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THE PURSUIT OF ABORIGINAL RIGHTS:
THE NEGOTIATION OF COMPREHENSIVE CLAIMS IN CANADA

by

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Bachelor of Arts

Political Science

(Canadian Studies)

A thesis submitted to the Faculty of
Graduate Studies and Research in partial fulfillment
of the requirements for the degree of
Masters of Arts
Department of Political Science

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"NEGOTIATIONS OF COMPREHENSIVE CLAIMS:
A CASE FOR DETERMINANT FACTORS"

submitted by Russell D. Geddes, Hons. B.A.,
in partial fulfilment of the requirements for
the degree of Master of Arts.

Thesis Supervisor

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Abstract:

In the past 15 years, comprehensive claims have become a highly politicized issue in the Canadian North. This thesis examines the legal basis of comprehensive claims and the dual objectives of preservation and integration sought by native groups through settlements of these claims. It also outlines the evolution of the federal claims policy, beginning with a treaty-making process and culminating in a negotiation process to resolve comprehensive claims. While Ottawa has adhered to the negotiation process, the Government has been inconsistent in settling these native claims. However, it has not been a lack of government willingness to respond to comprehensive claims, but rather the negotiations have been tempered by the particular political and economic climates in which each claim arises. The claims negotiation process of James Bay, the Mackenzie Valley and the Yukon were chosen to test this hypothesis. The paper outlines the development of each of these claims and identifies the determining factors involved in each negotiation process. In concluding, the timing of the claims, the problem of overlapping boundaries, and the interface of territorial claims with political development have been particularly influential in explaining the divergences in the negotiation of comprehensive claims.

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Russell D. Geddes

INTRODUCTION

INTRODUCTION

Aboriginal peoples throughout the world have encountered endless number of problems from advancing technological societies. New Zealand, Australia, Africa, the United States and Canada have good examples of native peoples who perceive themselves as falling victim to or at least experiencing the 'progressive' impacts of industrialization. Within these industrialized nation-states, the aboriginal peoples do not share the wealth and power of the dominant society. These native groups assert that political, economic and social dependence are directly related to what they refer to as the 'over-development' of these industrialized countries.¹

Canada's northern history of exploitation and the 'colonial' feeling, which the native peoples have experienced, have prompted them to take a stand against the injustices to which they have been subjected. These stands have come in the form of "comprehensive claims" which have recently been prompted by proposals for the construction of large resource developments or megaprojects. However, these claims cannot be interpreted as being against development per se, but rather against uncontrolled development - native groups are seeking development on terms acceptable to Natives.

British colonial policy towards the North American natives had assumed that the aborigines had an interest in the land which had to be dealt with before non-native settlement could take place. The policy encouraged early agreements with native groups in which native title or rights to land were surrendered in exchange for various forms of compensation (ie. land, monetary, institutional). After Confederation, the Government of Canada continued this policy as "Indians and lands reserved for Indians" came under federal jurisdiction.

As the pressures of settlement and development moved westward, the treaty-making policy was maintained in order to open up lands which were traditionally

used and occupied by native peoples. While these treaties arose out of a recognition of aboriginal rights, their purpose was to extinguish all native interests or rights accruing from occupancy in exchange for concrete rights and benefits. The treaty-making process ended in 1921, following the signing of Treaty 11. At this time, the federal government believed that all of the required lands for development and settlement was covered by some form of arrangement with the Natives. However, the process proved to be incomplete as native peoples in the non-treaty areas began to experience the pressures of outward growth of the industrial society.

Over the past fifty or sixty years, agreements or settlements with native peoples have been difficult to obtain. Native groups have been less willing to sign treaties which will extinguish their rights to, and interests in, the land. Rather through the assertion of comprehensive claims, natives are seeking to define their rights and affirm them through a claim settlement. It is through the settlements of these claims that native groups are looking for means to both preserve their culture yet, at the same time, become integrated within the larger, more dominant society.

The development of the Canadian federal policy for dealing with native claims has not only been affected by British policy, but it has been greatly influenced by the geographical proximity of the United States. The United States affected Canadian policy through three areas or precedents: the U.S. Indian Claims Commission; the Marshall doctrine; and the Alaska Native Claims Settlement Act (ANCS Act). In response to the proliferation of native claims and grievances in the 1930's and 1940's, the American government established an Indian Claims Commission (I.C.C.) in 1945. The American I.C.C. served as a point of reference for many debates and policy proposals in Canada to deal with the rising number of unresolved native claims and grievances. United States influence has

also been predominant in the law of aboriginal rights. The Marshall doctrine continues to form the basis of common law theory in the U.S., and has been referred to and approved by a number of Canadian courts.

The Alaska Native Claims Settlement Act of December 1971 has had a significant impact on the Canadian government's response to and settlement of native claims. The process to resolve the Alaskan natives' claims (claiming the total land area of Alaska) relied on negotiations, beginning in 1967 and intensifying after the discovery of oil in 1968. In exchange for the extinguishment of all claims which may arise from their traditional use and occupancy, the Natives received a cash payment of \$500 million, payable over a period of eleven years; a land allotment of approximately 40 million acres (15% of Alaska), of which full title was granted to 16 million acres; royalty payments up to a total of \$500 million; and the establishment of native corporations to administer the settlement assets and to be responsible for social and economic development.² Native groups in Canada, as well as, the federal government became cognizant of the settlement model and precedent which had been set. ANCS Act was to be memorable for the sums involved, not for any new provisions for Alaskan natives to determine their own affairs.³

Following the retraction of the controversial 1969 White Paper and in accordance with the Alaskan settlement model, the Canadian federal government has chosen negotiation as the means to achieve comprehensive claims settlements. As opposed to its options of arbitration, mediation or litigation, Ottawa has pursued negotiations as the best non-adversarial approach since this process allows the Government to be flexible in its dealings with different claims and, negotiations permit the native peoples to directly participate and formulate the provisions of their own settlement.

Despite this reliance on the negotiation process, the processes and outcomes of the comprehensive claims in Canada are quite different. However, the distinctiveness of each case cannot be attributed to a mere lack of consistency on the part of the federal government to recognize and respond to aboriginal claims. Comprehensive claims cannot be examined in isolation, but must be viewed in a larger scenario within which government response is largely a function of the economic and political climates.

The distinctiveness is quite apparent in the negotiation of the claims in the James Bay region, the Mackenzie Valley and the Yukon (Appendix 3 outlines the boundaries of each of these claims). These three comprehensive claims have been chosen to illustrate the divergences in the federal negotiation process. Those factors which are accountable for the differences in the processes and outcomes are: the fact that the James Bay project was provincially-sponsored; the Berger Inquiry; the federal versus the provincial political climate; the problem of overlapping claims in the Mackenzie Valley; the interface of territorial claims with political development; the influence of the United States; and the timing of the development projects.

Before these factors can be examined in any detail, it is important to first understand what comprehensive claims are and the underlying objectives of those native groups asserting them. For the purposes of this paper, it is equally important to place these claims based on aboriginal title into a historical context, illustrating the evolution of the federal comprehensive claims policy. The third chapter will then place the claims within this policy's development, outlining the processes of the three claims in James Bay, the Mackenzie Valley and the Yukon. The final chapter is designated for the examination of those aforementioned factors which are thought to be accountable for the divergences in the negotiation process.

CHAPTER 1

Native Claims:
A Search for Preservation Yet
Integration

CHAPTER 1

Native Claims: A Search for Preservation Yet Integration

In the August 1973 policy statement on Indian Affairs, the Government of Canada acknowledged a willingness to negotiate native claims based on aboriginal title to the land or "aboriginal rights". Due to the broad basis of what constituted traditional use and occupancy of lands and the variety of criteria involved, these claims became known as "comprehensive claims". The purpose of this first chapter is to provide a definition for comprehensive claims; identify the objectives of these claims; and provide some legal basis for the concept "aboriginal rights".

I Definition

Native claims¹ can be divided into two main categories:

A. "Specific" Claims

- Grievances that Indian people might have about fulfillment of Indian treaties of the actual administration of lands and other assets under the Indian Act.
- Claims made on basis of these grievances are termed "specific claims".

B. "Comprehensive" Claims

- Grievances based on the loss of Inuit and Indian traditional use and occupancy of lands in those parts of Canada where native rights had neither been extinguished by treaty nor superseded by law. These areas include Quebec, Labrador, Yukon, Northwest Territories, and most of British Columbia.
- Since any settlement of claims based on these criteria could include a variety of terms such as protection of hunting, fishing and trapping rights; land title; money; as well as other rights and benefits, in exchange for a release of the general and undefined native title, such claims came to be called "comprehensive claims".²

The focus of this paper is to examine the policy and processes involved with comprehensive claims.

II Comprehensive Claims

(a) Background

Following the discoveries of massive supplies of oil on the Alaskan North Slope in January of 1968, interests in the prospects for the Canadian North were greatly enhanced. With promises of attractive opportunities not only for investment capital within Canada, but also for employment and royalties from production, the viability of potential megaprojects or resource developments were seriously deliberated by Ottawa. The prominence of such deliberation was soon reflected in the Government's priorities for northern development during the 1970's:

3. To create jobs and economic opportunities through the encouragement and stimulation of development of renewable resources, light industries and tourism.
4. To encourage and assist strategic projects in the development of non-renewable resources and in which joint participation by government and private interests is generally desirable.
5. To provide necessary support for other non-renewable resource projects or recognized benefit to northern residents and Canadians generally.³

Included in the 1972 statement of the Government's major objectives and priorities for northern development by the Hon. Jean Chretien, the Minister of Indian Affairs and Northern Development (DIAND), were the assertions that "the needs of the people in the North are more important than resource development"⁴ and that development would accrue visible and lasting benefits to the native northerners rather than the past experience of development at their expense - "getting in, getting rich and getting out".⁵

The pace of oil and gas exploration and development readily increased. This is indicated by a rise in exploration expenditures from \$175 million in 1971 to \$205 million in 1972 (increase of 17%) and the footage drilled increased from 469,287 feet in 1971 to 566,303 feet in 1972.⁶ At the same time, the Government

continued to support the conviction that the needs of the people in the North were still given priority over resource development.⁷

Despite the repeated government assurances, the native peoples in the non-treaty areas increasingly began to feel the pressure of non-native settlement and development on those lands which they had previously used or occupied.⁸ With the competing land uses of exploration for oil and gas, or other minerals as well as hydroelectric projects, the land base of all these peoples was greatly endangered. Subsequently, through the assertion of comprehensive claims, various native groups have sought settlements prior to any resource development which may or does occur in their areas of use and occupation. These negotiations for settlements should essentially be viewed as fights for rights, not necessarily opposition to development. The position of the aboriginal peoples, in general, has not been a simple opposition to megaprojects or resource developments, but rather an insistence that their rights be recognized and incorporated before development can proceed.⁹ As Mr. Kurszewski, the South Slave Lake claims representative of the Metis Association of the Northwest Territories (MANWT), pointed out:

... we do not want to pull away from the rest of Canada. We want our land, we want to be consulted on development projects and we want a say in the terms and conditions of development.¹⁰

These claims put forth by the northern natives are based on the concept of aboriginal rights to the land. Aboriginal rights are "property rights in the lands which native people have traditionally used and occupied."¹¹ There are two components of the concept aboriginal rights:

- (i) land occupied and used by the Native people can only be surrendered to the Crown and can not be sold privately, since the Crown legally must extinguish the title to the land either by purchase or expropriation;
- (ii) the concept is one of communal ownership rather than individualistic in nature.¹²

The main principle of comprehensive claims is that the native title and aboriginal rights are not to be sold or extinguished but preserved, developed and implemented through a negotiated settlement.¹³

Native peoples, in general, interpret aboriginal rights in the following fashion:

... a person knocks on your door; you answer and invite him in out of the cold, wet weather. You help him get warm, feed and comfort him, and let him live with you. As time passes, you find yourself outnumbered by your guests and, for many reasons, living in the basement of your own home. Meanwhile, the person you assisted and many of his friends live upstairs, enjoying life through your resources.¹⁴

(b) Importance and Objectives of a Settlement

The goals or objectives of comprehensive claims settlements are critical for the futures of both the native peoples and the non-native majority. The importance of claims resolution is essentially two-fold. First, the settlement of comprehensive claims will be integral in determining the extent to which the Canadian North will contribute to the Canadian economy (ie. whether or the degree to which land selection in settlements impedes resource exploration and development). Concurrently, and of equal importance, the settlement of native claims will be vital to the future evolution of both the native and non-native populations in the North. As Dr. Lloyd Barber, Commissioner on Indian Claims, pointed out in 1977, most Indian claims are not simple issues of contractual dispute to be resolved through conventional approaches of adjudication and arbitration.

... They are the most visible part of the much, much more complex question of the relationship between the original inhabitants of this land and the powerful cultures which moved in upon them. ... The claims business is no less than the task of refining and redetermining the place of Indian people within Canadian society.¹⁵

Thus, for native leaders claims settlements which preserve aboriginal rights can be perceived as the chief means of reordering the relationship between Natives and

the rest of Canadian society; a mechanism putting an end to generations of injustice and securing a future for their peoples.¹⁶

The main objectives of a comprehensive claims settlement are basically two-fold. Native peoples are seeking a preservation of their culture and identity yet, at the same time, integration within the mainstream of Canadian society.¹⁷ These two objectives are reflected by examining the significant components of native settlement proposals. The components include: land; hunting, fishing and trapping rights; income support; government services; and increased political power and autonomy.¹⁸ For native groups, land is the paramount consideration. The emphasis on land is comprehensible for a number of reasons. First, the cultural identification with the land is of great significance. The conviction to the land is exemplified by Richard Nerysoo's remarks at Fort McPherson before the Berger Inquiry:

... to the Indian people our land really is our life. Without our land we cannot exist as people. If our land is destroyed, we too are destroyed. If your people take our land, you will be taking our life.¹⁹

The native peoples have used and occupied this land since time immemorial and have grown to respect it. They see the land as their mother, who is a teacher, a provider, a protector and she gives them life.²⁰ This stress on the control of land is evident in the Yukon Native Brotherhood's statement of grievances and proposal for settlement, entitled Together Today for our Children Tomorrow (January 1973). According to the Yukon Indians, land is the cornerstone of a settlement and its control is necessary for their cultural and economic survival.²¹

However, an interest in the land can also provide, directly or indirectly, many of the aforementioned components or benefits. Land can provide a basis for both strengthening hunting, fishing and trapping rights and increasing political power and autonomy. Furthermore, it can provide a foundation for greater input into decisions involving developments which may be disruptive to native communities,

as well as, result in revenue in a variety of forms (ie. royalties, leases, etc.). Therefore, land not only provides a cultural and traditional base but also a basis for many economic and political benefits.²²

The native groups also urge that a claims settlement should precede any resource development. If this scenario is adhered to, prejudice involved in land-selection will be minimized and the native peoples can obtain some influence into land-use planning and management. This insistence is exemplified in the presentation of the Council for Yukon Indians to the Alaska Highway Pipeline Inquiry, in which they stated "we do not want to get what our southern Indian brothers got - the land no one else wanted".²³

Protection for traditional pursuits is another key element for a claims settlement. Native peoples assert that they should have a prior right to hunt, fish and trap, subject to established conservation laws. This component often involves the establishment of areas reserved for the exclusive use of the Natives. However, in other areas, such a prior right has not been promoted for exclusive rights for traditional pursuits but rather to obtain a position whereby Natives can exercise some control over, and benefit from, the hunting and fishing activities of other people.²⁴

The preservation or protection of the traditional ways of life was an essential part of the Inuit Tapirisat of Canada's Nunavut proposal of February 1976. The Inuit were to have strong control over hunting, fishing and trapping within traditionally-used areas. In addition, the Natives were to have an exclusive right to hunt certain animals (ie. polar bears, musk-ox), establish an advisory Nunavut Council on Game (ie. control issuance of new trapping licences), and have advisory participation in conservation management.²⁵

Financial payments are also a common ingredient involved in the pursuit of settlements of comprehensive claims. Such payments are in recognition of

something given up or lost in past years. For example, expropriation without compensation of valuable interests in lands traditionally-used and/or occupied. As the Yukon Indians asserted in Together Today for our Children Tomorrow:

... we are saying that we deserve a cash settlement for all out past grievances and for the rights that have been taken away over the past one hundred years. We are saying that we should be compensated for having been left out of the Yukon's prosperity - the highest in Canada.²⁶

According to the native groups, a cash settlement is necessary in order for the Natives to develop an economic base from the lands which are awarded to them. In turn, an economic base would allow the native peoples to develop within the dominant society as well as compete with it.²⁷

The amount of money awarded in a claims settlement can be generally determined by the extent of the land awarded to the native groups. If a settlement provides the native people with relatively little land, more money will be required to compensate for the social and psychological disruption caused by the loss of land. In addition, adequate funds would be necessary for the Natives to engage in economic pursuits towards developing an economic base that is not as reliant on the land. If, on the other hand, the settlement provides the aboriginal people with large amounts of land, presumably less money needs to be transferred. As Gurston Dacks states in A Choice of Futures: Politics in the Canadian North, "the best tradeoff between land and money is a matter each native group will decide itself".²⁸

Accompanying the financial payments, native peoples have attempted to incorporate the provision of royalties into the structure of suggested settlements. The aborigines propose that where aboriginal rights to the land have been relinquished or not recognized, it is impossible to reliably ascertain the exact amounts of oil, gas and minerals recoverable from these areas. Consequently, the Natives feel that they should receive a percentage of the gross value of all gas, oil

and mineral production in these areas in question. The native peoples thus would have a stake in the development. According to the Yukon Indians, the funds received from this source could be used to finance programs, program development, research, economic and resource development.²⁹

The inclusion of royalty provisions is exemplified in the Inuit's Nunavut proposal. The Inuit hoped to receive 3% of the market value of production to fund cultural organizations and activities through the Inuit Tapirisat of Canada (ITC). A 2% royalty from development would also be collected to fund an extensive Inuit Social and Economic program which would be administered by a newly-created Inuit Development Corporation.³⁰

Tax exemptions are another possible type of cash payment. Some native groups argue that their administrative corporations and themselves should be exempt from taxes since "the land the settlements will allocate to the Crown represents, in effect, a prepayment forever of taxes".³¹ For example, the Yukon Indians proposed that they should not have to pay income tax on any money earned on the awarded lands in a settlement for a period of twenty-five years, from the date of signing the settlement.³²

The provision for income support may also be a feature of negotiated settlements. This type of provision may be unwarranted if the Natives receive adequate resources through the other components of a settlement (ie. land, money, royalties, etc.). However, one problem with these allocations is that they may not necessarily manifest themselves in activities which are attractive to the Native. For example, the availability of cash, accompanied by a decline in the prices of furs or fish, may appear to make employment in these culturally significant pursuits counter-productive. As well, the remoteness of some native communities may threaten the viability of engaging in any type of commercial enterprise

without some type of commitment from external centres or regions to purchase services or products produced in these communities.³³

A provision of this nature is illustrated in The James Bay and Northern Quebec Agreement (JBNQA). Included within this settlement is the establishment of an income security program which is designed "to provide an income guarantee and benefits and other incentives for Cree people to pursue harvesting activities as a way of life".³⁴ Each individual native hunter's family receives \$5,800 annually, indexed to the cost of living,³⁵ provided that he meets the requirements of defining harvesting as his way of life (ie. qualifications for both the recognized activities and the amount of time spent involved in these activities).³⁶

The maintenance and eligibility for government services is often an additional component of proposed claims settlements. The purpose of this provision is that it allows the Natives to continue to receive benefits and, at the same time, avoids an abrupt change from Indian Affairs' programmes. The native groups do not acknowledge this component as a symbol of perpetual dependence, but rather as benefits and responsibilities to which each Canadian citizen is entitled.³⁷ However, the native peoples do envision an administrative transfer of these programmes and services to the local or regional level. With the aid of financial compensation and special training, the aborigines foresee effective participation in decisions affecting the policy or administration of existing services and programmes.

Together Today for our Children Tomorrow is a good example of these provisions. Not only did the statement postulate a continuance of such programmes as health services, housing, welfare, education and economic development, but it also recommended that they be transferred, either in part or totally, to: the Municipality; the Yukon Indian General Council; the Yukon Territorial Government; or a Federal Government agency.³⁸

The native groups also recognize that ownership of the land is of little use without having some control over what takes place on that land. As a result, native peoples are seeking to gain effective political power and autonomy. Efficacious political clout would thus lead to a change in government responsibility both in programs affecting economic development and programs affecting socialization (educational, cultural, social welfare, etc.).³⁹

The degree of transferred power and autonomy sought by the various native groups varies considerably. For example, the Dene, within the Dene Declaration and Dene Manifesto, were seeking self-determination through the creation of a Dene government within Canada, with jurisdiction over a geographic area and over subject matters now within the jurisdiction of either the Federal Government or the Territorial Government of the Northwest Territories. The Metis of the Mackenzie Valley region, on the other hand, are seeking a devolution of powers from the Canadian Government to the Territorial Government and then being assigned to the local or regional governments. With further provisions for residency qualifications for voting the holding office, and the establishment of a "Senate of the Mackenzie Corridor and a Mackenzie Native Council", the Metis would thus gain participation in decision-making processes affecting government services and economic development.

Participation in those decisions which affect their lives and communities would in turn foster economic power for the northern natives. An essential part of the Natives' future is control over the renewable resource sector, which for many is their traditional way of life. However, influence in the decisions in the non-renewable sector (ie. oil and gas) is also necessary since development in this sector has a direct impact on the renewable resources. For example, development and exploration activities affect those areas available for traditional native pursuits, as well as, the location and migratory patterns of various animals.

Vital to this acquired economic power is that capital remain within the northern areas to produce spin-offs or forward linkages, rather than allowing northern surpluses stimulate growth in southern Canada and the United States. Instead of supplies and crews being directly imported from the South, northern businesses and wage-earners are seeking opportunities to supply the operations of these projects and share in their profits. Subsequently, purchasing power and investment capital can be utilized to precipitate growth within northern communities.⁴⁰ Through the creation of native corporate structures within claims settlements, aboriginal groups assert that they could actively participate in these northern business ventures and establish a viable economic base. Claims settlements can therefore be perceived as providing for both economic development opportunities and the preservation of traditional native pursuits, according to the native peoples' own choices.

In summary, these are some of the possible components of a comprehensive claims settlement. It should be noted that these are not all necessary elements. It is apparent that some native groups place greater emphasis on some components, land in particular, than others. However, all of the aforementioned elements have been seriously proposed in one context or another.⁴¹ Harvey Feit, a negotiator with the James Bay Cree, pointed out that native groups have sought comprehensive agreements which include specific benefits and actions that would include at a minimum:

- (i) protection and development of their hunting and gathering economies including protection of the environments and biotic resources on which they depend;
- (ii) expansion of the local economies;
- (iii) increased control and/or involvement in the local economic projects of regional, national or international institutions;
- (iv) maintenance and expansion of community self-determination; and
- (v) new social and political institutions to articulate the local and regional native interest with the larger political systems up to the national level.⁴²

Through these provisions native leaders are attempting to replace past experiences of subservience and domination with equality of opportunity. If this equality can be obtained, the aboriginal peoples can gain the self-expression and self-realization generally available to and achieved by other Canadians.⁴³ At the same time, the Natives are striving to have their rights affirmed and defined by means of a negotiated settlement, as opposed to having them sold and extinguished. Consequently, the native groups are hoping to obtain settlements which are inconsistent with past government agreements with native peoples (ie. the "numbered" treaties) which have emphasized the abolition of all possible interests to the land.

(c) The Legal Basis of Native Claims

These comprehensive claims forwarded by aboriginal peoples rest on economic, social, anthropological and political arguments. However, their ultimate "success" will depend on their legal position. The legal basis of comprehensive claims is the concept of aboriginal rights. The recognition of aboriginal rights is not indigenous to Canada. The theory and recognition of these rights have their foundations in sixteenth and seventeenth century interpretations of international law and were incorporated and further developed in British colonial policy.⁴⁴

Two of the most important court cases in the law of aboriginal rights are Johnson v. McIntosh⁴⁵ and Worcester v. Georgia,⁴⁶ both decided by the United States Supreme Court. The theory of these two cases was that an aboriginal claim was a legally recognized right to occupy those lands held by Indians from time immemorial. On discovery, the legal title or fee to the newly-claimed land went to the discovering State, subject to this aboriginal right of occupancy. The Indians' property right was also alienable solely to the State or Crown and title could be extinguished by either conquest (and cession) or by purchase.⁴⁷ This novel theory

of aboriginal title became known as the 'Marshall doctrine' since both the Supreme Court rulings were handed down by Chief Justice Marshall.⁴⁸

In the United States Marshall's theory of original Indian title was not as strong an affirmation of aboriginal rights as that enunciated in one of the leading pieces of legislation in American history. A less restricted interpretation is formulated within the provisions of The Northwest Ordinance of 1787 which states that:

... The utmost good faith shall always be observed toward the Indians; their land and property shall never be taken from them without their consent; and in their property, rights or liberty they shall never be invaded or disturbed unless in just and lawful wars authorized by Congress.
...⁴⁹

Despite this statutory evidence attesting to a more potent Indian title, the Marshall doctrine continues to form the basis of the common law theory of aboriginal rights in the United States and, has been approved by a number of Canadian courts.⁵⁰

The most complete statement in Canadian case law concerning aboriginal title came in the case St. Catherine's Milling & Lumber Company v. The Queen.⁵¹

Within the Supreme Court ruling, Justice Strong was of the opinion that:

... it may be summarily stated as consisting in the recognition by the crown of a 'usufructuary title'⁵² in the Indians to all unsurrendered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the Crown itself, in whom the ultimate title was ... considered as vested. ...⁵³

The Court found that aboriginal title was a personal and usufructuary right, alienable only to the Crown and vulnerable to extinguishment by the Crown.

Apart from the St. Catherine's Milling decision, there are no definitive judicial statements as to the character of aboriginal title and more specifically, as

to the interpretation of an usufructuary right. The Canadian judicial system has successfully evaded the necessity of defining just what 'aboriginal title' is. For example, this pattern has been sustained as recent as The Baker Lake case (1979), in which the Federal Court, Trial Division ruled on an Inuit claim to aboriginal title in the Baker Lake area of the Northwest Territories. The case contains a partial recognition of aboriginal title, but narrowed the concept to the traditional use of the land (the Baker Lake area was subject to the aboriginal right and title of the Inuit to hunt and fish).⁵⁴

To date, one of the most important court cases with respect to the concept of aboriginal rights is the Calder v. Attorney-General of British Columbia (1973).⁵⁵ When this case was finally taken to the Supreme Court of Canada, the seven judges divided four to three against the Nishga claim.⁵⁶ Six of the bench supported the Marshall doctrine's notion of aboriginal title "dependent upon the good will of the Sovereign" but there was no agreement on the fundamental question of how such rights might be extinguished or evaluated. Three of the judges held that aboriginal rights are without value unless the government obliges itself to pay by enacting compensation legislation. They also held that such rights can be extinguished implicitly through land legislation necessarily denying their continued existence. Three other judges declared that aboriginal rights cannot be extinguished without compensation or without specific direct legislation removing the right to compensation. Occupation, they said, was a proof of the continued existence of aboriginal rights, and the Nishga appear to have been in possession of the Nass Valley from time immemorial; they have never made any surrender agreement with the Crown.

The Nishga lost their case on the collateral and technical point that the issue could only properly come before the court with provincial authorization (ruling of Mr. Justice Pigeon). The substantive issue as to whether the Nishga have

aboriginal rights remains unresolved by the courts, as it does for all other native peoples in Canada pursuing comprehensive claims. Even though the Calder decision suggested that aboriginal rights 'might' be a valid legal concept, and further likely lead to a reversal in government policy towards comprehensive claims,⁵⁷ the judgement has left unanswered many questions as to the nature of aboriginal title, its worth, the manner by which it can be extinguished, and the degree of proof necessary to establish a valid claim to aboriginal title.

Not only the courts, but the executive and legislative branches of both levels of government in Canada (as well as the Government of Great Britain) have repeatedly acknowledged the existence of aboriginal rights throughout Canada. The leading Canadian document on Indian rights, The Proclamation of 1763, reflects the pre-existing policies and practices of the British Government and colonists. Often referred to as "The Charter of Indian Rights" or the "Magna Carta of aboriginal rights", the Proclamation created a large area of land 'reserved' for the traditional pursuits of the Indians (lands which had not been ceded to or purchased by the Crown), and this native-held land could only be sold to the Crown.⁵⁸

Official recognition of the provisions of the Royal Proclamation came in 1867 in regards to the transference of Rupert's Land and the Mackenzie Valley to Canada. In the December 1867 Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada, it was stated 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 the 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.⁵⁹

The Imperial Order in Council transferring Rupert's Land incorporated this commitment as a condition of transfer. (The Rupert's Land and North-Western Territory Order (1870) section 14).

