deals with corporate Canada. (John Walsh, VP, Real Estate, CPR, November 14, 2007)
>
> The process was very enjoyable and constructive. It doesn't happen very often – the kind of chemistry that occurred. (Graham Allen, Legal Counsel, First Nations, November 21, 2007)
>
> It was a win/win situation. There was a genuine feeling of mutual celebration at the ceremony. I've never seen that degree of good feeling. I walked in beside Chief David Walkem, the doors to the community hall were opened and there was a drummer and a chanter leading us in, the negotiating teams, the legal counsel, First Nation Chiefs and elders, all in robes and regalia. Inside was the whole community and representatives of the other First Nations involved - perhaps 300 people standing up, some with hands held up in traditional welcome. I, as well as the others, felt very honoured to have played a part in helping bring about this settlement for these folks. We walked in slowly and circled the hall. This is among the most memorable and cherished memories of my experiences over a 35-year federal career at INAC. (Rick Simison, retired Manager, Lands, INAC, October 24, 2007)

As stated initially, through the dynamic and elicitive negotiation process utilized by the parties, it appears that a new relationship developed between CPR and the First Nations, and INAC. However, the First Nations were much more low key in their response to the question of success. The next chapter will examine the case study from a critical theory

perspective. It will also examine several key turning points in the negotiations where the three parties had to shift from old viewpoints to new perspectives on their relationships.

Chapter 5: Case Study Analysis

Chapter 5 will provide an analysis of the interactions from the context of narrative, identity negotiation and critical theory and through the framework of the three hypotheses presented earlier, i.e. the case analysis will identify:

1. time and effort expended by the socially dominant railway in building trust and inclusion to gain an agreement;
2. evidence of successful interactive, cross-cultural communication and identity negotiation; and
3. a process that acknowledged and respected the differences between the Western and Aboriginal paradigms and that incorporated both worldviews;

1. Building Trust

In examining the process used, correspondence on file, and interviews with key stakeholders, it is evident that CPR put deliberate effort into building trust with the First Nations. These efforts included open and honest discussion of their objectives and limits, committing time and resources to the technical investigations required, and taking up the role of championing the agreement with the federal government. CPR representatives also spent the time to listen to and acknowledge historical grievances, kept communications open and responded to both the First Nations' needs and those of the federal government. A structured process was implemented to ensure that technical requirements were covered off and no steps or commitments were missed. This included regular meetings and conference calls, check lists and follow-up.

Once the First Nations and their legal counsel accepted CPR's commitment, they too took action to build trust within the wider First Nation communities by communicating the nature of the agreement to ITAB members one-on-one, and then as a group. The active role that INAC took in organizing the technical requirements and ratification vote, including developing the information for the information packages, also showed commitment and established a new foundation for their relationship with the First Nations in these matters. Through this process, all parties had to reframe their own roles and identities.

2. Identity Negotiation & Cross-Cultural Communication

Following is an examination of some of the turning points in the process that led to the renegotiation of the historical relationship. Fisher (1984) posits that human communication is a form of narrative that can reconstitute reason and rationality and offer a way of resolving problems of public moral argument. The conflict and moral argument between the First Nations and Canada and the Canadian Pacific Railway goes back over 150 years. As noted by other theorists, conflict, particularly over land and resources, may take on increased symbolic significance and often escalate over time, becoming embedded and maintained within individual and collective identities and narratives (LeBaron, 2003; Maiese, 2003; Rothman & Olson, 2001).

> Intractable identity conflicts typically involve a history of colonialism, ethnocentrism and emerge out of a history of domination and perceived injustice (Maiese, October 2003).

CPR identified improving relationships with the First Nations as one of the key objectives for participating in the negotiation process. CPR articulated this goal at the first meeting with

the First Nations and maintained and consistently reflected it in their written and verbal communications and actions throughout the process. The various information packages (2001) that went out to the communities for the ratification vote indicated that the Band Chiefs believed that, "The settlement is aimed at starting a new relationship with CPR, based on that company's intention to respect the Band's jurisdiction and your community's needs."

Other relationships that were influenced were those between the First Nations and Indian and Northern Affairs Canada and CPR and the internal relationship within the government between INAC and the Department of Justice. In order for the parties to have reached a successful agreement and to rebuild or forge new relationships, I believe there was some reframing of identity or beliefs on the part of all three parties, including maintenance and/or restoration of face[13]. Evidence of this is reflected in several key turning points in the negotiation process. These included:

- CPR's decision to acknowledge that they may not own the right-of-way lands running through the First Nations' reserves;
- CPR's acknowledgement that they had "perhaps incorrectly approached things in the past and wanted to have a better relationship as neighbours";
- the decision of the Assistant Deputy Minister of Indian and Northern Affairs Canada to support the agreement and facilitate the enactment of the tax legislation, and
- the decision of the First Nations to look to the future relationship and economic gain, and let go of the need for restitution for potential back taxes.

[13] Ting-Toomey has examined conflict face-negotiation theory and asserts that face concerns are linked to affective-based identity issues in conflict. According to Ting-Toomey (2005b), "The concept of *face* is about identity respect and other-identity consideration issues within and beyond the actual encounter episode." p. 73.

The following section will examine the collective or organizational identities of the key parties involved in these situations and how they were able to reframe their perspectives, thus moving the negotiation and agreement forward.

Canadian Pacific Railway

As outlined above, in 1995 CPR challenged the validity of the First Nations' property tax assessment notices. At the time, the company was of the firm belief that the rights-of-way did not fall within the taxing authority of the Bands, and in fact were owned by the railway in fee simple. CPR's belief that they had ownership of the right-of-way stems from the colonial history of Canada and was core to its corporate identity as a Canadian corporation that helped build a nation.

As mentioned by John Walsh, VP, Real Estate at CPR, "there were significantly different views in the company on how to approach resolution". It was after a 'history lesson' that the executive members agreed to look beyond the issue of ownership, to the issue of what was necessary for the continued operation of the company. Initially, CPR had put forward the suggestion of a payment in lieu of taxes, which was rejected by the First Nations. It took some time before it became clear to CPR that …"The tax money wasn't really it. They said, 'we want the land as fee simple' " (Paul Guthrie, VP, Legal Services, September 18, 2007).

