

Peter A. Cumming

**Canada: Native Land Rights  
and Northern Development**

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**CANADA: NATIVE LAND RIGHTS AND NORTHERN DEVELOPMENT**

**Copenhagen 1977**

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Peter A. Cumming is one of the main legal advisors of IWGIA.

From professor Cumming's long list of publications, we can here only mention a few:

- Co-editor (with N. Mickenberg) of Native Rights in Canada (2nd ed.), General Publishing Co., 1972.
- "Public Lands, Native Land Claims and Land Use", published in "Canadian Land Use in Perspective", eds. J.G. Nelson, R.C. Scace and R. Kouri, Ottawa 1974.
- "The Rights of Indigenous Peoples: A Comparative Analysis - The Canadian Perspective", American Society of International Law, 68th Annual Meeting, Washington, D.C., 1974, published as part of the proceedings.
- Inuit and the Law (with J. Kazanjian and G. Wong). This book is for the Inuit of the North, explaining government services and the legal framework in respect to which the people come into contact. Published by Inuit Tapirisat of Canada, Ottawa 1975.

The present paper is written especially for the IWGIA Document series.

The views expressed in IWGIA Documents are those of the authors and not necessarily those of the organization.

Copenhagen, January 1977

For the International Secretariat of IWGIA

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This article brings together views expressed in a series of lectures I gave in Europe during April - May 1976. The Institut for Eskimologi, Københavns Universitet, invited me to come to Denmark, making it possible to give these lectures, with appreciated financial assistance from the Social Science Research Council of Denmark. Lectures were also given in Norway at the Institutt for Etnografi, Oslo Universitet; the Department of Social Anthropology, Bergen Universitet; and the Institutt for Samfunnsvitenskap, Tromsø Universitet. I was also privileged to be able to give lectures in the Netherlands at the Institutt voor Volksrecht, Faculteit der Rechtsgeleerdheid, Katholieke Universiteit, Nijmegen; the Interfacultaire Werkgroep Arctisch Centrum, Rijksuniversiteit, Groningen; and to the Nederlandsche Commissie Voor Internationale Natuurbescherming on the premises of Utrecht Universiteit. The opportunity to give these lectures at these institutions, and the hospitality extended during my visit, were very much appreciated.

This article is given also in deep appreciation of the continuing support given by Dean Harry W. Arthurs in respect to my work in the subject area during his tenure as Dean of the Osgoode Hall Law School of York University, 1972-1977 .

## CANADA: NATIVE LAND RIGHTS AND NORTHERN DEVELOPMENT\*

Canada as a Nation State and How This Relates to Northern Development

One can assert that Canada is at present at least the equal of any of the advanced societies in the world. Canada has all the technological benefits of the advanced industrial society with the attendant high standard of living in a material sense. This growth has also afforded Canadians the delivery of social services by the public sector at a very high level. However, the growth of the Canadian industrial state has not yet so changed the social and physical environment so as to compromise traditional and basic values. Canada is truly a free society with the traditional core values and institutions remaining intact.

True, the forces of significant economic and cultural change constitute a threatening challenge to Canada. Canada is at the turning point of its history. How does it go forward, preserving and maximizing the advantages of an industrial and free society, and maintaining a high quality of life?

Compare Canada's position with those nations with which Canada has significant ties. Great Britain and France are the charter cultures of Canada. Although those nations may maintain their quality of life, one must question whether they have viable economies. Canada's economy and culture can never escape the enveloping shadow of its all-powerful neighbour, the United States. Yet while the United States may continue to have a viable economy, one can argue there is no longer a maintainable quality of life.

Clearly, Canada does not want to go the route of either Great Britain or the United States. Canada is a country with a future. Canada

is the second largest country in size in the world (after Russia) with only 23 million people, with a Gross National Product of \$176 billion,<sup>1</sup> and adequate natural resources. It has the cultural heritage, industrial capacity, and continuing social and physical environment to take its place in history as a unique and model society.

What are the present problems faced by Canada, and how does northern development fit into this context? One must identify the forces which threaten Canada's economic and environmental viability and hence, the future.

A fundamental problem of the advanced industrial democratic society in North America is the growth of large, monolithic institutions, specifically, big cities, corporations, governments, and unions. All these institutions, functionally necessary and still beneficial in terms of goals, have grown to the point where the checks and balances of the former frontier society are no longer present. These institutions continue to serve the legitimate needs of the institutional self-interest, but with the loss of checks and balances tend to get out of control. This phenomenon is accelerated by the fact that the institutions (government and the multinational corporations in respect to the northern development issue) have an intertwining relationship. The unchecked growth of the institution, in its self-interest, becomes counter-productive to the larger public interest.

The result is continuing quantitative development, often with a greater loss in terms of the qualitative development of society. Thus there is the paradox of the growing but disintegrating society. This is not to argue for no growth. We must have industrial growth. But if Canadians are truly to have a quality society, growth must be balanced by having due regard to all factors relevant to the public interest.

Northern Development and Institutions in  
Decision-Making

A prime example in recent years of the phenomenon of the unchecked big institution is in respect to its contribution to domestic inflation. The ability of the big union in either the public or private sector to demand a higher wage which can be easily passed along by government through raising revenues or the multi-national corporation through raising prices, resulted in cost-push inflation. Coupled with demand-pull inflation due to ever-increasing big-government spending, and international inflation, Canada had double digit inflation. Without a viable economy, the other more basic freedoms are inevitably diminished. Wage and price controls were introduced in October, 1975, for a three year period. In the Government's view, this gives some respite until values can change. One can agree with the need for economic regulation through wage and price controls in the short term. But what is truly needed in the long term is modified or new institutions so as to preserve and enhance traditional core values. Thus, for example, the adversarial collective bargaining process of the present could be modified by new mechanisms to ensure that the public interest is truly met.

Focusing upon questions relating to northern development, let us consider a few examples. In respect to multi-national corporations and the development of oil and gas, the competitive market system worked well in the 1950's and 1960's, with the result that the price of oil and gas actually fell between 1950 and 1970. However, with the external OPEC cartel in 1973, and an insufficient domestic supply to meet demand, the price inevitably increased dramatically. Moreover, the Canadian petroleum industry is 95% foreign controlled,<sup>2</sup> and this control

is concentrated amongst the five multinational giants. Government intervention was necessary in respect to pricing, whether to ensure that the domestic price was kept lower than the international price, or to appropriate the windfall profits to the public sector, or to ensure the profits went to exploration and development in the higher cost frontier areas. The quite legitimate corporate self-interest of maximization of profit was inconsistent with the public interest.

Another example is seen in the natural resources sector of public policy-making. There is a need for new public agencies in respect to both the policy advisory and the regulatory functions. The National Energy Board (N.E.B.), a quasi-independent public agency, performs both the advisory and regulatory functions in respect to important national energy questions. It is a mistake to marry together these functions.<sup>3</sup> During the critical period of decision-making in respect to northern development, 1968-1972, the chairman of the N.E.B. was a member of the intra-governmental advisory committee on northern development policy. The main element of policy development at this time was perceived as doing everything possible to guarantee Canadian oil, thought to be in great surplus, access to U.S. markets in the face of threatened competition from the discovery at Prudhoe Bay, Alaska in February, 1968.<sup>4</sup> Thus, the N.E.B. would hardly provide alternative policy suggestions, or criticism, to such a policy.

In terms of northern development policy formulation and regulation, one can see the problem of the modern monolithic institution in the extreme.

One must appreciate the Canadian mentality. We have been very much a frontier society well within the last 100 years. The growth ethic is firmly embedded as a present intuitive value. Moreover,

the proximity to the United States has easily led a willing Canada to be a mirror-image society. Given the strong industrial base coupled with post-war opportunity, it was inevitable that in both societies the development and consumptive ethic would dominate any other considerations over the past thirty years.

Being a branch-plant, limited market economy, with supposedly unlimited natural resources,<sup>5</sup> it was both necessary and easy to sell natural resources to generate the foreign exchange necessary to support the trading deficit in the consumer goods sector.<sup>6</sup> The effort of Government in the development of the minerals industry was premised upon growth and exports being desirable. That was the intuitively perceived public interest. Thus, the "northern vision" of Prime Minister Diefenbaker, a manifestation of the growth ethic, had immense appeal to an electorate which gave him the largest election victory in Canada's history in 1958. Growth on any terms was seen as inevitable progress, and the north was considered a hinterland supportive of the southern, urban metropolis.

Exploration permits for northern Canada were made available in the 1960's on easier terms than anywhere else in the world,<sup>7</sup> and without any prior land use planning or environmental regulation.

Moreover, with the Prudhoe Bay discovery in February, 1968, near hysteria came to government policy and decision-makers at both the federal and provincial level.<sup>8</sup> Canadian petroleum had to be assured of the American market, in the face of the threat of a glut of American oil and gas from Prudhoe Bay. Canadian exports would be assured by facilitating American utilization of Prudhoe Bay through allowing oil and natural gas to be transported across Canada to the United States. Canada would strive for a continental energy policy, if not stated or recognized as such, with northern pipelines serving to more closely

link Canada's petroleum reserves into the American market, thus enhancing the possibility for continuing and increasing Canadian exports. How times change for only five years later in October 1973, Canada was to experience with the rest of the world the energy crisis.

The Northwest Territories and Yukon Territory as Jurisdictions, and the Decision-Making Process

The Northwest Territories and Yukon Territory, being federal jurisdictions,<sup>9</sup> mean there is no check upon the federal use of power by a provincial government. The Territorial governments are weak, derivative governments beholden to Ottawa.<sup>10</sup> They have no role in non-renewable resource management. This means there is no check upon federal decision-making by another level of government.

Moreover, within the structure of the Federal Government, the Northern Natural Resources and Environmental Branch of the Department of Indian and Northern Affairs has a decision-making power unconstrained in any significant way by other departments. Native peoples' affairs is dealt with within the same department in which the Northern Natural Resources and Environment Branch<sup>11</sup> is paramount. Similarly the conservation interest, represented by the National Parks Branch, is submerged as well within this department. Although the conflict between the northern native peoples' interest, the conservation interest and the northern development interest is obvious, it is submerged and controlled at the bureaucratic level. In effect, the northern development interest is by far the dominant interest in fact in policy formulation going to the Minister and Cabinet, and in northern jurisdictional control. The Northern Development Branch controls the issuance of exploration permits.<sup>12</sup> Moreover, the Branch initiates, administrates and enforces the regulations for environmental protection.<sup>13</sup>

Finally, the Government itself is often the developer through Panarctic Oils Ltd., and this will increase with the recently created Petro Canada.<sup>14</sup> When the government becomes the developer, the regulated becomes the regulator. The board of directors of Petro Canada and Panarctic include civil servants whose duties are administrating the regulations constraining development. Hearsay suggests Panarctic is one of the worst environmental offenders in Canada's Arctic.

The overall effect is that the Arctic is a monolithic jurisdiction effectively controlled by a federal bureaucracy whose stated and main goal is development, whatever the name of the Branch might euphemistically suggest. The policy advisory, regulatory, and developer roles are all largely within a single bureaucracy with no significant checks upon it, nor any balancing factors. The branch of Government which has the goal of northern development has the power to submerge and defeat the competing native peoples' and conservation interests. Thus, there are no checks and balances and, consequentially, inadequate planning, ineffective control, and failure to ensure that other aspects of the general public interest have a meaningful part in decision-making.

Moreover, the process is largely secret with access to the critical information limited just to government, and industry with the consent of the government.<sup>15</sup> The history of northern development in Canada demonstrates how government has paid relative lip-service to native peoples' and environmentalists' concerns, while all the time pressing relentlessly forward for resource development, largely under foreign ownership and control.

One could give many examples of decisions made in respect to northern development which may have been different had there been a decision-making process allowing effectively for all the necessary inputs. A contemporary example is illustrative.

On April 16, 1976 the federal Cabinet decided to allow drilling for oil and gas in the Beaufort Sea, that part of the Arctic Ocean along the coast of the western part of the Northwest Territories, and the coast of the Yukon and the Alaskan North Slope. The drilling would take place about fifty miles offshore. The only drilling in the Beaufort Sea to that time had been from artificial islands constructed in shallow water close to the Mackenzie Delta.

Dome Petroleum had received approval in principle to a drilling program in July, 1973 from the federal Cabinet after private meetings between exploration companies and government officials. This was without consulting the Inuit who use the area for hunting and fishing, and notwithstanding the fact that no government agency had studied the environmental hazards even though the Beaufort Sea represents an ecologically sensitive area. Indeed, the memorandum to Cabinet prepared by the Department of Indian and Northern Affairs said the environmental risk was low. The Department had done no research and proposed no research.

However, the native peoples and environmentalists learned of the plans and protested, and the matter came before the Cabinet, which to its credit, in giving approval required an in-house environmental research program conducted jointly by the Department of the Environment and industry as to the possible environmental impact of the drilling. The study was viewed at its inception by most onlookers as mere window-dressing. However, the resulting report was sufficiently skeptical that the Minister of the Environment opposed the drilling. The report indicated that the problem of sea ice means operations in the Beaufort Sea differ significantly from those in other climates. If there is an oil blowout (the chance of which is estimated by the report as being somewhere between one in 1,000 and one in 10,000) it might well

be impossible to drill a relief well to stop the spill before the fall pack ice moves in, about October 15. It might be impossible to drill a relief well for many months, with the blow-out continuing, out of control. Some scientists predict such a blow-out would constitute an ecological disaster in the magnitude of the world's worst.