In addition, various Dominion Land Acts have given express recognition to aboriginal rights and acknowledge the need to satisfy claims arising from the extinguishment of Indian title. For example, the first Dominion Act, dealing with the sale of Crown land (1872 Public Lands Act), states in section (42):

...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.

The Indian treaties constitute one of the best indications that native peoples had a legally recognized title to the lands which they used and occupied. In return for the extinguishment of all interests to these lands, native tribes received compensation from the Crown in monetary, land and/or institutional form.

Formal recognition of aboriginal rights can also be found in the Charter of Rights (1982). In addition to outlining those rights and freedoms which apply equally to all Canadians, the Constitution Act, 1982 contains specific references to the special rights of the aboriginal peoples of Canada. The Canadian Charter of Rights and Freedoms (Part I of the Constitution Act, 1982), Section 25 states:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
 - (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

Section 35 of Part II of the Act makes specific reference to rights of aboriginal peoples of Canada and defines who they are:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

Participation by aboriginal peoples at a Constitutional Conference of First Ministers is specified in Section 37(2):

37. (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.
- (2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.
- (3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

Subsection 52(1) is also of relevance to aboriginal rights:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The preceding examples constitute a sample of the many constitutional, statutory, executive and judicial rights in Canada. Rights which have their derivation in such a rich history cannot be easily ignored. Yet, the extent to which these rights to the land are recognized is dependent on the interpretations of the courts and legislatures of Canada.

The following chapter will reveal how the federal government has historically chosen to recognize and respond to the notion of aboriginal rights in Canada.

CHAPTER 2

The Federal Government and Comprehensive Claims

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(a) Traditional Approach

While the comprehensive claims of Canada's native peoples have by no means been treated uniformly, there did develop a consistent body of precedent and tradition which was utilized on new frontiers where rapid settlement or resource exploitation was being promoted. British colonial policy towards the Natives had assumed that the aborigines had an interest in the land which had to be dealt with before non-native settlement could take place. The policy encouraged early agreements with native groups in which various forms of compensation were provided in return for surrender of native title to the land. At the same time, these agreements reserved areas for continuing Indian use.

At Confederation, the new federal government continued this policy as jurisdiction over Indians and lands reserved for Indians was given to the federal government under s. 91(24) of the British North America Act. Native interest to land was exchanged for finite areas of land reserved exclusively for Indian use, and a government department responsible for the management of the affairs of native peoples was created.

The early agreements with native peoples became known as the "numbered" treaties (1871 - 1921) and they were generally timed to precede widespread settlement in a given region. Treaties 1 '(Stone Fort Treaty) 3 August 1871' and 2 '(Manitoba Post Treaty) 21 August 1871' were negotiated closely in the wake of the 1869 Riel Rebellion.¹ The two treaties were made for the extinction of the Indian title to Manitoba, 1 including the land within the province and some timber grounds to the east and north, and 2 covering a large tract of land to the west of Portage

La Prairie. Treaty 3 '(Northwest Angle Treaty) October 1873' covered the lands between Manitoba and Lake Superior and, 'the remainder of the "fertile belt" of the Prairies and much of what is now northern Manitoba was covered by four additional treaties in four successive years, 1874 - 1877.

This treaty-making process which had become an integral part of the settlement of the Canadian West was revived from 1899 to 1930 when the pressures of settlement and mineral development began to open northern frontiers: Treaty 8 (1899 & 1900; Treaty 9 (1905 & 1906); Treaty 10 (1906) and; Treaty 11 (1921 & 1922).²

Following the negotiations of Treaties 1 and 2 in 1871, little consideration was given to alternative means of dealing with aboriginal claims. The Treaty Commissioners interpreted the first prairie treaties as the establishment of a policy precedent. This conviction is reflected in the words of Commissioner Archibald:

...I look upon the proceedings, we are now initiating (Treaties 1 and 2), as important in their bearing upon our relations to the Indians of the whole continent. In fact, the terms we now agree upon will probably shape the arrangements we shall have to make with all the Indians between the Red River and the Rocky Mountains. ...³

Treaty 1 and 2 had offered reserve lands to the extent of 160 acres per family of five, annuities of \$3 per person, a gratuity of \$3 per person, and a school on each reserve. In subsequent agreements, these provisions served as a model, with a number of circumstantial verbal promises also being made in response to specific Indian claims (ie. provisions for triennial suits of clothing for chiefs and headmen, a number of buggies, animals and implements).⁴

Throughout this period, the Natives also did not attempt to find alternative means to deal with their claims. Instead, their emphasis was on what the Indians would receive rather than on what they were giving up. The initial demands of various native groups were simply for direct negotiations with representatives of

the government prior to widespread settlements or surveys and, having a knowledge of former treaties, they sought to be dealt with in the same manner and on the same terms.⁵

The treaty-signing process utilized by the federal government constitutes the typical or traditional approach in its dealings with native claims. This policy approach allowed Ottawa to deal with the Natives in an ad hoc fashion as necessity dictated (the pressures of settlement and resource development facilitated negotiations for new lands from native groups). Accompanying an objective of minimal commitments, the federal government also desired treaties that were brief, simple, and uniform in content.⁶ Within these agreements and their negotiations, the nature and extent of the Indian title or aboriginal rights were avoided, although the texts of all eleven treaties were unmistakable in surrendering all land rights which might have existed. Thus, as emphasized by Douglas Sanders in "Native People in Areas of Internal National Expansion: Indians and Inuit in Canada", as such, the thrust of this approach can be classified as being assimilationist in nature. The treaties and the reserves formulated by the federal government can be interpreted as part of social planning designed to shift the aboriginal economic base to facilitate non-native settlement.⁷

(b) Recent Developments

After the signing of Treaty 11 in 1921, less attention was paid to the question of dealing with native interest in the land. Most of the unsettled areas in which future settlement was anticipated were believed to be covered by treaty or by other arrangements. However, the process proved to be incomplete as native peoples in the non-treaty areas gradually began to experience the pressure of non-native settlement and development on lands that they had previously used and occupied on a relatively exclusive basis. Yet the occasional presentation of native

claims were overshadowed by issues and deliberations generated by the Depression of the 1930's and later by World War II.

After World War II, the aboriginal groups increased their efforts to obtain acceptance of claims based on aboriginal title. These efforts included a frenzy of organizational activity as new small Indian organizations emerged throughout the country to articulate concerns about the general social welfare of the Natives and to defend treaty rights against settlements infringements. With reorganization and the establishment of linkages with non-native groups in support of native claims, these groups were able to increase governmental awareness of their grievances, especially the disruptive effects of northern non-native activities upon the traditional pursuits of northern native peoples.⁸

At the same time, the federal government was returning its attention to domestic affairs, including native issues. By 1945, if not before, the need for more effective action had become apparent. Subsequently, the government of William Lyon Mackenzie King established a Joint Committee of the Senate and the House of Commons to consider amendments to the Indian Act and to launch a broad investigation into Indian administration. While introducing the motion to establish the committee, the Minister of Citizenship and Immigration, J.A. Glen, who at the time held jurisdiction for Indian Affairs, indicated that economic conditions which had resulted from the stringency of the Depression, and the increasing restrictions on Indian hunting and trapping had forced a difficult policy choice:

... It would appear that we have reached a stage in our development as a nation when economic conditions will force us to do one of two things: (1) purchase at public expense the additional lands and additional hunting and trapping rights for an Indian population of 128,000, increasing at the rate of 1,500 per year; or (2) decide on an educational and welfare programme that will fit and equip the Indian to enter into competition with the white man not only in hunting and trapping but in agriculture and in the industrial life of the nation. ...⁹

Preference and emphasis was placed on the social and educational needs of the native groups (the second alternative), as opposed to rights and claims, and came to be reflected in the proceedings of the Joint Committee and in the programs characteristic of the Indian organizations throughout the 1950's and 1960's.¹⁰

Indian claims, however, could not be ignored. Not only were there many persistent unresolved grievances and many recent questions pertaining to fish and game resources, but the United States had set something of an example by creating an Indian Claims Commission (I.C.C.). The American I.C.C. was established in 1945 following a proliferation of claims petitions and mounting pressures for a more liberal and more efficient settlement mechanism.¹¹ The Commission was empowered as a judicial body to hear all claims against the federal government, of which the majority were essentially concerned with the revision of treaties on the grounds that the original provisions had been so meagre as to constitute unconscionable consideration for the surrender of aboriginal title. The I.C.C. made monetary awards where unconscionable consideration was recognized, however, their distribution was the responsibility of the Bureau of Indian Affairs, subject to Congressional review. The decisions of the Commission were also subject to appeal by either side to the Court of Claims, and ultimately, to the United States Supreme Court for a review of judgement.¹²

The American Indian Claims Commission served as a point of reference for many debates and policy proposals in Canada. For example, on June 22, 1948, the Joint Committee established by the King government recommended that:

... a Commission in the nature of a Claims Commission be set up, with the least possible delay, to inquire into the terms of all Indian treaties in order to discover and determine, definitely and finally, such rights and obligations as are therein involved and, further, to assess and settle finally and in a just and equitable manner all claims or grievances which have arisen thereunder. ...¹³

Debates in the House of Commons also continued regarding discriminatory sections of the Indian Act (ie. Section 141 preventing Indians from raising funds to prosecute claims) and the administration of Indian affairs. On June 21, 1950, John Diefenbaker (Lake Centre) questioned the Liberal administration as to:

... Why has no action been taken on the recommendation that a commission be set up, so that the Indians may not continue to feel that they have been unjustly treated, as they have? ...¹⁴

In response to inquiries of this nature, the Hon. W.E. Harris, Minister of Citizenship and Immigration (the position which carried the responsibility for the Indian Affairs Branch, 1949-1965), stated that the offensive sections of the Indian Act were being removed, however, there was no need, at this time, for the establishment of a claims commission. In support of this assertion, Harris cited evidence heard by the Joint Committee which suggested that treaty rights claims (ie. hunting, fishing and trapping rights) were more common in Canada, whereas most of the American native claims dealt with revisions of the prices paid for land or agreements signed under duress. According to the Minister, the former type of claim could be handled by the courts, and the latter type, was virtually non-existent in Canada. In the House of Commons, he stated that:

... I hope that if they (the Natives) think they have rights, they will take action in our courts to establish them, because our courts are set up for that purpose. I should think that the Indian would be better satisfied and that there would be equal justice if he took that course rather than that we should appoint a claims commission specifically to deal with his claims. ...¹⁵

The visibility and attention to claims issues were maintained throughout the 1950's, particularly by the claims of the British Columbia Indians (ie. Oka dispute, Caughnawaga Band Council, and the Blackfoot Band). A second Joint Committee was soon established (1959 to 1961) to review the Indian Affairs policy. A larger number as well as a greater variety of claims and grievances were presented by

native organizations, and in 1961, the Joint Committee repeated the recommendation of its predecessor of establishing an Indian Claims Commission in Canada. Informed that the American I.C.C. had settled a similar dispute to those of the British Columbia native groups, the Committee recommended that:

An Indian Claims Commission should be established to hear the British Columbia and Oka Indian land questions and other matters, and that the cost of counsel to Indians for the two land questions specified above, be borne by the Federal Treasury.¹⁶

This time, however, Ellen Fairclough, the Minister of Citizenship and Immigration for the Diefenbaker government, was receptive to the proposal of a Claims Commission and subsequently initiated discussions with the Department of Justice with the objective of drafting legislation. First draft legislation was completed within the Indian Affairs Branch of the Department of Citizenship and Immigration and was later modified in the winter of 1961-62 through consultation between senior officials of that Department and the Department of Justice.¹⁷

While the Conservatives under Diefenbaker appeared committed to establishing a Claims Commission, the introduction of the requisite legislation was deferred by clarifications requested by Cabinet and the calling of the 1962 general election.¹⁸ The Conservatives were returned to office, but with only a precarious minority government. Before the Commission legislation could be introduced, however, the Government was defeated in the House of Commons in February, 1963. In the subsequent April election, the Liberal Party, under the leadership of Lester Pearson, was back in power, falling just a few seats short of a majority government. During the election campaign, the Liberals made explicit promises to establish a claims commission. In the February issue of Native Voice, an Indian newspaper in British Columbia, the party pledged to develop a commission to settle all outstanding land claims. The Liberals' platform proposed full equality for Natives 'without loss of aboriginal, hereditary and usufructuary rights'.¹⁹

After a visit to Washington for a more thorough investigation of the American legislation and consultations with officials of the Bureau of Indian Affairs, efforts were renewed to bring a bill before Parliament. On December 14, 1963, Hon. Guy Favreau, the Minister of Citizenship and Immigration, moved that the House go into committee to consider the following resolution:

That it is expedient to introduce a measure to provide for the disposition of Indian claims and in relation thereto, --

1. To provide for the establishment of an Indian claims commission;
2. To provide for the duties of the commission, its decisions and awards;
3. To provide for appeals from the decisions of the commission to the Indian claims appeal court; and
4. To enact such financial provisions as may be necessary to accomplish the purposes of the act.²⁰

Bill C-130 proposed that the I.C.C. would have jurisdiction to hear claims concerning the expropriation of land without the extinguishment of aboriginal interest; disposal of reserve lands without compensation or with unconscionable consideration; failure to discharge obligations of treaties or other agreements; improper use of trust funds; and failure of the Crown to act fairly and honourably with the native peoples.²¹ After its first reading, copies of the bill were distributed to Indian organizations, band councils and other interested groups, such as the Canadian Civil Liberties Association and the Canadian Bar Association, for comment. This consultation resulted in approximately 300 submissions and briefs being filed with the Department, of which 70% criticized the bill in some respect. The consideration of these submissions led to an 18 month delay before the bill was reintroduced to Parliament, with several amendments, on June 21, 1965 as Bill C-123.²² Again, as in 1963 when the Conservatives appeared committed to introducing legislation to establish a claims commission, Bill C-123 died on the order paper when the Pearson administration decided to seek a new mandate from the electorate and subsequently dissolved Parliament.

Although the introduction of first draft legislation had occurred in both 1961 and 1963, an Indian Claims Commissioner was not established until 1969 as part of the White Paper on Indian policy.²³ There are a number of reasons for the delay from 1961 to 1969. First, the frequency of elections (1962, 1963, 1965, 1968) influenced the stability and policies (ie. focus on visible election issues) of the federal government. Second, court cases involving Natives produced delays. In 1965, until the resolution of Regina v. White and Bob, the British Columbia Indian Organization asked for a delay in the efforts to create a claims commission.²⁴ Similarly, on March 6, 1969, the President of the Nishga Tribal Council requested that a bill introducing a claims commission should be deferred so as not to prejudice or jeopardize their case before the courts (the Calder case proceedings began in 1969 before the B.C. Supreme Court).²⁵ Third, the federal government decided to involve Natives directly in the formation and administration of the claims commission; this process itself created a number of delays. For example, on March 22, 1966, Mr. Guy Williams, President of the B.C. Native Brotherhood, asked for a delay in the introduction of claims commission legislation until the native peoples of British Columbia could meet and organize on the land question of that province.²⁶ However, the diversity of Indian cultures and interests among the B.C. groups proved insurmountable in the attempts to establish The Confederation of the Native Tribes of British Columbia and later, a coalition of leaders. Both failed in producing stability and leadership necessary to carry out negotiations under a single organization.²⁷ Finally, delays were caused by a change in government organization in the late 1960's. Under the Trudeau administration, rationalization and increased bureaucratization of the Department of Indian Affairs and Northern Development added to the complexity already surrounding the issue of an Indian Claims Commission.

(c) Native Claims Policy and Developments 1968-1979

On April 19, 1968, Pierre Elliot Trudeau was sworn in as Prime Minister and shortly thereafter called a general election in which his Liberal Party was returned to office with a comfortable majority. One of the consequences of this leadership change was an alteration in policy formulation in all areas of government activity, including Indian Affairs. The thrust of Trudeau's approach was that specific proposals of senior departmental officials were to be supplanted by Cabinet Committees which would have extensive background information and several policy options.²⁸

Major policy reviews were conducted in many policy areas concerning native issues. By the late 1960's, the public, and particularly the press became better informed of native poverty and alienation. Reports, such as the Hawthorne Report, Vol. 1: A Survey of the Contemporary Indians of Canada (1966-67), which demonstrated that Indians suffered from poverty, underemployment and unemployment,²⁹ accentuated the visibility of native issues. Public sympathy for the Indian cause was also enhanced by the civil rights and anti-poverty movements in the United States and by the emerging nationalism of decolonizing third-world countries.³⁰

The growing attention given to the plight of the Natives fostered a major revision of basic government philosophy, centred around proposals for a revision of the Indian Act. The end result of this examination process was the presentation of the controversial White Paper on Indian Policy in June 1969, which proposed a fundamental change in the relationship of native peoples to Canadian society. "The Indian people's role of dependence was to be replaced by a role of equal status, opportunity and responsibility".³¹ Equalitarianism or equality of opportunity was perceived as the true path to progress, resting on "the fundamental right to full and equal participation in the cultural, social, economic and political life in Canada . . .

To argue against this right is to argue for discrimination, isolation and separation".³² In pursuit of the right to full and equal participation, the legislative and constitutional bases of discrimination must be removed (the Indian Act and s. 91(24) of the B.N.A. Act, respectively). Administrative equality would be achieved by transferring DIAND programs and responsibilities to the provinces and other federal departments within a five year period.

In reference to special rights or status, aboriginal title was rejected as a basis for native claims.

(Aboriginal rights claims) are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to Indians as members of the Canadian community.³³

At a Vancouver Liberal Association dinner on August 8, 1969, Prime Minister Trudeau stated in his address:

... Our answer is no. We can't recognize aboriginal rights because no society can be built on historical 'might-have-beens'. ... I can only say as President Kennedy said when he was asked about what he would do to compensate for the injustices that the negroes had received in the American society, "we will be just in our time". This is all we can do. We must be just today. ...

The rationality of the White Paper reflected the Prime Minister's own ahistorical approach to policy-making, as well as, his conviction on the danger and futility of special legislation for cultural groups such as French Canadians. According to Trudeau, cultural survival is not insured by special legislation and by remaining in isolation of Canadian society. Rather, the Natives, like other cultural groups, can alone preserve the vitality of their culture, language and philosophy proportional to their degree of participation in the wider society.³⁴

As part of the White Paper policy, an Indian Claims Commissioner was to be appointed. Rather than proceeding with a commission similar to that considered in the 1960's which would hear and render decisions on all outstanding claims and

grievances, the Commissioner, Dr. Lloyd Barber, was established under the Public Inquiries Act to consult with the Indian people and to inquire into claims arising out of treaties, formal agreements, and legislation. It was considered an exploratory and advisory "Commission", rather than one with explicit adjudicatory powers. Dr. Barber was also expected to classify the claims that in his judgement ought to be referred to the courts or any special quasi-judicial body that may be recommended.³⁵

Native reactions to the White Paper of 1969 were swift. The National Indian Brotherhood immediately issued a statement declaring that,

... the policy proposals put forward by the Minister of Indian Affairs are not acceptable to the Indian people of Canada ... We view this as a policy designed to divest us of our aboriginal, residual and statutory rights. If we accept this policy, and in the process lose our rights and our lands, we become willing partners in cultural genocide. This we cannot do.³⁶

Within the successive months, various native groups across Canada forcefully and repeatedly echoed this response. The Natives rejected the White Paper for two reasons. First, despite the rhetoric of "participatory democracy",³⁷ the policy had been unilaterally devised and therefore, it had not been developed in good faith or in accordance with the terms of participation that had been assured to the Natives. Secondly, the policy constituted a denial of their special rights, which had been recently recognized and recommended by the government-sponsored Hawthorne Report. The White Paper was thus perceived as the new articulation of a long-resisted policy of assimilation and a threatening extension of traditional Indian policy in Canada. Incorporated in the aboriginals' protest against the policy statement of 1969 was a rejection of the Indian Claims Commissioner. The Office was interpreted as "an out-growth of the unacceptable White Paper, viewing it as an attempt to force the policy on native people." Furthermore, the Commissioner's terms of reference appeared to preclude any examination of the question of aboriginal rights.³⁸

A significant repercussion of the 1969 White Paper was a resounding nationalism among the native peoples. "Nativism", significantly enhanced by the policy approach, became firmly associated to the notion of special rights, the basic native orientation which the policy statement had been designed to change.³⁹ Efforts were renewed to form provincial and national organizations through which the Natives could both prepare counter-proposals and lobby their own policies.⁴⁰ The intensity of this nationalism, aided by mounting public attention and support, precipitated a renunciation of the 1969 White Paper. In a statement at a meeting with the Indian Association of Alberta and the National Indian Brotherhood, Prime Minister Trudeau gave assurance to the Natives that the government would not press the White Paper on them. While acknowledging that the policy may have been 'shortsighted or misguided', he emphasized that the government's intention had been honest.

... But we have learnt in the process that perhaps we were too theoretical, we were a bit too abstract, we were not, as Mr. Cardinal (author of The Unjust Society (1969), considered an Indian manifesto on special rights) suggests, perhaps pragmatic enough or understanding enough, and that's fine. We are here to discuss this. ... And we won't force any solution on you, because we are not looking for any particular solution.

(Ottawa, June 4, 1970).

Formal retraction of the 1969 policy statement came in a speech delivered by Hon. Jean Chretien, Minister of Indian Affairs and Northern Development, at Queen's University on March 17, 1971. Entitled 'The Unfinished Tapestry - Indian Policy in Canada', Chretien stated that,

... The Government put forward its proposals for a future Indian Policy a year and a half ago. These stimulated and focused a debate and have served a necessary purpose. They are no longer a factor in the debate. The Government does not intend to force progress along the directions set out in the policy proposals of June 1969. The future direction will be that which emerges in meetings between Government and Indian representatives and people. (Emphasis in original)

By 1971, aboriginal claims became the focus of the Indian movement, primarily arising from the potential impacts of resource developments on regional native cultures in the James Bay region and the Mackenzie Valley. Natives and public supporters organized in an unprecedented fashion, pressuring the Government through the courts and the press to make appropriate claims settlements. The intensity of this opposition initiated a re-evaluation of government policy pertaining to native claims. Following the Prime Minister's assurance that the White Paper would not be imposed upon the native peoples, the Privy Council Office began funding native claimant groups and associations. These funds, in the form of contributions and loans, enabled the groups and their organizations to conduct research into their rights and treaties.⁴¹

Soon after the initiation of the funding program, another early response to the increased visibility of native issues was an extension of the Indian Claims Commissioner's mandate. In August, 1971, the Prime Minister agreed that the Commissioner would not be exceeding his terms of reference if he were to,

...hear such arguments as the Indians may wish to bring forward on these matters in order that the government may consider whether there is any course that should be adopted or any procedure suggested that was not considered previously.⁴²

Dr. Barber took this to mean that he was free to look at all types of native grievances and claims, including aboriginal rights issues.

The redirection of the Government's thinking regarding native claims was further reflected in the Minister for Indian Affairs' speeches in Parliament (Hon. Jean Chretien). Chretien began to emphasize a "new ideology" in Indian affairs, centred upon co-operation between the department and native organizations. He stressed the advantages of consultation, in which joint examination of the problems and mutual support would be the best means of proceeding with native issues.⁴³

Major developments which facilitated the change in government policy also occurred in 1973. Of vital importance was the Calder decision handed down by the Supreme Court of Canada in January of that year. Although the Nishgas narrowly lost their case, the judgement gave greater credence to aboriginal rights, but divided equally on the issue of what constituted extinguishment of these rights. The Prime Minister acknowledged the significance of the decision in a speech to a delegation from the Union of British Columbia Indian Chiefs. Trudeau conceded to the Chiefs that "...perhaps you have more legal rights than we thought you had..." in the drafting of the White Paper. The growth in the recognition of aboriginal rights was also reflected in the Standing Committee of the House of Commons on Indian Affairs and Northern Development. In its second report to the House on April 4, 1973, the Standing Committee endorsed the National Indian Brotherhood's (NIB) demands for recognition of native claims.

... Your Committee accepts and endorses the concept of Aboriginal Title as set out in the paper entitled "Aboriginal Title" presented to the Committee by Mr. George Manuel, President of the National Indian Brotherhood, ⁴⁴ on Thursday March 29, 1973, and urges the Prime Minister, on behalf of the Government of Canada, to publicly accept and endorse the said concept of Aboriginal Title, and to take steps immediately to enter into negotiations with the Indian people with respect to the said title.⁴⁵

On August 8, 1973, the Federal Government formally acknowledged the significance of the Calder decision by announcing a general policy statement on the claims of the Indian and Inuit peoples. Accompanying a reaffirmation of government policy to deal with "specific claims" arising from lawful obligations in the fulfillment of treaties and agreements, the statement included a willingness to negotiate settlements dealing with native rights of traditional use and occupancy which had never been extinguished by treaty or superseded by law ("comprehensive claims"). The main thrust of the negotiation process was to translate the concept of aboriginal interest into concrete and lasting benefits, such as lands, financial

compensation, participation in government structures, resource management, and special rights regarding hunting, fishing and trapping.⁴⁶

A final settlement of comprehensive claims would confirm these benefits in legislation, to give them the stability and binding force of law. With gas discoveries on Melville, King Christian and Ellef Ringes Islands and some oil on Ellesmere Island, and a rapid rise in the prices of base metals as well as hydrocarbons, the element of finality would be significant in removing some of the uncertainties of resource development. By enforcing the provision that negotiations on the same claim cannot be reopened at some time in the future, competing and sometimes conflicting land-use demands of development and traditional native pursuits would be identified and definitively resolved.⁴⁷

Until 1974, the federal government did not develop any special mechanism through which to process and adjudicate comprehensive claims. Cases had been simply handled through the normal administrative channels. However, in July 1974, the Office of Native Claims (ONC) was created within the Department of Indian Affairs and Northern Development to deal with the increasing number of claims that were being prepared and submitted to the federal government. At the present time, it is still ONC's responsibility to enter into discussions and negotiations with native groups and associations concerning their claims.

More effective negotiation of native claims was also sought through the establishment of a Joint National Indian Brotherhood/Cabinet Committee in April, 1975. This committee was to provide a basis for continuing consultation between Cabinet Ministers and the NIB on major Indian policy issues and problems, as well as, to discuss the principles and parameters for settling native claims. On April 14, 1978, the Executive Council of the NIB, apparently dissatisfied with the lack of significant progress in a broad range of issues under this new structure, decided to withdraw from the Joint Committee.⁴⁸

A Canadian Indian Rights Commission, which replaced the Indian Claims Commissioner after March 1977, was also established under the direction of the Joint NIB/Cabinet Committee. Under the joint chairmanship of Justice Patrick Hartt and Brian Pratt, the Commission was to provide a forum for the discussion of all issues affecting Indian people and assist the Joint Committee in constructing general principles for the settlement of claims. This sub-committee structure was dissolved in January 1979, following the withdrawal of the NIB from the parent Committee.⁴⁹

I The Existing Comprehensive Claims Policy

Outside of claims settlements in the James Bay region of Quebec and an Agreement-in-Principle with the Inuvialuit of the Western Arctic, substantive progress was generally lacking in the implementation of the 1973 policy. Consequently, an extensive policy review was carried out by the Government during the latter part of 1980, taking into account the need for a clearer sense of direction as well as the views and concerns of the native peoples.⁵⁰ In December 1981, the federal government released a new native claims policy, entitled In All Fairness - A Native Claims Policy. This policy paper is an expansion of the government's 1973 policy on comprehensive claims, and reaffirms its commitment to negotiate claims based on aboriginal title relating to traditional use and occupancy of the land. However, the claims process will remain unchanged.⁵¹

In All Fairness states that the Canadian government has three major objectives in response to comprehensive claims:

- (1) To respond to the call for recognition of Native land rights by negotiating fair and equitable settlements;
- (2) To ensure that settlement of these claims will allow Native people to live in the way they wish;
- (3) That the terms of settlement of these claims will respect the rights of all other people.⁵²

The Government also maintains that it hopes to pursue a negotiation process as the best means of meeting the legitimate concerns of the native peoples. To the federal government, this process allows a great deal of elasticity in its approach to native claims and, in addition, allows the indigenous peoples to participate in the formulation of the terms of their own settlement.⁵³ Ottawa also requires that the negotiation process and settlement formula be thorough so that claims cannot arise in the future. Therefore, any comprehensive claims agreement will be final.⁵⁴ Also in accordance to the 1973 policy statement, the intention of the 1981 policy is to replace contentious aboriginal land rights with concrete rights and benefits.

a) Negotiating Process and Structures

1. Office of Native Claims (ONC)

The Office of Native Claims was established in 1974 within DIAND to deal with the increasing number of claims being presented. The Office researches the claims submitted to the government in order to identify and analyse their legal, historical and factual elements. ONC is also responsible for co-ordinating the government's response to claims, as well as, advising the Minister on the further development of the claims policy. In addition, the Office represents the Minister and the federal government in claims negotiations with native groups across the country. ONC may do this on its own, or through negotiators who may be appointed from outside the public service.⁵⁵

2. Government Representation

During the policy review of 1980, the Government took the initiative of appointing Chief Negotiators from outside the public service. The rationale for the appointment of these negotiators, according to ONC, was that each would be able to "bring a fresh and objective perspective to the negotiating

table".⁵⁶ Their selection is based on criteria of highly developed negotiating skills and a sensitivity to native needs and aspirations. The negotiators enjoy direct access to the Minister of Indian Affairs and Northern Development and they are in continual contact with centres of federal decision-making authority.⁵⁷ Currently, six such negotiators are engaged in the resolution of comprehensive claims. A list of the Chief Government Negotiators, with brief biographical notes and the claims in which each is involved, is provided in Appendix 1.