It was at that time that several other core components of the CPR corporate identity, outside of nation builder and land-owner, came in to play. These identity elements include being a transportation supplier, and an innovative and continuously improving company.

A review of CPR's current web site shows that Canadian Pacific Railway's corporate identity emanates from the challenge of successfully building a transcontinental railway that helped build the nation of Canada, as well as that of a Class 1 Freight Railway competing in a global economy. The quote below was taken from the CPR website 'General Public' section and reflects the current public face or corporate identity of the company.

> For almost 120 years Canadian Pacific Railway has been part of the fabric of this great nation. The same application of experience and ingenuity that allowed us to build a railroad through some of the toughest terrain on earth continues to power our business solutions. Our focus has changed since we began binding a nation together in 1881, but we continue to fulfill our original mandate – linking people to each other and to the world. Today we move the goods that move North America's economy. …
>
> So, where does CPR go from here? If the last hundred and twenty years is any indication, anywhere our minds – and our ingenuity – can take us. (CPR website, retrieved on January 8, 2008 at www.cpr.ca).

The 'Community' portion of the CPR 'General Public' website also emphasizes the need to understand and address the issues of the communities through which CPR does business.

> At CPR, we believe our success depends on more than our ability to understand our business and customers. We must also appreciate the issues that matter to the communities in which we live and do business - issues such as safety, quality of life and the environment.
>
> To meet our commitments, we have launched a new community investment program called **Community Connect**. This program reflects our historic ties with communities along our tracks, and our goal of making a significant and lasting contribution to the quality of life in these towns and cities. It's about connecting North Americans with their history and with each other to build stronger communities. (CPR website, retrieved on January 8, 2008 at www.cpr.ca).

CPR was able to leverage other components of its corporate identity and reframe the identity of nation builder/landowner by raising internal awareness of the history of BC First Nations and the treaty process, as well as of the impact of the railway on these communities. Influencing this about-face were the recent Canadian court decisions around Aboriginal title and rights, as well as a change in CPR's executive, senior management, and legal counsel. This was also facilitated and enhanced by an evolving focus on community investment, social responsibility, and negotiation versus litigation. It appears that once the decision or reframe had been made, the role of good neighbour and innovative problem-solver took over.

First Nations

Native title is very much connected to Aboriginal identity. Differentiation between the various First Nations' identities is bound up in the establishment of land-based authority.

> Native title provides many claimants with the first opportunity to assert ownership of land and may be the only opportunity for them to express the deep hurt they have embodied as a result of colonization. It is often seen as the only vehicle of achieving recognition and respect, and any insistence upon extinguishments of native title denies this urgent need. (Bauman & Williams, 2004, p. 7).

The five First Nation Chiefs and the communities involved in the Matsqui agreement have all been impacted in a similar manner by the history reviewed above. However, each Chief represents a separate Band with differing interests. According to Dickason (2002), Native political institutions are varied but there are broad similarities in style and role of native leaders. The identity of the role of the Chief is based on First Nations' approach of

consensus politics. Within that role the Chief must maintain respect and personal trust of his/her people and guide decision-making through consensus and group harmony, as well as ensuring the basic economic needs of the community. In this case, the five Chiefs were initially sceptical of CPR's intent and were surprised and "intrigued" when CPR acknowledged that they "perhaps incorrectly approached things in the past". This acknowledgement and respect of their common position allowed the Chiefs to move forward and participate in finding a way to regain jurisdiction over the land, and a means for income for their communities.

As mentioned by Leslie Pinder, Legal Counsel for the First Nations (November 21, 2007), the Band Chiefs "showed real leadership" by recognizing the opportunity to negotiate with the railway. Given the past history, it may not have been easy for them to say to their communities that they were dealing with the railway. The issue of jurisdiction over the land was critical to gaining the communities' buy-in and ratification. As several people involved in the process mentioned, "it was always about the land". By acknowledging that the railway may have mishandled the relationship in the past, the company opened the door for further communication from the Chiefs and the expression of their requirement to regain tenure of the land, as well as the taxation monies. This is a good example of the dynamic and elicitive dialogue outlined as key to successful negotiations with Aboriginal peoples by Victor (2007), and Rothman's interactive negotiation process (Rothman & Olson, 2001).

The Chiefs themselves appear to have managed their role and identity by tactically relying on their legal counsel to act as their representatives. Between the five bands there were three highly experienced legal firms with expertise in the area of Aboriginal land claims

representing them in the negotiations. The lawyers interviewed for this paper were passionate about the rights of First Nations, were extremely experienced in Aboriginal law, and provided tactical flexibility in that they could move between two worldviews and act as a buffer between the Chiefs and CPR and the Chiefs and their constituents.[14]

Michelle LeBaron (2008) speaks to the need for cultural fluency in representative negotiations and the need for awareness of the culturally bound worldviews of all the parties, including their own.[15] As evidenced below, the Chiefs expressed appreciation for their legal counsel and the knowledge they had of First Nations viewpoints.

> I give our legal counsel a lot of credit for getting us to a common position or mindset to move forward. They were probably more instrumental in convincing us to go forward because we wanted a just agreement. They have years of experience with Aboriginal communities and understood where we were coming from. (David Walkem, Chief, Cook's Ferry Indian Band, September 21, 2007)

While their legal representatives may have played more of a direct role in the negotiations, the Chiefs were always invited to the meetings and participated in the discussions and kept up to date on progress. Ultimately, the First Nations communities through the ratification and designation votes made the decision as to whether the agreement was acceptable.

The shifting or reframing of identity on the part of the First Nations that contributed to the ratification of the agreement was a shift from seeking justice for past wrongs, to that of looking to the future. This shift was reflected in the fact that the Chiefs moved off their

[14] CPR had also retained legal counsel that was experienced in Aboriginal and land claims issues and who could assist them in principled negotiations with a relational, go-forward focus.