Even the U.S. State Department requested a delay in approval because of the need for further environmental impact assessment, and the danger to adjacent Alaskan waters and shore. Moreover, Canada's willingness to run undue risk in offshore exploration seems somewhat inconsistent with Canada's assertion at the Law of the Sea Conference for the right of a coastal country (Canada has the longest coastline in the world) in international law to declare an international economic zone extending 200 miles off its coasts in which the coastal country would have jurisdiction to prevent pollution.<sup>16</sup>

The permits affording Dome exploration rights had been issued in 1969, and as mentioned, approval in principle to drilling had been given by the Cabinet in July 1973. When final approval was sought from Cabinet, and given in April 1976, one argument in favour of approval was that Dome had vested rights and had put some \$150 million into drilling ships which were almost ready to embark for the Arctic. Thus, at the very least, the unchecked bureaucratic northern development interest had created a situation which made it very difficult to further postpone drilling in the Beaufort Sea.<sup>17</sup>

#### Arctic Native Peoples' and Land Claims

Canada's native peoples number approximately 500,000 or about 2 1/4% of the total population. Sovereignty of New France passed to Great Britain by conquest in 1760, and was followed by the Royal Proclamation of 1763,<sup>18</sup>

which affirmed Indian property rights under British sovereignty. The centralization of authority through the Royal Proclamation to deal with native peoples and their property rights was continued in the constitutional framework at Confederation of the Canadian provinces in 1867, the authority to deal with "Indians, and Lands reserved for the Indians" being given to the federal Parliament by s.91(24) of the British North America Act.<sup>19</sup>

The Treaty making process intended by the Royal Proclamation for the surrender of Indian property rights accelerated after Confederation, culminating in land cession Treaty No. 11 in 1921. About 125,000 Indians today are descendants of those Indian nations entering into treaties. Land cession treaties cover about one-third of Canada. The limited case law in Canada in respect to the legal nature of these Indian treaties has held the treaties to have only a legal status equivalent to that of ordinary contracts, and hence are subject to unilateral abrogation by Parliament.<sup>20</sup>

The more general question of Indian sovereignty has not received much analysis in Canadian law. British, and subsequent Canadian, sovereignty is assumed in all discussions of the recognition of native rights by English and Canadian law. The only legislation enacted by Parliament under its constitutional authority has been the Indian Act<sup>21</sup> (which had its birth in pre-Confederation legislation), but this special legislation affects very significantly the lives of the 271,000 status<sup>22</sup> (treaty and nontreaty) Indians. The historical twin policy goals of the Act, being protection and assimilation into the dominant society through the mechanism of rigorous paternalism, paradoxically have been a main contributing cause of the Indian plight, namely, the loss of identity and pride, living in a state of debilitating unilateral dependence, and being in a resultant significantly disadvantageous economic, educational, and social position.

In the past few years provisions of the Indian Act have been tested before the courts<sup>23</sup> as being discriminatory and thus in conflict with the federal Canadian Bill of Rights, enacted in 1960.<sup>24</sup> The latter Act recognizes and is protective of fundamental individual freedoms of intrinsic value to the whole of Canadian society. In this sense, the Canadian Bill of Rights is only protective of the values of the dominant society. Its language is not necessarily protective of the values of minority group rights. Moreover, at least one of the lower court decisions interpreting

the Bill of Rights took an egalitarian approach.<sup>25</sup> That is, because the Indian Act sets apart one racial group, it is thereby inherently discriminatory without further consideration, and in conflict with the Bill of Rights. However, the courts have not yet been faced squarely with the question of special legislation premised on a policy of protection and enhancement of minority rights as a group.

The cession of treaty-making in 1923 was followed by a period of quietude until the 1960's when the unilateral abrogation by Parliament of treaty rights, in particular hunting and fishing rights guaranteed by the treaties, became a dominant issue.<sup>26</sup> In June 1969, the Government's White Paper<sup>27</sup> asserted that special laws for native peoples were inherently discriminatory, that egalitarianism was the true path to progress, and that the Government should not respect unsundered native land rights. The White Paper was emphatically rejected by native peoples.<sup>28</sup> In 1973 a case in the Northwest Territories raised for the first time the basic question whether the literal words of the treaties are in fact representative of the true understanding of the Indian people at the time of treaty-making.<sup>29</sup> Moreover, there is some suggestion of forgery. Was there truly a legally effective surrender of native title?

In the past five years, with the explosive northward expansion of the dominant society in pursuit of the exploitation of natural resources, the question of Indian title in the Mackenzie Valley area (being 400,000 sq. miles and purportedly surrendered under treaties #8 and #11) and Indian or Inuit title in nontreaty areas (the balance of the Northwest Territories, the Yukon Territory, and Arctic Québec) has become the focal point in the subject area of native rights in Canada.<sup>30</sup> In Canada's north, native peoples constitute a significant percentage of the population (in some areas a majority), and the people still continue to use their traditional land base with the consciousness of a food gathering tribal society. There is a recently completed Land Use and Occupancy Study<sup>31</sup> which sets forth comprehensively that the 15,000 Inuit in the Northwest Territories still use and occupy 1.23 million square miles (866,600 of land, 371,000 of water).

In the Northwest Territories, there are about 7,000 status treaty Indians and perhaps 6,000 nonstatus Indians living along the MacKenzie River Valley, and some 15,000 Inuit (who never signed treaties and who cannot have status under the Indian Act). In the Yukon Territory there are

about 3,000 status (nontreaty) Indians and perhaps an equal number of nonstatus Indians. In Arctic Québec there are about 6,500 status (but nontreaty) Indians and 3,500 Inuit. There are about 2,000 Inuit in Newfoundland (Labrador).

With the competing land uses of exploration for oil and gas, or other minerals, or hydroelectric projects, the land base of all these people is greatly endangered. In particular, the possibility of a Mackenzie Valley natural gas pipeline dictates the urgency of fair, legislated land claims settlements in the Northwest Territories and Yukon Territory. A land claims settlement was made in November, 1975, in respect to Indian and Inuit claims in Arctic Quebec, where the James Bay hydroelectric project is under present construction. Native land rights and northern development are at present the most acute source of friction between native and non-native society in Canada.

There are three major projects: the \$13.6 billion James Bay Hydro-electric project, already under construction, the proposed Mackenzie Valley natural gas pipeline, and the soon to be proposed Polar Gas pipeline.

The Mackenzie Valley natural gas pipeline controversy involves the largest projected commitment of private capital in the history of Canada. Debate about this project has covered a broad range of matters, including native land claims, environment protection, existing gas supply and gas export policy, and economic impact. There are actually three alternative proposals under consideration.

The first is the application before the N.E.B. of Canadian Arctic Gas to build a 48-inch \$8.4 billion pipeline extending from the 49th parallel north and thence twin spurs to the Mackenzie Delta and to Prudhoe Bay, in Alaska. This applicant contends that the gas supply from Alaska alone will provide the threshold volumes of natural gas necessary to achieve an economic link to the limited proved reserves of the Mackenzie Delta, and without utilizing Alaskan gas, such access to Canadian supplies in the western Arctic would be prejudiced for many years. Thus, the Canadian Arctic Gas proposal would use the same pipeline facility to bring gas from Alaska and the Mackenzie Delta to southern Canada and the U.S., each country receiving the quantity of throughput gas it contributed at source.

The second applicant is Foothills Pipelines Ltd., which is proposing "The Maple Leaf Project". This \$3.06 billion project conceives of a smaller, lower pressure 42-inch mainline from the Mackenzie Delta to the northern perimeter of the Province of Alberta, where it will connect with the existing Alberta gas trunk line facilities to deliver western Arctic gas to points west, south, and east in Canada. Foothills argues that an Alaskan tie is unnecessary, and that regulatory approval of its proposal would catalyze sufficient exploratory activity that the necessary threshold reserves would soon be found in the Mackenzie Delta area. Foothills also disputes the contention that the Arctic Gas 48-inch system offers economies-of-scale that can meaningfully improve upon the proven efficiency of the 42-inch system.

The third proposal is for what is called the "Alcan Route". This undertaking is supported by Foothills, and consists of Alberta Gas Trunkline, West Coast Transmission, and Pacific Northwest Pipelines. They propose bringing Alaskan gas south by means of a gas line extending from Prudhoe Bay to Fairbanks and thence to northern British Columbia and Alberta via the Alaska Highway right-of-way, and then to the north-western U.S.A. by way of existing pipeline systems. Acceptance of this third proposal would defeat the Arctic Gas application, and would presumably eventually result in the Foothills Project, once greater gas reserves in the western Canadian Arctic become established, and the threshold in reserves is reached to make the proposed Foothills pipeline economically viable.

In opposition to Canadian Arctic Gas as well, is a U.S. entity, El Paso, which has applied before the American regulatory authorities to construct a natural gas pipeline to carry Prudhoe Bay gas across Alaska following the Alyeska oil pipeline route. The gas would then be liquefied and shipped by tanker, probably to California. If El Paso is successful, it means the Canadian Arctic Gas proposal must fail.

It is expected that the Polar Gas Project will apply to the N.E.B. in 1977 for the necessary authority to construct a more than \$10 billion natural gas pipeline from the Arctic Islands. This pipeline would move gas up to 3,200 miles southward and across up to 170 miles of Arctic Ocean channels with some depths for crossings exceeding 600 feet. While there are two main alternative possible routes, the probable one is down the west side of Hudson Bay through Manitoba and Ontario.

Underlying the specific concerns in respect to land and treaty rights is the more pervasive claim by all native peoples in Canada for their realization of more basic human rights - that is, true general equality of opportunity in fact so that native peoples will be able to gain the self-expression and self-realization readily available to and achieved by other Canadians.<sup>32</sup>

In my view, northern land claims settlements offer the opportunity of a significant mechanism whereby native cultural identity can be retained, so far as possible, and on the other hand, equality of opportunity can be effectuated within an integrated, emerging northern industrial society.

Given the competing cultures of Canada - a dominant society which values the vast northern land base primarily for its exploitative, development potential and a minority native peoples whose consciousness and life-style are rooted in an autochthonous culture - is there any possibility of realistically thinking that there can be a land claims settlement, or more general native peoples' policy, which truly meets the criteria of fairness and the general Canadian public interest?

#### Recent Court Developments in Respect to the Question of Native Title and Related Political Developments

The Federal Government had expressly stated in the 1969 White Paper<sup>33</sup> that native land rights, apart from those as part of treaty rights, would no longer be recognized. The native peoples, in seeking redress for the loss of their lands and traditional rights in the early '70's, had to pursue their claims through the only forum available, the courts. It is useful to review briefly three major court cases.

The non-treaty Indian Nishga nation of Northwestern British Columbia commenced court action in 1968 seeking a declaration that their native title had never been extinguished in respect of a large land area in the Nass River Valley of British Columbia. The Nishga Indians lost in the trial court<sup>34</sup> and on appeal the British Columbia Court of Appeal held that the Royal Proclamation of 1763 did not apply to British Columbia and further, that there could be no judicial recognition of native title.<sup>35</sup> The Nishgas appealed to the Supreme Court of Canada and a decision was rendered January 31, 1973.<sup>36</sup> The court held for the defendant, British

Columbia. However, due to the nature of the judgments rendered, there was not a decision for the defendant on the merits.

This case was the most important court decision to that time in respect to native title. The Nishga case was heard by only seven justices, rather than the full nine member court usual in a case of such importance. Mr. Justice Hall, with Justices Laskin and Spence concurring, decided on the merits in favour of the Indians. Mr. Justice Judson, with Justices Martland and Ritchie concurring, found on the merits for the defendant, British Columbia. The seventh Justice, Mr. Justice Pigeon, held for the defendant, but simply on a procedural basis.

As a result, the substantive issue as to whether the Nishgas have native title remains unresolved by the court, as it does for all native peoples in Canada pursuing such claims.<sup>37</sup> This would include the approximately 15,000 Inuit and the non-treaty Indians in the Northwest Territories and Yukon Territory. It would also include the approximately 7,000 treaty Indians in the Northwest Territories, if they can still assert an unrendered native title.

The controversy first ensuing from this decision often missed the point that the court is the least appropriate forum for dealing with native title. Litigation is expensive, time consuming, and abounds with technical uncertainties. Even if the Nishgas were successful in their court action, further litigation would be necessary. First, further litigation would be required to resolve the question of the precise incidents of native title, as the question of the legal content of native title has not been resolved by the courts in Canada, and the Nishgas' action sought only a declaration that native title exists. Second, litigation would necessarily ensue to determine the conflicts as between native title and other, competing land users. Third, there would have to be litigation to determine if compensation were payable in those instances where native title existed but had been expropriated.

It seems obvious that these issues are best determined and resolved by legislation rather than by litigation. The questions involved cannot easily be answered on a yes or no basis, which is the only approach a court can take. The issues are such that they can only really be resolved to the satisfaction of all through a negotiated, fair, settlement which requires calling upon the Government to recognize aboriginal rights and enter into a legislative settlement. Individual members of Parliament for the opposi-

tion parties took a fairly strong position in favour of recognition. Given the then minority Government situation, the Prime Minister was under considerable pressure.

Fortuitous from the standpoint of timing, on February 14, 1973, the Yukon Native Brotherhood presented its proposal to the Prime Minister for negotiation and settlement of the land claims of the more than 6,000 non-treaty Indians and non-status Indians of the Yukon.<sup>40</sup> The Prime Minister, whose representatives had met with Indian leaders and had considered the proposal privately over the preceding week, warmly embraced the proposal and agreed to set up the requested negotiating committee "with great haste".<sup>41</sup>

Thus, on February 14, 1973, the Government, to its credit, really reversed its position in respect to native title, although without any formal recognition thereof. Although the Yukon proposal did not specifically ask for a settlement of its claims on a basis of native title, this was implicit to the proposal. A settlement of the claims of the Yukon native peoples is still some considerable time away. However, whatever the legal niceties, the simple agreement to negotiate implied a recognition of some rights on the part of the native peoples, and a fair and reasonable settlement of claims based upon those rights.

The reasons were unclear as to why the Government refused prior to February 14, 1973 to recognize aboriginal rights. There had been nebulous references to the view that such recognition might amount to 'giving the country back to the Indians.' Perhaps Mr. Trudeau's concern stemmed from his fear of assisting separatism in Quebec, for he had said: "... some of us are also sorry about the Plains of Abraham but we don't ask for compensation about that ..."<sup>42</sup> If so, he failed to realize that the aboriginal rights question is not one of sovereignty. Moreover, at the time of the fall of New France, the British fully recognized the property rights of French settlers, as well as the property rights of the native peoples through the Royal Proclamation of 1763.<sup>43</sup> In any event, as Parliament has complete control of any legislative settlement of native title, nothing is really being given away through the recognition of such rights and the negotiation of a fair settlement.