3. Funding of Native Claims

Funding for comprehensive claims research development and negotiations is provided by the Department of Indian Affairs and Northern Development through the Research Branch, Corporate Policy in the form of contributions and loans. Contributions are made in cases where the claim has not yet been accepted for negotiation by the government. This funding is provided for the purposes of researching, formulating and presenting the claim. Interest-free loans, on the other hand, are offered in cases where a claim has been accepted by the Minister of DIAND, for purposes of further development of the claim, preparation of negotiating positions and actual negotiation of the claim. Finally, interest-bearing loans are awarded in cases where an agreement-in-principle has been signed and ratified, for purposes of negotiating the final agreement. The loans are repayable as a first charge against a claim.⁵⁸ According to the Office of Native Claims, as of March 31, 1983, total contributions and loans for comprehensive claims purposes amounted to \$27.6 million and \$56 million respectively.⁵⁹

4. Submission and Processing of Claims

After the submission of a comprehensive claim, the Office of Native Claims researches it to ascertain the historical, geographical and

anthropological facts. The claim is then forwarded to the Department of Justice which reviews and analyses all the historical and other documents and data in order to determine the legal merits of the claim. The Government's response is then prepared by the Minister of DIAND and if, on the advice of ONC and Justice, the claim is deemed acceptable by the Minister (where findings indicate the possible existence of unextinguished native interests), negotiations can begin.⁶⁰ In such cases, the Office of Native Claims is authorized to proceed with negotiating a settlement with the claimant. ONC is further responsible for co-ordinating the government's negotiating activities with various departments being drawn into the preparation and presentation of positions as required: Justice; Environment; Fisheries and Oceans; Energy, Mines and Resources; Finance; Privy Council Office; Federal-Provincial Relations Office; etc. As outlined in the preceding paragraph, contributions and loans are provided to native groups, according to the status of the claim, to research, develop and present their claims.⁶¹

5. Territorial and Provincial Involvement

Negotiations concerning those claims north of 60° are conducted on a bilateral basis between the federal government and the native groups. Yet, by mutual agreement, the territorial governments actively participate in the negotiation process as part of the federal team. Such participation is of particular importance since "many of the settlement provisions will fall within areas of territorial jurisdiction, require legislation and implementation by the governments concerned".⁶² In cases where native claims fall in provincial areas of jurisdiction or affect provincial interest and responsibilities, provinces must be involved in the negotiations in order that fully effective and equitable settlements can be reached.⁶³

6. Settlement Stages

The comprehensive claims settlement process normally adheres to a series of five stages, beginning with agreements-in-principle in which an accord on the general terms of settlement are reached. The second stage is a final agreement between the representatives of the parties in which all settlement provisions are defined in detail. Ratification of the terms of the final agreement is achieved by the claimants through referenda held in the native communities, while government approval is provided by Cabinet. Following ratification, the passage of legislation by Parliament, and by provincial or territorial legislatures where concerned, giving effect to the settlement constitutes the fourth settlement stage. Thereafter, implementation rests with the government agencies (federal, provincial and/or territorial) responsible for the administration of the various aspects of the legislation and with the beneficiaries, according to the terms of the settlement.⁶⁴

b) Existing Policy Guidelines

1. Compensation

According to the guidelines of In All Fairness, the federal government requires that the negotiation and settlement formula of comprehensive claims be fair and thorough in order that the claims will not arise again in the future. "The thrust of this policy is to exchange undefined aboriginal land rights for concrete rights and benefits."⁶⁵ In addition to any provisions for any degree of local self-government, the settlement will guarantee these rights and benefits which may include lands, limited subsurface rights, wildlife rights and monetary compensation. Lands will be selected by the Natives from their traditional areas for their continuing use and occupancy,

subject to the equitable consideration of the rights and interests of non-natives, and these areas will be insured against the expropriation powers of government. The native groups would also be guaranteed meaningful and influential involvement in land management and planning decisions effecting their lands by the provision of membership on the appropriate boards and committees. In the case of overlapping claims where there is no present arrangement between the competing native claimants, no land will be granted in the disputed area until the differences are resolved.⁶⁶

Limited amounts of subsurface rights may also be included in claims settlements. However, these rights will be granted by the federal government in only certain cases. Subsurface rights are a protective measure for the Natives' traditional areas of use and occupancy against the potential detrimental impacts of exploration and development, as well as, providing native groups with an opportunity and incentive to participate in non-renewable resource development.⁶⁷

Pertaining to wildlife rights, settlements may provide for prescribed preferential harvesting rights for Natives on Crown lands. Exclusive harvesting rights are limited to native lands or to specified species elsewhere. In addition, native participation in wildlife management and conservation policies would also be a key aspect of a settlement for native groups. Effective participation in these decision-making processes can determine native, as well as non-native access to wildlife resources, thereby ensuring the viability of harvesting as a way of life.⁶⁸

Benefits will also include monetary compensation. All compensation monies (cash, government bonds and other forms of debentures) will be exempt from all taxation (monies regarded as capital transfers), and the amounts must be specific and finite. As well, the scheduling of payments and

negotiations must be tailored to meet both the needs of various native groups and the government.⁶⁹

2. Other Provisions

Supplementing the guidelines for compensation, additional guidelines have been adopted with respect to eligibility to benefit from a settlement, the establishment of native corporate structures to manage the proceeds of a settlement, and access to social and other programs. In regards to eligibility, "those who benefit from the settlements must be Canadian citizens of Native descent from the claimed areas, as defined by mutually agreed criteria".⁷⁰ Thus, conditions for eligibility are negotiable, however, persons who have already benefitted under a previous settlement with the Government of Canada are not eligible for benefits under another settlement.⁷¹

Native control over their own affairs is another mutual goal of claims agreements. Consequently, native-controlled mechanisms should be established to manage the proceeds of the settlement and facilitate the lasting participation of all the beneficiaries of the settlement.

These devices will primarily be designed, staffed and their decisions implemented by Native people; they should protect and enhance their assets through sound management practices. (In All Fairness, p.25)⁷²

Guidelines have also been adopted with respect to eligibility for government programs. In All Fairness outlines that, unless agreed to be the parties, claims settlements will not diminish the eligibility of the beneficiaries to current and future programs. Access to these programs will conform with current approved criteria. In addition, according to DIAND officials,

... refocusing of normal program resources to achieve mutually agreed upon ends should be pursued rather than the creation of new indeterminate government programs.⁷³

CHAPTER 3

Native Claims Process in James Bay,
Mackenzie Valley and the Yukon

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Native Claims Processes in James Bay, Mackenzie Valley and the Yukon

Since the termination of the treaty-making process, native claims settlements have been difficult to obtain. Native groups are less willing to extinguish their interest in the land for specific rights and benefits. Aboriginal peoples have recently sought settlements through which their special rights are recognized and implemented. The inconsistency which has developed towards the resolution of comprehensive claims cannot be simply explained by lack of government willingness to settle, but rather intervening political and economic factors in each process must be considered in accounting for divergences in the claims process.

Three areas in northern Canada, the James Bay region of Quebec, the Northwest Territories, and the Yukon Territory have been especially significant in the litigation and negotiation of aboriginal rights since the early 1970's. In all three areas, comprehensive claims have been asserted in attempts to cope with intrusive large-scale economic development and to retain the maximum of native control over their traditionally used and occupied regions.¹

The comprehensive claims of James Bay, the Mackenzie Valley and the Yukon Territory have been chosen to illustrate the discrepancies in the federal government response to and recognition of claims based on aboriginal title. These examples will demonstrate how native claims negotiations are influenced differently by political and economic factors. In the following chapter, these factors will be clearly identified and elaborated upon.

(1) James Bay

Like the Mackenzie Valley, the James Bay area of Quebec is part of the Hudson Bay Company's territories transferred to Canada in 1870 (the Rupert's Land and Northwestern Territory Order). With the extension of Quebec's boundaries into part of this area in 1898 and 1912 (the Quebec Boundaries Extension Acts), the federal government required that the Quebec government be henceforth responsible for dealing with any native claims and rights in these lands. This stipulation of the 1912 agreement was not fulfilled and in 1971, the Dorion Commission, a royal commission on the territorial integrity of the boundaries of Quebec, reported that categorically aboriginal rights continued to exist in these areas of Quebec. In Rapport de la Commission d'Etude sur l'Integrite du Territoire du Quebec: Vol. 4.1 le Domaine Indien, the Commission outlined that these rights exist and pointed out the need to recognize those interests and to obtain their surrender in accordance with the 1912 Act.²

The Quebec government then formulated an agenda along which negotiations would proceed to extinguish any claims to these lands which might exist. However, three months later, on April 29, 1971, before any meetings had taken place between the native and government negotiators, Premier Bourassa announced the province's intention to develop a hydro-electric project in the James Bay area. The plan involved damming and diverting most of the major rivers of James Bay and building powerhouses which, once installed, would have a generating capacity of up to 14,000 megawatts (approximately 30 per cent of the current hydro-electric production of Canada).³

On July 14, 1971, the Quebec government passed Bill 50, creating the James Bay Development Corporation, which was given the authority to both administer the municipality of James Bay (133,000 square miles), and development and exploit the natural resources of the area.⁴ The Corporation was granted extraordinary

powers of expropriation and financial control, to such a degree, that one member of the Quebec Assembly argued that this legislation would, in effect, establish for the Corporation "a state within a state".⁵

The Quebec legislature decided to proceed with the LaGrande complex (Phase 1 of the project) in May 1972, at an announced estimated cost of \$5.8 billion, revised upward two years later to \$12 billion, and then to \$14 billion.⁶ Because of the haste with which the project had been conceived and carried forward, the area that would be affected and the potential of environmental damage caused were still relatively uncertain.⁷ The four power plants would be LG-1, at Mile 23 from the river mouth; LG-2 at Mile 73; LG-3 at Mile 148; and LG-4 at Mile 288. The scheme also provided for large spillways at each of the eight reservoirs and at the dam sites.⁸

The native peoples affected by this major project were some 6,000 Cree and 4,000 Inuit. Their initial reaction to the announcement of the hydro-electric project was one of shock at not having been informed or consulted. While the project was justified on the basis of job creation, energy exports and the demand for electricity (domestic), there was little mention of the native inhabitants and the 8,800 square kms. of Cree hunting lands that were expected to be flooded.⁹

However, in spite of the apparent flooding problem, there were minimal studies conducted to measure their effect. An informal federal-provincial task force, composed of any interested parties, was established to collect available information on the regional impact of the project, but it did not conduct research into the environmental or social implications. This group, at the end of 1971, reported that little was known on the project's impact on the LaGrande area, however, it concluded the James Bay project would have a serious impact on the ecology of the southern regions and on the native peoples.

The James Bay Task Force of the Indians of Quebec Association, funded by the Natives through DIAND, conducted studies at McGill University on the development project. In 1972, this Task Force presented similar findings which reinforced those reported by the informal federal-provincial task force.¹⁰ Despite these studies and their findings, the Quebec government refused to conduct its own research into the James Bay hydro project. The government viewed this venture as a model for environmental impacts of hydro-electric projects and consequently, it refused to negotiate to delay or modify the project.¹¹

The first response of the Cree to the announcement of the development was to establish informal linkages among the eight bands potentially affected by the project. The native chiefs were faced with a choice: they could either ask for federal government assistance, or seek court action. They opted for the former. At this time, the Natives considered the federal government to be the primary protector of their interests, since under Section 91(24) of the B.N.A. Act, it was Ottawa's responsibility for "Indians and lands reserved for Indians". However, since the federal government regarded the threat of separatism in Quebec as more important, Ottawa decided not to intervene on behalf of the Natives. It adopted a position of "alert neutrality".¹² Harvey Feit, in his article "Negotiating Recognition of Aboriginal Rights: History, Strategies and Reactions to the James Bay and Northern Quebec Agreement", argues that:

the failure of the federal government to actively support the indigenous peoples deprived them in large measure of an important potential avenue of political action, namely using differences of bureaucratic and potential interests between the federal and subordinate levels of government as a lever against one or the other.¹³

Yet, at the same time, Ottawa began to provide interest-free loans to the Cree, beginning with grants to pay for some basic research to provide the Natives with the opportunity to develop a more autonomous position on their goals and demands. However, one must not be deceived by this apparent generosity of the

federal government. Part of the impetus for this financial commitment can be attributed to public support as well as pressure exerted by environmental, Church and social organizations found in southern urban centres, which had aligned themselves with the plight of the Cree and Inuit people.¹⁴

The position taken by the Quebec government during these initial stages was that the plans for the project were not negotiable. According to Harvey A. Felt, an assistant and advisor to the Cree negotiators, the provincial government, at that time, stipulated that:

... the indigenous peoples had no special rights, or at least none that warranted anything more than an expropriation of their interest in the land and monetary compensation for that interest.¹⁵

The initial stages of the negotiation process demonstrated that the Government of Quebec was not ready to negotiate. The Bourassa administration perceived that the aborigines possessed no power that could alter the proposed project plans and therefore saw no reason to negotiate or compromise.

Since the federal authorities could not be counted on to assist the Cree and Inuit to protect their interests and because the provincial government would not acknowledge aboriginal rights, the choice left to the Natives was to pursue court action against the province and the state-controlled corporations. They did so in the spring and summer of 1972. On May 5, 1982, the indigenous peoples initiated proceedings for an interlocutory injunction to stop work on the hydro project which had been underway for a year. (An interlocutory injunction is a writ granted by a court whereby a party is required to refrain from continuing a specific act, i.e. construction of the project.)

The injunction hearing lasted for a period of six months, hearing testimony from 167 witnesses, many of which were Natives. The presiding justice, Mr. Justice Malouf, took an additional five months before making his ruling.¹⁶ Finally,

on November 15, 1973, Mr. Justice Malouf, of the Quebec Superior Court, granted the interlocutory injunction, and thereby ordered work on the project to stop.

... The province of Quebec cannot develop or otherwise open up these lands for settlement ... without the prior agreement of the Indians and Eskimo.¹⁷

This decision was a strong recognition and interpretation of aboriginal rights. However, the province immediately moved to suspend the injunction, and within a week, the Quebec Court of Appeal ruled to suspend the granted injunction so that work could continue on the project. The Court held that the Malouf decision was biased, and that aboriginals had no special rights. Furthermore, the interests of six million people (the entire province) greatly outweighed those of six thousand (the Cree and Inuit).¹⁸

Although the Malouf decision was reversed, it had asserted that the concept of aboriginal rights did exist, and thereby enhanced the position of the native peoples. The court judgement now made it impossible for the Quebec government to ignore the Cree and Inuit case. Consequently, the province was ready to negotiate and, within two weeks, Premier Bourassa presented the Natives with a proposal. The 11-point proposal, which was based on some indirect discussions with the Cree, emphasized two things: the offer of a renewed relationship between the local natives and the provincial government through their active participation in the development of the region; and a few modifications to the project.¹⁹

However, the Natives rejected this proposal on the basis of inadequate land provisions, inadequate recognition of hunting, fishing and trapping rights and environmental protection, and inadequate modifications to the project, as well as, the lack of local or regional autonomy provided for the Natives in government structures. The indigenous peoples were now faced with the decision as to whether they should continue court action, renew negotiations or wait for the possibility of an imposed settlement. The third alternative was utterly unacceptable, and heavy

reliance on court action would be too time-consuming. Time was one thing that was limited for the local natives. The momentum of the project was building. Roads, airports and construction sites had already been built, preparing the way for the first dam and the James Bay Development Corporation was actively encouraging mineral exploration all over the territory.²⁰ Thus, a long drawn-out process was unrealistic from the Natives' perspective, and so they therefore chose to resume negotiations. Furthermore, the negotiation process would potentially allow the native peoples to define their rights actively, and in exercising these rights, they could propose how the project could be made less damaging.²¹

The negotiations were organized around the seven parties that were involved in the project - the Cree, the Inuit, the Quebec and federal governments, and the three Quebec state-owned corporations responsible for the development of the territory (the James Bay Development Corporation, the James Bay Energy Corporation, and Hydro-Quebec). These parties differed not only across levels, but as well the self-interested and self-organized bodies within the parties' levels differed too (ie. the diverse departments, agencies and corporations within each government). Conflicts occurred throughout the bargaining process within as well as across levels, with each party seeking its highly-valued goals and exploiting those areas which the other parties undervalued.²²

On November 15, 1974, after eight months of negotiations, an Agreement-in-Principle was signed. One provision of this agreement was that a final agreement would be signed within a year. During the next twelve months negotiations proceeded on the details of the final draft. Problems, such as land-selection, provisions for hunting, fishing and trapping rights, environmental protection, and local and regional government, were all to be solved during this period.

Consequently, on November 11, 1975, the James Bay and Northern Quebec Agreement (JBNQA) was signed by the James Bay Cree, the Northern Quebec Inuit,

the Government of Canada, the Government of Quebec and the James Bay Corporations.²³ Federal enabling legislation (Bill C-9) received third reading in the Senate on July 6, 1977, and provincial legislation was passed on June 30, 1976. The proclamation of federal and provincial legislation approving and giving effect to the Agreement came on October 31, 1977, shortly before the deadline which the agreement specified of such legislation.²⁴ The wording of the agreement followed the classic renunciations made in past Canadian treaties with Natives:

- 2.1 In consideration of the rights and benefits herein set forth in favour of the James Bay Crees and the Inuit of Quebec, the James Bay Crees and the Inuit of Quebec hereby cede, release, surrender and convey all their Native claims, rights, titles and interests, whatever they may be, in and to land in the Territory and in Quebec, and Quebec and Canada accept such surrender.²⁵

However, the agreement also contained unique characteristics and provisions which set it apart from past traditional settlements, and made it the first Canadian 'modern day' treaty. One of the most interesting features was the three-tiered categorization of land provisions. Category I consisted of 2,158 square miles for the Cree and 3,205 square miles of reserves for the Inuit. These reserves were set out for the exclusive use and benefit of the Natives (sole ownership). These lands were to be chosen in the areas of existing communities, and will be held under conditions similar to those applying to existing aboriginal reserves in other parts of Canada: they would be alienable only to the Crown, which will own subsurface rights, but cannot develop them without the consent of the Natives and without paying some form of compensation (ie. other lands or royalties).²⁶ Under "Special Category IB Lands", which were those areas along riverbanks or bays opposite native communities, the government enjoys free access. Public easements for small projects and exploration may be taken from these lands by the government with no compensation awarded to the Natives.²⁷

Category II lands under the agreement consist of some 25,030 square miles for the Cree and 35,000 square miles for the Inuit. These lands are for the exclusive use of the native peoples for traditional pursuits (hunting, fishing and trapping). Wildlife productivity and existing known sites for development projects would be taken into account in the selection of these lands. Furthermore, Category II lands will be available to the province for development without the consent of the Natives, but subject to replacement or compensation, while non-native people will not be allowed to hunt, fish or trap on any of these lands. If valuable subsistence areas can be classified under this category, and if such areas were protected from development, this aspect of the agreement may be very beneficial in supporting native culture.²⁸

Category III lands, the third tier, comprise the balance of the territory in Northern Quebec. In these areas the indigenous peoples can exercise traditional pursuits, but these lands will be generally available for future development. In addition, the hunting, fishing, trapping and environmental conservation of all these lands will come under the control of a co-ordinating committee, with 50 per cent native and 50 per cent government representation, and a rotating chairmanship.²⁹ The total Category III lands reserved for native traditional activities is 65,300 square miles or 4,179,200 acres. Relative to the 250,000 other registered Canadian Indians who are living on six million acres, in comparative terms, the Northern Quebec natives did very well.³⁰ The conception of a three-tiered system of land provisions and the extent of those lands provided under this system was unprecedented in any previous settlement between aboriginal peoples and a provincial or the federal government.

Besides this land-tier system, another precedent incorporated in the JBNQA was that the Inuit decided to accept the allocated lands under the municipal system, thereby foregoing the traditional reserve system. This decision can be

attributed to a combination of two factors: the ability to get more land; and pursuing what the Natives felt was best for their future. The aborigines were seriously sceptical about future federal dealings with native rights and sincerely believed that Ottawa would legislate Indian affairs out of existence. This type of legislation was within the powers of Parliament and such actions would remove any uncertainties (ie. delays) arising from native claims with regards to resource development. Consequently, the Inuit opted to accept provincial lands under the provincial system rather than under a federal reserve system.³¹

Along with the substantial cession of lands, the Natives also received \$225 million in exchange for the surrender of aboriginal rights to sixty per cent of Quebec's land area. The Agreement involves three types of payment, one being a cash portion of \$75 million, currently being paid in installment, of which the federal government is contributing half. This federal contribution is based on that government's responsibilities for the extinguishment of native title in the area ceded to Quebec by the 1898 Boundaries Extension Act.³²

The balance of the \$150 million will be paid by a Quebec debenture of \$75 million payable over five years, and \$75 million in royalty payments to be made over twenty years by the James Bay Energy Corporation. Of the total \$225 million, the Cree will receive \$135 million and the Inuit \$90 million.

In addition to the land and the compensation monies, a guaranteed income security program was also included in the settlement. Those individual native hunters whose traplines are affected by development will be covered by a guaranteed annual income program which provides a payment averaging approximately \$5,800 per family, indexed to rises in the cost of living. However, to qualify, the indigenous hunters must live by harvesting as a way of life.³³ This program was established to provide some form of economic security for the native

hunting population in the face of changing conditions. In "Political Articulations of Hunters to the State", by Harvey Feit, the income security program:

... was intended that the improved funds available to hunters could be used to pay for transportation to travel to more distant or isolated wildlife resources, to improve hunters' equipment which could improve the efficiency of harvesting at a time when other factors may lead to declines in efficiency, and to improve the levels of security experienced in the bush during a time of disruption caused by development.³⁴

A final provision of great importance was the establishment of political institutions. Local and regional government structures were set up (Sections 9 thru 13 of the Agreement provide for the establishment of band councils, public corporations, a Cree Regional Authority, a James Bay Regional Zone Council and local government structures), as well as, bylaws, membership and election requirements that would ensure a degree of native input and control.

Two Joint Cree-government bodies were also established by the Agreement to implement an impact assessment and review procedure. The review committee and review panel are Cree/Quebec and Cree/Canada bodies respectively which are mandated to review the environmental and social impact assessment statements required of any developers whose project is likely to have a significant impact on the local natives, or on the wildlife resources of the territory.³⁵ Furthermore, these bodies are mandated to recommend the terms and conditions which must be respected and/or undertaken.³⁶

The following section will examine the process and outcome of the comprehensive claims put forth by the indigenous peoples of the Mackenzie Valley in response to resource development (pipeline proposals).

(2) Mackenzie Valley

Treaty 8 was signed at Fort Smith in 1899 and at Fort Resolution in 1900. It was the entry of large numbers of white prospectors into the Mackenzie Valley on

their way to the Yukon gold fields (the Klondike Goldrush) and the desire of the government to ensure occupation of the land that led to the signing of Treaty 8. The boundaries of the area covered by this treaty were drawn to include all the area within which geologists thought oil or gold might be found.³⁷ As a result, Treaty 8 came to include Northern Alberta, Northwest Saskatchewan, and a small part of the Northwest Territories. In return for their title to these lands, the aboriginals were to receive 160 acres of land each and an annuity payment for life (\$25 for a Chief and \$5 for every other Indian).³⁸

In 1920, Imperial Oil discovered oil on the Mackenzie River below Fort Norman. Ottawa quickly moved to ensure that this area would be legally open for industrial development, which meant extinguishing aboriginal claims. F.H. Kitto, the Dominion Land Surveyor, wrote:

The recent discoveries of oil at Norman (Wells) have been made on lands virtually belonging to those tribes (of non-treaty Indians). Until a treaty has been made with them, the right of the Mining Lands and Yukon Branch (of the federal government) to dispose of these oil resources is open to debate.³⁹

Treaty 11 was soon signed in the following years, and included most of the Mackenzie District of the Northwest Territories (some 372,000 square miles). Indian claims to these lands were surrendered for annuity payments for life (\$25 for a Chief and \$5 for every other Native) and the granting of a maximum of one square mile of land per each native family of five.⁴⁰

On February 8, 1968, Atlantic Richfield, a large American oil company, discovered a very large oil field at Prudhoe Bay, on the north coast of Alaska, containing at least a billion barrels of oil. By July, with further exploration, it became evident that on the north slope of Alaska lay the biggest oil and gas field in North America. The several oil companies that shared an interest in this discovery began to deliberate as to how Prudhoe Bay oil and gas could be transported to markets as quickly and as cheaply as possible.⁴¹ Since Canada lies between Alaska

and the rest of the United States, it provided the natural or most direct route for any pipeline connecting Prudhoe Bay to the American mid-west.⁴²

The federal government, in 1970, decided to encourage the construction of both an oil and a gas pipeline from the Prudhoe Bay up the Mackenzie Valley to American markets. These pipelines could transport both hydrocarbons from the north slope of Alaska as well as those that were expected to exist in the Mackenzie Delta region. The building of these two pipelines would take the form of a pipeline corridor, with the assumption that a gas pipeline would come first and that an oil pipeline would be likely to follow. Consequently, social and environmental impact assessments had to be made for a transportation corridor for two energy systems.

There eventually arose four alternatives to develop the Prudhoe Bay and Mackenzie Delta reserves:

- (i) the Canadian Arctic Gas Pipeline to tap both Alaskan and Canadian reserves via a Mackenzie Valley pipeline;
- (ii) the Foothills "Maple Leaf" project to carry Delta gas only to domestic markets along the Mackenzie Valley;
- (iii) the Foothills (Yukon) proposal - sponsored by the same companies supporting the Maple Leaf project - to transport Prudhoe Bay gas along the Alaska Highway to American markets; a Dempster pipeline from the Delta to Whitehorse, on the Alaska Highway main-line, may be built later;
- (iv) the "all-American" El Paso project which bypassed Canada entirely and would have carried Prudhoe Bay gas to the south coast of Alaska where it would have been liquefied and shipped by tanker to California.⁴³

One major impediment to the construction of the Foothills "Maple Leaf" pipeline or the Canadian Arctic Gas pipeline was comprehensive claims. These claims were put forth by the Dene and the Metis of the Mackenzie Valley area, based on their use and occupation of the land since time immemorial ("aboriginal rights"). Through these claims the Natives of the Mackenzie Valley region hope to obtain some degree of sovereignty and participation in the decisions which have an

impact on the lands which they inhabit or utilize. According to George Manuel, President of the National Indian Brotherhood (NIB):

the future of Canada's original people is ultimately dependent on maintaining our rights and controlling the development of our lands. Without these rights, we are condemned to repeat the disasters of the past.⁴⁴

The indigenous peoples are asserting that their title to the land has never been extinguished by any treaties made with the government. Yet, at the same time, the federal government is claiming that the purpose of the treaties in 1899 and 1921 was to obtain full control over the land and the people, so that Euro-Canadians could develop these areas.⁴⁵ The opposing interpretations of the purpose of Treaties 8 and 11 have produced some speculation as to their ambiguity and validity.

Treaty 8, in the eyes of the Natives, had been a treaty of peace and friendship, not a treaty which had extinguished their title to the land. This perception is illustrated by Chief Drygeese's speech when the treaty was signed:

... I would like a written promise from you to prove you are not taking our land away from us ... There will be nothing said about the land ... My people will continue to live as they were before and no White man will change that ... You will in the future live like the White man does and we do not want that ... The people are happy as they are.⁴⁶

It seems unlikely that the Natives at that time realized that their aboriginal title to the land 'was surrendered', as claimed by the federal government.