[15] Representative negotiation is negotiation conducted on behalf of disputing parties. (Hanycz, Farrow, & Zemans, 2008, p. 6)

position of requiring payment for back taxes. This compromise allowed them to position themselves as flexible and reasonable negotiators and business partners. The information packages mailed out to band members and the subsequent information letter to other BC First Nations outlining the agreement stated that through the agreement, "CP acknowledges the Band's property taxation jurisdiction over its right-of-way across the reserve", and that the signatory Chiefs "hope that these governments (the province and municipalities of BC) will see the Band as willing to compromise and work on a good-neighbour basis." Obviously, by emphasizing this point, the hope is that in the future governments and corporations may take the less costly, timelier and potentially more successful route of negotiation with First Nations, versus litigation.

Indian and Northern Affairs Canada

When the First Nations and CPR legal counsel approached representatives from Indian and Northern Affairs Canada in 2000 regarding the proposed agreement and requirement for tax regulations, they did not believe INAC representatives responded encouragingly. According to First Nations legal representatives who were in attendance at the meeting, the INAC representatives seemed to think the proposal was too difficult to implement and appeared to, initially, want to scuttle it.

Both CPR and the First Nations legal counsels had deliberately decided to wait until they had engineered an agreement between themselves before approaching the Canadian Government for support and assistance. At that time, INAC's mandate was slowly "evolving from one of providing basic services to First Nations, such as education and housing, road maintenance, and water and sewer systems … towards an advisory, funding, and supportive

agency in its relations with First Nations, Inuit and Northerners." (INAC website, Mandate, Roles & Responsibilities, retrieved on January 8, 2008 from http://www.ainc-inac.gc.ca/ai/mrr-eng.asp)

Although Canada had not been named in the earlier litigation, the Federal Government had an interest in the case as it apparently failed to grant fee simple title to CPR as intended in 1881.[16] So when a meeting was finally arranged with INAC to discuss the proposal, the government's legal counsel, the Department of Justice, necessarily had to be consulted.

The strategy to bring Canada into the negotiation process once an agreement had been reached between CPR and the First Nations allowed the parties to build a rapport and agreement without the added distraction of dealing with INAC and all the history behind that relationship. However, it was counter to INAC's expectations and may have initially alienated government representatives, as it was seen as an affront to the government's role of policy and lawmaker, as well as potentially compromising its fiduciary duty to First Nations.

It was only after discussion of INAC's role, reframing the agreement, and repositioning INAC as a facilitator to the agreement due to its "responsibilities for the management of reserve interests under the *Indian Act*"[17], that the government representatives were able to entertain supporting the process.

The initial reluctance of INAC to facilitate the ratification process and then the reluctance of the Assistant Deputy Minister of Indian Affairs and Northern Development to implement

[16] *Canadian Pacific Limited v. Matsqi Indian Band*, 1999

[17] Canada Gazette, Tax Regulations,

new Tax Regulations under the *Indian Act* was quickly communicated amongst CPR representatives and First Nations Chiefs and communities.

> The Feds gave us funding for the test court case but they should have been actively working on our side. They made us wards of the state but they were looking after the Ministry's best interest. They are protecting the Crown and the Ministry. They could have been more help. (David Walkem, Chief, Cook's Ferry Indian Band, September 21, 2007)

> We didn't want Canada getting in on it. Canada shows they are not looking after things. (Clem Seymour, Chief, Seabird Island Indian Band, September 21, 2007)

> Canada was hesitant because the case was murky. They thought the land could stay with CPR. (Paul Guthrie, VP, Legal Services, CPR, September 18, 2007)

> They came to us (INAC) in the summer of 2000. I think that was a strategic mistake. They wanted to press it through the department and have it resolved by November for the taxation year. I was on holidays at the time. They were pushing the government, asking them to accept the agreement and hold their nose. They needed to do their homework, look at the impacts, consultation process, the claims and treaty process in BC and the costs. The basic elements were there but the Senior Policy meeting to discuss it in the Fall went poorly and the Committee basically said "Get Real". I communicated some of this to First Nations legal counsel, Leslie Pinder and Art Pape. (Rick Simison, retired Manager, Lands, INAC, October 24, 2007)

The Federal Government's many roles (trustee for Indians and Indian assets, defendant in claims actions, funder of claims research, and adjudicator of claims validity and value) required time for internal consultation and review. These multiple roles have been identified as a conflict of interest and a central problem with specific claims resolutions, as well (Anderson et al., 2004; Assembly of First Nations, 1999; Indian & Northern Affairs Canada, 1998; Milroy, 2002).

> In general, INAC has primary, but not exclusive, responsibility for meeting the federal government's constitutional, treaty, political and legal responsibilities to First Nations, Inuit and Northerners. To fulfill this mandate, INAC must work collaboratively with First Nations, Inuit and Northerners, as well as with other

> federal departments and agencies, provinces and territories. Increasingly, INAC's role has become one of facilitating change and bringing together the partners and interests needed to implement *Gathering Strength — Canada's Aboriginal Action Plan*. (INAC website, Mandate, Roles & Responsibilities, retrieved on January 8, 2008 from http://www.ainc-inac.gc.ca/ai/mrr-eng.asp)
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>
> The Department of Justice works to ensure that Canada's justice system is as fair, accessible and efficient as possible. The Department helps the federal government to develop policy and to draft and reform laws as needed. At the same time, it acts as the government's legal adviser, providing legal counsel and support, prosecuting cases under federal law, and representing the Government of Canada in court.
>
> The Department's responsibilities reflect the double role of the Minister of Justice, who is also by law the Attorney General of Canada: in general terms, the Minister is concerned with the administration of justice, including policy in such areas as criminal law, family law, human rights law, and Aboriginal justice; the Attorney General is the chief law officer of the Crown, responsible for conducting all litigation for the federal government. (Department of Justice Canada Website, Canada's Department of Justice Role, retrieved on February 6, 2008 from http://www.canada.justice.gc.ca/en/dept/pub/about/index.html)

While the INAC representatives were able to reframe their role by relying on their responsibilities under the *Indian Act*, the articulation of their role/identity as a facilitator was and is still questioned by First Nations. Two of the Chiefs interviewed mentioned that it takes years and years to have the government deal with their issues and concerns, but when they want something to happen, it happens in days. However, the effort put in by INAC staff in the ratification and delegation vote process assisted in affirming INAC's intent to move in to a facilitator role.