There are two other important cases before the courts recently which relate to the question of native title.

The approximately 7,000 treaty Indians of the Northwest Territories have sought to lodge a caveat, in respect to lands traditionally used and occupied, with the Registrar of Titles of the Land Titles Office for the Northwest Territories. The Indians assert the literal wording of the treaties does not accord with the true agreement or understanding reached at the time of the signing of the treaties and that there has not been any legally effective surrender of their title.

In a decision given September 6, 1973,<sup>44</sup> the Supreme Court of the Northwest Territories held in favour of the Indians in respect to the issue as to whether a caveat could be lodged, Mr. Justice Morrow saying:<sup>45</sup>

"That notwithstanding the language of the two treaties there is sufficient doubt on the facts that aboriginal title was extinguished that such claim for title should be permitted to be put forward by the Caveators."

However, the court stayed the filing of the caveat pending a possible appeal, the decision was reversed on appeal,<sup>46</sup> and a further appeal is to be heard by the Supreme Court of Canada.

The Superior Court of Québec in a decision by Maleuf, J. November 15, 1973<sup>47</sup> allowed petitioners representing the Inuit and Cree Indians of the James Bay area of Québec an interlocutory order of injunction against the James Bay Development Corporation and others in respect thereto. On November 22, 1973, the Court of Appeal for Québec suspended the lower court's injunction until determination of the appeal in respect thereto.<sup>48</sup> On December 21, 1973, the Supreme Court of Canada (by a 3:2 decision) refused leave to appeal to the petitioners in respect to the suspension order.<sup>49</sup>

An agreement-in-principle as to a settlement was signed as between the native peoples and the federal and provincial Governments on November 15, 1974, and this ended the court action. However, the Court of Appeal shortly thereafter gave its judgment reversing Maleuf, J's decision on the merits.<sup>50</sup> Because of the agreed to settlement, the matter was not appealed to the Supreme Court of Canada.

If the Québec Indians and Inuit had been ultimately successful in court, undoubtedly the Government of Québec would have expropriated, very probably through a specific piece of legislation. This would have resulted possibly in further court action on the arguable assertion that the Province of Québec does not have the constitutional power to expropriate native title.<sup>51</sup>

Again, there could have been a multiplicity of court actions including a petition for an interlocutory order of injunction in the first instance. If the complex constitutional issue had been decided in favour of the native peoples, the Federal Government would then have had to decide whether it would meet Québec demands to expropriate and if so, on what terms. Finally, even if the Federal Government did expropriate, there is a possible argument that native title in the James Bay area has received recognition and protection by the British North America Act and, therefore, even the Federal Government could not pass expropriating legislation which sought to deny that there is any native title.<sup>52</sup> Therefore, further court action possibly could have resulted from an attempted expropriation by the Federal Government.

This paper does not deal with the many legal issues, and only provides a brief synopsis of the major recent cases. However, three points are obvious from this discussion. First, in Calder there was a strong dissent recognizing native title, and in both the caveat case in the Northwest Territories and the James Bay case, the trial courts' decisions, although both turn directly upon subsidiary or preliminary issues, suggest the petitioning native peoples may well have successful claims to native title on the merits.

Second, the path of litigation was the only recourse open to the native peoples in the early 1970's, but it is a very complex and unsuitable approach to the fundamental problems and concerns. Even with successful litigation, there is the power of government to expropriate, although nice constitutional questions may sometimes arise in this regard.

Third, the only fair and ultimately successful approach to the root problems and concerns can come about through a political and legislative solution.

There are many reasons compelling an early political and legislative solution to each of the several northern native groups' land claims. Some of the reasons have already been discussed, but it is useful to identify and discuss three main reasons, before considering further possible political/legislative approaches to land claims settlements.

First, the historical legal theory and practice of the British in North America, and of Canada, establish a strong argument that northern native peoples are owners of traditionally used and occupied lands.

There is a legal basis to land claims. Secondly, there is a moral basis to land claims. Thirdly, and finally, there is a very practical basis for the settlement of land claims, on the basis of desirable social or public policy.

#### Historical Legal Theory and Practice in Respect to Native title

The legal and historical theory and practice in respect to the recognition of native title<sup>53</sup> must be considered, albeit briefly. There are two distinguishable theories in this regard, although there is overlap.

First, there is the historical legal theory of English common law (also found in international law<sup>54</sup> and continental law going back to Roman law) as to the rules of law applicable to the acquisition of new territories. Upon the acquisition of a new territory by the English sovereign, the local customary law (lex loci) of the inhabitants in the acquired territory is recognized, protected, and incorporated by English law until the English Sovereign authority (the Crown's prerogative or the legislative authority, depending upon the nature of the acquisition and the point of time in history) changes that local law.<sup>55</sup> Thus, the local customary law of native peoples in North America as to property rights would, at least in theory be recognized and protected by English and later Canadian common law, which rights could only be altered by the Sovereign. This power would now rest with Parliament. Historically, the native peoples have been considered to be British subjects, with full rights and privileges. Their property rights receive full protection from interference by the Crown. The essential question really becomes - has Parliament for a given geographical area terminated the native title? Looking to expropriation law, it would seem that Parliament does not terminate that title without very expressly doing so, especially if compensation is not payable.<sup>56</sup> The Canadian Bill of Rights,<sup>57</sup> with its due process provisions, would also apply.

Therefore, a legal basis of the Inuit claim in the Northwest Territories is that they have a customary system of tenure, that is, an organized and systematic use and occupation of their traditional lands and waters, and that under Canadian law this is a full right of property. The Land Use and Occupancy Study<sup>58</sup> provides the extensive factual data to support the legal argument of the Inuit. Before the Crown can legally

interfere with Inuit property rights, it has to either obtain their consent, or else properly compensate them for an expropriation of their lands.

The Inuit assert that their rights extend to all the renewable and non-renewable resources. They argue that any territory which belongs to them by reference to their own customary system of tenure also belongs to them under Canadian law. This means that their claims to ownership extend as well to the sea ice adjacent to the continent and off-shore islands. The conclusion, accepting this historical legal theory, is that the Federal Government has no legal right to alienate lands in respect to which the Inuit have property rights without first obtaining the consent of the Inuit, or alternatively, following the usual formal expropriation procedures under Parliamentary authority.

The second approach of historical legal theory is to simply look at the unique English colonial practice experienced in each of its colonies. In North America, for the expedient reason of maintaining the peace with the native peoples, the English expressly recognized Indian hunting territories in the Royal Proclamation of 1763,<sup>59</sup> which has continuing statutory force in Canada. This expedient policy of political recognition ripened into recognition by both the common law and a good many statutory enactments (for example, the Manitoba Act of 1870<sup>60</sup> and The Quebec Boundaries Extension Act, 1912).<sup>61</sup> Under the Proclamation, procedures were provided as to obtaining a surrender of native property rights. As already discussed, the treaty-making process for land cessions by the native peoples lasted up to fifty years ago, about one-third of Canada being dealt with through this process. The treaties quite clearly employ the language of a purchase and transfer of property rights. Thus, it can be said that from colonial practice evolved a firm legal basis for native property rights in Canada.

An outline<sup>62</sup> of some of the leading authorities from Confederation to the present will serve to reiterate the proposition that the property rights of native peoples have always been conceded and that those rights may not be interfered with without both consent and compensation:

- 1869-70 - The purchase of the Hudson's Bay Company's territories and the acquisition of the North-western Territory. The Federal Government accepted responsibility for any claims of the Indians to compensation for land in Rupert's Land and the Northwestern Territory.<sup>63</sup>

- 1870 - The Manitoba Act granted land to settle the Métis' aboriginal claims.<sup>64</sup>

- 1871-1930 - The numbered treaties and their adhesions speak of the Indians conveying land to the Crown. As the Order-in-Council for Treaty No. 10 demonstrates, the treaty-making was done with a concept of aboriginal title clearly in mind:

"On a report dated 12th July, 1906 from the Superintendent General of Indian Affairs, stating that the aboriginal title has not been extinguished in the greater portion of that part of the Province of Saskatchewan which lies north of the 54th parallel of latitude and in a small adjoining area in Alberta...that it is in the public interest that the whole of the territory included within the boundaries of the Provinces of Saskatchewan and Alberta should be relieved of the claims of the aborigines; and that \$12,000.00 has been included in the estimates for expenses in the making of a treaty with Indians and in settling the claims of the Half-breeds and for paying the usual gratuities to the Indians."<sup>65</sup>

- 1872 - Section 42 of the first Dominion Act dealing with the sale of Crown land stated:

"None of the provisions of this Act respecting the settlement of Agricultural lands, or the lease of Timber lands, or the purchase and sale of Mineral lands, shall be held to apply to territory the Indian title to which shall not at the time have been extinguished."<sup>66</sup>

This provision remained in the various Dominion Lands Acts until 1908.

- 1875 - The Federal Government disallowed "An Act to Amend and Consolidate the Laws Affecting Crown Lands in British Columbia" stating "There is not a shadow of doubt, that from the earliest times, England has always felt it imperative to meet the Indians in council, and to obtain surrenders of tracts of Canada, as from time to time such were required for the purposes of settlements."<sup>67</sup>

- 1876 - A speech of Governor-General Dufferin in Victoria strongly upheld the concept of Indian title and criticized the British Columbia Government.<sup>68</sup>

- 1879 - The Dominion Lands Act authorized the granting of land in the Northwest Territories to satisfy "any claims existing in connection with the extinguishment of the Indian title, preferred by half-breeds..."<sup>69</sup>

- 1888 - In the St. Catherine's case the Federal Government argued that it obtained a full title to land from the Indians by Treaty No. 3.<sup>70</sup>

- The Federal-Provincial Agreements which followed the decision in the St. Catherine's case sometimes employed the following "whereas" clause (taken from the 1924 Ontario Agreement):

"Whereas from time to time treaties have been made with the Indians for the surrender for various considerations of their personal and usufructuary rights to territories now included in the Province of Ontario..."<sup>71</sup>

- 1889 - The Federal Government disallowed the Northwest Territories Game Ordinance because it violated Indian treaty hunting rights.<sup>72</sup>

- 1912 - In the boundaries extension legislation for both Ontario and Quebec, the Federal Government made a special provision requiring treaties with the Indians.<sup>73</sup>

- 1930 - A Constitutional enactment transferred the ownership of natural resources from the Federal Government to the prairie provinces. In each of the provinces the Indians are protected in their right "of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."<sup>74</sup>

- 1946 - Mr. R.A. Hoey, Director of the Indian Affairs Branch, May 30, 1946, before the Joint Committee of the Senate and House of Commons, stated:

"From the time of the first British settlement in New England, the title of the Indians to lands occupied by them was conceded and compensation was made to them for the surrender of their hunting grounds...this rule, which was confirmed by the Royal Proclamation of October 7, 1763, is still adhered to."<sup>75</sup>

- 1946 - The evidence of Mr. T.R.L. MacInnes, Secretary, Indian Affairs Branch, June 4, 1946 stated:

"Now it remained for the British to recognize an Indian interest in the soil to be extinguished only by bilateral agreement for a consideration. That practice arose very early in the contracts between the British settlers and the aborigines in North

America, and it developed into the treaty system which has been the basis of Indian policy both in British North America and continuing on after the revolutionary war in the United States."<sup>76</sup>

- 1966 - The Canadian Indian, a pamphlet published by the Department of Indian Affairs, stated:

"Early in the settlement of North America, the British recognized Indian title or interests in the soil to be parted with or extinguished by agreement with the Indians and then only to the Crown."<sup>77</sup>

- 1971 - The Dorion Commission Report expressly recognized aboriginal rights, in Quebec, urged an expansive view of the content of aboriginal title and acknowledged the need to compensate native peoples for the extinguishment of their native rights.<sup>78</sup>

- 1973 - Calder v. Attorney General of British Columbia<sup>79</sup> an inconclusive decision, provided strong dicta in support of the judicial recognition of native title.

- The Government of Canada's Statement<sup>80</sup> of August 8, 1973 agreed to negotiate a settlement of native land claims.

- 1974 - The James Bay case<sup>81</sup> a strong decision at the trial level recognized native title (reversed on appeal, but not appealed to the Supreme Court of Canada due to settlement of the dispute).

- 1975 - The Northwest Territories Indian caveat case<sup>82</sup> a strong decision at the trial level supported recognition of native title (reversed on appeal, but with an appeal pending in the Supreme Court of Canada).

- 1975<sup>83</sup> - The James Bay land claims settlement is signed (with supportive legislation pending before Parliament).

### The Moral Reasons for a Land Claims Settlement

There are moral reasons for a settlement of land claims. First, even if northern native peoples are considered not to have a legal basis for their claims (in the sense of being able to be successful ultimately in court actions) the undisputed fact is that they use and occupy the lands as claimed. In respect to the 15,000 Inuit of the Northwest Territories, current land use and occupancy amounts to some 1.23 million square miles (866,600 of land and 371,000 of water).

Parliament has the power, of course, to change the law and give the Inuit property rights which are fully recognized and protected by law. With the inevitable, continuing diminishing of the traditional pursuits of hunting, fishing and trapping due to the competing, conflicting uses for Inuit lands through non-renewable resource development, and hydro-electric projects,<sup>84</sup> it is only fair that the Inuit not be displaced entirely or substantially from their lands, but rather that they retain an extensive interest, recognized and protected by Canadian law. The Inuit should not lose their existing extensive property usage in fact, and that which is the essence of their cultural identity, without receiving in exchange meaningful property rights recognized by law.

Second, there are immense social and human costs associated with the change from the traditional society to the new, industrial society of the north. It is simply unfair for the native peoples to be the ones who bear the brunt of the social costs of change. As the first and continuing land users, the Inuit have a claim on a moral basis to benefit through non-renewable resource development as it comes to the Arctic, particularly because there will be tremendous social costs to them.

