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# **RESOURCE ALLOCATION AND DEVELOPMENT: SELECTED ISSUES FROM NORTHERN CANADA\***

Constance D. Hunt\*\*

## **I. Introduction**

Canada north of the sixtieth parallel has increasingly come under public scrutiny for the past two decades. As our last frontier, it has been viewed romantically as a storehouse of resource wealth and as a partial solution to our energy problems in the last decade of the 20th century. The oil and gas and mining sectors have pumped billions of dollars into exploration activities in the North. Direct government investments have also been substantial, through the participation of Petro Canada in certain ventures and subsidization of petroleum exploration and mining projects. This activity in Northern Canada has coincided with the increased environmental consciousness that characterizes our times. Given the delicate ecosystem of the North, many environmental concerns have been raised about the possible effects of development.

There have been three major results from the fact that development activities and environmental consciousness occurred in tandem. First, there has been a spurt of legislative initiatives designed to improve the environmental protection regime north of the sixtieth parallel. Second, proponents of development have been forced to expend much time and money on studies to assess the environmental and other impacts of their proposed activities. Third, considerable attention has been paid to the review processes whereby resource development decisions are taken and the way in which the appropriate considerations are fed into that process.

The "people" side of resource development has also been identified as a major factor in this equation. The North is sparsely populated and

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the majority of its inhabitants are aboriginal or native peoples who, until recently, had been insulated from the influence of southern society. The onslaught of development-related activities has removed this insulation and exposed them to an unprecedented rate of social change.

While there are many factors that distinguish resource development decisions in Northern Canada from those that occur south of the sixtieth parallel, there are nonetheless common problems. One advantage in studying northern development is that issues that may be obscured in the South can emerge clearly in the North. Thus, the recognition and resolution of these problems in the North may help improve the quality of resource decision-making in Southern Canada.

In the paper that follows, two areas of Northern Canada have been selected to illustrate our resource development experiences. The first concerns mineral exploration in the Keewatin District of the Northwest Territories and the second relates to proposals for oil and gas pipelines and other developments in the Yukon and the western portion of the Northwest Territories. Both examples demonstrate the serious resource use conflicts that can arise in the exploitation of non-renewable resources. Both exemplify the tension between hard economic values and softer social and environmental values and illustrate the means whereby our legal, regulatory and political system attempts to deal with that tension.

In each case, the factual background to the development is sketched in to provide a context in which to view the issues. Suggestions are made as to lessons that can be drawn from each case. The final section contains some general observations about the relevance of these two Northern Canadian examples to resource decisions being made elsewhere.

## **II. The Baker Lake Case**

The legal, social, economic and environmental issues raised by resource exploration and development in the Canadian North were put into stark relief by the case of mining in the Keewatin District of the Northwest Territories, which came to public attention in 1978 due to a legal action against the government of Canada and six mining companies commenced by the Inuit of Baker Lake and their national organization, the Inuit Tapirisat of Canada (ITC).

Baker Lake was a community of some 1,000 people, located about 200 miles west of Hudson Bay and about 150 miles south of the Arctic Circle. It is unique in that it is the only inland settlement of Inuit in Canada (traditionally, the Inuit have resided in coastal areas). There is

evidence that Inuit occupation of the area goes back as far as 1,000 B.C.,<sup>1</sup> although until recent times the Inuit were a nomadic people who did not settle permanently in one place. Beginning about 1914, white traders and others established posts in the vicinity, followed by missionaries, the Royal Canadian Mounted Police, the Canadian Army and the government.<sup>2</sup> During the 1950's and 1960's, most of the Inuit living in scattered camps moved to the settlement, where their children could be schooled. Despite this significant change in their living pattern, they continue to rely heavily on regional caribou herds as a primary food source.<sup>3</sup>