In conclusion, to move through the major hurdles to gain agreement, the parties involved reframed their own perception of their identity within the relationship and changed their actions to affirm that new identity and role. CPR had to shift its focus as "landowner/nation

builder" to that of a transportation operator, problem-solver and good neighbour. The First Nations shifted from fighting for past injustice to looking to the future and becoming a good neighbour, and flexible business partner. Indian and Northern Affairs Canada had to shift from a conflicted position of protector of Canadian policy and law and the patriarchal guardian of First Nation's interests, to that of facilitator in an out-of-court settlement benefiting First Nations and all Canadians. While none of these shifts came easily, it was through dialogue and interaction that they were able to take place.

3. Acknowledgement of Western and Aboriginal Paradigms

Gulliver (1979) found that patterns of interactive behaviour in cross-cultural negotiations are essentially similar despite marked differences in interests, ideas, values, rules and assumptions among the negotiators in different societies. However, as Woolford (2005) points out within Aboriginal contexts, the interests of redressing past injustices, self-government or self-sufficiency and the importance of regaining their land must be addressed to ensure successful negotiations.

The discourses of 'justice', 'certainty' and 'reconciliation or reparation' run through most of the current treaty and settlement negotiations with First Nations (Bauman & Williams, 2004; Woolford, 2005.) and were underlying interests within the Matsqui negotiations. Although the issue at hand was the certainty of tax revenues from a third party, the Bands were also looking for reparation of a perceived injustice through the return of authority over the land on which the right-of-way lies, and back taxes. They were also looking for a means to address future conflicts and maintain the relationship. So they were looking back to address

wrongs and learn from the past, and forward to future opportunities and how to address conflicts, they do not foresee a need for "extinguishments" of title or claims.

From a Western perspective, reparation is addressed through the justice system, which imposes certainty, clarifies rights, defines relationships and makes awards to repair injustice. From the dominant Western cultural perspective, certainty is seen as pragmatic given current economic, legal and political realities. Therefore, the focus is linear, moving from the present to the future, or 'going forward'. This requirement is based on the need for economic certainty for investors and developers and often results in the requirement for finality and extinguishment regarding the nature and scope of Aboriginal rights, title and jurisdictional authority (Bauman & Williams, 2004; Woolford, 2005.)

As noted by Leslie Pinder (November 21, 2007), certainty does not require extinguishment and may be attained by looking at what is actually required to meet the parties' needs. This would allow for flexibility as law and the two societies change and evolve. It therefore meets the more collectivist approach of many Indigenous societies that anticipate a continuous social process and change and may in fact eventually be appreciated by Western societies, given the current rate of change and the need for efficiency and elimination of redundancy.

Justice, certainty and reparation for First Nations are bound up with Aboriginal rights to the use of and title to their land. Recognition and redistribution are entwined and essential to establishing a relationship of trust for the future with Aboriginal communities. Woolford (2005) asserts that not addressing these issues means that certainty from a Western perspective may be disrupted and potential future challenges to the fairness of an agreement

may arise. Woolford outlines the need for "guideposts" which may help map the requirements of justice and counter the goals convenient to interests of the dominant group. (Borrows, 2000; Woolford, 2005)

In the Matsqui case, the First Nations were looking for justice in the return of the right-of-way to their jurisdiction. They were looking for certainty through the ability to gain tax revenue to support their economic and survival needs, and were looking for reparation in the form of acknowledgement of past injustice and monetary reparation in the form of back taxes. CPR was looking for justice in that they believed the land to be theirs and, while willing to continue to pay taxes, they wanted fair and reasonable taxation. They also required the certainty of the ability to continue to conduct their operations uninhibited. They were also looking for certainty in the form of a new working relationship with the Aboriginal communities.

By listening to the First Nations' stories and grievances at the initial meetings, and CPR's representatives sharing of their own operating concerns and how to manage a fair, go-forward agreement, both parties were better able to understand the context and worldviews each were coming from.

> There is a need to look at the stories, rituals, myths and metaphors used by a group to learn about members' identities (who they see themselves to be) and meanings (what matters to them and how they make meaning). When we do this with each side to a conflict, places of connection and divergence may become clearer, leading to a better understanding of the conflict in context. (LeBaron, August 2003)

By stating that the company had not approached things well in the past, the company acknowledged past injustices and mishandling of their relationships, a very important component to moving forward in a new relationship. From a critical race/Aboriginal perspective, it would be expected that the First Nations may not see the negotiations in the same light as do the company and government. In general, the process was guided by Euro-Canadian approaches, with a mainstream corporate entity, white legal counsel and representatives of the Canadian government dominating the process. This same situation is being played out in numerous land claims and other negotiations with First Nations across the country.

Surprisingly, based on the interviews with the First Nation Chiefs, it appears that they were generally satisfied with the negotiations and agreement. However, several of the Chiefs did indicate that they felt they had to capitulate to the company's limitation on the issue of back taxes, in order to regain authority over their land, and ensure future revenue. The company believed this to be a fair offer given that they were funding the land surveys, environmental assessments and providing a lump sum payment to the bands.

Although railway representatives did not initially fully understand that the First Nations' more pressing interest was the land jurisdiction versus the taxation income, offering funding in lieu of taxes as a way to meet what they understood to be the interest, allowed for clarification from First Nations and their Legal Counsel. Through the ongoing dialogue, CPR representatives came to understand that it was both the income from the taxes and utility contracts, and the land that were important to the bands. This jurisdiction issue was

so important, that the First Nations were willing to compromise regarding their request for back taxes.

