# DEVELOPING YOUR NEGOTIATING POWER

*By David Robbins, L.L.B., Woodward & Company*

The title for this session is *Principled – Interest Based Negotiations*. I am going to speak on maximizing your power for such negotiations. My talk will focus on six points.

1. The likelihood of achieving a satisfactory agreement when negotiating with others depends directly upon the power you bring to the negotiations. Your negotiating power in turn depends on your B.A.T.N.A. – your Best Alternative To Negotiated Agreement. As Harvard Law School Professor Roger Fisher put in his book *Getting to Yes: Negotiating Agreement Without Giving In*:

   > The better your B.A.T.N.A., the greater your power. People think of negotiating power as being determined by resources like wealth, political connections, physical strength, friends, and military might. In fact, the relative negotiating power of two parties depends primarily upon how attractive to each is the option of not reaching agreement.[1]

2. Here is an example, from the aboriginal context, of negotiating power derived from having a good B.A.T.N.A. Assume you lead a First Nation that has been negotiating with the Crown in British Columbia for years without much success. Somewhat suddenly, you develop a viable alternative to these negotiations: you discover that your First Nation very likely has the ability to go to court and fairly quickly get an order that you the nation has unextinguished aboriginal title to a large part of its traditional territory. Your negotiating power has just gone way up. The option of reaching negotiated agreement with the Crown becomes less attractive. Further, Crown representatives now really want to negotiate agreement because the option of a court declaring you have aboriginal title is very unattractive to them.

   This is what happened to the Nisga'a Nation. Having sued for aboriginal title in the famous *Calder* case, on appeal in 1973 the Nisga'a effectively convinced the Supreme Court of Canada that they had aboriginal title to the Nass Valley. However, the Court split 3-3 on whether aboriginal title was unextinguished in British Columbia. Subsequent negotiations with the Crown dragged on for decades. Nisga'a negotiating power was limited. Then, in 1997 the Supreme Court of Canada ruled 7-0 in *Delgamuukw* that aboriginal title in British Columbia had not been extinguished prior to Confederation. Suddenly, the Nisga'a had an attractive option to negotiating with the Crown: getting a court order that their aboriginal title to the Nass Valley was unextinguished. This was an extremely unattractive option for the Crown. In 1998 British Columbia finalized and ratified the Nisga'a treaty; in 1999 Canada did the same. As the BC Court of Appeal recently put it in *Tsilhqot'in Nation v. British Columbia*, where the court upheld an order of advance costs to the Tsilhqot'in so they could litigate an aboriginal title and rights case:

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[1] Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin, 1981) at p. 102.

> Canada's argument that the Nisga'a Final Agreement is proof that the treaty negotiations process does work and can arrive at settlements does not mention that the Nisga'a Final Agreement was the result of 20 years of tripartite negotiations, 100 years of Nisga'a protest and activism, and landmark decisions in the courts.[2] [Emphasis added.]

3. Here is an example, from the aboriginal context, of negotiating from a position of weakness due to not having a good B.A.T.N.A. Assume you are a First Nation in British Columbia with legal rights that the Crown has not yet recognized. You take steps to resolve the issue with the Crown: you file a specific claim with the federal government; you enter into consultations with British Columbia; or, you file a statement of intent and enter into the B.C. Treaty Process. But you don't develop a B.A.T.N.A. You do some research, hire some consultants, take some training and sit down with the Crown to negotiate in good faith. Years later you're still negotiating with the Crown without much success because you can't get the provincial or federal government representatives to change positions. In the meantime, its basically business as usual for how your claimed legal rights are dealt with by the Crown and others. For the Crown, continuing to talk is a pretty attractive option to finalizing a negotiated agreement that reflects your goals.