Treaty 11 of 1921 followed a similar pattern. The aboriginal peoples wanted to retain their traditional way of life, and therefore sought guarantees for their rights and land. The Dene were also guaranteed ownership by Commissioner Conroy who stated: "as long as the Mackenzie River flows and as long as the sun always comes around the same direction every day, we will never break our promise".⁴⁷ The Natives did not perceive this treaty as a surrender of their land

rights, but again saw it as a treaty of peace and friendship, or as Father Fumoleau described:

they saw the white man's treaty as his way of offering them his help and friendship. They were willing to share their tradition and culture. The two races would live side by side in the North, embarking on a common future.⁴⁸

The initial strategy of the Indian Brotherhood of the Northwest Territories (I.B.N.W.T.) and the Metis Association of the Northwest Territories (M.A.N.W.T.) was to ask the federal government for a land freeze in the Northwest Territories pending a settlement.⁴⁹ However, the Canadian government indicated no interest in this proposal.

Consequently, on April 2, 1973, the Indian Chiefs representing the sixteen Indian bands (some 7,000 natives) submitted a caveat to the land titles office in Yellowknife, claiming approximately 400,000 square miles of the Mackenzie District. If the caveat was allowed, all development in the area could be halted (temporary freeze) until the comprehensive claims were settled and if allowed, any transfer of land would be prevented unless it carried the consent of the Natives.⁵⁰

The Registrar of Land Titles, rather than accepting the caveat, referred it to Mr. Justice Morrow of the Supreme Court of the Northwest Territories claiming that by section 154 of the Land Titles Act that: "A question has arisen as to the legal validity and the extent, right and interest of the persons making application". . . .⁵¹ The federal government, concerned about the implications of such a caveat, raised four objections against the Natives for filing the caveat:

- (i) That the Land Titles Act has no application to lands for which a Certificate of Title has not been issued or applied for;
- (ii) That the Land Titles Act has no application because the caveat would affect Crown lands;
- (iii) That if the Land Titles Act is applicable that the Learned Trial Judge should simply order the caveat filed;
- (iv) That the Trial Judge has no jurisdiction to enter upon the merits of the claim to which the caveat relates.⁵²

Despite these objections, in July and August of 1973, Mr. Justice Morrow held hearings in various native communities in the Mackenzie Valley basin. On September 6, 1973, Mr. Justice Morrow ruled that the Natives were entitled to have their caveat filed in the land titles office. Among his conclusions were these propositions:

- (3) That there exists a clear constitutional obligation on the part of the Canadian Government to protect the legal rights of the indigenous peoples in the area covered by the caveat;
- (4) 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;
- (5) That the above purported claim for aboriginal rights constitutes an interest in land which can be protected by caveat under the Land Titles Act.⁵³

However, the apparent victory for the Natives was short-lived, for in the following months the Morrow decision was overruled by the Appeal Court of the Northwest Territories and confirmed by the Supreme Court of Canada in December 1976.

Yet, despite overrulings, the Morrow decision was not without importance. Public concern over the pipeline's social and environmental impacts had become widespread. Concurrently, in its minority position, the governing Liberals were highly susceptible to mounting public criticism over their pipeline policy. Along with citizen groups such as the Canadian Arctic Resources Committee, Pollution Probe and the Committee for an Independent Canada, the New Democratic Party demanded that an inquiry be made into the Mackenzie Valley pipeline proposal.

The National Energy Board (which drafted a memorandum to Cabinet in 1972 requesting that it be given formal jurisdiction over the environmental assessment of a Mackenzie pipeline) only had very limited environmental and socio-economic expertise and it was increasingly clear (to the Government) that the board would not be able to review the pipeline's impact in the North without a large infusion of new staff.⁵⁴

Thus, in January 1973, Cabinet decided to hold public hearings to assess the pipeline's impact. There seemed to be several political advantages to such a procedure:

- (a) it would meet the spirit of the government's 1972 statement on northern policy;
- (b) it would allow public input in the refinement of the northern pipeline guidelines;
- (c) it would depoliticize the volatile environmental and social issues by offering the pipeline critics a forum in which to channel their efforts;
- (d) the hearings would assuage the New Democratic Party which was critical of the government's northern development policy and at that time held the balance of power in Parliament.⁵⁵

In March 1974, Mr. Justice Thomas Berger of the British Columbia Supreme Court, a former leader of the New Democratic Party in British Columbia, was appointed to head the inquiry. Berger was instructed to:

inquire into and report upon the terms and conditions that should be imposed in respect of any right of way that might be granted across Crown lands for the purposes of the proposed Mackenzie Valley Pipeline. . . .⁵⁶

These instructions did not ask Justice Berger to advise whether the pipeline ought to be built, but they only instructed him to study how best to undertake the project already implicitly approved.⁵⁷ In other words, the Berger Inquiry was to merely recommend stipulations which would mitigate a pipeline's impact.

However, Berger proceeded to redefine his mandate and to build the political momentum that would make it very difficult for the federal authorities to take his recommendations lightly. Justice Berger announced that he would consider the impact of a transportation corridor and a gas-gathering system in the Mackenzie Delta as it might relate to the pipeline, and not just assess the impact of a single gas pipeline as outlined by the federal Cabinet.⁵⁸ Justice Berger also proceeded to make other changes which ran contrary to Cabinet's wishes to minimize the

publicity which may be aroused from the anticipated impacts of the proposed pipeline:

- (i) Berger decided to fund groups that wished to testify before him but that lacked the funds to make a detailed technical presentation. (These groups received about \$1.5 million);
- (ii) Berger ordered that all technical studies of the project, whether by government or corporations be made public to ensure that all parties had the information they needed to prepare their testimony;⁵⁹
- (iii) Berger arranged for extensive coverage of the proceedings by the CBC Northern Service. A summary of the day's events was broadcasted in English and the native languages every day that the inquiry was sitting. Public hearings in major centres in southern Canada were also set up.⁶⁰

The inquiry was also organized to hold hearings using two formats: there would be formal hearings where experts presenting technical evidence would be cross-examined and; there would also be community hearings, informal in nature, to allow the native peoples living in the area to state their views directly to Berger himself.⁶¹ The inquiry and the Natives and the CBC Northern Service very quickly developed a symbiotic relationship. To the Dene and the Metis, Berger represented perhaps the last chance to gain some measure of recognition and control over their future. The inquiry's recommendations would play a crucial role in the native claims negotiations.⁶²

It was through these community hearings that the indigenous peoples could most effectively voice their claims and grievances against a pipeline constructed prior to a settlement. For example, George Manuel, President of the National Indian Brotherhood, told the Inquiry that:

... the Mackenzie Valley Pipeline is a frontier-type development and will attract frontier-oriented characters who will exploit the Indian people during the course of their stay and will create total chaos and demoralization of our people as has happened before in so many frontiers, such as the Klondike and the Fraser Valley goldrush. ... ⁶³

... Most people see the proposed Mackenzie Valley Pipeline as a thread across a football field. But we know it as a slash on the Mona Lisa.⁶⁴

In addition, rather than being left with frustration, demoralization, and cultural and economic poverty, the Natives proposed to Justice Berger a degree of sovereignty and some form of participation which would maintain native rights, as well as, control the development of the land.

During the Berger hearings, the emphasis on a break from a past history of 'colonialism' and 'imperialism' was most apparent in the release of the "Dene Declaration". In July 1975, the Joint General Assembly of the IBNWT and MANWT made public their statement of rights; reasserting their interest in the land and asking for recognition by Canada and the World of a "Dene Nation". As part of the "Fourth World", the Dene refused to recognize the Government of Canada and the Government of the Northwest Territories as the government of the Dene. According to the Declaration, these governments were imposed on the Dene and in their place, the native peoples sought, through their right to self-determination as a distinct people and as a nation, independence and self-determination within Canada.⁶⁵

Within the following year, substantial progress was lacking in the development of a single formal claim. At federal government urging, the Dene claims negotiating committee agreed to submit a concrete claim proposal to Ottawa by November 1976. However, hopes of a co-ordinated effort among the two native organizations (IBNWT and MANWT) vanished, in early October 1976, when the Metis Association formally withdrew from the development of a joint Indian-Metis claim proposal. According to MANWT, there were six specific areas of contention between the two groups:

- (i) the Brotherhood's refusal to change a particularly offensive portion of the Dene Declaration which stated that the Government of Canada was not their government;

- (ii) the Dene's refusal to acknowledge the Metis as a distinct ethnic and cultural group;
- (iii) the lack of detail and the general 'haziness' of the principles and parameters of proposed native government (ie. democratic or totalitarian principles and the functions of this government);
- (iv) the lack of a definition specifically outlining who would be entitled to benefits of the claim settlement (eligibility);⁶⁶
- (v) the internal strife of the Dene organization (fractionalization of leadership) has hindered constructive progress towards establishing a claims proposal;
- (vi) the domineering approach of the Brotherhood - "pushed around, swamped by the Dene". The MANWT, by representing half of the native peoples, are entitled to equal input into developing a claim proposal.⁶⁷

In stating that they could not abide by the concept of "a nation within a nation", the Metis Association decided to develop its own claim and receive interim loans from the federal government to do so, on the understanding that there could only be one final settlement for both claims in the Mackenzie Valley.⁶⁸

Shortly after the MANWT withdrawal, on October 25, 1976, IBNWT submitted a claim proposal to the federal government in the form of a "Statement of Rights" and "Agreement-In-Principle". The proposed agreement envisioned an acknowledgement of aboriginal rights and special status under the Constitution of Canada, and the establishment of a Dene government, within Confederation, "with jurisdiction over a geographical area and over subject matters now within the jurisdiction of either the Government of Canada or the Government of the Northwest Territories". The agreement would also include other matters such as land ownership; control over non-renewable resource development; protection of Dene culture and traditional pursuits; "compensation for past use of Dene land by non-Dene"; and recognition and protection for the rights of the non-Dene.⁶⁹

A vital development in the negotiations of the Mackenzie Valley claims was the release of the Berger Report.⁷⁰ On May 9, 1977, Warren Allmand, the Minister of DIAND, tabled it in the House of Commons. The report recommended that no

pipeline be built in the Mackenzie Valley for a period of ten years in order to allow time for the settlement and implementation of the native claims and furthermore, that no pipeline ever be built across the environmentally sensitive north coast of the Yukon. Mr. Justice Berger also pointed out that the aboriginal claims must be viewed as the means to the establishment of a social contract, premised on a clear understanding that the Natives are distinct peoples in history. Thus, according to Berger, the object of the process must be the entrenchment, and not the extinguishment, of native rights.

The Government of Canada became very concerned about the degree of public opposition to a Mackenzie Valley Pipeline. This opposition, it believed, had been catalyzed in great measure by the Berger southern hearings which had provided critics of the pipeline with unprecedented media coverage. The broad basis of pipeline opposition, consisting of Church and labour groups as well as environmentalists and native peoples, gave it a political clout that few public interest groups intervening before the National Energy Board (NEB) had ever possessed.⁷¹ As a result, the NEB, which had the power to choose a pipeline (if any), did not think it could ignore the forcefulness of the Berger recommendations and the widespread public support it had encountered. Keeping these facts in mind, on July 4, 1977, the NEB endorsed the Foothills (Yukon) pipeline (Alcan proposal), but directed that it be routed through Dawson and then south along the Klondike Highway to the Alaska Highway.⁷²

On September 28, 1977, a month after the Prime Minister announced Canada's support for the Alcan line, the Metis Association submitted a formal claim to the federal government.⁷³ Entitled "Our Land, Our Culture, Our Future: A Proposed Agreement on Objectives", the proposal outlined eleven objectives of the Metis; including the protection of aboriginal lands and harvesting rights, the establishment of a "Heritage Fund", Mackenzie Native Council and a Senate of the

Mackenzie Corridor, and compensation for the past use and loss of Metis lands.⁷⁴ The proposal, unlike many others, does not make a distinction between the lands to be retained by the Metis and those to be given up. Ownership is conspicuously absent from the proposal. Rather, the Metis focus on the issue of control (ie. a Native land use regulatory board would control all the lands and possess a veto power over any proposed development for that land).⁷⁵

In spite of the presentations of formal claim proposals by both the native groups, the federal government continued to emphasize its conviction that there could only be one claims settlement in the Mackenzie Valley. Both groups lived in the same communities and utilized the same resources and therefore they should be subject to the same settlement. However, for the remainder of 1977, negotiations on the claims were at a standstill because of the inability of the Dene and Metis to agree on a joint negotiation process.

Recognizing the impasse in negotiations, the federal government took the initiative of presenting proposals which it felt would help to initiate joint discussions on claims. Dene and Metis Claims in the Mackenzie Valley: Proposals For Discussion was presented to IBNWT and MANWT on January 24, 1978 in Yellowknife, N.W.T. The proposals identified the two key elements of the native claims as authority in decision-making and, ownership and control of land. In pursuit of these elements, the federal government was willing to grant to the Natives measures of control over their own lives (ie. measures to secure greater native participation in political and development decision-making processes; specified rights and benefits, (ie. \$150 - \$250 million in compensation, substantial control over 30,000 - 50,000 square miles of land and, protected harvesting rights, and guarantees for a fair, reasonable and final settlement). Within the proposals, the federal government also reaffirmed its commitment to negotiating one settlement in the Mackenzie Valley:

... While the Federal Government agreed to receive two claims, there cannot be two settlements. The Indian and Metis live together in the same communities and must see themselves as "one" people. Accordingly, their representatives should come together at the negotiating table. Sufficient unity must be established so that work can proceed without further delay.⁷⁶

Questions regarding political evolution and the exploration into new institutional arrangements, according to the statement, would still be left to a separate process, outside the claims negotiations, under the direction of the Hon. C.M. Drury, Special Representative for Constitutional Development in the Northwest Territories.⁷⁷

However, the proposals initiated by the federal government were rejected by the two groups. The stalemate continued as there was a continuing inability on the part of the Dene and Metis to agree on a mechanism to conduct joint negotiations on their overlapping claims. The problem was both structural and ideological. In the structural sense, the Dene and Metis could not agree on a mutually acceptable form or means of representation. The differing networks of executive representation - the Dene were headed by their Chiefs and the Metis by a Board of Directors - undermined attempts at a single form of representation (bringing the executives together). For the two groups, these structural differences appeared insurmountable towards establishing a joint mechanism for negotiations.⁷⁸ In the latter months of 1978, Richard McNeely, President of the Metis Association, proposed that the existing organizations could form an interim unity board, consisting of ten Chiefs and six representatives of the Metis Board of Directors. The board would be responsible for supervising the negotiation process and determining the rate of progress made. Furthermore, actual negotiations would be conducted by a Dene team, meeting with the unity board every six weeks until a single organization had been formed.⁷⁹

In a Dene news release, the Dene urged the dissolution of the two existing Mackenzie Valley organizations by January 1979, with the concurrent formation of a single organization to be called the "Dene Nation" - one of the thirteen resolutions made by the Dene National Assembly. "In their response (to the Metis proposal), the delegates to the Dene Assembly stressed no negotiations could take place until the two organizations had merged and a new executive elected."⁸⁰

The thrust or rationale of the Dene response stems from their ideological conception of the Mackenzie Valley. The Dene perceive all native peoples of the Valley as being of Dene descent or ancestry, therefore, a single negotiating stance or organization was warranted and desirable.⁸¹ The Metis, on the other hand, reject this argument, stressing their distinctiveness as a people. The words of Morris Lafferty, a local Metis, typifies the Metis desire to maintain their identity:

No way we can be one of a kind, we are different, we are different people. ... Nobody seems to understand that ... well, I think really the government should recognize us as a separate people.⁸²

In response to the formation of a single organization, Richard McNeely, President of MANWT, acknowledges the Metis apprehension of uniting with the domineering Dene: "they don't agree with a merger, they want a complete takeover".⁸³

With the lack of progress in establishing a joint mechanism and in spite of federal government pressure for reconciliation between the two groups (beginning in May 1978), the Minister of DIAND, Hon. Hugh Faulkner suspended the funding for claims development and negotiation on September 27, 1978. The suspension would remain intact until the two organizations could agree on a joint negotiating apparatus (suspension effective October 1, 1978) - in 1977, MANWT had received \$243,000 and IBNWT \$345,000. Both associations, at the time, assured the Minister that each would continue to work towards ways to initiate joint negotiations.⁸⁴

The situation remained relatively static, until November 1979, when the Metis Association submitted a conditional proposal for the Dene to be responsible

for negotiations on behalf of all native peoples in the Mackenzie Valley.⁸⁵ This proposal formed a basis for an agreement reached with the Minister of DIAND in March 1980, which resulted in the resumption of funding to the Dene Nation effective April 1, 1980 - with part of these funds being allocated to the Metis for preparatory work with their constituency. The Dene were granted a period of time to prepare for negotiations and indicated in December 1980 their readiness to proceed.⁸⁶

As part of the federal policy review process initiated in the latter part of 1980, Mr. David Osborn was appointed as Chief Federal Negotiator on April 21, 1981, for the claims of the Dene and Metis of the Mackenzie Valley. Preliminary discussions began in July (Metis represented on the Dene team) and, at this time to allay native concerns, the government announced a two-year moratorium on the Norman Wells pipeline and expansion project.⁸⁷ According to DIAND, the government-imposed delay was in response to the concerns raised by the Dene and Metis, and the Government of the Northwest Territories that more time be allowed for effective and meaningful planning so that special measures and benefit packages are in effect during the construction phase of the \$1 billion project.⁸⁸ The moratorium, according to Hon. John Munro, Minister of DIAND, signified that, "I am doing everything possible to further the claims negotiations and I believe that this two-year delay will demonstrate our commitment to wrap up the land claims issue".⁸⁹ Coincidentally, a two year delay of exploration activity by Petro-Canada was imposed in the Mackenzie Valley. Seven new Exploration Agreements, covering approximately 15 million acres in the Mackenzie Valley region, through the granting of preferential land selection rights, to Petro-Canada by amendments made in 1977 to the Canada Oil and Gas Land Regulations. According to the Minister of DIAND, this two-year delay further demonstrated the Government's commitment to the claims negotiations and maximized the potential native participation in these exploration projects.

The claims of the Natives of the Mackenzie Valley were once again brought to the forefront by the Norman Wells pipeline proposal, after being placed on the backburner by the Alaska Highway Pipeline decision. However,

one major difference between the Berger era and the contemporary scene is the mood of the public towards environmental and native rights issues. With rising energy prices, the federal-provincial revenue struggle, and looming oil shortages, the public now sees these concerns as a luxury it can no longer afford. The loose coalition of public interest groups opposing the Norman Wells project attempted to rekindle earlier levels of southern concern, but clearly failed.⁹⁰

In the following months of August and September, two negotiation sessions were held but they resulted in an impasse due to the Dene demand for the inclusion of constitutional/political development in the claims forum. Reiterating their long-standing conviction, DIAND officials informed the Dene that questions pertaining to political devolution and constitutional affairs would not be included in the claims negotiating forum and that such a forum was best suited for non-political matters. This position was later restated as part of the 1981 federal policy:

Constitutional development cannot be decided within the claims negotiating forum since all citizens affected must be involved. Final resolution in this regard will therefore require action beyond claims settlement. In some cases, local or municipal types of government can be accommodated within federal, territorial or provincial legislation.⁹¹

Shortly after the impasse had been reached, in November 1981, the Dene released a draft document "Denendeh, Our Land: Public Government for the People of the North". The draft reflected a Dene consensual approach to government, in which all residents would participate in public matters provided that they satisfy a ten-year residency requirement. Based on the principle of aboriginal self-determination, the Denendeh government would be granted "province-like" jurisdiction over the boundaries of the Dene homeland - basic

constitutional powers of other provinces plus other areas transferred from federal responsibility (ie. communications, navigation and fisheries, labour and employment).⁹² The structure of the Denendeh government would be comprised of a Senate, a Denendeh Assembly and Community Assemblies.⁹³ Accompanying provisions for exclusive Dene lands and harvesting rights, a Dene Heritage Fund (10 per cent of royalty revenues collected by all governments) and a Charter of Founding Principles (Dene rights and freedoms) would also be established.

The Metis Association of the N.W.T. endorsed the principle of publishing the Denendeh public government proposal. "However, the Metis considered the document to be destined to serve as a discussion paper rather than as an expression of firm policy." National representatives of the Metis have rather urged adoptions specifying "guaranteed (aboriginal) representation in all legislative assemblies" (ie. as in presentations in the November 1982 constitutional discussions).⁹⁴

Between January and May 1982, a hiatus developed in claims negotiations due to Dene preoccupation with other matters. Beginning on December 7, 1981, the Dene began to focus negotiations on the possibility of negotiating an ownership interest for the Dene/Metis in the Norman Wells project as part of their claims package. Structural deficiencies also arose again during this period. The multitude of issues which were being considered at the time (ie. taxation issues, constitutional matters, etc.), the inherent problems of the prevalence of "shuttle diplomacy" between the two organizations and their communities and, the failure to convene a joint assembly overwhelmed the native structures. During this period, predominance was also given to the questions of the constitution and political devolution. The release of "Denendeh, Our Land: Public Government for the People of the North" and the fervour of constitutional patriation preoccupied the time and resources of the Dene team.⁹⁵

Claims negotiations resumed in May 1982, focusing on eligibility. At a meeting held from July 27 to 29, 1982, the Dene tabled a draft on eligibility which gave rise to concern, since the government felt that it did not offer adequate protection for the Metis. During the course of negotiations throughout the summer of 1982, it became evident that the two claimant groups were unable to reach a consensus on eligibility and requested time to deal with their internal problems.⁹⁶ The strong differences are attributable to divergent objectives in eligibility criteria and the distribution of settlement benefits. The Dene maintain a "core group" philosophy, seeking rigid eligibility criteria and benefits for long-term descendants (long-term residency). The Metis, on the other hand, adhere to less stringent criteria for eligibility as a larger portion of their population is comprised of transients and new arrivals (ie. intermarriages and the migration of Alberta Metis).⁹⁷

In November 1982, the Dene and Metis organizations appointed two external negotiators to act as consultants. Once the negotiators were hired, considerable progress was made. In the following month, a memorandum of understanding on process, describing the principles under which negotiations were to be conducted, was signed in Edmonton. Subsequently, on February 17, 1983, an Interim Agreement on Eligibility and Enrollment was initiated in Ottawa.⁹⁸ However, in June, when negotiations resumed, Dene proposals regarding eligibility met with strong Metis opposition. Once again, the "core group" philosophy of the Dene came to the forefront. Negotiations concerning eligibility continued throughout the summer of 1983, until in August, a new interim agreement was initialled and approved in September by the Dene Chiefs and the Metis Board of Directors.⁹⁹

Beginning in April 1983, negotiation sessions were also held in the attempt to resolve the problem of overlapping claims. Under federal claims policy, claimant groups are strongly encouraged to resolve overlapping boundaries among

themselves. However, despite the number of bilateral meetings between the native leaders in the Northwest Territories, no confirmed agreements on overlaps have been reached. Consequently, on September 8, 1983, Hon. John Munro announced the establishment of a dual process to help resolve the overlap of lands claimed by three native groups in the Northwest Territories - the Inuvialuit in the Western Arctic, represented by COPE (Committee of Original Peoples' Entitlement); the Dene Nation and Metis Association in the Mackenzie Valley; and the Inuit in the Central and Eastern Arctic, represented by the Tungavik Federation of Nunavut. Professor William C. Wonders was appointed as a fact-finder to research and determine native land use in areas claimed by more than one group, and Robert W. Hornal to act as a facilitator in bringing those groups together in their attempts to reach bilateral agreements with respect to any overlapping interests.¹⁰⁰ According to Mr. Munro,

the problem of overlapping boundaries has proven to be a major stumbling block on the road to settlement of the three comprehensive claims in N.W.T. . . . This dual process should lay the groundwork on which the claimant groups can reach mutually satisfactory agreements.¹⁰¹

Recent negotiations had overall demonstrated a lack of progress. Consequently, on July 8, 1983, the Minister of DIAND suspended funding for lack of progress and collaboration between the Dene and Metis. However, the two organizations presented Mr. Munro with a proposal for a joint Dene/Metis negotiating mechanism following their recent elections of new leaders (Steve Kakfiwi, President of the Dene Nation and Wally Firth, President of the MANWT). The two groups proposed to negotiate their claim through a single negotiator, who will be under the direction of a new joint leadership group consisting of three representatives from each of the associations. In addition, a joint assembly representing the Dene and Metis communities is to meet annually to direct the leadership group and ratify sub-agreements which the negotiator has worked out.

A joint secretariat would also be appointed to provide technical advice and develop position papers for the negotiator.¹⁰² With the presentation of this proposal for a joint mechanism, funding to support the process of claim negotiations was resumed and, confirmation came in Yellowknife on October 1, 1983 with the presentation of a cheque for \$2 million to the Dene Nation and Metis Association of the Northwest Territories (a loan against the settlement of the claim covering the claims-related operations of the groups from April 1983 to March 1984).¹⁰³

At this time of writing, the comprehensive claim(s) of the Mackenzie Valley are still unresolved. The following section will examine another outstanding claim, the claim of the Council for Yukon Indians (CYI).

(3) The Yukon

In 1967, one of the most respected figures in all the Yukon Indian communities, Elijah Smith, the first Chairman of the Council for Yukon Indians, began urging the Natives to start to pursue some guarantees to their rights as the original - and still - owners of some 207,000 square miles of Yukon land. Although organizations were foreign to their communal way-of-life, it was clear to Elijah Smith that if his people were to survive they must organize.¹⁰⁴

Organizational efforts were intensified after the Atlantic Richfield discovery of oil and gas on the north slope of Alaska in 1968. Several oil companies that shared an interest in this discovery began to deliberate as to how Prudhoe Bay hydrocarbons could be transported to markets as quickly and as cheaply as possible. The Yukon represented a natural geographical land bridge between Alaska and the rest of the North American continent and, from the beginning of the 1970's, it was recognized that a gas pipeline carrying Alaskan gas might be run through the Territory to the lower United States.¹⁰⁵ Consequently, in 1970, the Yukon Native Brotherhood (YNB) was formed, representing the status Indians. Two years later,

the Yukon Association of Non-Status Indians (YANSI) was established to represent the non-status natives of the Territory.

The following year, 1973, was a historic and crucial year for the natives of the Yukon. In January, YNB prepared a statement of grievances and an approach to a claim settlement. In the midst of the policy turbulence in early 1973 surrounding the principles of the controversial 1969 White Paper, the Brotherhood submitted a brief to the federal cabinet in February. "Together Today for our Children Tomorrow" marked the first time in Canada that a native group formally presented to Ottawa a statement of their aboriginal rights, a definition of what they felt it was to be Indian and a claim to their traditional homeland.¹⁰⁶ The claim position paper acknowledged the inevitability of development and, as being strong supporters of development, the Yukon Indians wanted to be part of it ("share in that development") and demanded the rights to plan their own future. The purpose of a settlement, according to YNB, would be to establish social and economic equality among all Yukoners and; if such equality was to be achieved, the Natives would require specific rights to land and resources to insure their cultural and economic survival.¹⁰⁷ YNB proposed that lands be granted to "Indian Municipalities" and that additional lands should be set aside for historic sites, camps, cemeteries, hunting and fishing cabins, and for local economic development projects. Such lands would include subsurface rights, water rights, timber rights, and exclusive harvesting rights - no figures were given as to the quantity of land that would be involved. The Brotherhood also sought the right to hunt and fish for food on all Yukon lands; a capital payment to be used for socio-economic development; a 15% royalty on all revenue collected by governments from commercial hunting; and a percentage of the gross value of all gas, oil and mineral production in the Yukon. Provisions were also incorporated in the draft for the political devolution of territorial government and administration. Through the

provisions of land (the "cornerstone" of a settlement), exclusive harvesting rights, royalties and financial compensation, the Yukon Indians believed that they could live and work together with the White man and possess an economic base from which to compete with him.¹⁰⁸

YANSI accepted the principles of "Together Today for our Children Tomorrow", with the exception of a few amendments (in respect to negotiations and administrative units). They stated:

... In general terms, the ideas set forward in the Yukon Native Brotherhood's paper are acceptable to YANSI and their membership.¹⁰⁹

Within months, Prime Minister Trudeau promised that the YNB brief, with its principles and philosophy, would be taken seriously by his government and it would provide the basis for a politically-negotiated settlement for the Yukon Indians' comprehensive claim. In August 1973, the cabinet reversed its long-standing policy of refusing to recognize aboriginal rights when Hon. Jean Chretien, then Minister of DIAND, announced that the Government would negotiate settlements of claims in areas of the country where no treaty surrendering the land had been signed by the original occupants - which included the claims of the Yukon natives.¹¹⁰ In a statement by Mr. Chretien to the Yukon community, he stated that:

... The Yukon Native Brotherhood have put forward their views in a submission they entitled "Together Today for our Children Tomorrow". The Yukon Association of Non-Status Indians have also submitted a paper outlining their position. ... The Federal Government is confident that the people of the Yukon will give their full support to the negotiating process and that they look forward with equal anticipation to a successful conclusion. This is essential if all the people of the Yukon are to move forward together towards increased cultural, social and economic development.¹¹¹

In addition to the position paper and the policy developments, organizational progress also occurred in 1973. Elijah Smith had the foresight to recognize the might of the federal government and the negotiating advantages of a united position. Subsequently, the two Yukon native organizations formed the Council for

Yukon Indians (CYI) as a joint body to negotiate the Yukon comprehensive claim on behalf of all people of Native ancestry.