By recognizing the impact of past actions and history and agreeing to redistribute income/resources and quit claim for the land, CPR inadvertently put the Government of Canada in an awkward position, given their patriarchal role in Western society. They had to find a way to help the government manage that concern and reframe the government's role as that of facilitator. Ironically, the parties were able to use the *Indian Act*, often referred to as patriarchal legislation that has impacted the First Nations in many negative ways, to facilitate the taxation agreement.

A visible symbol of the respect for both worldviews came in the form of the final celebrations. Both CPR and the Canadian Government representatives participated in the traditional First Nations' celebrations and CPR assisted with funding for the second celebration. As noted by two Chiefs, these were opportunities to celebrate a victory, let go of the past, and look forward to the future.

In summary, it was the dynamic and elicitive dialogue between the parties, which allowed for the exploration of worldviews and interests and coming up with solutions, that assisted in reframing the situation and identities of the stakeholders.

4. Keys to Success

Key components to the success of the process, or as Woolford (2005) suggests potential 'guideposts' that may facilitate success in future negotiations include:

- highly motivating factors for both parties, including costly litigation and a potentially negative Supreme Court decision;

- awareness and acknowledgement by all stake holders of the historical relationship and different worldviews between the parties;

- utilization by the First Nations of an experienced legal team to assist in countering social power issues.

- urgency due to tight timelines for the ratification and designation vote, as well as the development and passing of the taxation regulations, promoting a focus and concerted, collaborative effort.

- a novel and interesting challenge for the various legal and technical teams to come up with solutions to unusual technical challenges;

- all parties having access to teams of knowledgeable and experienced members, with the technical/community/cultural/relationship skills, allowing for the effective and efficient progression of collaborative work plans;

- a process driven approach with ongoing technical meetings, conference calls, and communication strategies to ensure all stakeholders were informed of progress;

- an agreement that provided the level of certainty that both the First Nations and CPR required, and that recognized and respected all parties' rights and responsibilities on an equal footing. These include Aboriginal right to self-government and economic and social development. In doing so, the agreement avoided perpetuating the extinguishments of the First Nations' title;

- acknowledgement of outstanding issues and claims by the First Nations and an agreement that does not preclude the progression of other claims against CPR or the government;

- a forward focus and establishment of a mechanism to facilitate the resolution of conflict and disputes arising out of the continuing relationship;

- a satisfactory agreement and traditional celebration providing all parties involved with the positive feelings of accomplishment in addressing historical injustice.

Chapter 6: Conclusion

In summary, many historical, legal and cultural factors have led up to and impacted the Matsqui decision, negotiations and model. A review of the literature and case study has identified a number of key components that assisted in a successful process.

The Matsqui Model has continued to prove effective in the on-going negotiations between CPR and other BC First Nations. The company has been successful in utilizing a similar approach and process in negotiating with First Nations in other Canadian provinces over issues of concern as well. On June 29, 2007, the Assembly of First Nations held a National Day of Action to bring attention to Aboriginal issues, particularly poverty and land claims. Canadian Pacific Railway stopped its trains for one minute as a symbol of solidarity with First Nations in their fight for social justice (*Protest day calm despite blockades*, 2007).

However, relationships require ongoing management, and tending and relationships with the Aboriginal community means relationships with individual communities, not just at the national level. According to several of the First Nation Chiefs, there is disappointment over the lack of ongoing contact by CPR to maintain the relationship side of the agreement. Chief Walkem pointed out, "The relationship stuff has been nil. It is up to us. There has been nothing proactive on their side. There are things we should be doing to follow up, but we don't have the time or resources. " **(**Chief David Walkem, September 21, 2007)

While the Agreements included a specific process for the resolution of differences between CPR and the Bands, there is nothing specific on how the relationship was going to be

maintained at the community level, or what was understood by the term relationship. It appears that there may be differing interpretations or worldviews, based on individualistic and collectivist society interpretations, of what building and maintaining a relationship looks like.

Lindberg (2007) provides a discussion of the differences between English and Cree (Indigenous) linguistic indicators and the need for a critical examination of the laws, principles, and understandings that exist in Indigenous context, including the understanding of reciprocity-based relations and responsibilities.

> In the example at hand, when we talk about the renewal of our relationship as Indigenous peoples and non-Indigenous peoples, we need to examine "renewing our relationship" as an issue. Those relationships that we possess as citizens (of Indigenous and non-Indigenous relations) determine the obligations that we have and those in turn must be completed in accordance with our laws, values and principles to be lawful. (Lindberg, 2007, p. 20)
>
> …
>
> Again, using our relationship as Indigenous and non-Indigenous peoples as the topic, specificity related to relationships needs to be addressed in applying the accurate values, laws and principles to the topic. There are certainly rules governing how you behave and interact with a person and these are linked to the nature of the relationship that you have with the person. (Lindberg, 2007, p. 23)

Milroy (2002, pp. 342-343) references Elazar Barkan's *Guilt of Nations: Restitution and Negotiating Historical Injustices*, and emphasizes the pitfall to be avoided in the use of restitution as "an inexpensive way for powerful nations and governments to regain the appearance of just societies while maintaining their position of hegemony and control." CPR and the Canadian government need to ensure that they are not simply utilizing business agreements and compensation as a means of settling historical disputes, without maintaining the relationships they so proudly refer to as one of the main reasons for the negotiations.

Limitations of the Study

As with any qualitative research study, there are limitations that must be considered. The case study relied on a text and file analysis, as well personal, face-to-face interviews. The CPR files portray the company's viewpoint of the sequence of events, the interaction and outcomes. Given that CPR was very deliberately trying to reshape the relationship with the First Nations, the meeting minutes, e-mails and documentation are slanted to reflect the company's goal of building an identity of a supportive, empathetic, yet business-oriented corporation.

It is hoped that the interviews were able to provide further context, some balance and additional perspective to that of the CPR documentation. However, it should be noted that only representatives from three of the original five Bands agreed to be interviewed, as well as a representatives from one of the Bands in the second round.[18] The Chiefs from the Matsqui and Skuppah Bands were not interviewed and may have a different perspective on the negotiations and outcome of the agreement.