   In essence, this is what has happened to aboriginal groups who entered into the British Columbia treaty process. While impoverished First Nations in the treaty process have been able to develop their bargaining *capacity*, though the receipt of grants and loans for negotiations, this has not increased their negotiating *power*. Absent the real alternative of having their rights under s. 35 of *Constitution Act, 1982* readily enforced against the Crown, not a single treaty has been concluded in twelve years of multiple different negotiations. In the words of the Royal Commission on Aboriginal Peoples in 1996:

   > [e]xperience clearly indicates that without an enforcement mechanism, it is all too likely that disputes will continue to be protracted as a result of the reluctance of the federal or provincial governments to come to the bargaining table or, when there, to attempt in good faith to reach a speedy and just solution of the issues.[3]

4. Absent a First Nation having a good B.A.T.N.A. – e.g. the real threat of having the First Nation enforce one or more of its legal rights against the Crown - it is completely foreseeable that Crown representatives in British Columbia will not attempt to negotiate "a speedy and just solution of the issues." It is simply not in their political interests. The governments of British Columbia and Canada, regardless of which party is in power, depend upon the popular vote for their election to office. However, currently First Nation voters only make up a small minority of the electorate. Consequently, First Nation rights are minority rights, always vulnerable to the decisions of politicians representing the majority within the province. This is especially so when one considers that the legal rights of First Nations, unlike those of non-aboriginal minority groups, are generally legal rights to the very land and resources that the Crown seeks to exploit. As the Supreme Court of Canada has said:

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[2] *Tsilhqot'in Nation v. British Columbia*, 2002 BCCA 434, at para. 34.
[3] *Report of the Royal Commission on Aboriginal Peoples*, vol. 2, "A New Deal for Aboriginal Nations – An Aboriginal Lands and Treaty Tribunal," at 593.

> [A] Constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority.[4]
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> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities <u>on the land</u>, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional status.[5] [Emphasis added]

5. The Crown in British Columbia has actively sought to stop First Nations from increasing their treaty negotiating power by developing litigation of their s. 35 Constitutional rights as their B.A.T.N.A. As the British Columbia Treaty Commission published in February 2004:

> Of continuing concern is the "litigate or negotiate" policy of the governments of Canada and BC. …
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> In the Treaty Commission's view there is an inherent contradiction in a policy that starts from the position that First Nations must commit fully to a political process to reconcile their aboriginal rights with Crown rights, but are not permitted recourse to the legal process to protect those same rights when the political process stalls or fails.[6]

This Crown policy is highly suspect, however, particularly given the recent *Haida Nation* decision where Supreme Court of Canada found an ever-present duty of honourable conduct on the Crown, including during treaty negotiations.[7]

6. The Supreme Court of Canada and the BC Court of Appeal recognize the need for First Nations to have litigation as a B.A.T.N.A. so as to foster fair and just negotiated settlements of their legal rights with the Crown.[8] As the Chief Justice of Canada said recently on hearing of the Crown's unsuccessful appeal in *British Columbia v. Okanagan Indian Band*:

> COUNSEL FOR BRITISH COLUMBIA: In the Province's submission, this Court and the Court of Appeal have emphasized that negotiations, not litigation, are the preferable first choice for resolution of complex issues involving the relationship between Aboriginal people and the Crown.
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> …
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> CHIEF JUSTICE McLACHLIN: Do we have to leave our common sense at the courthouse door? I mean, the fact is, we know that the ability to litigate may have an effect on how negotiations come out…[9]

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[4] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 74.
[5] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 30.
[6] British Columbia Treaty Commission, "Obstacles Remain to Treaty Negotiations," February 2004 Update, p. 8.
[7] *Haida Nation v. British Columbia*,[2004] 3 S.C.R. 511, at paras. 16-17, 19-20.
[8] E.g. *R v. Marshall*, [1999] 3 S.C.R. 533 at paras. 22-23; *Tsilhqot'in Nation v. British Columbia*, 2002 BCCA 434 at paras. 135-136.
[9] *British Columbia v. Okanagan Indian Band*, (June 9,2003) 28974 (S.C.C.), transcript excerpt at p. 25.