... There are more than 6,000 Indian people in the Yukon who have united in the CYI and mandated it to negotiate a land settlement that is fair and just. All Yukon Indians wish to be treated equally in the settlement even though some may be called non-registered and others registered and enfranchised. ... The main objective is to do everything necessary to establish aboriginal title, and to identify these aboriginal rights for the Indian people of the Yukon.¹¹²

Negotiations on the Yukon claim began in the fall of 1973, but progress was slow. Hon. Jean Chretien had selected a federal negotiating team, composed of six civil servants and the Commissioner of the Yukon. Actual negotiations, during these initial stages, were unsuccessful due to a lack of co-ordination between the participants and the lack of open responses to what was going on. The sessions were sometimes referred to as the "adversary approach", in which CYI set its proposals on the table and then tried to get the government to say what it thought of them.¹¹³ Progress was also deterred by the fact that the Chief federal negotiator at that time, Albert Hutchinson, was mandated to negotiate but he lacked the authority to initiate independent provisions or positions.

On March 3, 1975, the federal government came to Whitehorse with an offer of settlement that had been developed in Ottawa, not at the negotiating table. The offer proposed a settlement with three categories of land, but with no subsurface rights. The Yukon natives would have full surface rights to 128 acres per person, ownership of an unspecified number of lots in existing communities, and exclusive harvesting rights in over 15,000 square miles of the Yukon Territory. An initial payment of \$25 million and a further \$25 million from gross federal revenues from Yukon resource development were also suggested. In addition, the aboriginals would receive 50 per cent of gross government resource revenues from the 1,200 square miles of land that they would receive as part of the settlement.¹¹⁴

The Indian negotiators rejected the offer, denouncing it as a unilateral action and an attempt to circumvent the negotiation process. Mr. Judd Buchanan, the new Minister of DIAND, was forced by the Natives to change the offer into a federal government "working paper", which signalled a reassessment by Ottawa of its approach.¹¹⁵ Subsequently, in July 1975, Mr. Digby Hunt, previously an Assistant Deputy Minister for Indian Affairs, was named as the Chief Government negotiator for the Yukon claim.

The claims negotiator was now a senior federal official, and he held a full-time appointment: this step marked the beginning of a second round of negotiations on the Yukon Indian land claim.¹¹⁶

Negotiations recommenced in November 1975, when Mr. Hunt was dispatched to Whitehorse. Sessions continued into January 1976 and resulted in the release of a federal draft agreement-in-principle. As in the previous paper, the lands to be granted to the Indians were to be divided into categories. The fee simple (Category I lands) retention was 128 acres per capita, resulting in a total of 1,200 square miles with 6,000 Natives participating. Category II lands totalled 17,200 square miles: 15,000 square miles to be held in trust by the federal government on which the Indians were to have exclusive harvesting rights; 2,000 square miles designated as "Forest Management Areas" where the Natives would both manage and exploit timber, and enjoy exclusive harvesting rights; and another 200 square miles would be available for purchase from the federal government at market value (purchase would not include subsurface rights).¹¹⁷ The federal draft also involved a capital payment of \$35 million and royalty provisions:

on the 15,000 square miles, Indians would receive 25 per cent of government revenues from non-renewable resources up to a maximum of \$8 million. On unoccupied Crown lands, the Indians would receive 25 per cent of the gross government resources revenues up to a maximum of \$55 million, and there would be a minimum guarantee of \$25 million from this source. The total compensation, over time, would be between \$60 million and \$98 million.¹¹⁸

In addition, provisions were included for the establishment of native local government structures (12 Local Native Community bodies and an overseeing co-ordinating committee), an economic and social development institution, and guaranteed native membership on advisory boards for resource and land use management. In exchange for these specific rights and benefits, the aboriginal rights and title to the land of the Yukon natives would be extinguished.

Rejection of the federal draft agreement-in-principle came within the same month. Matters pertaining to the extinguishment of aboriginal rights and interests in the land, eligibility, taxation, and the relationship of the native municipal government structures with the Yukon Territorial Government (which was absent from the draft) were emphasized in the CYI rejection.¹¹⁹ Following this impasse, Mr. Hunt returned to Ottawa for three months for "a more specific mandate" to be approved by Cabinet. CYI expressed its frustration with the long delay, and hoped that the negotiating process would continue and sessions resume promptly.¹²⁰ "We hope very much to keep it out of the courts, . . . and negotiations will continue," stated Willie Joe, Vice-President of YNB.¹²¹ A date for a formal agreement-in-principle was subsequently retargeted from March 31, 1976 to July 1976.

Reinforcing its desirability for an effective deliberation process, CYI suspended negotiations in May 1976 in order to reorganize and revamp its organizational structure. During this period, the Council was to reorganize itself more effectively around the native communities, inform them of the proceedings, and take some new direction from them in respect to the kind of settlement that the people wanted.¹²² To make CYI more responsible to the communities and to improve their understanding of the claim, each community would now elect five delegates to the general assembly (12 recognized communities), one of which became a director of CYI responsible for the hiring of staff, negotiators and the direction of negotiations.¹²³

Amidst the suspension there was also a wholesale change of the principal negotiators. Mr. Elijah Smith resigned as Chairman of the Council, and he was replaced by Mr. Daniel Johnson. Dr. A. Pearson became Commissioner of the Yukon and, Warren Allmand, the newly-named Minister of DIAND, appointed Dr. John Naysmith to replace Digby Hunt as the Chief Federal negotiator (October 1976). Dr. Naysmith's mandate was to conduct informal discussions leading to substantive negotiations on the Yukon claim and to negotiate the claim itself.

The subsequent informal meetings between Naysmith, the territorial government and CYI resulted in the acceptance of a "co-operative planning approach", a more informal, open discussion format which would begin with the basics - understanding the philosophy and goals of the Indian people (accepted in January 1977). "The Planning Council - Yukon Indian Claims" was a tripartite group representing those responsible for implementing a final settlement - the Council for Yukon Indians, and the federal and territorial governments (CYI President Daniel Johnson, Federal negotiator Dr. Naysmith, and the Commissioner of the Yukon, Arthur Pearson).¹²⁴

After a period of two months, on March 8, 1977, the Planning Council released the document "A Statement of Goals Respecting the Yukon Indian Claim." Through an examination of the approaches and the policies of the three represented parties, the Planning Council agreed that the goals of the Yukon Indian Claim Settlement should be to:

1. Restore, protect, preserve and guarantee the identity of Yukon Indians and their freedom to choose a way of life in harmony with their cultural heritage.
2. Provide land and other forms of compensation to the Yukon Indian people to compensate them for loss of lands traditionally used and given up under the settlement so that they may have the opportunity to build an economic base equal with that of other Yukon citizens.

3. Provide the Yukon Indian people with the incentive and opportunity to have their rightful say, within the context of a one-government structure, in the decision making authority which governs their everyday life.

After the release of a document focusing on eligibility,¹²⁵ the Planning Council issued a position paper on a "settlement model" for the Yukon Indian claim (July 14, 1977). The model relates the agreed-upon goals of a claim settlement ("A Statement of Goals Respecting the Yukon Indian Claim") with the means to achieve those goals. As such, the settlement model was intended to illustrate the shape of a possible agreement-in-principle and outline the elements which could be contained in it. With respect to the aforementioned goals, aboriginal identity would be preserved through preferential harvesting rights; social, cultural and education programs which reinforced native identity as well as establishing equality of opportunity for the Indians and the non-natives; and native corporate structures to "receive, administer and manage the proceeds of the settlement." Compensation, the second of the three goals, could take the form of specific allotments of land; special provisions for native ventures into commercial wildlife harvesting; cash and a share of the royalties accruing from resource development; and compensation monies and resource revenues shared with government will be exempt for taxation. Finally, incentive and opportunity for Natives in decision-making processes would be insured through incentives and guaranteed opportunities for participation in the political and administrative institutions of a one-government structure; and equal representation on an "Advisory Planning Council" which would advise governments on matters of policy and planning regarding the general development of the Yukon.

While the Co-operative Planning Council was meeting and releasing its documents, another important scenario was unfolding. Following an initial decision of the United States Litt Commission, on February 28, 1977, the Alcan Project (Foothills (Yukon) proposal) was redesigned to provide a 48-inch diameter express

gas pipeline to carry Alaskan gas across Canada to the continental United States. On April 19, 1977, the Alaska Highway Pipeline Inquiry (also known as the Lysyk Inquiry, as Kenneth Lysyk was its Chairman) was established by the Minister of DIAND to examine certain aspects of the revised Alcan proposal and submit its report by August 1, 1977.

The Inquiry was directed to prepare a preliminary report that identified the principal social and economic implications of the proposal and the attitudes of people in the Yukon to it. . . . If approval-in-principle is given to the Alaska Highway Pipeline proposal, the government will then establish a second inquiry to produce a final statement on the socio-economic impact of the proposed pipeline.¹²⁶

Initially, the Council for Yukon Indians refused to participate in the Inquiry, denouncing it as a whitewash. However, after being assured that there would be a second stage inquiry, which would determine the relevant terms and conditions to be applied to the construction of a pipeline, CYI agreed to participate.¹²⁷ Three weeks before the commencement of the inquiry hearings, the Council received \$119,000 to research and prepare a presentation to the Inquiry.¹²⁸

On May 16, 1977, in his opening remarks to the Inquiry, Daniel Johnson, Chairman of CYI, reiterated their denunciation of the Inquiry:

I recognize that the Federal Government has imposed upon you a ridiculously short period of time in which to conduct research and hear evidence. We totally oppose this superficial hit and run approach. . . .¹²⁹

Mr. Johnson's presentation emphasized the need for the rights of the Yukon natives to be defined, understood and entrenched through a claim settlement. Intrinsic to a settlement was also the need to establish new institutions and programs that would facilitate and maintain native aspirations towards self-determination. The presentation further reasserted that a claim settlement and its implementation must precede any development, otherwise predated development would prejudice land selection and undermine Indian ambitions towards political self-determination - meaningful influence and possible leverage would be negated by a lack of

guaranteed lands and resources.¹³⁰ Consequently, CYI requested the same 10-year moratorium which Mr. Justice Berger had recommended in his report on the Mackenzie Valley Pipeline Inquiry. However, this deferral was not inflexible as the Yukon natives asserted that seven to ten years would be a comfortable period for planning, negotiating, settling and implementing a claim agreement.¹³¹

After its two months of hearings, of which approximately half were of an informal community nature, the Alaska Highway Pipeline Inquiry issued its report to the Hon. Warren Allmand, Minister of DIAND, on July 29, 1977. With respect to its terms of reference - the preliminary assessment of the socio-economic impact of the proposed Alcan pipeline - the Inquiry reported that "we think that the social and economic effects can be kept within acceptable limits . . .".¹³² Within a specific section on the Yukon Indian claim, the Inquiry's panel acknowledged that perhaps a claim settlement was the most important reason for the deferral of the commencement of pipeline construction.¹³³ Consequently, the Inquiry recommended that:

... a minimum of four years will be necessary to permit sufficient implementation and to avoid prejudice to a just settlement of the Yukon Indian land claim. If your government decides to give approval-in-principle to the construction of a pipeline through the southern Yukon, it is our strong and unanimous recommendation that construction of it should not proceed before August 1, 1981.¹³⁴

Other specific recommendations with respect to the native claims were an advance payment of \$50 million, as part of the monetary compensation to implement a settlement, held in a special trust account pending a claim settlement; and the maintenance of informal methods of protecting specific parcels of land in anticipation of a claim agreement in order to minimize prejudice in land selection (ie. constraints on land grants).

The fervour of the inquiry proceedings had caused the Council for Yukon Indians to suspend claims negotiations between June and September of 1977 so that

CYI could concentrate its efforts on the pipeline developments. Progress in claim negotiations thereafter was slow. In December 1977, the federal government made a proposal to CYI based on the Co-operative Planning Council's "settlement model". However, Ottawa and CYI encountered difficulties in transforming the general goals of the settlement model into specifics and consequently, the elements of a claim settlement remained subject to negotiation.¹³⁵ In the following month, the Council for Yukon Indians suspended negotiations once again. CYI requested additional time to review its position on the claim and to further consult with the Yukon native communities in this regard.

The Council for Yukon Indians spent the next twelve months researching and reformulating its claim through close communications with the communities.¹³⁶ On January 20, 1979, CYI presented a revised claim proposal to the federal government. Included within this proposal were the following principles for a claim settlement:

- (i) the entrenchment of aboriginal rights through a settlement and within the Canadian Constitution;
- (ii) the recognition of native harvesting rights;
- (iii) with respect to the native right to self-determination, the implementation of appropriate political structures;
- (iv) the right of the Natives to determine their eligibility criteria.¹³⁷

The proposal also called for the division of Yukon territorial lands into two categories: Category I lands would award fee simple title and exclusive use to the Natives; and Category II lands would be remaining territorial lands which would be shared by the Indians with other Canadians, and these lands would be subject to the laws of general application. In addition to the outlining principles and the allotment of lands, provisions were also included for political devolution and resource-revenue sharing.¹³⁸

Little progress was made with the proposal and in the claim negotiations between the summer of 1979 and May of 1980. First, negotiations were interrupted

for the summer of 1979 due to a federal policy review by the new Conservative government. In October 1979, Dr. Holmes was appointed the new Federal Chief Negotiator and subsequent negotiations resumed on November 16. The period of constructive deliberations was short-lived due to the calling of a federal election in February 1980. In the following month, the newly-elected Liberal government confirmed its commitment to resume negotiations on the Yukon native claim. Subsequently, on May 23, 1980, Dennis O'Connor, a former magistrate of the Yukon Territory, was appointed Chief Federal Negotiator for the CYI claim.¹³⁹

Negotiations resumed in June 1980 in Vancouver and, by December, satisfactory progress had been made in a number of key aspects - financial compensation, corporate structures, general provisions, eligibility and enrollment, land selection. In regards to land selection, native peoples may select land within the Alaska Highway Gas pipeline corridor, subject to the final right-of-way of the pipeline. Sites required by the Foothills Corporation along the Yukon pipeline route for staging sites, granular fill, etc., have been identified and land selected is subject to the use of the sites. Agreement between the parties as to the restoration of these sites after construction has also been achieved in many of the affected areas.¹⁴⁰

This stage in negotiations also resulted in the approval of an agreement-in-principle with respect to providing interim benefits to Yukon Indian elders on January 23, 1981. The Interim Elders' Program provides the elders, over 60 years of age, with an interest-free loan of approximately \$600,000 per year, for a two-year period, against settlement compensation. Upon ratification of an agreement-in-principle, the program will continue for an additional two years or until a final agreement is reached. According to the federal government, the funds for this program have been approved in recognition that the participation of many elders in

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a final agreement will be diminished because of their advanced years, and that accordingly, some immediate benefits should be provided for them.¹⁴¹

Following this agreement-in-principle on the elders' program, negotiations continued, focusing on land selection for the remaining communities (ie. August 5-14, 1982 concentrated on the selection of lands in Teslin and Pelly Crossing). Subsequent sessions in 1982 focused on the finalization of land selection in Teslin and Pelly Crossing, local government and program issues, and the questions of resource development, economic opportunities and compensation.¹⁴² Progress in these negotiations throughout 1982 had been substantial and resulted in a preliminary accord on the majority of claim matters, including eligibility and enrollment; Yukon Indian rights to wildlife harvesting; the provision, delivery and funding of programs to beneficiaries; economic and corporate structures; financial compensation; settlement land selection; and local government provisions for six native communities.¹⁴³ (A specific listing of the sub-agreements-in-principle can be found in Appendix 2).

The negotiation process suffered a set-back on December 13, 1982, when the Yukon Territorial Government (YTG) withdrew from the claim negotiations, attaching certain conditions (six issues) that would have to be met before it would return. The items included matters associated with post-settlement YTG financing and the transfer of lands to the Government of the Yukon.¹⁴⁴ Between January and May 1983, bilateral negotiations were held between YTG and the federal government to resolve the impasse. On May 12, 1983, with the signing of a land transfer agreement, YTG announced its return to claim negotiations.¹⁴⁵

During the territorial-federal government impasse, bilateral negotiations continued between CYI and Ottawa. Matters respecting subsurface rights and economic opportunities, as well as, the completion of community land selections were the focus of these consultations. According to the Office of Native Claims,

these negotiations were important in maintaining momentum and in sustaining progress towards an overall agreement-in-principle.¹⁴⁶

Beginning on June 6, 1983, the next round of negotiations began. Matters pertaining to overlapping boundaries with COPE on the North Slope, a YTG constitutional provision and subsurface rights remain to this date outstanding issues. With Cabinet to examine the extent of subsurface rights to be awarded and the COPE negotiation forum to determine their claim boundaries, the Office of Native Claims will be seeking Cabinet approval of an agreement-in-principle for the CYI claim in November 1983. By January 1984, an agreement-in-principle will be initialled by Cabinet and the Council for Yukon Indians.¹⁴⁷ The proposed settlement includes an allotment of lands, with surface title, totalling approximately 5% of the Yukon Territory. These lands will be distributed among the native communities, based on a per capita basis. The Yukon Indians will enjoy exclusive harvesting rights on these lands and in the remaining territorial lands, the Natives will enjoy harvesting rights subject to the laws of general application.¹⁴⁸ In addition, the agreement-in-principle contains a \$183 million monetary compensation package, payable over a twenty-year period. Of this total, \$130 million had been awarded to the Yukon Indians for the loss of traditional lands, and the remaining \$53 million was granted for the buy-out of certain federal programs that CYI is taking up front in cash.¹⁴⁹ Unfortunately, the other provisions of the agreement-in-principle remain within the confidence of the claim negotiation process.

CHAPTER 4

Determining Factors

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Determining Factors

The negotiation processes of the James Bay, Mackenzie Valley and Yukon comprehensive claims are quite distinct. But why are they different? The divergence of each case would appear to indicate an inconsistency on the part of the federal government in its response to native claims. However, upon closer examination, Ottawa's response to these comprehensive claims seems to have been tempered by the political and economic circumstances in which each process evolved. Those factors which are being offered to account for the differences in the processes and the outcomes of the comprehensive claims in James Bay region of Quebec, the Mackenzie Valley and the Yukon are: the fact that the James Bay project was provincially-sponsored; the Berger Inquiry; the federal versus the provincial political climate; the problem of overlapping claims in the Mackenzie Valley; the interface of territorial claims with political development; the influence of the United States; and the timing of the development projects.

The fact that the James Bay hydro-electric project was a provincially-sponsored project influenced the negotiation process and subsequent settlement of the native claim. With the federal government adhering to a neutral position ("alert neutrality"), negotiations were conducted between the Cree and Inuit, the Quebec government and the provincially-owned corporations. In this arrangement, the Cree and Inuit were at a clear disadvantage with a lack of public support and limited financial backing. On the other hand, the province had few problems justifying the project. According to Premier Bourassa, a project of this magnitude was unprecedented in Quebec's economic history and it was the key to the province's economic and social progress. James Bay soon became presented as the hydraulic solution to a projected provincial energy deficit, a creator of 125,000 jobs for

unemployed Quebecers, an impetus for economic growth as hydro would be an export commodity - arrangements were made in 1970-71 to export electricity to Ontario and New Brunswick and beginning in 1977, it was to be exported for 20 years to Consolidated Edison of New York.¹ These assertions were successful in generating sufficient momentum to push ahead for construction of the project. As a result, at best the local natives were in a position to negotiate with the province and accept the best deal that they were offered, while the Quebec government was willing to negotiate. This particular type of arrangement lent itself to a fast and simple claim settlement as momentum and support for the hydro-electric project was continually increasing.

The pipeline deliberations involved the active participation of four parties - the Natives, the federal and territorial governments and the pipeline applicants.² However, in these claim negotiating processes, the onus was placed on the aboriginal peoples to initiate their own claims and proposals - the Government of Canada did not make offers or propose packages for the Natives to accept or reject. It was only after the pipeline decision had been made that Ottawa began to take more initiative in the negotiation processes. In addition, throughout the pipeline deliberations, pressures upon the aboriginals to sign quick settlements were not as predominant. As a result, the Natives took their time to carefully formulate their rights and responses. These conditions, coupled with the intense lobbying by pipeline applicants, environmentalists and other "interested parties" (ie. the State of Alaska, Ontario and Alberta), and the shifting configurations of private interests (the formation of consortiums), served to protract the period of deliberation or negotiation.

The impact of or role played by the Berger Inquiry further differentiated the claim negotiation process of the Mackenzie Valley from both the Yukon and James Bay. After four years and expenditures approximating \$5 million, the Berger

Inquiry provided the Dene and Metis organizations with a national platform more powerful, and with some extensive media coverage, than any public inquiry in Canada before it. In addition, at the heart of the Berger Report was the Justice's recommendations of the need to settle the native claims. The recommendations, the credibility of the Inquiry and the strength of the native peoples' opposition effectively aroused a large amount of Canadian public support. The activities of the native organizations and other groups, such as the Canadian Arctic Resources Committee, were very successful in forming links with other interest groups critical of the federal energy and environmental policies. The Mackenzie Valley Pipeline Inquiry thus served to enhance the negotiating position of the Natives, provided them with time to formulate and refine their claims and positions, and as such, in simple terms, it negated any quick extinguishment of aboriginal rights by the federal government.

An inquiry, similar in form, was also established during the negotiations of the Yukon comprehensive claim. The Alaska Highway Pipeline Inquiry copied the funding of interviews, the role of the press medium, the reliance on community hearings and even the style of the report. However, this inquiry was overrun with credibility problems. Although the Lysyk Inquiry was headed by a panel representative of the three principal political interests (Kenneth Lysyk for the Government of Canada; Edith Bohmer nominee of CYI; and Willard Phelps representing the Yukon Territorial Government), the process operated under the confines of very limited resources and time, and proceeded under the shadows of the National Energy Board and Berger recommendations that had already been tabled (NEB recommended the "Klondike option", a route substantially different from the Alcan route under which the Lysyk Inquiry was to investigate). Within this scenario, the Alaska Highway Pipeline Inquiry had little chance of approximating the fervour generated by the Berger Inquiry.

An inquiry of this nature was never undertaken in the James Bay region. Despite environmental and social impact assessments which proved the hydro-electric project detrimental to the local natives' way of life, the Cree and Inuit received little public support. Thus, the indigenous peoples had to face the corporations and the provincial government very much on their own. The visibility and predominance of the promises of jobs and economic growth effectively undermined the necessity for the Quebec government to conduct a large-scale public inquiry. Once again, these conditions produced an unequal bargaining position for the native peoples and a subsequent quick claim settlement.

Another factor which affected the negotiation processes with respect to these comprehensive claims was the provincial versus the federal political climate. Throughout the James Bay negotiations, the Bourassa administration enjoyed a strong majority in Quebec City, while the federal Liberals were in a minority position during the early pipeline deliberations, with the New Democratic Party (NDP) holding the balance of power. For their part, the NDP tended to be sympathetic to the cause of the aboriginal peoples and critical of the Liberals' northern policies. With specific reference to the Mackenzie Valley proposal, the NDP criticized the ecological impacts of the proposal and the predominance of foreign multinational companies within the Canadian Arctic Gas consortium. According to Francois Bregha's Bob Blair's Pipeline: The Business and Politics of Northern Energy Development Projects, with the survival of the minority government depending on their support, the New Democrats made one of their conditions for parliamentary support the "setting aside of the Mackenzie pipeline".³ Within this context, the selection of Mr. Justice Thomas Berger, a former NDP leader in British Columbia, as the sole commissioner of the Mackenzie Valley Pipeline Inquiry can be interpreted as an obvious play to win NDP support - "the government's appointment of a man with a different political philosophy to

examine a sensitive area of public policy would have been unlikely under normal circumstances".⁴ Furthermore, would Prime Minister Trudeau and the Liberals have approved the Berger Inquiry, an inquiry which could become critical of and promote opposition to northern resource development, if they had held a majority in Parliament? This was the same party which had produced the 1969 White Paper, promised to build a Mackenzie Valley highway in 1972 regardless of outstanding native claims, and later passed the Northern Pipeline Act and the Canada Oil and Gas Act.⁵ These actions seem to indicate that the answer would be "no". The Liberals have, at least since 1969, attempted to eliminate or achieve surrenders of all native claims to lands selected for resource development. Therefore, it appears unlikely that a Liberal majority government would have sought to protract and publicize the negotiation process through a public inquiry. In accordance with the argument of a number of writers,⁶ the initiation of the Berger Inquiry and its subsequent influence on the claim negotiation process can thus be partially attributed to the existence of a minority government in Ottawa.

Quite a different interpretation of the actions of the Liberal government has been proposed by Michael Whittington. According to this line of argument, the Liberals, before the initiation of the Berger Inquiry, had decided that the construction of a Mackenzie Valley pipeline was not in their best interest. Discoveries in the Mackenzie Delta region had been disappointingly low and subsequently the heavy expenditures associated with a pipeline and the requisite infrastructure were not justified. As a result, in the guise of responding to the extensive amount of opposition of the Mackenzie Valley route, the Government introduced a public pipeline inquiry, headed by a commissioner with a well-known philosophy and background concerned with the plight of the native peoples. Within this context, the Liberals knew from the beginning what Justice Berger would recommend in his report - a delay in the construction of any pipeline along the

Mackenzie Valley. With a majority government by the time the first volume of the Berger Report was released in May 1977, Trudeau and his Liberals were in no way compelled to abide by the Inquiry's recommendations. However, since it did not want a Mackenzie Valley pipeline at this time anyway, the Government could adhere to the principles of the Report and profit politically by endorsing the Alaska

Highway pipeline proposal:

- (i) competition from Prudhoe Bay, Beaufort or Mackenzie Delta gas was the last thing that Alberta wanted. Therefore, some type of bargain could be made with the Alberta government while Alberta was able to export its surplus gas to the United States (oil and gas pricing agreements);
- (ii) the Alcan route could utilize the existing infrastructure in Alaska and therefore Ottawa avoided the heavy expenditures on infrastructure in the Mackenzie Valley and the environmental costs of development of the northern Yukon plains;
- (iii) an Alaskan endorsement avoided the necessity of dealing with the native claims of the Mackenzie Valley, and appeased environmental opposition at the same time;
- (iv) the support of the Foothills (Yukon) pipeline eluded the problem of foreign ownership of the Mackenzie Valley route (Canadian Arctic Gas).

Thus, within this political scenario, the Berger Inquiry was a device to legitimize a pipeline decision already made and forestall any pressing need to settle the native claim of the Mackenzie Valley.⁷

The Quebec government, on the other hand, enjoyed a strong majority during the James Bay claim negotiations. In the 1973 election, the Liberals had secured 55% of the popular vote and held 102 seats of the 110 seats in the National Assembly - the largest parliamentary majority in Quebec history. In the wake of the October Crisis, the James Bay project provided Bourassa with the opportunity to reassert his leadership position in a growing Quebec. With his strong nationalist support, Bourassa perceived James Bay as the means,

to make Quebec an economically powerful modern state and to draw away the veil covering our main weaknesses through the promotion and creation of a diversified industrial infrastructure.⁸

The promises of job creation, revenue for the province, that the cheap and plentiful supply of hydro-electricity provided an impetus for Quebec's economic growth, and the rhetoric like "the world begins today" with the announcement of the project minimized the political ramifications of both the project itself and the claim negotiation process. Furthermore, within this political climate, the Cree and Inuit had failed to generate any significant public opposition or support for themselves.

Yet, the different outcomes were not solely the result of the provincial versus the federal government negotiating a claim settlement. For in the case of James Bay,

the role of the federal government has largely been played down as public attention has been focused on the provincial government, its development corporation, and the amounts of money that might be lent, spent, made and lost. Yet the whole project would be impossible without the blessing of the federal cabinet.⁹

With jurisdiction over "Indians and lands reserved for Indians", navigable waterways, migratory birds and airports, any one of these interests would justify an active role on the part of the federal government instead of its chosen position of "alert neutrality".

Another determining factor has been the overlapping boundaries of some native claims. This problem of overlapping claims has proven to be a major stumbling block in the resolution of the comprehensive claim in the Mackenzie Valley. While the Dene have asserted that the native peoples of the Valley are all of Dene descent and therefore should be incorporated into one organization, the Metis have been equally persistent in distinguishing their positions from the Dene and emphasizing their distinctiveness as a cultural and ethnic group.