Also a review of the First Nations and INAC files may have provided a more balanced and informed picture of the negotiations process. It is possible that a more complex or positivistic way of addressing the data could provide a supplementary in-depth understanding of the dynamic interplay between the parties and a scientific analysis of the texts might assist in providing a more statistically reliable analysis.

[18] Only Siska was approached from the second round of negotiations as they had initially been involved in the first round.

The interviews, while approached using an interview protocol and specific questions, were informal and unstructured, although the various questions were answered. The respondents were likely influenced by the focus of the research and questions, which centred around whether the negotiations were a success and, if so, what made them successful. All parties had a stake in constructing a narrative of success and communicating that success to their constituents. I believe the media reports, emotional rhetoric from the interviews, including the descriptions of the celebration, support the finding that this process was seen as a success by all parties. However, the entire negotiating process and the research for this paper was conducted from a western colonial viewpoint. It is possible that I have been influenced by my connection as an employee with the company and was seeking, and thus co-produced, a narrative of success.

The data gathered in this study was prefaced by a review of the historical relationship between the three stakeholders - the five First Nations, CPR, and the government of Canada. Questions regarding the historical relationship and cultural differences were also raised during the interview. This attempt to link the past to current negotiations may have influenced or raised issues that could be unrelated to the actual negotiations and issues at hand. However, given the reference by First Nations to historical issues both during the negotiations and during the interviews, I believe the historical relationship was key to understanding the context.

Questions for Further Research

Further research into similar negotiations would be required to determine whether the key components identified above, including identity management, are consistent in facilitating historic, cross-cultural or identity conflicts and disputes. Given the current number of Native claims in Canada and the growing number of First Nations entering into partnerships with mainstream corporations, there appears to be many opportunities to study this further.

I believe it is important to explore the question of what a renewed relationship means to the various parties in this agreement. This appears to be a piece of dialogue that was not elicited or pursued through the negotiation process and will likely be key to future success. Recent research into Indigenous paradigms and the conceptualization of Indigenous notions of relationships, including reciprocal relationships may provide some insight.[19] Is it possible that the tactic to have western legal counsel take the lead in the negotiations on the part of the First Nations allowed this oversight to occur?

Further research could also look into whether there may be a way to reframe the current narrative and identity of mainstream Canadians and Aboriginal Canadians. Can the common values of social justice and fair-mindedness and the utilization of the current legal framework help reframe current identity issues and ongoing conflicts and legal challenges? Are there differences in interpretation of those terms within the various paradigms?

[19] Lindberg (2007)

Finally, and I think most importantly, how can we get a similar level of excitement from all Aboriginal and non-Aboriginal Canadians in finding solutions and ways to resolve issues within the overall identity of Canada?

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Appendix A: Certification of Institutional Ethics Review

Appendix B: Interview Protocal & Questions

The "Matsqui" model:
A Case Study of Corporate/Aboriginal Relations between the
Matsqui First Nations and Canadian Pacific Railway

Research Objective: The objective is to identify potential recommendations that may be of assistance to participants negotiating similar taxation or land settlements.

Central Research Question: What were the circumstances, approach and processes that promoted the reported success of the Matsqui negotiations?

Theory-Based Questions:

TB 1 - What role did the historical context of colonialism and post-colonialism play in these negotiations, if any? How were the historical issues addressed?

TB 2 - What impact did cultural differences, including identity, play in these negotiations? How were cultural differences addressed?

TB 3 – What type of communication (or public relations) style did the various parties adopt? Did these change over time? How did the communication style impact the relationship and negotiations?

Interview Questions:

IQ 1 – What was your involvement in the negotiation and ratification process?

IQ 2 – From your perspective, what were the factors that led to the decision to negotiate a settlement?

IQ 3 – Do you consider the settlement process and agreement a success? Why? Why not?

IQ 4 – Given the well-known historical context of the colonial settlement of Canada and the CPR's role in that, what do you think facilitated the success of the negotiations and ratification process?

IQ 5 – Were there differences in approach by the various parties (First Nations, CPR, the Crown)?

IQ 6 – How would you describe the differences?

IQ 7 - Did these differences impact the negotiations?

IQ 8 – Were there similarities in approach by the parties?

IQ 9 – How would you describe the similarities?

IQ 10 – Were there difficulties or breakdowns in negotiations?

IQ 11 - How were these addressed and resolved?

IQ 12 – What did the CPR do to facilitate negotiations and the ratification process? What mistakes were made on their part?

IQ 13 – What did the First Nations do to facilitate negotiations and the ratification process? What mistakes were made on their part?

IQ 14 - What did the Crown do to facilitate negotiations and the ratification process? What mistakes were made on their part?

Depending on response to IQ 3:

IQ 15 – Have you been involved in other negotiations that were (not) successful?

IQ 14 – If so, to what do you attribute this?

IQ 16 – What do you think were the key ingredients to the (lack of) success of the negotiations? The ratification process?

Appendix C: List of Interviewees

Dave Courville	Director, Real Estate	Canadian Pacific	Aug. 14, 2007 Sept. 20, 2007
John Olynyk	Solicitor (CPR)	Lawson Lundell	Sept. 11, 2007
Paul Guthrie	Vice-President, Legal Services	Canadian Pacific	Sept. 18, 2007
David Walkem	Chief	Cook's Ferry Indian Band	Sept. 21, 2007
Clem Seymour	Chief	Seabird Island Indian Band	Sept. 21, 2007
Rick Simison	Manager, Land Titles Group, INAC (retired)	Indian & Northern Affairs Canada	Oct. 24, 2007
John Walsh	Vice-President, Real Estate	Canadian Pacific	Nov. 14, 2007
Representatives of the Boothroyd Indian Band	2 individuals who wish to remain anonymous	Boothroyd Indian Band	Nov. 20, 2007
Fred Sampson[20]	Chief	Siska First Nation	Nov. 20, 2007
Leslie Pinder	Solicitor (First Nations)	Formerly with Mandell Pinder	Nov. 21, 2007
Graham Allen	Solicitor (First Nations)	Formerly with Snarch & Allen	Nov. 21, 2007
Cindy Clarkson	Analyst	Indian & Northern Affairs Canada	Dec. 12, 2007

Note: Requests were made for interviews with the Matsqui and Skuppah Indian Bands, but did not come to fruition.