#### Social Policy Through a Land Claims Settlement

Given the unstated major premise that there is going to be significant development of natural resources in northern Canada, the need for a governmental policy to deal meaningfully with the social problems of the local, native peoples arising from such development is apparent to all Canadians. Moreover, most Canadians have some familiarity with the inadequacy of governmental policy over the past 100 years toward the Indian peoples in southern Canada. Not only are the Indian people by far the most socially debilitated of all Canadians, with the consequential, immense human cost; but their plight results in a very heavy, continuing economic burden to the country. Canadians must learn from past mistakes in devising a new social policy and relationship for northern native peoples within Canadian society, in formulating a humane, and effective social policy for Arctic Canada. Land claims settlements offer a unique opportunity for a new, effective, and progressive yet less costly social policy to meet the foremost problem of northern development, 'the relationship of the native peoples to that development'.

The Prospects and Principles in Respect to a  
Settlement of Land Claims in Canada's North

On August 8, 1973 the Government issued a new and encouraging policy statement saying that it "is prepared to negotiate" with non-treaty Indians and Inuit on the basis of their "traditional interest in lands."<sup>85</sup> There are potential problems in the vague language and stipulated conditions of this statement, and it does not formally recognize native title. The Government has also been funding native organizations to research and argue their claims.

What are the prospects of a land claims settlement in the North? Few Canadians realize that many Inuit are experiencing within a single life-time the tremendous cultural transformation from a tribal community to industrial society. The far North is entering a new phase of impact due to the dictates of non-native society. The first phase of economic activity arising from outside influence was the 19th Century whaling industry, which ended about 1910. The fur economy then came into full bloom, together with the ascendancy of the Hudson's Bay Company in the high Arctic. The era of the fur trader is now ending. With the discovery of oil in Prudhoe Bay in February, 1968, and the subsequent exploration activity in the Mackenzie Delta, followed by that in the Arctic Islands, a third phase of change due to the needs of the non-native economy has begun. The assimilation of the North as an integral part of the national industrial economy approaches.

This brief and simplified view of the far North does not mean to overlook the impact of other important forces such as Christianity, the Dew Line in the '50's, and recently, the non-native educational system. What is being emphasized is that, in my opinion, the incipient industrial era will be at least as traumatic a force as the collective impact of all those forces and changes experienced by native society to date.

The industrial economy is bringing profound changes. I was present at the Inuit Arctic Coppermine Conference in July, 1970, at which time the central issue for those present was the intended exploration activity upon Banks Island. This was the first national conference of Inuit from across the North, and everyone sensed the magnitude of the forces being thrust upon the far North: for the first time the land base, the integral element of the autochthonous culture, was significantly threatened. It

is essential for the non-native person to realize that the very unique, essential element of native culture is the intense relationship to the natural environment and, to the extent such relationship lessens, there is a corresponding diminution of identity.

Change in Canada's North through exploration and development activity is taking place more quickly than reasonable response can be attempted. Ideally, there would have been a temporary freeze (which the Government has always refused) upon exploration activities and development until comprehensive planning could have taken place in respect to all facets of development, not only in respect to land rights, but also such important matters as overall land-use planning, ecological and game preserves, national parks, and related vital questions such as the fiscal regime to govern exploration activities, and a national energy policy.

Given the fact of no land cession treaties in the Yukon and Northwest Territories (except for Treaty #11 in 1921 with the Indians in the MacKenzie River valley, which has a unique and peculiar history and is of doubtful validity) or Northern Quebec, with northward expansion in the 1970's of southern technology in pursuit of non-renewable resources and hydroelectric power, an intense conflict has once again emerged over land as between native peoples and the dominant society. This conflict mirrors what happened in southern Canada with westward expansion of settlers in the 19th century. Indeed, the Riel Rebellion of 1869 which led to the creation of the Province of Manitoba was due primarily to a similar conflict as to native property rights. The McDonald Government in fostering settlement westward of Ontario, after the transfer of Rupert's Land to Canada in 1869, and in undertaking the major development of the day, the Canadian Pacific Railway, sent out government officials who simply ignored the property rights of the native people.

In my discussions with Inuit communities, the people emphasize maintaining their close relationship with the lands and waters they have traditionally used and occupied. At the same time, it is obvious to all that rapid changes are being forced upon the people and considerable development is going to take place. Therefore, the question is, how can the native peoples influence the form of development, and to what extent can they control their destiny? At the same time, how can the native

peoples retain ownership and thereby preserve their traditional way of life or at least retain the closest possible relationship to their land, within the context of significant development and change?

To the extent change is inevitable and development proceeds, it is clear that the native people should, and wish to be involved in the development in both an ownership and management capacity. The people are not prepared to be just employees always taking direction from non-natives. They cannot be simply laborers, or alternatively welfare recipients. Until very recently, the Federal Government's policy in respect to northern development has been limited mainly to pursuing zealously employment opportunities for native peoples.<sup>86</sup> Apart from the fact that there does not appear to be a significant number of these opportunities in any event, such a limited perspective for native participation in the emerging new northern society is very inadequate. True, the Government did announce a new policy August 8, 1973, saying it would negotiate land claims settlements. The only settlement since then has been the James Bay settlement and in my opinion it will cause more harm than good.

Recent Practice in Respect to the Settlement of  
Northern Land Claims - The James Bay Land Claims  
Settlement

The James Bay land claims settlement of November, 1975, allows the Inuit and Cree Indians in the area the retention as owners of about 1.3% of the traditionally used lands which are ceded and surrendered.<sup>87</sup>

The other major element of the settlement is the transfer of \$225 million to the 10,000 native people<sup>88</sup> over several years. Discounting for inflation, the per capita present value of a share in these monies could approximate as little as \$7,000.

This land/money formula<sup>89</sup> is not unlike the historical land cession treaties in southern Canada. Indeed, the comparative value of southern reserve lands retained and annuities received through a land cession treaty (say in 1873, for example, when Treaty #3 was signed in northwestern Ontario) would be much greater than those under the contemporary James Bay 'treaty'. The James Bay settlement is simply a forced purchase, an 'offer that could not be refused' in the sense that no other offer would be made. Construction on the hydroelectric project was continuing throughout negotiations. All provincial political parties supported the hydro-electric project,

the largest development project in Canada's history. A major installation was proposed near the Cree Indian community of Fort George on La Grande river, and a major inducement to the Indians to enter into the agreement-in-principle was the Government's undertaking to move this installation some 32 miles away. The federal Government was not prepared and politically unable to exert any pressure upon Québec.

The only bargaining lever the native people had arose from the interim injunction against the project they had succeeded in obtaining in November 1973, on the basis of native title. Although the injunction was removed by the Court of Appeal a week later, the temporary success afforded a psychological advantage, and the chance of success through eventual appeal to the Supreme Court of Canada did give the native people some leverage.

However, one might well argue that they should have continued their court action rather than accept the settlement they did. If they had been ultimately successful before the Supreme Court of Canada, as was, in my opinion quite possible, undoubtedly expropriation would have followed quickly, but it is probable compensation would then have been on a considerably fairer basis. Even if they had lost in court, it is probable that they still would have been able to get at least the settlement they eventually did, on simply a basis of fairness. Finally, one can argue that from the standpoint of social effect no settlement at all would have been far better than the settlement achieved.

By settling, the public assumes justice has been done. The native peoples' problem is forgotten. But as the traditional hunting and trapping identity inevitably disappears, and the James Bay native realizes he is not part of the new identity of his surrounding society, loss of pride, frustration and hostility will result. Canadians will see the experience of the southern Canadian Indian repeated in Arctic Quebec, and the loss in both human and economic terms in the coming years will far outweigh what a fair settlement would have cost today.

One can see some reason behind the historical land cession treaties. They afforded a peaceful colonization with the westward expansion of Canada. The Canadian policy was much preferable to the American practice

of sending in the cavalry. Moreover, perhaps the treaty-making process did seek to effectuate a social policy. The benefits retained or given to the Indians seemed to be for the purpose of attempting to turn them into farmers, thereby seeking to integrate them into the life-style of values of the white colonizer. This policy failed, but at least the land cession treaties were founded upon a discernible social policy, if misguided in hindsight, which at the time may well have been honestly viewed by Government as being both possible and desirable.

In contrast, the James Bay settlement has no positive features at all, and indeed, is worse than having no settlement at all.

The James Bay settlement fails in dealing with the two essential requirements in a land claims settlement. On the one hand, it fails to do anything significant to effectively preserve the traditional identity. Through the surrender of land rights the people are removed from their traditional identity. They retain only a surface title to about 1.3% of traditional lands.<sup>90</sup> On the other hand, the settlement does not provide a mechanism to bridge the people into the new identity of the emerging industrial society in Arctic Québec. They will not be the owners of sufficient lands to effectively involve them in non-renewable resource development. Moreover, the unwitting public believes fairness has been done and will not readily respond to the inevitable complaints of the native peoples in the future. Finally, the native peoples themselves will eventually show self-hostility to the fact that they 'sold-out', and got nothing substantial in return.

The federal Government obligated itself through the settlement only to the extent of \$40 million. Perhaps this is why the federal Government, with its short-term perspective, could hail the settlement as a "benchmark" for the future.

The northern native peoples' culture and identity is based upon an intimate relationship with their lands and waters. In an autochthonous culture, the people are truly part of the very lands they occupy. Their land is not regarded by them as a marketable commodity simply because it provided their traditional livelihood, with a cash payment through a sale seen as providing a substitute for physical needs. Their lands and waters are an integral part of their total being. To the extent that relationship is compromised, they lose their identity. This is

inevitable to some considerable extent, given the apparent attitudes, values, and perceived needs of the dominant society. But the native people do not want to sell their lands, and thus themselves and their heritage, for money. They do not want to give up their lands as part of a settlement. On the other hand, it seems inevitable that a very large part of the traditional land bases will be utilized for non-renewable resource development.

#### The Alaska Land Claims Settlement of December, 1971

In Alaska, the 70,000 native people received a legislated settlement<sup>91</sup> whereby they retained a full fee simple title to forty million acres of land (about 11% of Alaska) and received \$962.5 million as compensation for the taking of the remainder. However, the peoples' shares in the corporations which own the retained lands can be sold to non-natives, and the lands taxed, after twenty years. By then many of the native peoples may be well-to-do Alaskans, although they will have lost a great deal of their identity as native people. Their life-style will be that of the wage economy and industrial society, the antithesis of the autochthonous culture.

Perhaps this is the best possible solution, in terms of Realpolitik in that the new land use, development, makes the traditional society impossible in the long term. For example, a James Bay trapper uses more than 50 square miles of land and that use is inevitably compromised by non-renewable resource development. However, the Alaskan settlement, unlike the James Bay settlement, is premised upon a policy of settling land claims within a context of discernible social policy. The U. S. Congress realized the historical governmental policy of paternalism toward the native person had failed. Accordingly, the new policy sought to give Alaskan native peoples the means to self-develop within the context of a developing Alaska.

There is no question - this is a policy of assimilation. The Alaskan settlement does not recognize special rights. Perhaps the reason for this was three-fold. First, Congress seemed to view special rights as not being consistent with the general American approach of egalitarianism. Second, special rights and racially defined institutions were viewed as tending to isolate the native peoples from the mainstream of society and this was counter-productive, being seen in part as a cause of historical problems. Finally, perhaps Congress thought it unrealistic to think that

there could be any retention of other than a few vestiges of the native culture in moving into the industrial society. After all, the native culture is a land rooted culture and that land base is largely lost with non-renewable resources development. Thus, once the decision to have extensive non-renewable resource development is made, the integral element of the culture is substantially diminished, and perhaps only the cultural trappings, such as language and art, can survive in the new order over the long term. Moreover, the Alaskan native retains the same scope for hunting, fishing and trapping in fact that the James Bay native supposedly retains through his land claims settlement. The point is, in both Alaska and James Bay, traditional pursuits will remain only to the extent that non-renewable resource development can proceed without interfering. The James Bay native has no greater protection than the Alaskan native.

Be that as it may,<sup>92</sup> the Alaskan settlement did at least seek to give the means to native Alaskans to participate in the industrial society. Without implying the Alaska settlement was sufficient, fair, or moral, the point for the purpose of this discussion is that the Alaskan natives received more in the way of ownership of land than did the James Bay native peoples under their land claims settlement. It is still too early, and too much of a generalization, to say whether the Alaska settlement is working. I have travelled to Alaska and I would guess that the results are very mixed.

However, on the North Slope, one can certainly see positive social change with the Inupiat Eskimos. The North Slope Regional Corporation, adjacent to Prudhoe Bay, owns sizeable tracts of very promising lands for development. This amounts to about 2 1/4 square miles (surface and subsurface interest) on a per capita basis.<sup>93</sup> In contrast, on a per capita basis an Inuk in James Bay received less than one square mile.<sup>94</sup> The Inupiat are very much involved in the development of the region. They are engaged in joint-ventures with the multi-national petroleum corporations. Moreover, they control the local government, the North Slope Borough, which encompasses Prudhoe Bay.

The North Slope Regional Corporation has formed several business corporations to do such things as housing and sub-contract work on the Alyeska oil pipeline. A cadre of strong and sophisticated leadership increasingly well-versed in non-native business skills, is developing.

Even now, they have engaged in such relatively esoteric corporate experiences as proxy-fights. However, the greater participation of the Inupiat has modified the nature of development as well. Holidays are geared to the hunting seasons, seismic work is restricted when the caribou are migrating and so on.

The point is, for the Inupiat on the North Slope, the land claims settlement is at least attempting to provide a means to a new identity, as citizens in the American industrial society. However, the Alaskan Native Land Claims Settlement may well be insufficient in providing this means. Moreover, it seems clear that the harshly assimilative approach of the Alaskan settlement is undesirable. The James Bay settlement, it is predicted with much greater certainty, will serve only to further alienate the native person of northern Québec from his traditional identity while at the same time offering no effective mechanism to gain a new identity within the industrial society. The major flaw of the James Bay settlement is the absence of a sufficient large land base owned by the native peoples, such that they will necessarily and effectively be involved in non-renewable resource development.