Two large caribou herds, the Beverly and Kaminuriak, are found in the area, numbering about 124,000 and 41,000 animals respectively.<sup>4</sup> While other wildlife is also present, the caribou have been the focus of greatest concern. In part, this reflects the economic importance of the resource: it was estimated that about two-thirds of the value of wildlife harvest to the community could be imputed to caribou consumption. In dollar terms, caribou meat was valued at \$683,000 per year or \$4,350 per family, over 42% of the 1977 real income of heads of households in the community.<sup>5</sup> As a species caribou are notoriously susceptible to human disturbance.<sup>6</sup> Moreover, a decline in the Kaminuriak herd has been noted, a matter of concern to wildlife biologists.<sup>7</sup> The Baker Lake area was also important to industrial interests.<sup>8</sup> In 1969, prospecting permits for approximately one-third of the area were granted, reflecting the belief in the possibility of uranium finds. Most of the activity was exploratory in nature, with the exception of diamond drilling on some mineral claims. The exploration activity included extensive use of helicopters and other low-flying aircraft,

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1. *Survival of the Inuit Culture vs. Mining*, I.T.C. NEWS, Sept. 1979, at 10-11, quoting from the testimony of Dr. Elmer Harp, a professor of anthropology, to the Federal Court of Canada in the Baker Lake case.

2. T. Welland, *Inuit Land Use in the Keewatin District and Southhampton Island* in I INUIT LAND USE AND OCCUPANCY PROJECT 105 (1976) (Published by the Minister of Supply & Services Canada, Ottawa).

3. See, generally, I.T.C. NEWS, *supra* note 1.

4. 1 Interdisciplinary Systems Ltd., Executive Summary, Effect of Exploration and Development in the Baker Lake Area, Study Report, February, 1978, at iv. [hereinafter referred to as I.D.S.].

5. *Id.* See also *Hamlet of Baker Lake v. Minister of Indian Affairs & N. Dev.*, 87 D.L.R.3d 342, 345 (1978) [hereinafter referred to as The Baker Lake Interlocutory Injunction Case].

6. I.T.C. NEWS, *supra* note 1, at 11-12.

7. Allison, *Caribou: Management of a Vital Resource*, 2 NORTHERN TRANSITIONS, SECOND NATIONAL WORKSHOP ON PEOPLE, RESOURCES & THE ENVIRONMENT NORTH OF 60# 222 (R.F. Keith & J. B. Wright eds. 1978) (Published by the Canadian Arctic Resources Committee, Ottawa).

8. I.D.S., *supra* note 4, at 78.

drilling and blasting and the establishment of camps and other facilities.<sup>9</sup> If non-renewable resources are developed, there will be long-term impacts arising from the construction of roads and other permanent facilities. Furthermore, in December 1977, Polar Gas made initial filings to the National Energy Board pursuant to an application to construct a pipeline to transport natural gas from the Arctic Islands to southern markets. Part of the proposed routing crossed an area west of the settlement.<sup>10</sup>

The people of Baker Lake expressed concern over these industrial activities at an early stage.<sup>11</sup> In April 1974, a formal petition was sent by the community to the federal and territorial governments, objecting to mineral exploration. In 1975, pursuant to a new policy initiative announced by the Department of Indian Affairs, the ITC presented a land freeze proposal to the government on behalf of the community. This was rejected by the government on the argument that existing environmental controls, under the Territorial Land Use Regulations,<sup>12</sup> would protect the land and wildlife from excessive environmental damage. These Regulations constitute a system of land use controls on industrial activities rather than a management system involving pre-selection and allocating specific lands to appropriate uses.<sup>13</sup> One problem with the application of the Regulations to the Baker Lake area between 1971 (when they were first promulgated) and 1975 was that only general, nonspecific controls were applicable. In November 1975 the government designated part of the Eastern Arctic as a Land Management Zone, including the Baker Lake area.<sup>14</sup> This somewhat improved the degree of environmental protection in that it required operators to obtain land use permits for their work. Thereafter, specific terms and conditions could be written into permits governing operations in particular places.<sup>15</sup>

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9. The Baker Lake Interlocutory Injunction Case, *supra* note 5, at 345-6.