The differences between the two groups are reinforced by contrasting approaches to the comprehensive claims issue. The Dene Nation, especially under the leadership of the Georges Erasmus, has adopted a strong political orientation towards their claim. For example, the "Dene Declaration" seeks a formal

recognition of their rights as a people and a political entity. Through their right to self-determination, the Dene wish to retain ownership and total control over the decisions concerning development on their lands. These objectives are restated within "Denendeh, Our Land, Public Government for the People of the North" through the formation of a Denendeh government with "province-like" jurisdiction over the boundaries of the Dene homeland. The political inclination of the Dene is further illustrated by their persistent demands to have questions pertaining to political/constitutional development included within the claims forum.

The Metis, on the other hand, have adopted a more socio-economic approach to their claim. Rather than a stress on land ownership and extensive political requirements, MANWT is predominantly concerned with control through effective participation within existing institutions and in structures involved in the distribution of claim settlement benefits. "Our Land, Our Culture, Our Future" is a good indication of this approach since the questions of land ownership and political self-determination are absent from this proposal, and the list of objectives is predominated by the establishment of a native economic base (ie. Heritage Fund), some devolution of powers from the federal and territorial governments, and the continuing accessibility to government services and programs. These contrasting approaches to comprehensive claims, combined with the different cultural philosophies of the Mackenzie Valley, have been frequently detrimental, and at times obstructive, to the establishment of either a joint negotiating process or a joint negotiating team.

From the federal government's point of view, it has continually emphasized that only one claims settlement can be negotiated in the Mackenzie Valley. Ottawa essentially perceives the two groups as one people - they use the same land, the same resources, live in the same communities and are claiming the same areas. Funding has been suspended twice for the lack of progress towards a joint

Dene/Metis negotiating process, and subsequent funds have been provided under the condition that each of the groups recognize that only one settlement can be reached. On September 8, 1983, a fact-finder process was initiated by DIAND with the objective of resolving this outstanding impediment. Perhaps this type of approach may ultimately remove one of the long-standing obstacles to the settlement of the Mackenzie Valley claims.

The issue of overlapping claims has also been involved in the negotiation processes of the Yukon and James Bay claims, although the areas of overlapping boundaries were not as extensive. Only recently has the matter of overlapping boundaries become involved in the CYI claim. The area of overlap is a coastal section of the North Slope, which is part of the territory claimed under the COPE claim (5,000 square miles). This problem is expected to be only incidental, being easily clarified by the fact-finder and within the COPE negotiation forum.

In the case of the James Bay negotiations, in January 1975, the Naskapi Indians of Schefferville (Quebec) - also known as the Naskapis de Schefferville Band -, a band of 400 Indians living in the James Bay Agreement "Territory", decided to join in the agreement negotiations with the James Bay Cree and Inuit, and the Quebec government. In the fall of 1975, the Naskapis decided to negotiate their claim to the "Naskapi Sector" (area of overlap) on their own. The claims to traditional use and occupancy were easily resolved between the two claimant groups and the provincial government and, on January 31, 1978, the Northeastern Quebec Agreement was signed by the Naskapis of Schefferville and all of the signatories of JBNQA (on April 14, 1978, a federal Order in Council approving the Northeastern Quebec Agreement was brought into effect).¹⁰

Interface with political development is another factor which has served to differentiate the territorial claims from the James Bay negotiations. Until recently, native groups in both Territories have continually sought to include the

matters of political/constitutional development within the claims forum. Consequently, both territorial governments in the past have sought full participation in the negotiations and a veto power over any potential settlement as both rejected the political dimensions of the native claims. Since these territorial governments were dominated by non-natives, the native peoples viewed them as part of the unresponsive system and rejected their participation in the negotiation process - the claims were solely a matter of Ottawa's obligation under "Indians and land reserved for Indians". Ottawa, on the other hand, perceives continuing territorial participation as essential since the powers of the governments of the Territories would be intricately involved in the provisions of settlements and their implementation.

The Government of the Northwest Territories (GNWT) has participated on the federal team in the negotiation of the Mackenzie Valley claims.

The Eighth Assembly of the Northwest Territories, which sat from 1975 to 1979, contained a majority of native members, many of whom favoured development of the wage economy in general and northern megaprojects in particular, without making their approval contingent on settlement of the native claims. However, these members tended not to figure prominently in the business of the Council.¹¹

Concerning the settlement of native claims, the Eighth Assembly stated categorically:

1. The Government of the Northwest Territories ... is the senior government in the Northwest Territories and represents all Northwest Territories residents. Canada, through the settlement of native claims, shall not erode any constitutional authority of the Government of the Northwest Territories.
2. The Government of Canada shall not give, to any group or groups of peoples any constitutional authority or responsibility which has not yet been delegated to the Government of the Northwest Territories.¹²

Statements and positions of this nature did not sit favourably with the native groups, especially the Dene Nation. As a result, the Dene boycotted the Eighth Assembly and denounced it as being illegitimate (ie. within the Dene Declaration -

"...the Government of Canada is not the government of the Dene. The Government of the Northwest Territories is not the government of the Dene. These governments were not the choice of the Dene, they were imposed upon the Dene".)

In October 1979, the Ninth Assembly of the Northwest Territories was elected. The majority of the members were native people who support native claims (ie. Nellie Cournoyea, James Wah-Shee, Richard Nereysoo and Tagak Curley have all been leaders of native groups) and several non-native MLAs sympathetic to the native cause. One of the first actions of the newly-elected Assembly was to pass a motion stating that it did not support and would not be bound by the principles related to the settlement of native claims which had been established by the Eighth Assembly in October 1978.¹³ The election of the Ninth Assembly, with its majority of supportive native people, demonstrates a turning point in the philosophy of the native peoples in the Northwest Territories. The once-denounced appendage of the non-native society has now become a significant ally for the native peoples with respect to most claims questions and an avid promoter of a fast and just resolution of these claims.¹⁴ From the federal government's perspective, the elements of political development may prove to be a constraining factor to the settlement of the Mackenzie Valley claims. Ottawa can no longer rely upon GNWT to support its positions on political evolution and the federal government can no longer offer the territorial government as an alternative to the institutions of native self-determination sought through the claims. Since it is comprised of a native majority, the Assembly may reach decisions on specific issues which might be the types of decisions Ottawa fears giving the Natives the power to make. For example, if the Assembly were given some authority over resource development, it might delay the approval of projects until appropriate concessions are made to the native peoples or their needs are

met.¹⁵ However, this protracting influence of the questions of political development on the negotiation of comprehensive claims of the Mackenzie Valley is contingent upon the ability of the federal government to keep these questions separate from the claims forum and the willingness of the Dene and the Metis to do so.¹⁶

The Yukon Territorial Government (YTG) appears to have an even more active role in the claim deliberations in the Yukon. YTG has been adamant in the protection of its own self-interests, including a frequent opposition to any proposals for separate or independent native government institutions. The general position of the Yukon government is reflected in its position paper "Meaningful Government for all Yukoners". YTG supports a one-government structure, one local government structure with one delivery system. In response to the native claims, the territorial government has proposed provisions for the creation of opportunities and mechanisms for viable or guaranteed native participation in all levels of the territorial structure (ie. 4 new native electoral districts and changes in the Executive Committee composition). In addition, YTG has supported a settlement of comprehensive claims which is fair to all Yukoners, in which all existing claims and special rights of the Natives are extinguished in exchange for social and economic equality.¹⁷ According to its presentation to the Alaska Highway Pipeline Inquiry, the Yukon government further believes that construction of a pipeline could precede any claim settlement and in no way prejudice that claim. Rather pipeline construction would benefit all Yukon residents, especially providing opportunities for the Natives to participate.¹⁸

Apart from its participatory role through the tripartite "co-operative planning approach", the best indication of the Yukon Territorial Government's objective to protect its own interests was the YTG withdrawal from the claim negotiation process in December 1982. Upon withdrawal, the territorial

government presented six issues to the federal government for resolution before it would return to the negotiations. Over the next five months, bilateral discussions were held between YTG and Ottawa to resolve the impasse. The first two issues concerned the inclusion of the North Slope within the COPE claim, and the overlapping of wildlife and subsurface rights in the Yukon. These two matters were resolved through the provision for YTG participation within the COPE negotiation forum, and a sub-agreement-in-principle on non-residents' and native wildlife rights in the Yukon - the question of subsurface rights remains outstanding. Participation in post-settlement land use management and in negotiations concerning political development in the Territory were another two grievances put forward by the YTG. These were resolved through federal assurances that the territorial government would be a full party to negotiations towards political/constitutional evolution and that a joint committee of the two governments, responsible for post-claim settlement land use planning and management, would be established. YTG was also concerned about the implementation of a claim settlement. Consequently, it demanded, and later received, a commitment from the federal government to fund the costs accruing to the territorial government for the settlement's implementation. The final issue dealt with the question of aboriginal rights and the Constitution. With respect to Section 35, YTG asserted that a settlement should extinguish those rights contained under this section and that any additional rights granted to the Natives under Section 37 (Constitutional Conferences) should be subject to YTG approval. Like the issue pertaining to subsurface rights, these constitutional conditions remain unresolved at this time.¹⁹ This incident of the Yukon Territorial Government safeguarding its own interests not only served to delay the claim negotiation process but it also enhanced the natives' distaste for the territorial political institutions, which are still viewed as part of the unresponsive 'system'.

However, unlike GNWT, Ottawa can continue to use the territorial government structure as an alternative to independent native institutions to resolve the native claims since the aboriginal peoples remain a minority within the Territory and they are marginally involved in the system.

One cannot discount also the influence of the United States in the territorial claims negotiations which stemmed from its leverage in the pipeline deliberations. In the wake of energy shortages and the OPEC crisis, the U.S. Congress passed the Alaska Natural Gas Transportation Act (ANGTA) in late 1976. This Act gave President Ford the power to review the Federal Power Commission (FPC) decision on the Arctic gas proposals, while reserving to Congress the final judgement. The Act established a four-step timetable to designate a route for transportation of Prudhoe Bay gas:

1. the FPC would make a recommendation to the President no later than May 1, 1977;
2. Federal agencies, state governors and "any other interested person" would have the opportunity to comment by July 1, 1977;
3. the President would announce his decision by September 1, with an option of a ninety day delay;
4. Congress would vote on the President's decision within sixty days of having received it.²⁰

The intention of the Act was to bypass the traditionally slow FPC and legislative approval for one of the pipeline routes.

In 1974, the El Paso Natural Gas Co., the largest U.S. gas utility, proposed a gas pipeline parallel to the Alyeska oil pipeline (trans-Alaska pipeline system - TAPS), giving the U.S. government a better negotiating position vis-a-vis the Canadian Alcan proposal. Since ANGTA had set a deadline of September 1, 1977 by which a decision had to be made, El Paso would presumably get the nod if the land bridge over Canada had it not been secured by that time. Thus, if the United States went ahead with the trans-Alaska gas pipeline as it had previously done for oil, Canada would not be able to bring its Mackenzie Delta gas to market -

discoveries in the Delta did not justify the construction of a separate Canadian pipeline.²¹ The necessity to have a prompt decision also stemmed from Canada's oil and gas export policy. Due to domestic and international energy shortages, the Canadian government was forced to both decrease oil and gas exports to the United States and impose import taxes to increase the prices of those amounts entering the United States. Subsequently, the resulting displeasure expressed by the American government, the fear of U.S. retaliation, and the domestic energy concerns served to increase the importance of and the pressure for pipeline construction.²²

On May 2, 1977, the final decision of the U.S. Federal Power Commission split, two commissioners endorsing the Alcan route and the other two, the Mackenzie Valley route. In the following week, the first volume of the Berger Report was released. In the wake of the recommendation for a ten-year moratorium and the widespread public opposition, the National Energy Board endorsed the Alaska Highway pipeline (Alcan route). Thus, under the establishment of the decision schedule set by Congress in ANGTA, American influence clearly accelerated the decision to choose the Alaska Highway route and thereby foregoing the immediate need to deal with the native claims in the Mackenzie Valley.

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With the redesign of the Alcan project on February 28, 1977, the Alaska Highway Pipeline Inquiry was appointed to assess the socio-economic impact of the route. However, the terms of reference for this inquiry incorporated the decision schedule set by the U.S. Congress (ANGTA), setting August 1 report deadline with no extensions possible. Claims negotiations were suspended during the inquiry, and on July 29, 1977, the Lysyk panel reported that the pipeline's impact could be confined within acceptable limits with a four-year delay in pipeline construction. However, in acknowledgement of American interests, on September 8, 1977, Canada signed an agreement with the United States for the construction and

operation of the Alcan pipeline system. Subsequently, the Northern Pipeline Act (Bill C-25) was passed on April 11, 1978, giving effect to the American-Canadian agreement-on-principles to such a pipeline (ie. fixed construction timetable). The Act established the "Northern Pipeline Agency" which was to take measures necessary to facilitate the expeditious and efficient construction of the pipeline. However, from the Natives' point of view, the contentious aspects of Bill C-25 were that it made no reference to the title of the lands in question; it provided no means to protect the territorial land interests or the political, economic and land rights of the aboriginals, and; the Act contained extraordinary restrictions on the judicial appeal process.²³ With respect to the negotiation process of the Yukon Indians' claim, the presence of American influence accelerated the Canadian endorsement of the Alaska Highway Pipeline system and culminated in the passing of Bill C-25 which paid only lip-service to the native claims in the affected region.

There was no apparent American pressure or influence in the James Bay claim process. The provincial government and the James Bay corporations set their own agendas and schedules for dealing with the claims of the Cree and Inuit.

Yet, probably one of the most influential factors in creating a discrepancy in responding and settling these cases of native claims was timing. For example, much of the Mackenzie Valley and Yukon processes came after the signing of the JBNQA. As a result, the Dene, the Metis and the Yukon Indians could be critical of the settlement and identify its inadequacies. The Mackenzie Valley natives recognize that the Agreement was signed by the James Bay natives under duress. According to George Manuel in "An Appeal From the Fourth World":

... if Indians have learned any lesson from the James Bay experience it is that negotiations made with a gun at your head are short-sighted and in the long run, to the disadvantage of Indian people.²⁴

In addition, JBNQA was termed a 'bad business deal' because the cash settlement amounts to less than one thousand dollars per person for the first years of the

settlement.²⁵ In commenting on the James Bay agreement, James Wah-Shee, a former President of IBNWT, stated:

the agreement will, I hope, be the last in Canadian history in which Native people give up their political rights to be self-governing in their own homelands, for the mere sake of material gain. And I hope it will be the last time that a government of Canada will ask the Native people to do so.²⁶

Furthermore, the Agreement also extinguished the aboriginal rights of the James Bay natives. The Dene and the Metis feel that negotiations are intended to establish agreements between the government and the indigenous peoples on how the principles on native title and aboriginal rights will be put into practice.²⁷ Thus, aboriginal rights should not be extinguished, but defined and affirmed so that native peoples will have adequate participation and control over decisions which affect their lands.

Similar criticisms have been forwarded by the Council of Yukon Indians. Throughout the negotiation process, CYI has criticized the federal government's adherence to the past policy precedents of the treaty-making process and JBNQA. Like the Mackenzie Valley aboriginals, the Yukon Indians reject the extinguishment of aboriginal rights through a claim settlement. According to their 1979 position statement,

... the major principle of our settlement is that the settlement will entrench and strengthen our aboriginal rights in the Yukon. Thus, rather than surrendering aboriginal rights, we are seeking to formally establish control for our lands and our People.²⁸

In addition, CYI has been critical of the deficiencies of the local government structures established within JBNQA. Rather than local government concessions, the Yukon natives are seeking innovative political structures in which they can exercise self-determination within their homeland and yet, at the same time, be an intrinsic part of the Canadian society.

Another dimension of timing that distinguishes the negotiation processes of the Mackenzie Valley and Yukon claims from James Bay is the difference between a project that had been started and one that had not. Clearly, in the case of James Bay, work had begun on the hydro project and the Natives of the area were not even consulted.

The James Bay hydro project was in full swing. Land was being cleared. Dams were being built. The water was rising. . . 29

The initiation and thrust of the project obviously undercut the negotiating position of the local natives. According to Boyce Richardson in "James Bay and Mackenzie Valley":

. . . they (the Cree and Inuit) were afraid that if they did not play ball and agree to surrender their rights in return for certain considerations in the traditional manner of treaties between Indians and the government, the government of Canada would legislate their rights out of existence.³⁰

In addition, this intimidation was reinforced by the lack of sympathy from the courts following the overthrow of the Malouf judgement, and threats to withdraw funding for the Indians to defend their injunction victory in the Appeal Court, unless they were 'reasonable' in negotiating with the provincial government.³¹ Consequently, the James Bay aborigines were in a position to take whatever settlement they could get while the Quebec government was still prepared to make an agreement.

The Mackenzie Valley Pipeline, on the other hand, had not begun before the Dene and the Metis became aware of proposals. The decision-making process was much more complex and required a close examination of the four proposed pipeline routes. As a result, the natives of the Mackenzie Valley had time to prepare their cases and initiate court action on the matter. The Berger Inquiry and the large amount of public support which followed also aided the native peoples in establishing their case and preventing extinguishment of their aboriginal rights.

The complexity of the pipeline decision-making process was not such a predominant factor in the Yukon negotiating process. Organizational activities had already begun in 1967 and in 1973, the Yukon Native Brotherhood had submitted "Together Today for our Children Tomorrow" to federal government. In accordance with the August 1973 policy statement, negotiations on the Yukon comprehensive claim began in the fall of 1973. Thus, negotiations had been underway for three years before the Foothills (Yukon) route was proposed. Consequently, as in the Mackenzie Valley, the Council for Yukon Indians was not being forced to compromise their interests by "negotiating with a bulldozer in their backyard".

The timing of the projects and native claims, the impact of the United States, the interface of territorial claims with political development, the federal versus the provincial political climate and the other aforementioned factors help to explain why the negotiation processes and outcomes of the James Bay, Mackenzie Valley and the Yukon comprehensive claims are divergent. However, it is these "macro" political and economic factors which must be considered to explain why the federal government is not consistent in its recognition and response to native claims.

CHAPTER 5

Conclusion

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Comprehensive claims or demands for the recognition of aboriginal rights have generally been resolved by the federal government through treaties with the native peoples. These treaties and settlements were often made in response to the pressures of non-native settlement and/or resource development.

Past federal policy has focused on the extinguishment of aboriginal claims or rights to the land, in return, the Natives received land, institutional and/or monetary compensation. However, within the last half-century, native groups have sought to gain these forms of compensation yet, at the same time, define and affirm their rights through a claims settlement. According to the native leaders, this is a means through which the native peoples can guarantee protection for their culture and identity while simultaneously obtaining the ingredients to live in and compete with the mainstream of Canadian society.

The strong conviction that native interests and rights to the land are not to be extinguished through a settlement and the number of provisions sought by the Natives have made comprehensive claims settlements difficult to obtain. Prior to 1973, the federal government had refused to recognize comprehensive claims. However, after the Calder decision and the surge of "nativism" and widespread public support, Ottawa began to negotiate native claims based on aboriginal title. However, the failure which has befallen the 1973 policy statement and In All Fairness: A Native Claims Policy to resolve comprehensive claims has not been the result of a lack of government willingness to recognize and respond to these claims. Rather, factors within the political and economic climates must be incorporated into any analysis in order to understand the inconsistency of federal government negotiations towards claims settlements. The preceding examples of

the comprehensive claims of James Bay, the Mackenzie Valley and the Yukon have attempted to demonstrate the existence of these determining factors.

What of present or future native claims based on aboriginal title to the land? There are essentially four basic comprehensive claims in the North that remain unsettled at this time. Two of these claims are in the formative stages of negotiation between the native groups and the federal government. The first involves 13,000 Inuit of the Eastern and Central Arctic, represented by the Tungavik Federation of Nunavut (TFN) - affiliate of the Inuit Tapirisat of Canada (I.T.C.) -, and the second claim involves the Dene and the Metis of the Mackenzie Valley. The remaining two northern comprehensive claims are in the definitive stages of negotiation. The Committee for Original Peoples' Entitlement (COPE), representing 2,500 Inuvialuit of the Mackenzie Delta and the western Arctic coastal region, has signed an Agreement-In-Principle with the federal government (October 31, 1978), and the Council for Yukon Indians (CYI), representing 5,000 - 6,000 status and non-status Yukon Indians, is expected to do the same by January 1984.

With respect to these claims, Ottawa will continue negotiations towards their resolution. According to the major political parties, this non-adversarial format permits the Natives not only to express their opinions and grievances, but it further allows them to participate in the formulation of the terms of their own settlement.¹ The negotiation process also permits Ottawa to be flexible with comprehensive claims, addressing all aspects of aboriginal rights on a local and regional basis.

Native groups also appear happier with a negotiation format. In recent years, litigation has been used in some instances in an attempt to establish aboriginal rights - providing a basis from which Natives might negotiate with the government - but negotiation has been relied upon to produce or pursue comprehensive

settlements. A reliance on litigation, for native peoples, contains many drawbacks. The process is very time consuming, expensive and abounds with technical uncertainties (ie. Calder case). Furthermore, many of the questions involved in comprehensive claims cannot easily be answered on a yes or no basis, which is the approach under which the courts operate.²

Within the negotiation process, the federal government may be willing to compromise somewhat in order to achieve claims settlements. The drive for resource development appears somewhat inevitable, as greater pressures are being exerted on the Government of Canada for new and viable energy discoveries to meet growing demands and reduce the country's reliance on imports (towards self-sufficiency). Ottawa may thus seek various means to reduce some of the uncertainties associated with frontier exploration and development. These means could include claims settlements or, on the other hand, the passage of legislation which sidesteps the necessity of dealing with comprehensive claims (ie. the Northern Pipeline Act and the Canada Oil and Gas Act).

From their point of view, native groups are questioning the compatibility of resource development with their traditional economies. In the past, the Natives have been told that they must make one of two choices in terms of development: "development as industry and government dictate it, or return to a total subsistence living". Through their assertion of comprehensive claims, the aboriginals are seeking a third alternative, to control development (control of the land is an integral part) and use it as a tool to evolve their own society.³ The recent advent of native development corporations may also be interpreted as an attempt by native peoples to improve their ability to direct the development process. For example, the Dene Nation, who had clearly rejected the co-existence of a traditional and an industrial economy in the North, has entered into an interim agreement for a joint venture with the Metis Development Corporation (MDC) and

Esso Resources through its newly-created Denendeh Development Corporation (DDC). The Dehcho Drilling Company Ltd., owned jointly by three parties, is expected to conduct drilling in the Norman Wells oilfield.⁴ With ventures of this nature, native groups can both actively participate in and benefit from development prior to the finalization of claims settlements.

Recent developments have also occurred in respect to the recognition of treaty and aboriginal rights. As outlined in Chapter 1, the Constitution Act, 1982 contains specific references to the special rights of the aboriginal peoples of Canada (Sections 25 and 35). Despite these references,

the question remains as to whether aboriginal rights are inherent or whether they are what aboriginal peoples have received or will receive as a result of past treaties or past or future land claims settlements.⁵

Consequently, the practical effect of the constitutional provisions would have depended on the courts in their role, under Section 58, of declaring void and of no effect any law inconsistent with the new Charter of Rights.

Federal and provincial courts necessarily would have had to determine what rights are "aboriginal" or "treaty" rights, what rights are "recognized" by the 1763 proclamation, and what rights tribes may have acquired in the recent northern land settlements.⁶

In order to remove some of the ambiguity and the broad areas of judicial interpretation, a two-day conference of First-Ministers was convened under the terms of the 1981 constitutional accord. The March 15-16, 1983, conference was also attended by the elected representatives of the Yukon Territory and the Northwest Territories, and leaders of four aboriginal rights groups - Assembly of First Nations, Metis National Conference, Inuit Committee on National Issues, and the Native Council of Canada. The conference was to identify and define native rights and to give them protection within the Constitution. That did not happen. The native request for a veto over constitutional amendments affecting their rights

was denied.⁷ However, there was an agreement signed that committed the Ministers to an ongoing process of at least three more First Ministers conferences by 1990 - the next has been scheduled for March 1984. The agreement also states that native groups will be consulted before any changes are enacted to parts of the Constitution dealing with Indians, Inuit and Metis. In addition, the accord stipulates that if there were any new claims settlements, they will be on the same constitutional protection as the existing treaty rights within the Constitution.⁸ Unfortunately, the passage of this agreement, which was cited as the Constitution Amendment Proclamation, 1983, has been delayed by the Senate to this date.

It will be interesting to see how these developments will be reconciled with the growing pressures for resource development. The Department of Indian Affairs and Northern Development will again have to resolve its often conflicting dual role - encouraging the expansion of northern development while, at the same time, attempting to minimize its risks and consequences on the native peoples. The resolution of these roles, including the negotiation of comprehensive claims, will also occur within the "macro" political and economic arena.

POSTSCRIPT

POSTSCRIPT

A significant development in the future evolution of the federal comprehensive claims policy and the settlement of these claims is the recent release of the Report of the Special Committee on Indian Self-Government in Canada. Through its orders of reference of December 22, 1982, the Special Committee was to review:

- (a) the legal status of Band Governments;
- (b) the accountability of band councils to band members;
- (c) the powers of the Minister of Indian Affairs and Northern Development in relation to reserve land, band monies and the exercise of band powers;
- (d) the financial transfer, control and accounting mechanisms in place between bands and the Government of Canada;
- (e) the legislative powers of bands and their relationship to the powers of other jurisdictions;
- (f) the accountability to Parliament of the Minister of Indian Affairs and Northern Development for monies expended by or on behalf of Indian bands;
- (g) all items referred to in section "H" of the report of the Sub-committee on Indian Women and the Indian Act;

and make recommendations in relation to the above questions in regard particularly to possible provisions of new legislation and improve administrative arrangements to apply to some or all Band Governments on reserves, taking into account the various social, economic, administrative, political and demographic situations of Indian bands, and the views of Indian bands in regard to administrative or legal change.¹

Although its terms of reference "focus primarily on the geographically dispersed First Nations of southern Canada", the Committee's recommendations may have a considerable influence on both the northern comprehensive claims structural process and policy. In a structural sense, the Special Committee recommended:

- 55. As Indian First Nation governments exercise control over their own affairs, the Committee strongly recommends that the programs of the Department of Indian Affairs and Northern Development relating to

Indian people be phased out. This process should be completed within five years. This recommendation does not affect the Department's mandate for northern development.²

To manage and co-ordinate the federal government's relations with Indian First Nations, the Committee proposed the establishment of a Minister of State for Indian First Nations Relations. The Ministry would be responsible for the promotion of the interests of Indian First Nations, social and economic development, and the administration and delivery of government services and programs.

The recommendations of the Special Committee also envisaged the creation of a new agency to carry out a proposed new claims settlement policy.

47. It is imperative that the new process be shielded from political intervention. It should be set out in legislation so that it cannot be readily changed. Claims should be negotiated between the government and the claimant with a neutral party to facilitate the settlement. Where a settlement cannot be reached, there should be access to a quasi-judicial process. . . .³

The Report of the Special Committee on Indian Self-Government in Canada

could also have a significant impact on the evolution of the comprehensive claims policy. For example,

45. The Committee is firmly convinced that there must be a new policy to promote the fair and just resolution of outstanding claims consistent with the protection of aboriginal and treaty rights in the Constitution. The federal government and designated representatives of Indian First Nations should undertake negotiations regarding a new claims settlement process to be set out in legislation.⁴

Through a commitment to the diversity of Indian nations, the Committee also concluded that "there should be no single model for claims settlements" (ie. treaties and JBNQA) and that "the doctrine of extinguishment be eliminated from the settlement of claims".⁵ Furthermore, with respect to political institutions which may be incorporated within comprehensive claims, "the Committee applauds

all initiatives to design innovative government structures for the North embracing all its people".⁶

The Report was tabled in the House of Commons on November 2, 1983, with a request for a formal government response within 120 days. The principle recommendations of the Commons committee is "the right of Indian peoples to self-government be explicitly stated and entrenched in the Constitution of Canada," thereby establishing a third order of government.⁷ The proposals initially affect 325,000 estimated status Indians recognized under the Indian Act (Metis and Inuit not included), in as many as 573 Indian bands across the country. Committee Chairman, Keith Penner, has conceded that it will be difficult to achieve public, provincial and parliamentary approval for many of the recommendations.⁸ However, despite the degree to which the Special Committee's recommendations are accepted, the release of the Report has served as an important precedent for Natives in their pursuit of both self-government and a more encouraging claims policy.

APPENDIX I

Chief Negotiators

Chief Negotiators

Dennis O'Connor: Yukon Indian Land Claim

Currently, with the Toronto law firm of Borden and Elliot, and appointed Queen's Counsel in 1980, Dennis O'Connor was designated as Chief Negotiator on May 23, 1980. A former Professor of Law at the University of Western Ontario, and Consultant for the Federal Department of Justice, Mr. O'Connor has served as Deputy Magistrate in the NWT, Provincial Judge in B.C., and Magistrate in Yukon Territory.