#### The Abortive Yukon Land Claims Settlement

In May, 1976, a draft "Agreement in Principle" was drawn up by a negotiating committee on behalf of the 6,000 Yukon Indians (status and non status) and a negotiating team acting on behalf of the Government of Canada. Apparently, the document received approval by the Cabinet, but was repudiated, along with the Indian negotiators, by the membership of the Yukon Indian organization. Negotiations are presently at a standstill. However, the draft "Agreement in Principle" is, of course, of importance.

It has been emphasized in this paper that the critical item in any land claim settlement is the land to be retained. Under the draft Agreement the fee simple (Category I lands) retention is 128 acres per capita.<sup>95</sup> This results in a total of 1,200 square miles with 6,000 people participating. The lands are to be chosen by mutual agreement. By s.7(2) there are no sub-surface mineral rights whatsoever given in respect to any lands. Category II lands are 17,000 square miles in extent upon which there is exclusive hunting, fishing and trapping. This provision does not give anything at all except 'exclusivity'.

Exclusivity is worthless to the extent that hunting and trapping and fishing is compromised by development on the lands, although there is a nebulous provision as to compensation.

The revenue or resource sharing provisions provide in total that there will be \$70 to \$90 million dollars paid over-all, over a long period of time. On the basis of 6,000 people and discounting to present cash values, this would seem to have a present worth of less than \$10,000.00 per capita.

There are many further provisions to the suggested settlement, but all in all this draft Agreement in Principle is a proposal which seems even less generous than the James Bay settlement, and just as ill-conceived.

#### Future Land Claims Settlements in Northern Canada

The retention of identity and pride of northern native peoples in Canada is directly related to the degree of retention of ownership of lands by them as part of a settlement of their land claims. The native people are not content to lose their lands and thus their life-style and values in exchange for simply a white life-style and values. The Inuit do realize there must be some trade-off, because they do not live in a world where the choice is left simply to them.

The Indian people of the Northwest Territories issued the "Dene Declaration" on July 19, 1975<sup>96</sup> which was perceived by many Canadians as seeking separation from Canada, or at the very least, as asking for a special status for the Dene<sup>97</sup> This declaration was emphatically rejected by the Government. Whatever may have been actually intended by the somewhat vague language of the Dene declaration, there is quite understandably no possibility of a land claims settlement which is not seen by the Government of Canada as being in the public interest of Canada, as well as the interest of the native group involved.

There is no merit, nor realistic chance of success, in the adoption of a position by a native group which is extremist, or seen by most Canadians to be extremist. Equally important is the realization that there is no merit in any extremist position of the Government, that is, a position which would result in excluding the native peoples from being owners and managers, in a truly meaningful sense, of northern lands.

Yet the Government's statement of August 1973, whereby native title is to be voluntarily surrendered in exchange for monetary benefits, is ambiguous. The Government appears to wish to channel negotiations on a basis of the primary thrust of lands being exchanged or expropriated for monies.

Clearly, this was done in respect to the James Bay Settlement. Moreover, the Minister of Indian Affairs, Judd Buchanan, seemed to suggest at the time of the signing of the James Bay agreement-in-principle November 15, 1974 that it would serve as the "benchmark" or "model" for negotiations in other Canadian jurisdictions. Upon protests being expressed by native organizations, the Minister said that the James Bay settlement would not impose any limitations upon negotiations in other jurisdictions. However, the suspicion remains that the Government cannot see the merits of negotiating land claims settlements in the Northwest Territories or Yukon Territory which depart markedly from the James Bay settlement in either the qualitative or quantitative aspects.

Such an approach, if it is intended or inadvertently pursued in practice, would be a grave mistake. First of all, it will not be acceptable to the native peoples in the Northwest territories. Second, even if the Government could force a settlement on this basis, a simple transfer of monies, even on the basis of compensation or the extinguishment of rights rather than a handout, would only intensify rather than ameliorate the fundamental problem.

The main reason for failure in native and non-native relationships in Canada historically has been, on the one hand, the emphasis upon destroying the identity of the native person, and on the other hand, paternalistically isolating the native person from the mainstream of Canadian society through denying the means to truly gain equality of opportunity.

The native people can only take their rightful place within Canadian society if and when these critical errors in policy are realized and remedied. The settlement of northern land claims offers not only a significant, but the only opportunity in the north to make the required fundamental shift in approach in native and non-native relationships. The Inuit want to retain their lands, but realize the practical necessity for some compromise. But monetary compensation is an alternative only to

the extent they are given no choice and their lands are, in effect, expropriated. Surprisingly, the Government itself does not seem to realize yet the full scope of opportunity through land claims settlements. Government policy over the past seven years has been to fund native organizations as cultural/political organizations, and to fund the land claims' projects of these organizations. This in itself has afforded self-development, and the positive results are manifest. This process, for which initiative the Trudeau Government deserves considerable credit, illustrates the potential of the much greater opportunities to achieve social change, and a new native-non-native relationship, through land claims settlements in northern Canada. The people must have the means to self-develop.

The Critical Elements of any  
Northern Land Claims Settlement

A settlement might provide for some reasonable maintenance of the traditional way of life, identity, and self-determination at the individual and local level for the native peoples, and yet accommodate orderly development in such a manner as to maximize the benefits of northern peoples and resources for all Canadians.

This might be accomplished by a settlement which employs the following elements. First, the native peoples would retain ownership, with formal legal recognition, to considerable tracts of those lands they have traditionally used and occupied. The native peoples would own the interests in respect to these tracts of lands, like other private owners. Special rights would be used as necessary to protect this retained land base from encroachment, at least for some period of time.

Second, the native peoples would have special hunting rights. Game management in the sense of game conservation would be the responsibility of the total society, with meaningful participation by native people. However, only native people would have hunting rights upon traditionally used lands in respect to the limited game supply. This requires recognition by the dominant society of special hunting rights on both a subsistence and cultural basis.

Third, the native peoples would retain an interest in respect to those lands they have traditionally used and occupied but in respect

to which they are not allowed to retain title. In respect to these tracts of lands, existing petroleum permits and mining claims would remain for the most part, but the native peoples would be recognized as having a residual interest in the lands, through a royalty provision.

Fourth, some financial compensation would be paid because there has been in effect, expropriation without compensation of valuable interests in lands traditionally used and occupied, and because the traditional way of life is being compromised inevitably, but compensation would be utilized within the framework of having a social function. A simple transfer payment in itself is meaningless.

Fifth, appropriate mechanisms would be devised to ensure participation by native peoples and their communities in the total society, including participation in the civil service and in the management of development activities from the standpoint of both business enterprises engaged in exploration or development and environment protection. This might even suggest special rights on a transitional basis to achieve equality in fact over a period of time.

It must be realized that it is only through a settlement which emphasizes ownership and management that the native peoples can achieve the difficult two-fold goals, that is, some preservation of their identity, yet integration within the mainstream of Canadian society. Financial compensation is important, but it can come mainly through ownership and a royalty provision with continuing development over a period of time. To isolate the people from ownership of their lands and participation in the management of development of the Arctic is to isolate them from both their identity and also the mainstream of society. They would be left in a vacuum which would only repeat the mistakes of southern Canada and be immensely more costly, in both human and dollar terms, over the long run than a settlement based upon the suggested approach.

It is suggested that the Inuit Nunavut Proposal,<sup>98</sup> made to the Federal Cabinet on February 27, 1976, constitutes an offer to the Government of Canada by the 15,000 Inuit of the Northwest Territories to settle their land claims on a basis which embraces the suggested critical elements of any northern land claims settlement.

The Proposal for the Settlement of Inuit Land  
Claims in the Northwest Territories and Yukon Territory  
(called "The Nunavut Proposal")

The four basic goals of the proposed Settlement are to:

- Preserve Inuit identity and the traditional way of life so far as possible;
  - Enable Inuit to be equal and meaningful participants in the changing North and in Canadian society;
  - Achieve fair and reasonable compensation or benefits to the Inuit in exchange for the extinguishment of Inuit claims, and in a form which serves to better achieve the first two goals; and
  - Protect and preserve the Arctic ecology and environment.
- Let us now consider each of these four goals.

Preservation of Inuit Identity and the Traditional  
Way of Life so far as Possible

The means through the Nunavut Proposal to achieve the first goal is sought through several provisions,

There is to be the creation of Nunavut Territory.<sup>99</sup> Nunavut Territory will comprise about 750,000 sq. miles of land, being approximately the land north of the tree line in the Northwest Territories and Yukon Territory. The basic idea is to create a new Territory out of the existing Territories, the vast majority of people within being Inuit. Through numbers and consequential voting power, the Inuit will have control for the foreseeable future. As such, this Territory will better reflect Inuit values and perspectives than with the present Northwest Territories. No significant new powers beyond those of the existing Territories are sought, other than length of residency (10 years) for voting requirements. 'Special status' is not contemplated. Essentially, Nunavut Territory is to have the same jurisdictional structure as the Northwest Territories and the Yukon Territory.

The Inuit are to have strong control over hunting, trapping and fishing within traditionally used areas.<sup>100</sup> An advisory Nunavut Council on Game is established, with community Hunters and Trappers Committees, with the Inuit having the exclusive right to hunt polar bears, musk-ox, and marine mammals, having control over the issuance of new trapping licences, within community trapping areas, and all subsistence users having a first

claim to wildlife. Conservation management is left to government, with Inuit advisory participation.

The Inuit are to hold surface title (the land from the surface to 1,500 feet below the surface) to at least 250,000 square miles within Nunavut. These "Inuit lands" are to be owned in roughly equally sized blocs by thirty-three Inuit community corporations. This will give the Inuit a large land base, better control over what happens with regard to development activities on and under those lands, and better control over community growth.<sup>101</sup> The Inuit, through their community corporations, would be private owners of the blocs of land which in total would be at least 250,000 square miles. By giving up the subsurface rights (i.e. below 1,500 feet, subject to a 3% royalty) and as such all oil and gas,<sup>102</sup> the Inuit seek to own a much wider surface area than they could otherwise achieve from a political standpoint. This will give them ownership of many traditional hunting, trapping and fishing areas. Existing alienations to development would remain, subject to cancellations, with Government approval, in up to 50,000 sq. miles of the total 250,000 square miles. The balance of Nunavut, about 500,000 sq. miles, the subsurface throughout Nunavut, and all offshore Canada would be owned as public lands by the federal Government.

The surface title held by the community corporations would be held in the manner that any privately owned property is held. There is no 'special status', with the exception of the expropriation laws of general application not applying. To expropriate, special legislation would have to be enacted.

The Nunavut Proposal has resulted in many and varied responses. Perhaps the aspect which has received the most concern of non-Inuit is the Proposal's suggestion that the Inuit be owners of a 'surface title' to 250,000 square miles. There are several reasons why a large total area of 250,000 sq. miles of land, held as owners, is necessary, and several reasons why such an area would not represent an extraordinary item of wealth to the 15,000 Inuit. Underlying all of these reasons is the basic point made by this paper, that a fair, and meaningful land claims settlement which incorporates sound social policy, must have the ownership of lands as the main element.

First, the Inuit land claims extend to a very large area. The Inuit currently use and occupy some 1.23 million square miles and historically

they have used even more. This factual claim is fully supported by the empirical evidence provided by the Land Use and Occupancy Study. One aspect of a land claims settlement is that it must be viewed from the standpoint of the extent of the lands being surrendered. Moreover, as compared to historical land use and occupancy by Indian nations, the Inuit use much more land. For example, to take a significant land cession treaty in southern Canada, the North-West Angle Treaty (Treaty Number Three) of 1873, the area of Northwestern Ontario surrendered amounted to 55,000 square miles. This area is relatively small when compared to what the Inuit are being asked to surrender. The Inuit are being asked to surrender much more than any Indian nation in terms of the historical treaty surrenders. The compensation should in part, relate to the amount surrendered. The Inuit are proposing to share their traditionally used lands on a basis whereby they give up much more than they retain, being about 20%. In Alaska, the native peoples retained 11% of traditional lands, but on a basis of full fee simple.

Second, without implying that the historical Indian land cession treaties were at all fair or sufficient, the fact is that the Indian beneficiaries have retained a full beneficial interest in reserve lands (that is, surface and subsurface rights), and the reserve lands were retained without being subject to any existing alienations, as these were virtually none at the time.

In contrast, the Inuit are not seeking to retain the sub-surface below 1500 feet (which means all oil and gas is excluded). Moreover, existing mining operations are excluded from Inuit land selections and, subject to relatively minimal exceptions (50,000 sq. miles), existing alienations are respected. Because vast areas of the Arctic are already under permit, lease or mining licence, Inuit land selections will be restricted to other areas, or will have to be made subject to such rights held by third parties. Thus, in contrast to historical treaty created reserve lands, the Inuit are retaining only a 'surface' (to 1500 feet below the surface) title, and these 'surface' selections will be subject to many existing alienations.

The Government has expressly stated that it will not impose upon the Inuit in the Northwest Territories the James Bay land claims settlement formula. Moreover, there are fundamental differences between the Inuit factual situation in the Northwest Territories and the James Bay situation or the historical treaty-making land cessions.

Third, the Inuit have a legal claim as property owners. The Inuit assert ownership to this 1.23 million square mile area (including ownership of the sub-surface, and the offshore sea-bed). The Inuit are present property owners. Moreover, a land claims settlement is not unlike a negotiated expropriation of private property rights. The expropriation of native lands in Canada to present has taken place in a manner unlike the expropriation of private property of other Canadians (excepting, perhaps, that of the Japanese-Canadians in World War II) and, it is argued, in violation of the Canadian Bill of Rights, and the compensation offered is miniscule compared to that afforded by statutory procedures. The Nunavut Proposal emphasizes the Inuit are giving up much more than they are retaining or receiving through the land claims settlement. But acceptance of the Nunavut Proposal, including the 250,000 square miles, would represent the first truly negotiated land claim settlement.

Fourth, the Inuit have a moral claim. Whatever the legal position, the undisputed fact is the people use and occupy the land as claimed, and as the first and continuing users, they have a claim on a moral basis to benefit through non-renewable resource development as it comes to the Arctic, particularly because there will be tremendous social costs. The people who bear the brunt of this cost should, in fairness, share the benefits of development. The principal way of achieving this is to allow them to have lands as owners so that they retain much of their traditional livelihood and identity, and so that they can be developers as their values change.