[20] Siska First Nation participated in the first round of negotiations and then withdrew. They eventually negotiated an agreement as part of the next nine Bands in 2004.

Appendix D: Chronology of Key Events

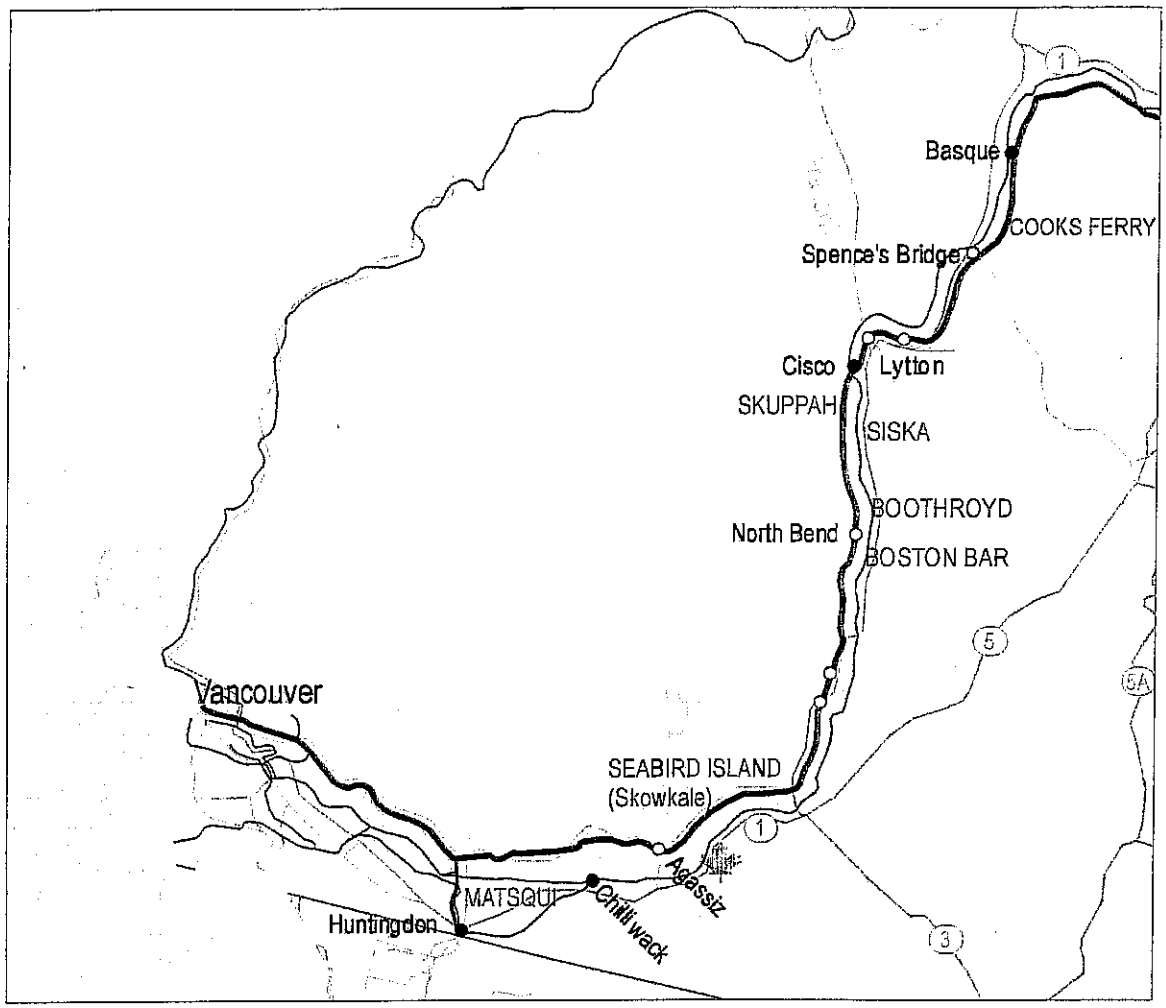
Date	Event
1763	Royal Proclamation guaranteeing Aboriginal title to treaty negotiations.
1846	Colonial Administration established on Vancouver Island under James Douglas.
1867	Confederation
1871	BC joined Confederation with John Trutch as Lieutenant Governor, un
1874	First petition from 110 BC Indian Bands to government regarding land claims.
1876	*Indian Act*, indicating compensation for railway roads through reserves.
1876-1880	Reserve Commission established.
1881	Canadian Pacific Railway Act
1885	Completion of CPR
1888	Railway Act
1912-1916	McKenna-McBride Commission established to examine Reserve Lands.
1913	Slide at Hell's Gate during building of Canadian National Railway.
1927	First Nations prohibited from hiring lawyers to pursue grievances.
1960	First Nations permitted to vote in Canada.
1973/74	*Calder v. British Columbia* decision changed focus to occupancy and use and need for certainty.
1982	Existing Aboriginal and Treaty rights entrenched in Canadian Constitution.
1984	*Guerin v. the Queen* – decision against government for breach of fiduciary duty.
1985	S. 83 of *Indian Act* allows taxation by Indian Bands.
1988	"Kamloops" amendment sought to S. 83 of Indian Act by Chief Manny Jules to clarify authority of Band Counsels to levy real-property taxes on reserve lands.
1989	ITAB established
1989	BC passes Indian Self Government Enabling Act (ISEA)
1990	*R. v. Sparrow* – reinstated important Aboriginal and treaty rights against unjustified government infringement. Extinguishments must be clear and plain.
1991	*Delgamuukw v. British Columbia* – decision on Aboriginal title, encompassing exclusive use and occupation of land, and compelling governments to consult with First Nations.
1992/93	First Nations notify Province of BC of intention to enact property taxation by-laws. Province notifies it is vacating