Simon Reisman: COPE (Committee for Original Peoples' Entitlement) Land Claim

A economist and a former Deputy Minister of Finance in the federal government, Mr. Reisman was appointed as Chief Negotiator on October 22, 1982. In 30 years of public service, Mr. Reisman held a number of executive position, including those of Treasury Board Secretary, and Deputy Minister of Industry where he was principal negotiator of Canada - U.S. Automotive agreement of 1964. Mr. Reisman also has the distinction of being an Officer of the Order of Canada, and in 1974 he received the Governor-General's Outstanding Public Service Award. Now active in the private sector as President of Reiscar Ltd. and chairman of Reisman and Grandy Ltd., Mr. Reisman is a member of the boards of numerous Canadian companies.

David Osborn: Dene/Metis Land Claim

A member of the bars of Ontario and Saskatchewan, and a specialist in litigation, David Osborn was appointed Chief Negotiator on April 21, 1981. Mr. Osborn has served as partner in the Saskatoon law firm of Lamarsh and Company; Assistant Professor in the School of Business Administration, University of Western Ontario; Executive Director of the Canadian Bar Association; and as General Counsel of the Canadian Radio-Television and Telecommunications Commission. He is now a partner in the Ottawa law firm of Johnston and Buchan.

William Thomas Molloy: TFN (Tungavik Federation of Nunavut) Land Claim

A Saskatoon Lawyer specializing in labour relations, Tom Molloy was appointed Chief Negotiator on March 12, 1982. Mr. Molloy is Senior Partner of the law firm MacDermid and Company, and is a Director of Air Canada, Develcon Electronics Ltd., and Bridge City Mortgage Corporation. A former Governor of Hockey Canada, and a member of the Canadian Order of the Knights of Malta, Mr. Molloy has been officially recognized by the City of Saskatoon for his service to numerous civic organizations.

Anthony Price: CAM (Counsil Attikamek-Montagnais) Land Claim

A Quebec City Lawyer who has worked in both the private and public sectors, Tony Price was appointed Chief Negotiator on March 4, 1982. A former founding partner of the legal firm Letourneau, Stein, Amyot, with which he practiced 12 years, Mr. Price has founded various businesses in the Province of Quebec, including Whale River Outfitters Limited, and "outfitter" operating in Northern Quebec, and Musee du Fort, an electronic sound and light presentation of the military history of Quebec. Mr. Price spent a dozen years working initially as director of the Canadian Bilateral Aid Program in Morocco, and later in Senegal and Kenya as regional director for the International Development Research Centre of Ottawa.

John Bene: Nishga Land Claim

A retired B.C. businessman and international consultant, Mr. Bene was appointed Chief Negotiator on June 26, 1981. Mr. Bene, a graduate in mechanical and electrical engineering, founded, designed and operated Pacific Veneer Co. Ltd. of New Westminster from 1938 to 1943, and then established and headed as President, until 1968, the company now known as Weldwood of Canada Ltd. A Director of both companies, Mr. Bene served in the same capacity with the Bank of British Columbia and Champion International (U.S.A.). In the public sector, Mr. Bene served as special advisor to the President of the Canadian International Development Agency, and later assumed the post of Director General of the Special Advisors Branch. Joining the International Development Research Centre in 1975, he became senior advisor to the President and also served as Governor on the first board of this institution. Since returning to Vancouver in 1980, Mr. Bene has led CIDA missions to India and Guyana. Mr. Bene is an honorary lecturer at the Faculty of Forestry at U.B.C.

Source: Canada. Office of Native Claims, Perspectives in Native Land Claims Policy. A Background paper prepared for the Canadian Arctic Resources Committee's Third National Workshop on "People, Resources and the Environment North of 60°", (Yellowknife: June 1-3, 1983), pp. 20-21.

APPENDIX 2

Council for Yukon Indians

Council for Yukon Indians

Sub-Agreements-In Principle on the Following Subjects:
(January - December 1982)

- eligibility and enrollment
- fishing, trapping, harvesting rights and management wildlife resources
- land use planning and environmental assessment
- provision, delivery and funding of social programs
- tenure and settlement land selection in Yukon
- land selection, co-operative planning process and community affairs and services for Carcross
- land quantum for Champagne-Aishihik, Whitehorse and Teslin
- selection of lands and community affairs and services within Burwash
- selection of settlement lands in the Burwash/Beaver Creek areas
- selection of lands within Beaver Creek and Destruction Bay and Local Government for Beaver Creek
- Interim benefits to Yukon Indian Elders amending agreement
- definition of boundaries and measures of areas of settlement land
- land quantum for Dawson, Carmacks and Selkirk
- selection of settlement lands in Champagne/Aishihik area, Pelly Crossing area, Teslin and Whitehorse
- local Government for Pelly Crossing and Teslin
- beneficiary training for settlement implementation
- financial compensation
- corporate structures
- general provisions

Source: Canada. Office of Native Claims. Fact Sheets on Native Claims. (May 1983).

APPENDIX 3

2.

Source of maps: Canada. Department of Indian Affairs and Northern Development. Comprehensive Native Claims. Brief to the Special Committee of the Senate on the Northern Pipeline from the Department of Indian Affairs and Northern Development: Backgrounder (September, 1982).

YUKON CLAIM

(8a) James Bay Agreement Territory
(Cree, Inuit and Naskapis)
(8b) Land areas selected by Crees and Inuit
of Quebec pursuant to JBNQA.

Indian and Northern
Affairs Canada

Attaques indiennes
et du Nord Canada

COMPREHENSIVE NATIVE CLAIMS IN CANADA

LEGEND

Apart from the James Bay "Territory", the areas indicated on this map represent only approximate boundaries of the areas in which the various native associations have claimed an interest. The precise delineation of these areas for each claimant group will be determined as negotiations proceed on the separate claims settlements.

- (1) Council for Yukon Indians (CYI)
- (2a) Western Arctic Region
- (2b) Committee for Original Peoples' Entitlement (COPE):
Land areas selected by COPE pursuant to the COPE Agreement-in-Principle
- (3) Dene Nation
- (4) Métis Association of the Northwest Territories (MANWT)
- (5) Inuit Tapirisat of Canada (ITC)
- (6) Labrador Inuit Association (LIA)
- (7) Naskapi-Montagnais Innu Association (NMIA)
- (8a) James Bay Agreement "Territory" (Grand Council of the Crees of Quebec & the Northern Quebec Inuit Association; Naskapi of Schefferville)
- (8b) Land areas selected by the Crees and Inuit of Quebec pursuant to the James Bay and Northern Quebec Agreement
- (9) Conseil Atikamek Montagnais
- (10) Miège Tribal Council
- (11) Kivwano Band
- (12) Association of United Tahltans
- (13) Gitksan-Carrier Tribal Council
- (14) Kitimaat Village Council (Haida Nation)
- Proposed National Wilderness Park, Northern Yukon

REVENDEICATIONS GLOBALES DES AUTOCHTONES AU CANADA

LEGENDE

A l'exception du "Territoire" de la Convention de la Baie James et du Nord québécois, les zones indiquées sur cette carte ne représentent que les limites approximatives dans lesquelles les diverses associations autochtones ont revendiqué un intérêt. La délimitation exacte de ces zones pour chaque groupe revendicateur sera déterminée au cours des négociations sur les règlements particuliers.

- (1) Le Conseil des Indiens du Yukon (CIY)
- (2a) Région de l'Arctique de l'Ouest
- (2b) Comité d'étude des droits des Autochtones (CÉDA):
Terres choisies par le CÉDA en conformité avec l'Entente de principe
- (3) La Nation Dénée
- (4) L'Association des Métis des Territoires du Nord-Ouest (AMTNO)
- (5) L'Inuit Tapirisat du Canada (ITC)
- (6) L'Association des Inuit du Labrador (AIL)
- (7) L'Association Naskapi-Montagnais Innu (ANMI)
- (8a) Le "Territoire" de la Convention de la Baie James et du Nord québécois (le Grand Conseil des Cris du Québec & l'Association des Inuit du Nouveau Québec; les Naskapis de Schefferville)
- (8b) Terres choisies par les Cris et les Inuit du Québec en conformité avec la Convention de la Baie James et du Nord québécois
- (9) Le Conseil Atikamek Montagnais (CAM)
- (10) Le Conseil tribal Nishga
- (11) La bande Kivwano
- (12) L'Association des Tahltans unis
- (13) Le Conseil tribal Gitksan-Carrier
- (14) Le Conseil du village Kitimaat (la Nation Haida)
- Parc national national envisagé dans le Nord du Yukon

FOOTNOTES

Footnotes

Introduction

- 1 G. Erasmus, "We The Dene", in M. Watkins ed., Dene Nation - The colony Within (Toronto: University of Toronto Press, 1977), p. 177.
- 2 James S. Frideres, "Native Settlements and Native Rights: A Comparison of the Alaska Native Settlement, the James Bay Indian/Inuit Settlement, and the Western Canadian Inuit Settlement", The Canadian Journal of Native Studies Vol. 1 No. 1 (1981), pp. 63-4.
- 3 Hugh Brody, The People's Land ((Markham: Penguin Books Ltd., 1975), p. 231.

Chapter 1

- 1 The term "native claims" has been deliberately employed. Despite a common synonymity between this term and "land claims", there is more than just land or private property at stake here. For both the Indian and Inuit alike, the land is the nucleus for their survival. This type of interdependence is pointed out in Michael Whittington's "Canada's North in the Eighties", in Michael S. Whittington and Glen Williams eds., Canadian Politics in the 1980's (Toronto: Methuen, 1981). For the native peoples there is a "oneness" with the land and "all of the requirements for existence must somehow be extracted from the land".
- 2 Canada, Department of Indian Affairs and Northern Development, Office of Native Claims, Fact Sheets on Native Claims (May 1983).
- 3 Canada, House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings, Issue No. 3 (Ottawa, 1972), pp. 3:7-8.
- 4 Ibid. p. 3:7.
- 5 Ibid. p. 3:8.
- 6 Hon. Jean Chretien. Statement on Northern Development, Conservation and Indian Affairs. Presented to the Standing Committee of the House of Commons on Indian Affairs and Northern Development. (Ottawa, March 1 and 6, 1973), p. 20.
- 7 Ibid. p. 2.
- 8 It should be noted that aborigines in non-treaty areas experienced the expansion of non-native activities as early as the 1920's, after the treaty-signing process was no longer pursued. Only after 1969, did comprehensive claims receive greater public attention due to their symbiotic relationship with resource development and the announcement of the 1969 White Paper

which rejected the concept of claims based on aboriginal title. See Canada, Department of Indian Affairs and Northern Development, Research Branch, Corporate Policy, Richard Daniel, A History of Native Claims Process in Canada, 1867-1979 (Ottawa, February 1980), pp. 220-21.

- 9 Harvey Felt, "Protecting Indigenous Hunters Way of Life: The Social and Environmental Protection Regime in the James Bay and Northern Quebec Aboriginal Rights Agreement", paper presented at the Conference on Social Impacts of Natural Resources Development on Indigenous Peoples, at Cornell University, Ithaca, New York, August 19-20, 1980, p. 2.
- 10 "North Natives for Rights, Not Against Development", The Native People 9:12 (April 2, 1976), p. 12.
- 11 C. Sutton, "Aboriginal Rights", in M. Watkins ed., Dene Nation - The colony Within (Toronto: University of Toronto Press, 1977), p. 130.
- 12 H. McCullum and K. McCullum, This Land Is Not For Sale (Toronto: The John Deyel Co., 1975), p. 12.
- 13 Canada, Department of Indian Affairs and Northern Development, Mackenzie Valley Pipeline Inquiry, Summaries of Proceedings, Volume 5: The Human Environment - Social and Economic Aspects (Ottawa, 1976), p. 3.
- 14 S. Killen, "What Aboriginal Rights Are Not," The Native People 10:19 (May 25, 1977), p. 10.
- 15 Canada, Commissioner on Indian Claims, A Report: Statements and Submissions (Ottawa, Minister of Supply and Services, 1977), p. 34.
- 16 Peter J. Usher, "Unfinished Business on the Frontier", The Canadian Geographer Vol. XXVI no. 3 (Fall 1982), p. 187.
- 17 See Peter A. Cumming, "Native Rights and Northern Development", Alberta Law Review Vol. 12 (Edmonton, 1974), pp. 64-7.
- 18 Commissioner on Indian Claims, A Report: Statements and Submissions, p. 41.
- 19 Martin O'Malley, The Past and Future Land (Toronto: Peter Martin Associates Ltd., 1976), p. 53.
- 20 Gurston Dacks, A Choice of Futures: Politics in the Canadian North (Toronto: Methuen, 1981), p. 33.
- 21 Yukon Native Brotherhood, Together Today for our Children Tomorrow: A Summary (Whitehorse, February 1974), p. 51 & 63.
- 22 Commissioner on Indian Claims, A Report: Statements and Submissions, p. 42.
- 23 Council for Yukon Indians, Presentation to the Alaska Highway Pipeline Inquiry (Whitehorse, May 16, 1977), p. 5.
- 24 Idem.

- 25 Peter A. Cumming, "Canada: Native Land Rights and Northern Development", IWGIA Document 26 (Copenhagen, 1977), p. 41.
- 26 Yukon Native Brotherhood, Together Today for our Children Tomorrow: A Statement of Grievances and an Approach to Settlement by the Yukon Indian People (Whitehorse; January 1973), p. 73.
- 27 Ibid; p. 51.
- 28 Gurston Dacks, A Choice of Futures, p. 54.
- 29 Yukon Native Brotherhood, Together Today for our Children Tomorrow: A Statement, p. 71.
- 30 Peter A. Cumming, "Canada: Native Land Rights", pp. 42-7.
- 31 Gurston Dacks, loc. cit.
- 32 Yukon Native Brotherhood, Together Today for our Children Tomorrow: A Statement, p. 52.
- 33 Commissioner on Indian Claims, A Report: Statements and Submissions, p. 43.
- 34 The James Bay and Northern Quebec Agreement Section 30 (Editeur officiel du Quebec, 1976), p. 437.
- 35 Harvey Feit, "Political Articulations of Hunters to the State: Means of Resisting Threats to subsistence Production in the James Bay and Northern Quebec Agreement", Inuit Studies 3:2 (1979), p. 47.
- 36 The James Bay and Northern Quebec Agreement, p. 451.
- 37 Commissioner on Indian Claims, A Report: Statements and Submissions, loc. cit.
- 38 Yukon Native Brotherhood, Together Today for our Children Tomorrow: A Statement, loc. cit.
- 39 Gurston Dacks, A Choice of Futures, p. 55.
- 40 M. Watkins, "From Underdevelopment to Development", in M. Watkins ed., Dene Nation - The colony Within (Toronto: University of Toronto Press, 1977, p. 90.
- 41 Commissioner on Indian Claims, A Report: Statements and Submissions, p. 44.
- 42 Peter A. Cumming, "Native Peoples and Aboriginal Rights", North Vol. XXIX No. 2 (Summer 1982), p. 14.
- 43 Peter A. Cumming and Neil H. Mickenberg eds., Native Rights in Canada 2nd Ed. (Toronto: The Indian-Eskimo Association of Canada, 1972), p. 14. This edition also traces the origins of the theory back to the Spanish theologian

Francisco de Vitoria and his two famous lectures De Indis and De Jure Belli in 1532 (pp. 14-6). For a more thorough examination consult E. Nys ed., Classics of International Law, De Indis et De Jure Belli Reflections (New York: Oceania Publications, 1964), pp. 86-149.

45 (21 U.S. (8 Wheat.) 240 (1823))

46 (31 U.S. (6 Pet.) 350 (1832))

47 Neil H. Mickenberg, "Aboriginal Rights in Canada and the United States," Osgoode Hall Law Journal Vol. 9 No. 1 (August 1971), pp. 123-4.

48 See Cumming and Mickenberg eds., Native Rights in Canada 2nd ed. or Brian Slattery, "Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title", Studies in Aboriginal Rights No. 2 (University of Saskatchewan Law Centre, 1983) for more elaborate details in each case.

49 Cumming and Mickenberg, Native Rights in Canada 2nd Ed., p. 20.

50 References to the Marshall doctrine were made in both the St. Catherine's Milling and Calder decisions.

51 (13 S.C.R. 577 (1887))

52 Cumming and Mickenberg refer to H. Black, Black's Law Dictionary 4th ed. (St. Paul: West Publishing Co., 1951), p. 1712, to define the term "usufructuary right" - a right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing. The usufruct was a personal and inalienable right which terminated upon the death of its holder.

53 Cumming and Mickenberg, Native Rights in Canada 2nd Ed., p. 39.

54 A more intricate description of the Baker Lake proceedings can be found in Jerome E. Bickenbuch's "The Baker Lake Case: A Partial Recognition of Inuit Aboriginal Title", University of Toronto Faculty of Law Review Vol. 38 Rev. 232 (1980), pp. 232-42.

55 ((1971), 13 D.L.R. (3d) 64, (1970), 74 W.W.R. 481 (B.C.C.A.).)

56 Proceedings of the Calder case were initiated in 1969 before the British Columbia Supreme Court. The Nishga Indians sought through the courts a judicial declaration that their aboriginal title had never been surrendered by treaty or otherwise extinguished. The claim was dismissed by the Court and later after appeal, the British Columbia Court of Appeal dismissed the claim as well. The case was taken to the Supreme Court of Canada which reached its decision in January 1973.

57 The Calder case led to a complete reversal in federal government policy. Contrary to the White Paper of 1969 which refused to recognize aboriginal rights claims, Ottawa made a policy statement in August 1973 which announced that it was prepared to negotiate comprehensive claims.

- 58 R. St.J. MacDonald and John P. Humphrey, The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms (Toronto: Butterworth, 1979), p. 270.
- 59 Government of the Yukon, David W. Elliot, The Development of Greater Self-Government in the Yukon Territory: Legal and Constitutional Provisions Affecting Yukon Indian People (Whitehorse, 1979), pp. 22-3. With respect to a number of the Arctic Islands contained in the COPE claim and the ITC claim, these areas were transferred to Canada as part of Rupert's Land and by the Imperial Order-in-Council of July 31, 1880, which provided that they become subject to the laws for the time being in force.

Chapter 2

- 1 The rebellion had been occasioned by the transfer of the vast Hudson Bay Company's Territory to the Government of Canada without consultation or settlement of the rights of the people of the Northwest, the majority of whom were native people - both Indian and Metis.
- 2 Not all of these treaties came in response to specific identifiable Indian claims. Rather, in some cases, negotiations proceeded in order to incorporate "potential" Indian grievances. Treaty Commissioners had received background reports which proposed that a lack of consultation with the Natives may foster acts of aggression or violence against settlers and developers. See R. Daniel, A History of Native Claims Processes in Canada, 1867-1979, pp. 8-9.
- 3 Idem.
- 4 Ibid, pp. 9-10.
- 5 James S. Frideres, Native People in Canada: Contemporary Conflicts 2nd Ed. (Scarborough: Prentice Hall, 1983), p. 89.
- 6 R. Daniel, in A History of Native Claims Processes in Canada, 1867-1979, indicates that the extent to which Indian tribes were able to influence the terms of the treaties varied according to local conditions and Indian demands (pp. 10-13).
- 7 D. Sanders, "Native People in Areas of Internal National Expansion: Indians and Inuit in Canada", IWGIA Document 14 (Copenhagen: November 1973), p. 30. James S. Frideres in Native People in Canada refers to the treaty provisions as part of the "government's open policy of detribalization" in his chapter on Indian claims (pp. 90-1).
- 8 James S. Frideres, Native People in Canada, p. 121.
- 9 Canada, Parliament, House of Commons, Debates 13 May 1946, p. 1447.
- 10 Government policy, after World War II, shifted from signing treaties to relocating the native peoples and integrating them into the Canadian society. Economic development of reserve communities was not to be stressed, as

suggested by the Hawthorne-Tremblay Report, but rather young Natives were encouraged to urbanize southern Canadian cities and communities. Wage-labour was perceived as the only alternative to increased welfare or southern migration. See comments by Hon. Jean Chretien on the "northern problem" in D. Sanders' "Native People in Areas of Internal National Expansion", pp. 30-1.

- 11 The U.S. Claims Commission remained intact until 1978. Before its incorporation and after its termination, cases were referred, with Congressional permission, to the U.S. Court of Claims.
- 12 R. Daniel, A History of Native Processes, 1867-1979, p. 135.
- 13 Canada, Senate, Journals of the Senate Vol. LXXXIX (June 22, 1948), p. 482.
- 14 Canada, Parliament, House of Commons, Debates 20 June 1950, p. 3974.
- 15 Canada, Parliament, House of Commons, Debates 16 March 1951, p. 1355.
- 16 Canada, Senate, Journals of the Senate Vol. CVII (1960-61), p. 598n.
- 17 R. Daniel, A History of Native Processes, 1867-1979, p. 143.
- 18 The proposals of the Conservatives were very similar to the American legislation. A Commission of 3 members would be established to hear a wide range of native claims. The expected life of the body would be 10 to 15 years, with a cut-off date of 5 years for filing claims. The Statute of Limitations would not apply, strict evidentiary rules would not be followed, and the Commission would establish its own rules of procedure.
- 19 Sally M. Weaver, Making Canadian Indian Policy: The Hidden Agenda 1968-1970 (Toronto: University of Toronto Press, 1981), p. 37.
- 20 Canada, Parliament, House of Commons, Debates 14 December 1963, p. 5916.
- 21 The Liberal administration made two significant modifications which would have brought the legislation closer to the American model: the Commission would render decisions rather than make recommendations, yet Parliament was still responsible for the appropriation of funds, and; the provision was made for an appeal process either to a newly-established Indian Claims Appeal Court or to the Exchequer Court and the Supreme Court, the choice depending on the nature of the appeal. See Daniel, A History of Native Claims Processes, 1867-1979, pp. 146-7.
- 22 Bill C-123 contained several amendments which included a provision for one of the five commissioners to be an Indian, a provision for financial assistance to claimants, and an extension of the time limit for filing a claim, from two to three years. Canada, Parliament, House of Commons, Debates Vol. III 22 June 1965, p. 2749.
- 23 As late as March 6, 1969, the Minister of DIAND, Hon. Jean Chretien, was assuring the House of Commons that legislation for a Claims Commission was being considered (House of Commons, Debates 6 March 1969, p. 6292). On December 20, 1968, he told the House that legislation had been referred to

the Commons Committee on Health, Welfare and Social Affairs so that another amendment could be made before the bill's introduction in the House (House of Commons, Debates 20 December 1968) p. 4232.

- 24 Some of the B.C. Indian leaders believed that because the proposed Claims Commission would not have jurisdiction to hear claims against the provinces, and because there was some dispute as to whether their claim was against the province or against Canada, the aboriginal rights question should be resolved through direct negotiation before the I.C.C. bill became law. See Daniel, A History of Native Claims Processes, 1867-1979, pp. 149-151.
- 25 Canada, Parliament, House of Commons, Debates 6 March 1969, p. 6291.
- 26 Canada, Parliament, House of Commons, Debates 22 March 1966, p. 2989.
- 27 R. Daniel, A History of Native Processes, 1867-1979, p. 151.
- 28 Sally Weaver, in Making Canadian Indian Policy: The Hidden Agenda 1968-1970, provides an excellent examination of the rationalization which occurred within Indian Affairs (pp. 120-145). She emphasizes the extent to which decisions were influenced as much by agencies, such as the Privy Council Office and the Prime Minister's Office, as by department officials.
- 29 The Hawthorne-Tremblay Report further proposed that the Natives should be restored to a "citizen plus" standard - freedom of choice to stay in their own communities or leave them, maintaining the special privileges of their status while enjoying full participation as provincial and federal citizens. A good explanation of the "citizen plus" argument can be found in R.L. Barsh and J. Youngblood Henderson, "Aboriginal Rights, Treaty Rights and Human Rights: Indian Tribes and Constitutional Renewal", Journal of Canadian Studies Vol 17 No. 2 (Summer 1982).
- 30 Analogies with emerging nations with newly-assuming leadership became more common. For example, see Lloyd Barber, "The Basis for Native Claims in Canada", The Musk-Ox Circle Paper Seven (Saskatoon: Institute for Northern Studies, (1974)), p. 3. Many Natives went as far as to characterize their position as that of the "Fourth World", (George Manuel, "An Appeal from the Fourth World", Canadian Forum 666 (November 1976)).
- 31 Hon. Jean Chretien, Statement of the Government of Canada on Indian Policy, 1969. Presented to the First Session of the Twenty-eighth Parliament (Ottawa), p. 6.
- 32 Ibid, p. 8.
- 33 Canadian Indian Rights Commission Library, Indian Claims in Canada: An Introductory Essay and Selected List of Library Holdings (Ottawa: 1975), p. 22.
- 34 Sally Weaver, Making Canadian Indian Policy, p. 168. An elaboration of Trudeau's philosophy towards cultural groups can be found in P.E. Trudeau, P.E. Trudeau: Federalism and the French Canadians (Toronto: Macmillan, 1968) : "the way to be strong in Canada is not to be apart but to be equal to the English."

- 35 Canada, Department of Indian Affairs and Northern Development, Office of Native Claims, Reference Book (Ottawa: March, 1981), P. 132.
- 36 Commissioner on Indian Claims, A Report: Statement and Submissions, p. 23.
- 37 The concept of "participatory democracy" became popular in 1968 during which Prime Minister Trudeau had promised to make government more accessible to people in order to give citizens a sense of full participation in the affairs of government.
- 38 Commissioner on Indian Claims, A Report: Statements and Submissions, p. 1.
- 39 Sally Weaver, Making Canadian Indian Policy, p. 189.
- 40 These proposals included: Citizens Plus (The Red Paper), Indian Chiefs of Alberta (Edmonton, 1970); A Declaration of Indian Rights: The B.C. Indian Position Paper, Union of British Columbia Indian Chiefs (Victoria, 1970) and; Wahburg: Our Tomorrow, Manitoba Indian Brotherhood (Winnipeg, 1971).
- 41 In February 1973, this responsibility for funding was transferred to the Department of Indian Affairs and Northern Development.
- 42 Commissioner on Indian Claims, A Report: Statements and Submissions, p. 23.
- 43 Sally Weaver, Making Canadian Indian Policy, p. 186. For example, consult Canada, House of Commons, Debates 17 February 1971, p. 3484 for Chretien's remarks regarding the establishment of a permanent committee to consider contentious native issues.
- 44 In his presentation before the Standing Committee, Mr. Manuel outlined his group's conception of aboriginal rights:
... What we feel about aboriginal rights cannot be enunciated, for it is a part of all of us and how we were raised and what our values are now. But for the purposes of this Committee, what it means is that if there is no agreement clearly understood on both sides to cede land, then we still own all of it
(Canada, House of Commons, Standing Committee on Indian Affairs and Northern Development. Minutes of Proceedings Issue No. 8 (29 March 1973), p. 8:41.)
- 45 Canada, House of Commons, Standing Committee on Indian Affairs and Northern Development, Minutes of Proceedings Issue No. 11 4 April 1973, p. 11:3.
- 46 Canada, Department of Indian Affairs and Northern Development, Office of Native Claims, Native Claims: Policy, Processes and Perspectives, Opinion paper prepared for the Second National Workshop of the Canadian Arctic Resources Committee, Edmonton, Alberta (February 20-22, 1978), p. 4.
- 47 Hugh Brody, The People's Land, p. 10.
- 48 Office of Native Claims, Fact Sheets on Native Claims.

- 49 Eric Colvin, "Legal Process and the Resolution of Indian Claims", Studies in Aboriginal Rights No. 3 (1981), p. 3. A similar structure is currently operating in Ontario, where an Indian Commission for the province has been established to facilitate the work of a Tripartite Council of the Chiefs of Ontario and the federal and provincial governments.
- 50 Office of Native Claims, Native Claims: Policy, Processes and Perspectives, p. 3.
- 51 "Munro releases booklet on claims", The Native People 14:51 (December 18, 1981), p. 5.
- 52 Canada, Department of Indian Affairs and Northern Development, In All Fairness: A Native Claims Policy (Ottawa, 1981), p. 7.
- 53 Ibid, p. 22
- 54 Ibid, p. 19.
- 55 Canada, Department of Indian Affairs and Northern Development, Brief to the Special Committee of the Senate on the Northern Pipeline, Comprehensive Native Claims Backgrounder (September, 1982), p. 5.
- 56 Canada, Department of Indian Affairs and Northern Development, Office of Native Claims, Perspectives in Native Land Claims Policy. A background paper prepared for the Canadian Arctic Resources Committee's Third National Workshop on "People, Resources and the Environment North of 60°", (Yellowknife: June 1-3, 1983), p. 6.
- 57 Idem.
- 58 Department of Indian Affairs and Northern Development, Comprehensive Native Claims, p. 5.
- 59 Office of Native Claims, Perspectives in Native Land Claims Policy, p. 7.
- 60 Department of Indian Affairs and Northern Development, Comprehensive Native Claims, p. 6.
- 61 "A summary of federal land policy", The Native People 15:1 (January, 1982), p. 11.
- 62 Department of Indian Affairs and Northern Development, supra,
- 63 Idem.
- 64 Office of Native Claims, Perspectives in Native Land Claims Policy, p. 7.
- 65 Department of Indian Affairs and Northern Development, In All Fairness, p. 19.
- 66 Department of Indian Affairs and Northern Development, Comprehensive Native Claims, p. 3.