Fifth, the surface title is to lands which can be accurately described as a desert. The 250,000 square miles of tundra to be owned as Inuit lands under the Nunavut Proposal would have the same yield from the standpoint of biological productivity as a few thousand square miles of southern Ontario farmland.

Sixth, the market value of the 250,000 square miles of surface title retained would be less than a few hundred square miles of southern Ontario farmland. There is little perceived demand, and hence little market value, for Inuit lands.

Seventh, the 250,000 square miles (held in many small blocs) approximates in quantity the square miles of interest held by developers through exploration rights. In terms of scale in the Canadian Arctic, the 250,000 square miles is not excessive in size.

Eighth, private ownership is the best form of control,<sup>103</sup> and through private ownership, the traditional pursuits of trapping and fishing will be better facilitated upon those lands owned by the Inuit. The 250,000 square miles do not nearly meet the needs of the Inuit in this regard, but the point is, through ownership there is some better protection of traditional pursuits, as the Inuit can better control new development projects on their lands.

Finally, as emphasized throughout this paper, the Nunavut Proposal is premised upon a policy of integrating the Inuit into the emerging new, industrial society of the North. The Nunavut Proposal represents desirable social policy. The Inuit must hold property as owners, like other Canadians, whether individual or corporate citizens. Through owning property, the Inuit will have the means to participate as developers as their values change. They can learn by self-experience. They will be better able to engage in mining, and such activities as sand and gravel operations.

The ownership of sufficient land is critical to providing the means for effective and meaningful involvement by the Inuit in the new, industrial, North. Otherwise, as traditional pursuits diminish, compromised by non-renewable resource development, not having lands as owners, the Inuit will be on 'the outside looking in' with consequential loss of pride, identity, hostility, social debilitation and human destruction, and resulting economic costs to Canada over the long run. All the mistakes seen in southern Canada in respect to the relationship between the Indian peoples and the dominant society would be repeated in the Arctic. Moreover, as a consequence in the long run, the costly and ineffectual bureaucracy of 'Indian Affairs' would be perpetuated, with attendant huge welfare-type transfer cash payments, and the Inuit would not be an economically productive part of the industrial society.

Ownership of land is the most critical element of the Nunavut Proposal, although all of the principles and basic elements set forth in the Proposal are vital. Ownership of land is the most important element in terms of the traditional and present identity, yet is the principal means to effectively enable integration into the new identity. This is the present lesson being learned by observing the similar experience of the Inupiat Eskimo on the North Slope of Alaska. The Nunavut type of proposal is far

cheaper to Canada in dollar terms (as well as human terms) in the long run than the James Bay or historical land treaty type of approach to settlement.

Under the Nunavut Proposal, the Inuit are to receive royalties (a total of 3% of the market value of production) from development, a part of which is to fund national, regional, and local Inuit cultural organizations and activities through the Inuit Tapirisat of Canada.<sup>104</sup> The Inuit organizations would be self-supporting thereafter, not depending upon government support. The remaining, larger part of the 3% royalty is to go to the Inuit Development Corporation .

There is to be better planning and land use management of public lands.<sup>105</sup> A Land Use Planning and Management Commission is proposed, to be independent of government, to advise as to land use planning and management for public lands.

Enabling the Inuit to be Equal and Meaningful  
Participants in the Changing North and in Canadian Society

The means to achieve the second goal is sought through several provisions.

The Inuit are to be very involved in all Government activities through the creation of Nunavut and special training programs.<sup>106</sup>

The Inuit are to participate in land use planning and management.<sup>107</sup>

There is to be an extensive Inuit Social and Economic program, funded by a 2% royalty from development.<sup>108</sup> The health, education housing and physical standards of living for Inuit are inadequate as compared to accepted national standards. Present social problems will accelerate with increasing development. The social costs of non-renewable resource development should be borne by that development. Special efforts must be directed to social and economic programs that will enable the Inuit through adequate health, education, housing and employment to have true equality with other Canadians and participate in a meaningful way in Canadian society. The Nunavut Proposal suggests that the following two principles be adhered to as a basis in determining policies and programs to achieve these goals:

- the traditional practices and perspectives of the Inuit will be utilized as the basis for the solution of Inuit problems; and
- each community will be directly involved in the decision-

making process to the extent that it is affected by that process.

The Inuit Social and Economic Fund is to be established for the purpose of funding regional programs to be carried out by regional Inuit corporations, to upgrade the social and economic conditions of the Inuit.

An Inuit Development Corporation, funded through royalties,<sup>109</sup> is to have an important role. The Inuit Development Corporation has already been constituted.<sup>110</sup> It is important to remember that it is an ordinary business corporation constituted under the Canada Business Corporations Act.<sup>111</sup> Although its corporate structure may seem unique, its structure is determined within the flexibility allowed for private arrangements within present laws of general application. There is no 'special status' to be conferred.

The Inuit Development Corporation is to perform two related functions: it will be the means for the collection of royalties through development of subsurface oil, gas and minerals; and through this wealth, it will be the means to enable the Inuit to better participate in business, either directly or through subsidiaries at the local community level, through financing and providing management expertise to community businesses.

The basic idea is to give control of the Inuit Development Corporation to the Inuit communities through their community corporations. The communities will have the only voting shares, called Class A shares, and can determine who the directors of the Inuit Development Corporation will be. The major benefits of the Inuit Development Corporation will accrue through the royalties it receives, and the projects it undertakes.

Because the communities will control the Inuit Development Corporation, they will be able through the election of the Inuit Development Corporation directors, to determine if and when any of the profits which the Inuit Development Corporation should make, are to be distributed to the Class B shareholders. 100 Class B shares are to be owned by each Inuk enrolled in the land claims settlement. Only Class B shares participate in corporate distributions. Therefore, 'ownership' (Class B shares) of the corporation (and its property and profits) is divorced from 'control' (Class A shares). This provides good 'checks and balances' as between communities and individuals, and yet provides flexibility for the future.

After the first twenty years, the directors can distribute dividends at any time (assuming solvency) and all individual Inuit (Class B shareholders) participate equally. Only those Inuit enrolled are entitled as a right by the Settlement to Class B shares. Thus, individual community corporations can decide in the future on a community-by-community basis who will be a member of the community corporation, but such new members would not receive Class B shares as a right under the settlement. The Inuit Development Corporation could issue further Class B shares to individuals, subject to the provisions of the Canada Business Corporations Act.

All profits of the Inuit Development Corporation will have to be invested for the first twenty years. Thus, the objectives of the Inuit Development Corporation will be better achieved as the Inuit Development Corporation will have more money, not having distributed any to its shareholders over this period. This means that many older people who are shareholders will never receive any monies through Inuit Development Corporation dividends, however, their children or grandchildren should have greater benefits accordingly.

The royalty provision has three basic premises: first, royalties should accrue from development over the whole of Nunavut (plus the off-shore) and not just from Inuit lands (this 'spreads the risk' and means a much lower percentage can be claimed); second, the royalty should be expressed as a fixed percentage and be a right in perpetuity (although, as with any property right, it could be sold or expropriated at a later date) and not be limited in years (in effect, a monetary limit) or by a stated monetary limit; and third, the Inuit should have protection from the loss of value from inflation, or changes in government royalty or taxation laws or policies, and the administrative arrangement for collection should be protective of the Inuit interest. Apart from its unique manner of inception, the 'royalty' would be held in the manner of ordinary private property. There is no 'special status' in respect to the royalty. The initial royalty receipt is not taxed, because it is a receipt in payment for the transfer of a capital property (the surrender of Inuit title), which is actually being transferred at a loss. All income earned from the royalty is taxable under laws of general application.

The cash flow generated should be sufficient to achieve the two-fold goal of funding Inuit participation in business development through the monies the Inuit Development Corporation receives, and providing

the monies necessary for the support of programs to enhance the Inuit culture, through the monies the Inuit Tapirisat of Canada receives.

Moreover, the percentage is reasonable and fair to both the Inuit and public, and involves no disbursement from the Federal Treasury. The Nunavut Proposal does not ask for any direct cash transfer from the Federal Treasury. The nature of the Nunavut Proposal tends to involve the Inuit more intimately in the changing northern society. It does not make them the quasi-welfare recipients of a cash transfer which serves no useful social function, and which would tend only to exclude them from their lands and what happens to those lands. The Inuit would be co-risk takers. There are no guaranteed minimum payments by Government. The Inuit benefit only to the extent that there is development.

The Inuit Tapirisat of Canada and the Inuit regional associations would no longer be financed by the Government of Canada. Thus, the land claims settlement will be a means to fund the on-going activities of the national Inuit organization which is responsible for enhancing Inuit cultural objectives. The Inuit Tapirisat of Canada will in turn distribute part of the monies it receives to regional and community associations in Nunavut Territory.

Achieving Fair and Reasonable Compensation or Benefits to the Inuit in Exchange for the Extinguishment of Inuit Claims, and in a Form Which Serves to Better Achieve the First Two Goals.

Compensation or benefits in the land claims settlement are taken in the main in the form of:

- surface title to 250,000 sq. miles of lands;<sup>112</sup>
- royalties from development (all royalties from the Inuit surface title and three percent of the subsurface (that is, deeper than 1,500 feet), from all of Nunavut and offshore<sup>113</sup> and through further royalties funding the Social and Economic Program<sup>114</sup>

No cash transfers from the Government are asked for as compensation in the settlement. Any monetary compensation is to come through royalties arising from development. The Inuit will share fully the risks in respect to the benefits of development: they do not want handouts.

Protection and Preservation of the  
Arctic Ecology and Environment.

The settlement is premised upon there being better protection to the Arctic ecology and environment. In particular, better land use planning and management is sought in respect to public lands.<sup>115</sup>

The Inuit are very concerned about the possible detrimental effects of development activities to the environment and ecology of the Arctic. They consider their proposal in this regard to represent desirable public policy which should be implemented irrespective of a land claims settlement. The experience of the Inuit has been that the Government of Canada, whatever it says, invariably puts development ahead of protection of the environment. The Northwest Territories is a Federal jurisdiction, with the Territorial Government having no role in environmental protection. Moreover, within the structure of the Federal Government, the Northern Natural Resources and Environment Branch of the Department of Indian and Northern Affairs has a decision-making power unconstrained in any significant way by other departments. Finally, the Government itself is increasingly often the developer via Panarctic Oils Ltd. or now, Petro-Canada.

The overall effect is that the Arctic is a monolithic jurisdiction effectively controlled by a Federal bureaucracy whose stated and main goal is development. There is inadequate planning, ineffective control, and no 'checks and balances' to ensure that the interest of environmental protection is a meaningful part of decision-making. A Land Use Planning and Management Commission, independent of the Northern Natural Resources and Environment Branch, is suggested by the Nunavut Proposal as the starting point in bringing sense to northern development.

The Commission would have Inuit and conservationist participation among its directors.

The Land Use Planning and Management Commission is to prepare for the Governments of Canada and Nunavut a land use and management plan and report in respect to public lands within five years. The report may include recommendations as to:

- changes in the existing Land Use Regulations, and the enforcement procedures thereof, the system of environmental impact assessment, and land management zones;

- the development of comprehensive land use evaluation and management procedures;

- the criteria and conditions for the establishment and management of any hydro-electric projects;

- the formal designation of critical renewable resource areas where screening of mineral development or other land use proposals would be done especially carefully; and

- how the biological productivity of public lands will be maintained, and as to what are the safe minimum standards of conservation.

The Land Use Planning and Management Commission upon its own initiative may place at any time a temporary freeze in respect to any or all development or similar or other activities upon blocs of public lands, provided the Commission has given to the Government of Canada one month's prior notice, setting forth full particulars as to the reasons for the temporary freeze. Thus, it is proposed that the Commission would have some regulatory power, although its principal function is advisory.

The land use management plan and report, as well as interim recommendations of the Land Use Planning and Management Commission is to be published and made available generally to the public, and public hearings are to be held in Nunavut and elsewhere in Canada upon the completion of the plan and report to discuss and consider the plan and its implementation. Hopefully, as well, Canada will have a general "Freedom of Information" statutory law in the not too distant future which will facilitate public understanding of government decision-making generally in respect to northern development.

The Nunavut Proposal seeks agreement by the Government of Canada that at least 30% of public lands will be set aside as International Biological Program areas, wildlife refuges, game sanctuaries, wilderness preserves, ecological preserves, national parks, recreational areas, or hunting, trapping and fishing reserves, in a number of blocs as determined by the Land Use Planning and Management Commission from time to time, and such blocs may include rivers, offshore sea waters and the seabed.

Conclusion

Given the political realities of contemporary Canada, and the values of the Inuit and the general public, the Nunavut Proposal for an agreement-in-principle in respect to the settlement of Inuit land claims in the Northwest Territories and Yukon Territory<sup>116</sup> represents a basis for a fair and reasonable settlement, in the best interests of both the Inuit and Canada. The Nunavut Proposal represents desirable public policy, and incorporates the critical elements, as discussed in this paper, necessary to a new, and meaningful relationship between the Inuit and the emerging industrial society in northern Canada. The Nunavut Proposal represents a unique opportunity for both the Inuit and Canada.

The next year will determine whether this opportunity has been acted upon, or lost, as the decision as to whether to proceed with a natural gas pipeline from the Mackenzie Delta to southern Canada will be made within this time. Thus, it is during this period that the focus of the public is upon land claims and the north and the Inuit have their most significant bargaining advantage. It is anticipated that the report of the Berger Inquiry will make a strong statement in support of an early settlement of land claims. Government and industry have a real self-interest in resolving the land claims issue if at all possible before proceeding with a pipeline. The general public desires that there be a negotiated settlement. Once a decision has been made by the Government to proceed with a pipeline, northern development will accelerate tremendously, and a Nunavut Proposal type of settlement will not be achievable. Even if the decision is to not proceed with a Mackenzie Valley gas pipeline, the Inuit will have lost the present advantage due to the pressure upon Government of making a decision on the pipeline shortly, such pressure being the major incentive to Government to see that a negotiated settlement is achieved. Any later decision-making process in favour of the Polar Gas pipeline will not involve nearly the same degree of pressure upon Government to settle land claims, as is present in connection with the Mackenzie Valley pipeline applications. It is possible that there may be a Conservative victory in the next general federal election, expected in 1978, and such result would, it is suggested, put the Inuit at a much greater

disadvantage in negotiations than the position they have with the present Liberal Government.