	taxation field as per ISEA
1993	*Delgamuukw v. British Columbia* – appeal decision held that First Nations had unextinguished rights other than right of ownership and recommended negotiated settlements.
1993	ITAB proposes agreement in principle re taxation issues. CP agrees to look at Alberta but will appeal BC due to double taxation. CP appeals taxation jurisdiction.
1995	CP v Matsqui Indian Band (MIB) Supreme Court Decision
1996	CP applied for Judicial review of tax notices.
1996	CPvMIB Fed Court Decision
1999	CPvMIB Fed Court of Appeal
Sept./Oct/Nov. 1999	Meetings by CP to discuss background. CP reviews tax liability and options, discusses possibility of settlement, approached First Nations and ITAB. Appeal deadline to SCC changed to spring 2000.
Dec. 2, 1999	Meeting with First Nations and CP at Lawson Lundell offices, with ITAB.
Dec. 10, 1999	Letter with Proposal sent to FN Counsel
January 2000	Meeting with Band re concerns.
Feb. 11, 2000	Response from First Nations.
April 2000	Meetings with all lawyers.
May 12, 2000	Meeting with ITAB
May 14, 2000	Extension received for Bands to file Appeal to Sept. 30th.
June - Aug, 2000	Drafting of Settlement/Right of Way Agreement, and proposed draft tax regulations.
July 28, 2000	Conference call at CP.
August 14, 2000	Meeting with representatives from Government of Canada in Ottawa.
Sept. 9, 2000	Compensation proposal provided by CPR.
Oct. 3, 2000	Letter from Graham Allen, First Nation Legal Counsel to Assistant Deputy Minister (ADM), requesting cooperation.
Oct. 10, 2000	Advised new ADM of Lands and Trust Services named.
Nov. 1, 2000	Letter from CPR to Minister requesting assistance in asking team to give issue priority..
Nov. 14 & 15/ 2000	Meeting with First Nations Counsel, CP & Dept. of Indian Affairs representatives.
Dec. 15, 2000	Email received from R. Simison indicating Canada willing to initial “any final negotiated settlement agreement.”
January 9, 20000	Letter from CPR’s John Walsh to Minister of Indian Affairs requesting meeting and outlining position.
January 16, 2000	Meeting with Minister of Indian Affairs
Feb. 15, 2000	Agreement in Principle signed.
April 12, 2001	Work plan developed for ratification vote and designation vote.
June, 2001	Information Sessions held and info package sent out.

June 22, 2001	Ratification and Designation vote held and passed.
June 25, 2001	Letter from First Nations to Province notifying them of change of taxation.
July 4, 2001	Celebration at Seabird Island.
July 2001	Signing of designations by FN Chiefs.
Sept. 19, 2001	Special Committee of Cabinet approved pre-publication of proposed regulation in Canada Gazette.
Sept. 24, 2001	INAC informs First Nations Legal Counsel they secured $125,000 financial contribution to five first nations as Canada's commitment to the settlement.
Nov. 7, 2001	Submission and approval and registration of designation.
Nov. 8, 2001	Regulations approved and signed by Governor General.
Nov. 21, 2001	Release from confidential obligations, except Schedule H (Revenue Sharing plan)
Nov. 21, 2001	First Nations file notices of discontinuance with SCC.
Jan. 17, 2002	Ceremony at Seabird and Press Release

APPENDIX E: Map of Fraser River & Indian Reserves

APPENDIX E: Map of Fraser River & Indian Reserves



- Canadian Pacific Railway
- Canadian National Railway
- Trans-Canada Highway
- Indian Bands

Appendix F: Legal Rationale for Matsqui Court of Appeal Decision[21]

Justice:	The Crown erred in granting CPR Fee Simple	Taxation of non-Indians is Discriminatory
Marceau J.A.	**No** – The *CPR Act* had authority to grant fee simple title and "absolute property".	**No**– The *Indian Act* provisions assured Indians of tax exemption for the use and occupation of reserve lands.
Desjardins J.A.	**Yes** – The Right of Way is in the reserve within the meaning of s. 23 of the *Indian Act*, R.S.C. 1985, c.I-5.	**Yes** – Section 83 of the *Indian Act* does not authorize discrimination based upon the identity of their owners. Section 83(1)(a) does not guarantee to Indians they will not be taxed by their band councils.
Robertson J.A.	**Yes** – the *CPR Act* did not authorize the Crown to convey fee simple title to rights-of-way crossing reserves. CPR was entitled to no more than a statutory easement or license to rights-of-way because the *Railway Act* restricted alienation of Crown lands acquired by railway companies. The *CPR Act* did not displace or override the restraint on alienation by identifying which provisions were being displaced, as required by the *Railway Act*.	**No** – The *Indian Act* provided reserve Indians with tax exemption and draws distinctions between Indians and non-Indians. Parliament has jurisdiction to enact such distinctions as per the Constitution Act of 1867. Taxation by-laws enacted by bands under S.83 of the *Indian Act* are subordinate legislation that implies that the constitutional authority to distinguish between Indians and non-Indians for taxation purposes was delegated to band councils.

[21] Canadian Pacific Railway v. Matsqui Indian Band et al, 1999

APPENDIX G: Legislation & Court Decisions

Indian Act. 1876, 1880, 1985, R.S., c. I-6, s. 1.

The Canadian Pacific Railway Act, 1881

Indian Lands Agreement (1986) Act, S.C. 1988, c. 39

British Columbia Land Amendment Act, 1979

British Columbia Indian Lands Settlement Act, S.C. 1920

Indian Self Government Enabling Act. [RSBC 1996] CHAPTER 219

Property Assessment and Taxation (Railway Right-of-Way) Regulations [2001]

The Railway Act, 1888

Calder et al. v. *Attorney General of British Columbia* [1973] S.C.R. 313

Guerin v. The Queen [1984] 2 S.C.R. 335

R. v. Sparrow [1990] 1 S.C.R. 1075

Canadian Pacific Railway v. Matsqui Indian Band et al. (R.S.), [1996]

Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010

Canadian Pacific Railway v. Matsqui Indian Band et al. (R.S.), [1999]