- 67 Department of Indian Affairs and Northern Development, In All Fairness, p. 24.
- 68 Department of Indian Affairs and Northern Development, Comprehensive Native Claims, loc. cit.
- 69 Department of Indian Affairs and Northern Development, In All Fairness, loc. cit.
- 70 Ibid, p. 27.
- 71 Ibid, p. 28.
- 72 Ibid, p. 25.
- 73 Office of Native Claims, Perspectives in Native Land Claims Policy, p. 6.

Chapter 3

- 1 Canadian Indian Rights Commission Library, Indian Claims in Canada, p. 28.
- 2 Ibid, p. 29
- 3 Boyce Richardson, Strangers Devour the Land (Toronto: Macmillan, 1975), p. 333.
- 4 Idem.
- 5 Walter Taylor, The Defense of James Bay - An Emergency for All Native People and other Residents of North America (Unpublished manuscript: January 1973), p. 1.
- 6 Boyce Richardson, Strangers Devour the Land, p. 334.
- 7 George W. Bauer, "Aboriginal Rights in Canada", The Canadian Forum Vol. 53 no. 628 (May 1973), p. 15.
- 8 Boyce Richardson, Strangers Devour the Land, p. 321.
- 9 Harvey Feit, "Negotiating Recognition of Aboriginal Rights: History, Strategies and Reactions to the James Bay and Northern Quebec Agreement", Canadian Journal of Anthropology 1:2 (Winter 1981), p. 159.
- 10 Interview, Harvey Feit, Department of Anthropology, McMaster University, Hamilton, 6 April 1982.
- 11 Idem.
- 12 Harvey Feit, "Negotiating Recognition of Aboriginal Rights", p. 160.
- 13 Idem.
- 14 Idem.

- 15 Idem.
- 16 I. LaRusic, Negotiating a Way of Life. Initial Cree Experience with the Administrative Structure Arising from the James Bay Agreement (Montreal: SSDCC, 1979), p. 14.
- 17 Harvey Feit, "Negotiating Recognition of Aboriginal of Aboriginal Rights", p. 161.
- 18 Interview, Harvey Feit, Department of Anthropology, McMaster University, Hamilton, 6 April 1982.
- 19 Harvey Feit, "Negotiating Recognition of Aboriginal Rights", p. 162.
- 20 Boyce Richardson, Strangers Devour the Land, p. 20.
- 21 Harvey Feit, "Negotiating Recognition of Aboriginal Rights", p. 163.
- 22 Ibid, p. 166.
- 23 Harvey Feit, "The Future of Hunters within Nation States; and, the Theory and Practice of Anthropologists. Questions Arising out of the Canadian Experience and Particularly Experiences in the James Bay Region of Quebec", preliminary paper prepared for the Conference on Hunters and Gatherers, Paris, June 27-30, 1978, p. 4.
- 24 The Northeastern Quebec Agreement was signed on January 31, 1978 to extinguish those rights of the Naskapis of Schefferville whose lands were included within the territory negotiated by the James Bay Cree and Inuit. This agreement is explained in greater detail in Chapter 4 with respect to overlapping claims.
- 25 The James Bay and Northern Quebec Agreement Section 2, p. 5.
- 26 Boyce Richardson, Strangers Devour the Land, p. 321.
- 27 Constance D. Hunt, "Native Land Rights and the Recognition of Native Culture", Perception (November/December 1977), p. 44 or The James Bay and Northern Quebec Agreement Section 5.1.4, p. 56.
- 28 Constance D. Hunt, "Native Land Rights", p. 45.
- 29 Boyce Richardson, Strangers Devour the Land, p. 322.
- 30 Idem.
- 31 R. Oughted, "Land Claims called Fight for Survival", The Native People 9:13 (March 26, 1976), p. 6.
- 32 Canadian Indian Rights Commission Library, Indian Claims in Canada, p. 31.
- 33 Harvey Feit, "Political Articulations of Hunters", p. 47.
- 34 Ibid, p. 43.

- 35 Harvey Feit, "Protecting Indigenous Hunters Way of Life", p. 7.
- 36 Idem.
- 37 Thomas R. Berger, Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry Vol. I (Toronto: McClelland and Stewart, (1973)), p. 72.
- 38 R. Fumoleau, As long as this shall last (Toronto: McClelland and Stewart, (1973)), p.72.
- 39 Thomas R. Berger, Northern Frontier, Northern Homeland, p. 167.
- 40 R. Fumoleau, As long as this land shall last, p. 167.
- 41 Francois Bregha, Bob Blair's Pipeline: The Business and Politics of Northern Energy Development Projects (Toronto: Lorimer and Co., 1979), p. 9.
- 42 Idem.
- 43 Ibid, p. 11.
- 44 G. Manuel, "An Appeal from the Fourth World", p. 16.
- 45 C. Alexander, Angry Society (Saskatoon: Yellowknife Publishing Co., 1976), p. 57.
- 46 Thomas R. Berger, loc. cit.
- 47 Ibid, p. 168.
- 48 Idem.
- 49 D. Sanders, "Native People in Internal National Expansion", p. 22.
- 50 Hugh and Karmel McCullum, "The Dene: Land and Unity for the Native People of the Mackenzie Valley, A Statement of Rights", Project North (Yellowknife: Dene of the N.W.T., (1975)).
- 51 D. Sanders, "Native People in Internal National Expansion", loc. cit.
- 52 R. Mehta, "Indian Aboriginal Rights left Unaltered Again by Supreme Court of Canada", Indian News 17:12 (February, 1977), p. 1.
- 53 D. Sanders, "Native People in Internal National Expansion", p. 23.
- 54 Francois Bregha, Bob Blair's Pipeline, p. 45.
- 55 Idem. In Chapter 4, a different interpretation of the political climate surrounding the role and impact of the Berger Inquiry has been offered by Michael Whittington.
- 56 Gurston Dacks, A Choice of Futures, p. 126.

- 57 Idem.
- 58 Idem.
- 59 Ibid, p. 137.
- 60 Francois Bregha, Bob Blair's Pipeline, p. 117.
- 61 Ibid, p. 47.
- 62 Ibid, p. 117.
- 63 G. Manuel, "An Appeal from the Fourth World", p. 13.
- 64 "North Natives For Rights, Not Against Development", loc. cit.
- 65 Indian Brotherhood of the Northwest Territories, "Dene Nation and Dene Declaration", Dene Rights: Supporting Research and Documents Vol. IV Paper 1 (Yellowknife, (1974)). This concept of a "Dene Nation" is concisely described in "Indians to Propose Native State", The Native People 9:39 (October 22, 1976), p. 1. The concept was rejected by the Minister of Indian Affairs in a public statement issued September 10, 1975.
- 66 "Metis Clarify Position of Association In Regards to the Dene", The Native People Vol. 9 no. 40 (October 29, 1976), p. 3.
- 67 "Organizations Still in Disagreement", The Native People Vol. 9 No. 37 (October 1, 1976), p. 5.
- 68 Office of Native Claims, Fact Sheets on Native Claims.
- 69 Hugh and Karmel McCullum, Project North. On August 3, 1977, the Prime Minister formally rejected the concept of a separate "Dene Nation", in announcing the appointment of Hon. C.M. Drury as the Government's Special Representative for Constitutional Development in the Northwest Territories. Drury's mandate was to consult with leaders of the GNWT, northern communities and northern native groups, and recommend measures to extend and improve representative government, responsive to the needs of all Northwest Territories residents.
- 70 Francois Bregha, Bob Blair's Pipeline, p. 119. On October 15, 1976, the Berger Inquiry had come to an end in Yellowknife after 283 days of testimony. Justice Berger had compiled over 40,000 pages of transcript and heard testimony from 1,700 witnesses.
- 71 Ibid, p. 128.
- 72 Gurston Dacks, A Choice of Futures, p. 138.
- 73 A claim proposal similar in objectives, in the form of a discussion paper, was presented by MANWT to the federal government on April 4, 1977, and distributed to various NWT communities and professional people across Canada. For a brief discussion of the presentation see Laurent Roy, "Metis Claim Proposal Revealed", The Native People Vol. 10 No. 20 (June 3, 1977), p. 1.

- 74 Metis Association of the Northwest Territories, "Our Land, Our Culture, Our Future", proposed agreement on objectives between the aboriginal peoples of the Mackenzie Corridor and the Government of Canada (September 1977).
- 75 James S. Frideres, "Native Settlements and Native Rights", p. 76.
- 76 Canada, Department of Indian Affairs and Northern Development, Dene and Metis Claims in the Mackenzie Valley: Proposals for Discussion (Yellowknife: January 24, 1978), p. 7.
- 77 The commitments for a separate political evolution process and one settlement in the Valley were reiterated in speeches by both Hon. J. Hugh Faulkner, Minister of DIAND, at the opening of the N.W.T. Council on January 20, 1978 and, Keith Penner, MP to the N.W.T. and Personal Representative for the Minister, at the All Chiefs' Conference, Fort Providence, January 10, 1978. See Proposals for Discussion booklet for both speeches.
- 78 Interview, Suzanne Loewen, Policy Analyst for the Dene Claims Office of Native Claims, Ottawa, 30 September 1983.
- 79 Hubert Johnson, "Unity Set Back Two Years by Dene Stance: Metis Boss", The Native People Vol. 11 No. 33 (August 25, 1978), p. 1.
- 80 Idem.
- 81 Interview, Suzanne Loewen, Policy Analyst for the Dene Claim, Office of Native Claims, Ottawa, 7 October 1983.
- 82 "Indian-Metis Split Widens", The Native People Vol. 9, No. 39 (October 22, 1976), p. 15.
- 83 Hubert Johnson, "Unity Set Back Two Years by Dene Stance", loc. cit.
- 84 "Metis Undermining Land Claim", The Native People Vol. 9 No. 48 (December 17, 1976), p. 8.
- 85 MANWT proposed that the Dene be responsible for negotiation and concluding a claims settlement within 12 months on behalf of both the Dene and Metis (50% of settlement benefits to go to the Metis Association).
- 86 Department of Indian Affairs and Northern Development, Comprehensive Native Claims, p. 10. The Dene-Metis negotiating team was to be comprised of the executives of the Dene Nation and the Metis Association of the NWT plus 10 regional representatives, two chosen by each of the five regions.
- 87 In the 1970s, Imperial Oil and Esso Resources had enhanced the level of production and recoverability of the reserves discovered at Norman Wells. Consequently, in March 1980, Interprovincial Pipelines applied to the NEB for a certificate of 'public convenience and necessity' for a twelve-inch pipeline from Norman Wells to Zama Lake, Alberta (the northern end of the existing pipeline system). In April 1981, NEB decided to approve the Norman Wells - Zama Lake Pipeline. Cabinet approval came shortly thereafter, following a refusal by the Federal Court to grant a leave of appeal sought by public interest groups. Two studies, one by NEB and the other by the Federal

- Environmental Assessment Review Office (FEARO), recommended conditional approval of the project, thereby challenging Berger's recommendation for a ten-year moratorium on any Mackenzie Valley pipeline in order to allow for settlement of aboriginal claims.
- 88 Opportunities for the native peoples were announced as over \$100 billion in business opportunities and 240 jobs during the construction phase and, operation and maintenance opportunities would generate up to 200 jobs and up to \$8 million per year in northern business opportunities. Canada, Department of Indian Affairs and Northern Development, Communique 1-8122 "Norman Wells Approved with a further one-year delay", (July 31, 1981), p. 3.
- 89 Canada, Department of Indian Affairs and Northern Development, Communique 1-8123 "Two-year Activity delay Put on New Petro-Canada Exploration Agreements in Mackenzie Valley", (July 30, 1981).
- 90 R. Page, "Norman Wells: The Past and Future Boom", Journal of Canadian Studies 16:2 (Summer, 1981), p. 29.
- 91 Canada, Department of Indian Affairs and Northern Development, Communique 1-8135 "Government announces Native Claims Policy", (December 16, 1981).
- 92 The Dene Nation and the Metis Association of the NWT, Public Government for the People of the North (Yellowknife: November 9, 1981), pp. 4-6.
- 93 S.M. Malone, "Guaranteed Representation of Aboriginal Peoples in Institutions of Public Government", Prepared for the Legislative Assembly Special Committee on Constitutional Development, June 1983, p. 17.
- 94 Ibid, p. 18.
- 95 Interview, Suzanne Loewen, Policy Analyst for the Dene Claim, Office of Native Claims, Ottawa, 30 September 1983.
- 96 Also, during this session, the Dene reintroduced the topic of constitutional /political development. On Friday, August 6, the Minister of DIAND sent telexes to the leaders of both the Dene and Metis, who were meeting at Drum Lake, expressing disappointment in the pace of negotiations and re-emphasized that political and constitutional evolution and the definition of aboriginal rights were not matters to be resolved within the claims forum.
- 97 Interview, Suzanne Loewen, Policy Analyst for the Dene Claim, Office of Native Claims, Ottawa, 30 September 1983.
- 98 Office of Native Claims, Perspectives in Native Land Claims Policy, p. 10.
- 99 Interview, Suzanne Loewen, Policy Analyst for the Dene Claim, Office of Native Claims, Ottawa, 7 October 1983.
- 100 Canada, Department of Indian Affairs and Northern Development, Communique 1-8125 "Overlapping Claims in Northwest Territories", (September 8, 1983), p. 1.

- 101 Idem. At the time of writing, the fact-finder is still conducting and gathering research in this process. Mr. Munro has indicated that the problem of overlaps is hoped to be resolved by the end of 1983.
- 102 Canada, Department of Indian Affairs and Northern Development, Communiqué 1-8133 "Resumption of Claims funding for Dene and Metis in NWT", (October 3, 1983), p. 2.
- 103 Ibid, p. 1.
- 104 Council for Yukon Indians, Together Today for our Children Tomorrow Vol. 2 (Brampton: Charters Publishing Co., 1976), p. 6.
- 105 Kenneth M. Lysyk, Edith E. Bohmer and Willard L. Phelps, Alaska Highway Pipeline Inquiry (Ottawa: Supply and Services Canada, 1977), p. 2.
- 106 Council for Yukon Indians, Together Today for our Children Tomorrow Vol. 2, p. 7. The area claimed by the CYI is all of the Yukon Territory north of the 65th parallel and bordered by the Northwest Territories on the east, Alaska on the west, and the Beaufort Sea on the north, some 207,000 square miles.
- 107 Yukon Native Brotherhood, Together Today for our Children Tomorrow: A Statement of Grievances and an Approach to Settlement by the Yukon Indian People (Whitehorse: January, 1973), passim.
- 108 Idem. A more concise summary can be found in Yukon Native Brotherhood, Together Today for our Children Tomorrow: A Summary (February 1973).
- 109 Yukon Association for Non-Status Indians, Statements of proposed Settlement of Claims by the Indian people of the Yukon Territory, presented to the House of Commons Standing Committee of Indian Affairs and Northern Development (May 29, 1973), Appendix M, p. 2.
- 110 "Yukon Indians Offered \$80 Million Settlement", The Native People Vol. 9 No. 21 (June 11, 1976), p. 6.
- 111 Canada, Department of Indian Affairs and Northern Development, Communiqué 1-7340 "Statement made by the Honourable Jean Chretien to the Yukon Community", (August 8, 1973).
- 112 Council for Yukon Indians, Together Today for our Children Tomorrow Vol. 2, p. 13.
- 113 Ibid, p. 11.
- 114 Kenneth Lysyk, et al., Alaska Highway Pipeline Inquiry, pp. 111-12.
- 115 Ibid, p. 110.
- 116 Idem.
- 117 Peter A. Cumming, "Canada: Native Land Rights and Northern Development", p. 36. The allocated lands were divided into six categories. Categories IV thru VI were comprised of burial sites, sacred grounds, and

historical sites, five-acre parcels (lots) available for lease by Natives, and unoccupied Crown Lands where Indians would be allowed to hunt for food for "subsistence purposes only".

- 118 Kenneth Lysyk, et al., Alaska Highway Pipeline Inquiry, pp. 112-13.
- 119 Council for Yukon Indians, Together Today for our Children Tomorrow Vol. 2, p. 13.
- 120 "Yukon Land Talks Re-open in Ottawa", The Native People Vol. 9 No. 20 (June 4, 1976), p. 7.
- 121 Gary George, "Willie Joe Wants Native Rights Protected", The Native People Vol. 9 No. 10 (March 19, 1976), p. 13.
- 122 In May 1976, Mr. George Manuel, President of NIB, publicly released the Yukon draft agreement-in-principle and the federal draft. Mr. Manuel actively opposed any settlement based on these drafts, an action that immobilized CYI, and contributed to the suspension of negotiations.
- 123 Council for Yukon Indians, Together Today for our Children Tomorrow Vol. 1 (Brampton: Charters Publishing Co., 1976).
- 124 The Planning Council examined a range of subjects such as the following: eligibility; land; water; government structures; health and social services; education and justice as they pertain to Yukon Indians; hunting, trapping and fishing; legal entities to administer proceeds of settlement; cash; resource revenues; taxation, and; native economic development. Consult Planning Council Position, "Co-operative Planning Toward a Settlement of the Yukon Indian Land Claim", Document #1 (January 21, 1977). This paper also provides a description of the structure of the Council (ie. working groups).
- 125 On March 8, 1977, the Planning Council released Document #3 "Eligibility". The document outlines guidelines with respect to eligibility criteria and the establishment of accreditation (a Central Registrar and a Credentials Committee in each community) and appeal procedures (a five-member Appeal Board, two members appointed by both CYI and the Government of Canada and one independent member).
- 126 Kenneth Lysyk, et al., Alaska Highway Pipeline Inquiry, p. 3. At about the same time, the federal government established an Environmental Assessment Review Panel to prepare a preliminary statement on the environmental implications of the Alcan proposal. The panel was directed to submit its report by August 1, and like the Lysyk Inquiry, no extension of time was feasible.
- 127 Joe Jack, Statement by the Council for the Yukon Indians to the Native Land Claims Plenary Session of the Second National Workshop on People, Resources and the Environment North of 60°, Edmonton, February 20-22, 1978, in Robert F. Keith and Janet B. Wright eds., Northern Transitions Vol. II (Ottawa: CARC, (1978)), p. 100.
- 128 Laurent Roy, "CYI - Negotiations Still Pending", The Native People Vol. 10 No. 21 (June 10, 1977), p. 11.

- 129 Council for Yukon Indians, Presentation to the Alaska Highway Pipeline Inquiry (Whitehorse: May 16, 1977), p. 1.
- 130 Ibid, p. 6.
- 131 Kenneth Lysyk, et al., "Letter to the Minister", Alaska Highway Pipeline Inquiry, p. X.
- 132 Ibid, p. VIII.
- 133 Ibid, p. XI.
- 134 Ibid, p. XIV.
- 135 Interview, Sara Gaunt, Council for Yukon Indians - Negotiations, Ottawa, 3 November 1983.
- 136 An important event occurred in the claims process. In the summer of 1978, Hon. Hugh Faulkner, Minister of DIAND, removed 15,000 square miles of Yukon lands from the negotiation table. Of this total, 5,000 square miles of coastal territory was designated as part of the COPE claim and the additional lands were set aside for a national park.
- 137 "Yukon Indian Position 1979: Together Today for Our Children Tomorrow", Northern Perspectives Vol. 7 No. 4 (Ottawa: CARG, 1979), pp. 7-8.
- 138 Interview, Sara Gaunt, Council for Yukon Indians - Negotiations, Ottawa, 2 November 1983. Within the statement there was no mention of the quantity of land which would comprise Category I. A land use planning commission was to be established to administer the land provisions. Unfortunately, further specifics concerning the CYI revised proposal and the federal response have remained within the confidence of the claims negotiation process. Both parties announced their commitment to intense negotiations, beginning April 1979.
- 139 Office of Native Claims, Fact Sheets on Native Claims.
- 140 Department of Indian Affairs and Northern Development, Comprehensive Native Claims, p. 15.
- 141 "Yukon negotiators agree", The Native People Vol. 14 No. 9 (February 27, 1981), p. 6.
- 142 Department of Indian Affairs and Northern Development, Comprehensive Native Claims, p. 8.
- 143 Office of Native Claims, Perspectives in Native Land Claims Policy, p. 9.
- 144 The six YTG issues will be discussed in further detail in the following chapter regarding the influence of claims interface with political evolution.
- 145 On May 27, 1983, CYI invited YTG back to the negotiation table.
- 146 Office of Native Claims, Perspectives in Native Land Claims Policy, p. 9.

- 147 Interview, Heather Flynn, Policy Analyst for the Yukon Claim, Office of
Native Claims, Ottawa, 14 October 1983.
- 148 Interview, Sara Gaunt, Council for Yukon Indians - Negotiations, Ottawa, 3
November 1983.
- 149 Canada, Parliament, House of Commons, Debates 17 December 1982.

Chapter 4

- 1 Robert Bourassa, James Bay (Montreal: Harvest House Ltd., 1973), pp. 8-16.
- 2 These are the four principal parties involved in the pipeline deliveries in
Canada. The statement is not intended in any sense to omit or gloss over the
vested interests in the pipeline proposals.
- 3 Francois Bregha, Bob Blair's Pipeline, p. 30.
- 4 Ibid, p. 46.
- 5 The Northern Pipeline Act (Bill C-25) was passed in April 1978, approving the
construction of the Alaska pipeline across land on which unresolved native
claims still existed. The Act also contained stringent limitations on an
appeal process for those affected by the construction. The Canada Oil and
Gas Act (Bill C-48) of December 1980 removed areas of the Norman Wells
oilfield from the claims bargaining table, ignoring the concept of aboriginal
title.
- 6 This line of argument is made by Edgar Dosman, The National Interest: The
Politics of Northern Development 1968-75; Gurston Dacks, A Choice of
Futures: Politics in the Canadian North; Earle Gray, Super Pipe: The Arctic
Pipeline - World's Greatest Fiasco; Stephen Clarkson, Canada and the Reagan
Challenge, and; Francois Bregha, Bob Blair's Pipeline: The Business and
Politics of Northern Energy Development Projects.
- 7 Interview, Michael Whittington, Department of Political Science, Carleton
University, Ottawa, 7 November 1983.
- 8 Robert Bourassa, James Bay, p. 8.
- 9 George Manuel and Michael Posluns, The Fourth World (Don Mills: Collier-
Macmillan Canada, 1974), p. 197.
- 10 Office of Native Claims, Fact Sheets on Native Claims. The Naskapis agreed
to "hereby cede, release, surrender and convey all their native claims, rights,
titles and interests . . ." in return for \$6 million, exclusive harvesting rights
to 1,600 square miles, ownership of 268 square miles of land, and timber and
harvesting rights to Category III lands, which comprised the remainder of the
"Naskapi Sector". Provisions for local government structures, government
services and programs, and environment and future development were also
included.
- 11 Gurston Dacks, A Choice of Futures, pp. 121-2.

- 12 Government of the Northwest Territories, Legislative Assembly of the N.W.T., Debates 8th Assembly 66th Session 27 October 1978, p. 443.
- 13 Government of the Northwest Territories, Report of the Ninth Legislative Assembly (Yellowknife, 1983), p. 8.
- 14 The overriding consideration of native participation and issues can be found in a number of position papers and statements made by GNWT. A good indication of the Ninth Assembly's support of aboriginal rights can be found in "Aboriginal Rights and the Constitution", GNWT Position Paper, November 16, 1982.
- 15 Gurston Dacks, A Choice of Futures, p. 82.
- 16 Political development in N.W.T. will also be influenced by the Nunavut proposal put forward by the Inuit Tapirisat of Canada. Should Nunavut become a separate territory, the majority of the population in the remaining part of the Northwest Territories will be white. This development could lead to the election of a future Assembly whose views on native claims and northern development closely resemble those of the Yukon Assembly or the Eighth Assembly of the N.W.T. The territorial Assembly could then be presented as an alternative to separate native institutions towards aboriginal self-determination.
- 17 Government of the Yukon Territory, Analysis and Position on Yukon Indian Land Claims (October 1974), p. 3. This policy statement also suggests that the Natives should receive complete title to 1,200 square miles of land; a lump-sum payment of \$25-30 million; no royalties, and; some guarantee for preferential harvesting rights.
- 18 Yukon Territorial Government, Presentation to the Alaska Highway Pipeline Inquiry No. 1 (Whitehorse: July 8, 1977); p. 10.
- 19 Interview, Heather Flynn, Policy Analyst for the Yukon Claim, Office of Native Claims, Ottawa, 14 October 1983.
- 20 Francois Bregha, Bob Blair's Pipeline, pp. 85-6.
- 21 Stephen Clarkson, Canada and the Reagan Challenge (Toronto: James Lorimer & Co., 1982), p. 146.
- 22 Francois Bregha, Bob Blair's Pipeline, p. 56.
- 23 Under Bill C-25, a person had 10 days to appeal a ruling; an "affected" person was only interpreted in the economic sense (ie. not culturally), and; the Courts could only refer an appeal back to the Agency for reconsideration. For a good description of the contentious development of this bill, consult "Bill C-25: An Act of Haste, An Act of Faith", Northern Perspectives Vol. 6 No. 2, 1978.
The strict adherence to the American decision schedule is further indicated by the decision of Hon. Hugh Faulkner not to conduct a 2nd-stage inquiry as originally put forward by Warren Allmand. The Minister asserted that the Lysyk Inquiry had been through enough and any further study would be the responsibility of the Northern Pipeline Agency. See Michael Beer, "CYI critical of federal Yukon claims proposal", The Native People Vol. 11 No. 6 (February 10, 1978), p. 1.

- 24 George Manuel, "An Appeal from the Fourth World", p. 13.
- 25 Idem.
- 26 Gary George, "Natives Only Want Control", The Native People Vol. 9 No. 10 (March 19, 1976), p. 2.
- 27 George Manuel, supra.
- 28 Council for Yukon Indians, "Yukon Indian Position 1979", p. 6.
- 29 George Manuel, supra.
- 30 Boyce Richardson, "James Bay and Mackenzie Valley", Canadian Forum Vol. 56 (November, 1976), p. 34.
- 31 Gurston Dacks, A Choice of Futures, p. 81.

Chapter 5

- 1 Interview, John McDermid MP, Progressive Conservative Critic for Indian Affairs, Ottawa, 1 November 1983.
- 2 Peter A. Cumming, "Native Rights and Northern Development", p. 58.
- 3 James S. Frideres, "Native Settlements and Native Rights", p. 77.
- 4 Frances Abele, "Native Corporations in the Northwest Territories: Economic Development and the Prospects of Self-Determination", a paper presented to the Annual Meeting of the Canadian Political Science Association, University of British Columbia, June 6-8, 1983, p. 19.
- 5 Government of the Northwest Territories, "Aboriginal Rights and the Constitution", GNWT Position Paper (November 16, 1982), p. 18.
- 6 R.L. Barsh and J. Henderson, "Aboriginal Rights, Treaty Rights and Human Rights: Indian Tribes and Constitutional Renewal", Journal of Canadian Studies Vol. 17 No. 2 (Summer, 1982), p. 77.
- 7 J. Sallot, "Natives will get more rights talks but not a veto", Globe and Mail (March 17, 1983), p. 9.
- 8 R. Sheppard, "Provinces block statement of principles", Globe and Mail (March 17, 1983), p. 9.

Postscript

- 1 Canada, House of Commons, Minutes of Proceedings and Evidence of Special Committee on Indian Self-Government Issue No. 1 (December 22, 1982), p. 1:3.

- 2 Canada, House of Commons, Report of the Special Committee on Indian Self-Government Issue No. 40 (Ottawa: October 12, 1983), p. 134.
- 3 Ibid, p. 115.
- 4 Idem.
- 5 Ibid, pp. 115-6.
- 6 Ibid, p. 63.
- 7 Ibid, p. 141.
- 8 Ken MacQueen, "Give Indian self-government and scrap department: Report", Gazette (Montreal: November 3, 1983), p. B-1.

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