The critical questions faced by the Inuit and Government today are: what kind of land claims settlement is desired, and is it at all possible for the competing interests to be reconciled, such that there can be a truly negotiated land claims settlement within the next year. It is suggested that the principles and basic elements of the Nunavut Proposal provide the means to a fair and meaningful settlement, at least for an agreement-in-principle between the Inuit and Government as to a settlement, and one that is in the best interests of all concerned.

1. \$176-billion in current dollars, or \$150-billion in constant dollars (1971 base). This brief description of the present general situation of Canada as a nation does not include any discussion as to the possibility of the separation of the province of Québec.
2. See, Can. 1 An Energy Policy for Canada Phase I (Ottawa: Queen's Printer, 1973) at 20 where it states: "The petroleum industry... is dominated by foreign controlled firms which account for over 91% of the assets and over 95% of the sales of the industry".
3. See, generally, A. Lucas and T. Bell, The National Energy Board: Policy, Procedure, Practice (unpublished study prepared for the Law Reform Commission Administrative Law Project, 1974) at 65-71.
4. See, generally, E. Dosman, The National Interest (Toronto: McClelland & Stewart, 1975).
5. Thus, given this very tenuous premise, the Government stated in June, 1973: "Thus, present indications of Canada's oil and gas potential suggest that there is probably more than enough energy resources to meet domestic requirements until at least the year 2050 with a possibility of substantial amounts of oil and gas being available for export." An Energy Policy For Canada Phase I, supra, note 2 at 12.
6. An Energy Policy for Canada Phase I, supra, note 2 at 35-36 which indicates the impact of the petroleum industry on Canada's foreign reserves.
7. Thompson and Crommelin, "Canada's Petroleum Leasing Policy - A Cornucopia for Whom?", in Canada's Petroleum Leasing Policy (Ottawa: Papers presented to CARC, March 22, 1973) at 1.
8. See, generally Dosman, supra, note 4 at 1-84.
9. Northwest Territories Act, R.S.C. 1970, c. N-22; Yukon Act, R.S.C. 1970, c. Y-2.
10. See, generally, J. Lotz, Northern Realities - The Future of Northern Development in Canada (Toronto: New Press, 1970), and Can. Report of the Advisory Commission on the Development of Government in the Northwest Territories, (Ottawa: Queen's Printer, 1966) - Carrothers Report.
11. The name was changed recently from the much too obvious "Northern Development Branch".
12. Except for Hudson's Bay and Hudson Strait in respect to which the issuance of permits is controlled by the Department of Energy, Mines and Resources - a Department with an obvious bias in favour of development. This Department also issues permits for the offshore areas of the east and west coasts.
13. See, generally, P. Usher, "Land Use Regulations: A Conflict of Interests", in Northern Perspectives (Ottawa: Canadian Arctic Resources Committee, March, 1973) at 1-4.

14. Panarctic Oils Ltd. is now a subsidiary of Petro Canada.
15. Canada does not have any "freedom of information" law, in contrast to the United States. See 5 U.S.C. §552.
16. See generally, B. Buzan and B. Johnson, Canada at the Third Law of the Sea Conference: Policy, Rule, and Prospects (Kingston, R.I., Law of the Sea Institute, 1975).
17. This discussion in respect to drilling in the Beaufort Sea is for the purpose of illustrating the inadequacies of the northern development decision-making process. There were many arguments put forward in favour of drilling, not discussed here. Given the lack of Canadian self-sufficiency in oil supplies, the lack of proven natural gas reserves at this point to justify the proposed Gas Arctic pipeline, and the fact that the Beaufort Sea has a large potential for oil and natural gas, an early start to drilling in the Beaufort Sea was favoured by many in Government. Moreover, in giving approval to drilling the Government did impose conditions to seek to ensure environmental protection. Two drilling operations commenced in August, 1976, but in mid-September there was a water blowout in one well (from an underground lake below the ocean floor) necessitating the abandonment of this site. There was a discovery of gas at the other drilling site, the extent of which cannot be determined for another year. As to drilling in the Beaufort Sea, see generally, Pimlott, Brown and Sam, Oil Under the Ice (Ottawa: Canadian Arctic Resources Committee, 1976) at 41-50.
18. Reproduced in R.S.C. 1970, Appendices, 123-29.
19. 1867, 30 & 31 Vict. c.3, (U.K.). The word "Indians" in the Constitution has been interpreted to include Inuit. Re Eskimos, [1939] S.C.R. 104. See also Sigeareak E1-53 v. The Queen [1966] S.C.R. 645, 57 D.L.R. (2d) 536.
20. Attorney-General of Canada v. Attorney-General of Ontario, [1897] A.C. 199 (P.C.); and R. v. Wesley, [1932] 4 D.L.R. 774; [1932] 2 W.W.R. 337 (Alta. App. Div.) constitute authority for the proposition that Indian treaties are of a contractual nature. R. v. Sikyea, [1964] S.C.R. 642; (1965), 44 C.R. 266, aff'g (1964), 43 D.L.R. (2d) 150; 46 W.W.R. 65 (N.W.T.C.A.) is a leading case which deals with a conflict between hunting rights given under a treaty and the terms of the Migratory Birds Convention Act, (R.S.C. 1970, c. M-12). There the Supreme Court of Canada held that Parliament had the power to abrogate treaty agreements through its legislation.
21. R.S.C. 1970, c. I-6.
22. The word "status" means that the person is registered or has "status" under the Indian Act. Of the 500,000 Indian people in Canada, some 271,000 are "status" Indians. This figure includes the 125,000 treaty Indians.

23. R. v. Drybones, [1970] S.C.R. 282; 9 D.L.R. (3d) 473; Attorney-General of Canada v. Lavell (1974), 38 D.L.R. (3d) 481; 23 C.R.N.S. 197 (S.C.C.); rev'g (sub nom. Bedard v. Isaac), [1972] 2 O.R. 391 (Ont. H.C.) and (sub nom. Re Lavell and Attorney-General of Canada), [1972] 1 O.R. 396; 22 D.L.R. (3d) 188 (Fed. C.A.) which reversed, [1972] 1 O.R. 390; 22 D.L.R. (3d) 182 (Cty. Ct.); Canard v. Attorney-General of Canada, [1973] 3 W.W.R. 1 (S.C.C.); rev'g (1973), 30 D.L.R. (3d) 9; [1972] 5 W.W.R. 678 (Man.C.A.); Isaac v. Davey (1975), 5 O.R. (2d) 610 (Ont. C.A.); rev'g, [1973] 3 O.R. 677 (Ont. H.C.); appeal pending to the Supreme Court of Canada.
24. R.S.C. 1970, Appendices, 457-60.
25. See Isaac v. Davey, [1973] 3 O.R. 667 (Ont. H.C.) at 690-91 per Osler, J.; rev'd on appeal, (1975), 5 O.R. (2d) 610 (Ont. C.A.); appeal pending to The Supreme Court of Canada.
26. This is illustrated in several cases: for example, R. v. Sikyea, supra, note 20; R. v. White and Bob (1965), 50 D.L.R. (2d) 613; 52 W.W.R. 193 (B.C.C.A.); The Queen v. George, [1966] S.C.R. 267; 55 D.L.R. (2d) 386; R. v. Cooper (1969), 1 D.L.R. (3d) 113 (B.C.S.C.); Daniels v. The Queen, [1968] S.C.R. 517; (1969), 2 D.L.R. (3d) 1.
27. Department of Indian Affairs and Northern Development, Statement of the Government of Canada on Indian Policy (Ottawa: 1969). (hereinafter referred to as the White Paper on Indian Policy).
28. See, generally, H. Cardinal, The Unjust Society (Edmonton: M.G. Hurtig, 1969).
29. Re Paulette et al and Registrar of Titles (No. 2) Re Paulette's Application to file a Caveat, [1976] 2 W.W.R. 193 (N.W.T.C.A.); rev'g (1974), 42 D.L.R. (3d) 8; [1973] 6 W.W.R. 97, 115, appeal pending to the Supreme Court of Canada. This appeal will be determined shortly.
30. Id. See, also, Kanatewat v. James Bay Development Corporation, [1975] 1 S.C.R. 48; (1974), 41 D.L.R. (3d) 1.
31. Done by Milton Freeman Research Ltd. This report will be published shortly by the Government of Canada.
32. Although Canada is a rich and progressive country, the native peoples are at a distinct disadvantage, economically and socially, when compared with non-native society. This is illustrated by E.R. McEwen in Rights of Canada's First Citizens - The Indian & Eskimo, a Resource Paper prepared for the World Council of Churches Consultation on Racism, London, England, 1969 (Toronto: Indian-Eskimo Association of Canada, 1969) at 7-8. He cites statistics indicating that over 40% of Canada's native peoples are on relief, with 75% of Indian families earning less than \$2,000 a year. The infant mortality rate among the Inuit and Indian people is twice the national average, while the average life expectancy is from one-third to one-half of that of the average Canadian. The levels of educational achievement are very low; for example, approximately 50% of Indian students do not go beyond Grade VI and about 61% fail to reach Grade VIII.

Although these statistics were given in 1969, there is little indication that the situation in 1976 is significantly different.

Chief George Manuel, President of the National Indian Brotherhood, in his submission in 1976 to the Mackenzie Valley Pipeline Inquiry (called the Berger Inquiry, after Mr. Justice Thomas Berger who is conducting the Inquiry) in Appendix "B" thereof ("Economic and Social Conditions of Canadian Indians") states that infant mortality is four times higher among Indians, 62.12 per 1,000, compared with 15.3 for all infants in Canada (1973 figures), and that the mortality rate for status Indians was 8.32 per 1,000 in 1973 compared to 7.42 per 1,000 for other Canadians (p.1). Chief Manuel states that a 1975 survey indicates that the average income earned by the Indian labour force was \$730.60 (p.2). He cites figures from 1973-74 indicating that the school drop-out rate for Indians was 84% compared to the national rate of 12% (to the end of Grade 12) (p.2). Chief Manuel states that 41% of the native people are receiving welfare, compared to the national rate of 3.7%(p.2).

33. Supra, note 27.
34. Calder v. Attorney-General (1970), 8 D.L.R. (3d) 59; 71 W.W.R. 81 (B.C.);
35. Calder v. Attorney-General (1971), 13 D.L.R. (3d) 64; (1970), 74 W.W.R. 481 (B.C.C.A.).
36. Calder v. Attorney-General, [1973] S.C.R. 313.
37. See, generally, K. Lysyk, The Indian Title Question in Canada: An Appraisal in the Light of Calder (1973), 51 Can. Bar. Rev. 450.
38. See, P. Cumming, Native Rights and Law in an Age of Protest (1973), 11 Alta. L. Rev. 238 at 256.
39. Referred to in an article by P. Cumming, Toronto Globe & Mail, February 21, 1973, at 8.
40. Yukon Native Brotherhood, Together Today for Our Children Tomorrow: A Statement of Grievances and an Approach to Settlement by the Yukon Indian People (Whitehorse: Prepared for the Commissioner on Indian Claims and the Government of Canada, 1973)
41. Cumming, supra, note 39.
42. Speech given in Vancouver, British Columbia, August 8, 1969.
43. It appears that there was a concerted effort, at the time of the conquest, to preserve the property rights of the French-Canadian colonists. British leaders, such as Attorney-General Edward Turlow and Solicitor-General Alexander Wedderburn, made statements to the effect that the colonists should be able to maintain their own laws to the greatest extent possible. The Quebec Act of 1774 permitted the retention of French civil law, and thus "embodied a new sovereign principle of the British Empire: the liberty of non-English people to be themselves". See, I Burt, The Old Province of Quebec (Toronto: McClelland & Stewart, 1968) at 166-181.

44. Re Paulette et al and Registrar of Titles (1974), 42 D.L.R. (3d) 8; [1973] 6 W.W.R. 97 at 115 (N.W.T.S.C.). In a decision rendered in June 1973, Morrow, J. had held the Supreme Court of the NWT had jurisdiction to hear the case:38 D.L.R. (3d) 45.
45. Id. at 40 and 148.
46. See, supra, note 29.
47. Chief Robert Kanatewat et al.v. The James Bay Development Corporation et. al. (Unreported)
48. Unreported: Case No. 09-000890-73.
49. Kanatewat v. James Bay Development Corporation, supra, note 30.
50. Unreported.
51. By s. 91(24) of the B.N.A. Act, the Federal Government has the competence to legislate in respect to "Indians, and Lands reserved for the Indians". The question then is, can a province expropriate property interests falling within a federal sphere of power, for purposes within the legislative competence of a province by s.92 of the B.N.A. Act, when the expropriation would affect the very status of the native peoples, as they have an autochthonous culture, that is, their identity is intimately tied to the lands and waters they have traditionally used and occupied? Two of the many cases pertinent to this question of overlapping jurisdiction are Charlie Cardinal v. The Attorney-General of Alberta, [1974] S.C.R. 695; (1974), 13 C.C.C. (2d) 1; affg 5 C.C.C. (2d) 193; 22 D.L.R. (3d) 716; and British Columbia Power v. A.-G. of B.C. (1965), 47 D.L.R. (2d) 633. For a discussion of the last mentioned case, and of the issue generally, see, G. La Forest, Natural Resources and Public Property Under the Canadian Constitution (Toronto, Univ. of Toronto Press, 1969) at 174-182.
52. See the reasons for judgment of Morrow, J. in the Northwest Territories Caveat case, supra, note 29, where he discusses the unique history of Rupert's Land and the transfer thereof by the Hudson's Bay Company to Canada. Justice Morrow's remarks are pertinent as well in respect to the James Bay area as this territory historically was also part of Rupert's Land.
53. For a good discussion of this topic see the testimony of Douglas Sanders to the Berger Inquiry April 15, 1976. See, generally, Cumming and Mickenberg, eds., Native Rights in Canada (2nd ed. Toronto: General Publishing Co. and the Indian Eskimo Association of Canada, 1972).
54. See, generally, Native Rights in Canada, supra, note 53 at 14-16.
55. Calvins Case, [1608], 7 Co. Rep. 1a; 2 Howell St. Tr. 559; 77 E.R. 377 (K.B.); Campbell v. Hall (1774), 1 Cowp. 204; 98 E.R. 1045 (K.B.); Amodu Tijani v. Secretary, Southern Nigeria, [1921] 2 A.C. 399.

56. Native Rights in Canada, supra, note 53 at 46-47.
57. R.S.C. 1970, Appendices, 457-60.
58. Milton Freeman Research Ltd., to be published shortly by the Government of Canada.
59. Reproduced in R.S.C. 1970, Appendices, 123-9.
60. S.C. 1870, c. 3, s. 31.
61. S.C. 1912, c. 45, s. 2(c)
62. This outline is taken largely from Native Rights in Canada, supra, note 53 at 276-278.
63. The deed of surrender is reprinted in R.S.C. 1970, Appendices, at 257-77. In the December, 1867, Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada upon the transference of Rupert's Land to Canada, it was stated: "And furthermore that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines." Reprinted in R.S.C. 1970, Appendices, at 264.
64. S.C. 1870, c.3, s. 31.
65. Treaty No. 10 and Reports of Commissioners (Ottawa: Queen's Printer, 1966) at 3.
66. S.C. 1872, c.23.
67. W. E. Hodgins, Dominion and Provincial Legislation, 1867-1895 (Ottawa: Government Printing Bureau, 1896) at 1026.
68. The speech may be found in G. Stewart, Canada under the Administration of the Earl of Dufferin (Toronto: Rose-Belford Publishing Co., 1879) at 491-93.
69. S.C. 1879, c.31, s.124 (e).
70. (1889), 14 A.C. 46, at 54.
71. S.C. 1924, c.48. s.1.
72. Reprinted in S.C. 1891, at lxi.
73. S.C. 1912, c.40, s.2(a)(Ontario); S.C. 1912, c.45, s.2(c)(Québec).
74. R.S.C. 1970, Appendices, at 371, 380-81, and 388-89.
75. Minute No. 1, at 31.
76. Joint Committee of the Senate and House of Commons, Minute No. 2, at 54.

77. Department of Indian Affairs and Northern Development, The Canadian Indian (Ottawa: Queen's Printers, 1966) at 3.
78. H. Dorion, 4 Commission of Inquiry on the Territorial Integrity of Québec, Rapport 4: le domaine indien, (Québec: 1971) at 389-97.
79. [1973] S.C.R. 313.
80. Department of Indian Affairs and Northern Development, Statement on Claims of Indian and Inuit People (Ottawa: Queen's Printer, 1974).
81. Kanatewat v. James Bay Development Corporation, discussed, supra, notes 30, and 47-50.
82. Discussed, supra, note 29.
83. See Bill C-98 - James Bay & Northern Québec Native Claims Settlement Act (Measure to approve and declare certain agreements, between the Federal Government, Government of Québec, and Québec organizations), introduced into Parliament July 12, 1976. On June 30, 1976, Bill 23 of the National Assembly of Quebec, An Act Approving the Agreement concerning James Bay and Northern Quebec was sanctioned.
84. The fifth of five "energy targets" of the Government of Canada in An Energy Strategy for Canada: Policies for Self-Reliance (Ottawa: Minister of Energy, Mines & Resources, 1976), at 6 is expressed as being: "doubling at a minimum, exploration and development activity in the frontier regions of Canada over the next three years, under acceptable social and environmental conditions."
85. Department of Indian Affairs and Northern Development, Statement on Claims of Indian and Inuit People (Ottawa: Queen's Printer, 1973).
86. See, generally, the brief of the Inuit Tapirisat of Canada to the Government of Canada in response to the Government of Canada's Guidelines for Northern Pipelines (1972).
87. The Agreement provided the following allocations:  
 Crees: Category I - 2,158 square miles.  
       Category II - 25,130 square miles (hunting, fishing and trapping rights).  
 Inuit: Category I - 3,250 square miles.  
       Category II - 35,000 square miles (hunting, fishing and trapping rights).
- The native peoples receive a surface title ownership to Category I lands, plus 50% of any subsurface development benefits. They receive hunting, fishing and trapping rights to Category II lands, but not ownership.
- The land settlement covers a total area of some 410,000 square miles (the areas added to the province of Québec in 1899 and 1912 - see section 1. 16 of the Agreement), and it seems the native peoples' position that this entire area comprised traditionally used and occupied lands was not challenged by the Government. Thus, some 10,000 people will own (collectively) 5,408 square miles. Not

being owners of Category II lands (upon which there are hunting, fishing and trapping rights) development is permitted and will over time diminish the traditional form of livelihood.

88. This figure is approximate, and includes 6,500 Cree Indians and 3,500 Inuit. Québec Government figures suggest about 9,600 native persons while native organizations refer to about 10,050.
89. My analysis deals only with those lands retained by the native peoples as owners, and the amount and form of monetary compensation through the settlement. The settlement did provide for many other things, however, in my opinion they will be inconsequential in the long term, or amount to rights extended which are simply those rights other citizens ordinarily have. Moreover, my basic point is that the 'ownership of land' is the essential element in a northern land claims settlement, and therefore, my criticism centres upon this aspect of the settlement. On the James Bay settlement, see generally J. Ciaccia, Native Claims - the James Bay Settlement, Canadian Bar Association Annual Meeting, August 31, 1976.
90. The Inuit retention as owners works out to slightly less than one square mile (about 601.6 acres) per capita. The Inuit usage for hunting, fishing and trapping works out to about 50 square miles per capita.
91. Alaska Native Claims Settlement Act, 85 Stat. 688 (1971); 43 U.S.C. §1601 - 1624 (1973).
92. Perhaps the most significant special right is hunting and fishing. In the writer's conversations with native leaders in Alaska during a visit in June, 1974, they stated that they considered special hunting and fishing rights as still being a question for discussion with government, and that it was not dealt with at the time of the land claims settlement because there was not sufficient time to consider all aspects of the issue.
93. Traditionally used lands for the 3,900 Inupiat (of the North Slope area) was 56.5 million acres. They received 5.5 million acres in the settlement. This works out to about 1,410 acres per capita or almost 2 1/4 square miles per capita. Ownership of the land is on a fee simple basis: that is, ownership includes the subsurface mineral interests, although existing alienations at the time of the land claims settlement remain. Title is held collectively through use of the corporate entity.

Note that 70% of all revenues from timber and subsurface resources in the region's lands must be divided equally among the 12 regional corporations, on a relative population basis. Thus the Inupiat, through their Arctic Slope Regional Corporation will be allowed to retain only a total of about 35% of its timber and subsurface income: 30% due to the location of resources in its region, and approximately 5% because of its relatively small population.

This analysis is taken largely from The Alaska Native Claims Settlement: A Report on a Trip to Alaska by Representatives of the Inuit Tapirisat of Canada (Ottawa: Inuit Tapirisat of Canada, June 1974).

94. The James Bay Agreement provided the following allocations:
- |              |                                   |  |
|--------------|-----------------------------------|--|
| 6,500 Crees: | Category I - 2,158 square miles   |  |
|              | Category II - 25,130 square miles | - (hunting, fishing,<br>and trapping rights) |
| 3,500 Inuit: | Category I - 3,250 square miles   |  |
|              | Category II - 35,000 square miles | - (hunting, fishing,<br>and trapping rights) |

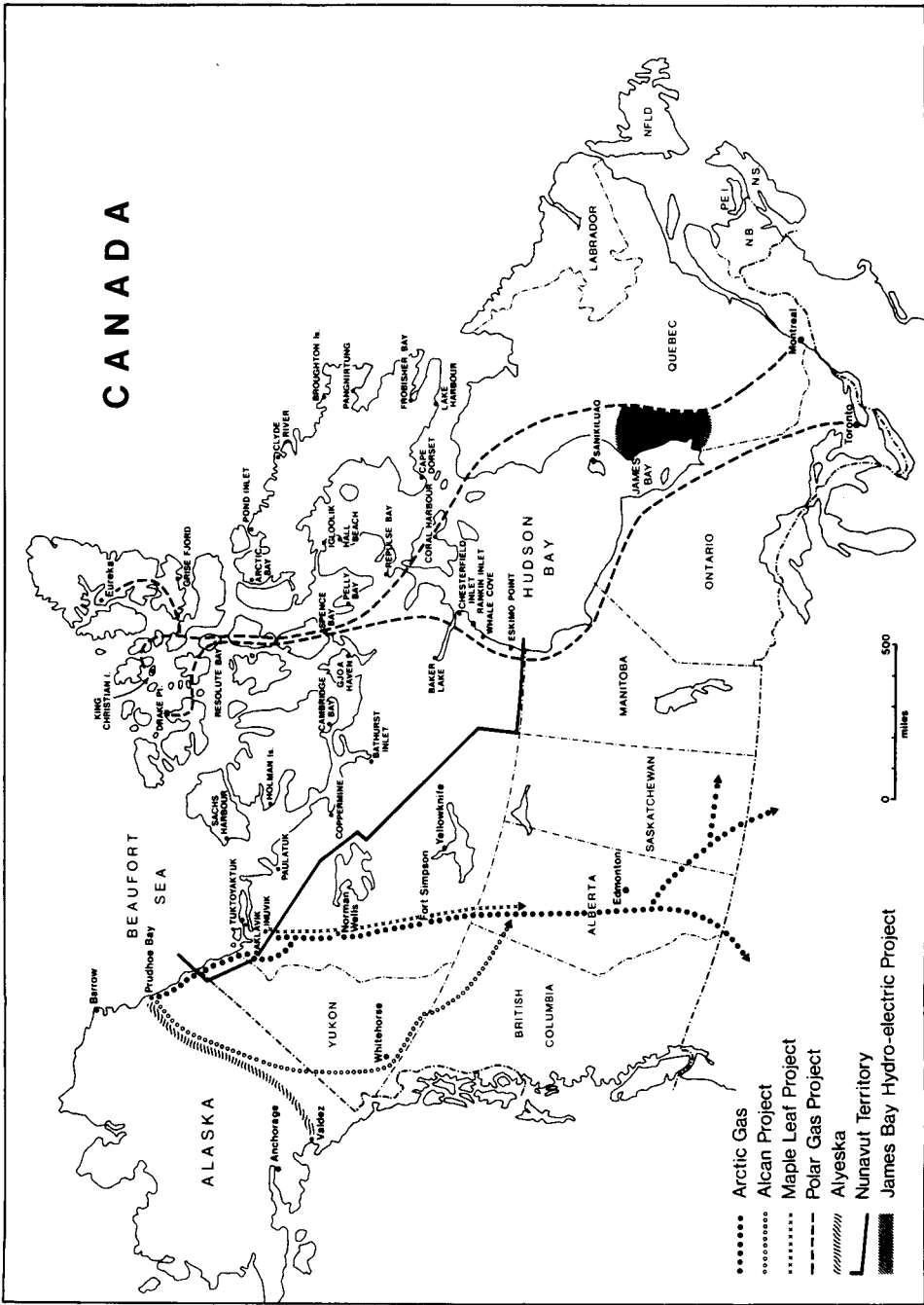
The native peoples receive a surface title ownership to Category I lands, plus 50% of any subsurface development benefits. Title is held collectively through use of the corporate entity. They receive hunting, fishing and trapping rights to Category II lands, but not ownership.

The land settlement covers a total area of some 410,000 square miles (the areas added to the Province of Québec in 1899 and 1912 - see section 1. 16 of the Agreement), and it seems the native peoples' position that this entire area comprised traditionally used and occupied lands was not challenged by the Government. Thus, some 10,000 people will own (collectively) 5,408 square miles. Not being owners of Category II lands (upon which there are hunting, fishing and trapping rights) development is permitted and will over time diminish the traditional form of livelihood. Thus, the native peoples of James Bay retain as owners (surface interest) about 1.3% of lands traditionally used, in contrast to Alaska where the retention is 11% (surface and subsurface interests) of lands traditionally used.

95. Amazingly, this is the same per capita retention as the major land cession treaties. See, for example, Treaty No. 3 of 1873 reproduced in A. Morris, The Treaties of Canada (Toronto: Belfords, Clarke & Co, 1880) at 322-23.
96. The Dene Declaration was issued by the Second General Assembly of the Indian Brotherhood and Métis Association of the Northwest Territories at Fort Simpson, Northwest Territories.
97. For a forceful and articulate defence of the Dene Declaration, see the testimony of Professor Peter H. Russell to the Berger Inquiry in April, 1976, "The Dene Nation and Confederation".
98. Nunavut: A Proposal for the Settlement of Inuit Land Claims in the Northwest Territories. (Ottawa: Inuit Tapirisat of Canada, January 27, 1976).
99. Part Four of the Nunavut Proposal.
100. Part Five of the Nunavut Proposal.
101. Part Six of the Nunavut Proposal.
102. Oil and gas are to be found only below 1500 feet.
103. The experience of the Inuit with the Land Use Regulations has been that regulation of exploration, while perhaps ameliorative, does not render significant or sufficient protection to traditional pursuits.

104. Part Nine of the Nunavut Proposal.
105. Part Eleven of the Nunavut Proposal.
106. Part Four of the Nunavut Proposal.
107. Part Eleven of the Nunavut Proposal, discussed infra.
108. Part Ten of the Nunavut Proposal.
109. Parts Eight and Nine of the Nunavut Proposal.
110. The Inuit Development Corporation has been organized under the provisions of the Canada Business Corporations Act.
111. S.C. 1974-75, c. 33, assented to March 24, 1975.
112. Part Six of the Nunavut Proposal.
113. Part Nine of the Nunavut Proposal.
114. Part Ten of the Nunavut Proposal.
115. Part Eleven of the Nunavut Proposal.
116. The traditionally used and occupied lands of the Inuit extend to what is now the Yukon Territory, although there are only one or two Inuit families that presently reside therein, on Herschel Island.

# CANADA



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