10. A general review of the Polar Gas application and its predicted impact may be found in FRANK J. TESTER, *SOCIO-ECONOMIC AND ENVIRONMENTAL IMPACTS OF THE POLAR GAS PIPELINE KEEWATIN DISTRICT (1979)* (Published by Environmental-Social Program Northern Pipelines, Ottawa). The application is still under review, with additional information being required. N.E.B. Regulatory Agenda, Dec. 1, 1986.

11. This overview is derived from Summary of Principal Events, Background Information to I.D.S., *supra* note 4.

12. Now SOR 82-217.

13. A general review of the operation of the Land Use Regulations is found in KENNETH P. BEAUCHAMP, *LAND MANAGEMENT IN THE CANADIAN NORTH (1976)* (Published by the Canadian Arctic Resources Committee, Ottawa).

14. Now dealt with by the Regulations themselves, *supra* note 12.

15. Beauchamp, *supra* note 13, at 130.

Nevertheless, the community continued to express dissatisfaction about exploration activities in the Baker Lake area. In the face of growing development pressures, in April 1977 the Minister of Indian and Northern Affairs imposed a one-year suspension on the issuance of mineral rights and land use permits near Baker Lake (the Baker Lake Study Area).<sup>16</sup> In the year following, a study was undertaken by a consultant group, Interdisciplinary Systems Ltd. of Winnipeg, concerning the effects of exploration and development in the Baker Lake Study Area.<sup>17</sup> The consultants were assisted in their work by an Advisory Committee made up of Inuit from Baker Lake.

The I.D.S. Report made a number of recommendations. These included:

1. A program of intensive monitoring should be undertaken whenever long-term activities identified as having potentially adverse impacts on wildlife and fish species are permitted in any critical area.

2. Aircraft operations should be strictly controlled in areas critical to caribou, including calving grounds, post-calving areas, and water-crossing sites.

3. Where land use permits are not required, holders of mineral prospecting permits should be required to advise communities of all proposed field activities, and programs should be tailored with community concerns in mind.

4. The land use permit system should be revised to ensure that communities have an adequate time to review and comment on land use permit applications.

5. Special controls should be imposed concerning land use activities in critical caribou areas, including calving and post-calving grounds and water-crossing sites. Such controls would restrict the location of facilities and facility design, regulation of aircraft activities, timing of activities, and possible prohibition of industrial facilities in certain areas.

Following the release of the I.D.S. Report, the 1977 freeze in the Baker Lake Study Area was extended by the government to April 24, 1978.<sup>18</sup> Because of the government's announced intention to permit exploration to proceed in the summer of 1978 within the parameters recom-

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16. S.I./77-94. The freeze is discussed briefly in A.R. Lucas & E.B. Peterson, *Northern Land Use Law & Policy Development: 1972-78 & the Future*, NORTHERN TRANSITIONS, *supra* note 7, at 66-7.

17. I.D.S., *supra* note 4.

18. The pertinent events leading to the litigation are outlined in the Baker Lake Interlocutory Injunction Case, *supra* note 5, at 343.

mended by the Report, a Statement of Claim was issued on April 17, 1978, seeking an interlocutory injunction prohibiting the issue of prospecting permits, the grant of mining leases and the recording of claims under the Canada Mining Regulations,<sup>19</sup> and the issue of permits under the Territorial Land Use Regulations<sup>20</sup> in respect of mining exploration and related activities in the Baker Lake area. A day later an interim injunction was sought before the Federal Court of Canada, because exploration crews were assembled at Churchill, Manitoba, ready to proceed to the field as soon as the withdrawal order expired. The plaintiffs in the case included the Inuit Tapirisat of Canada, the Hamlet of Baker Lake, the Baker Lake Hunters and Trappers Association, and 113 named Inuit Hunters. Defendants included officials and representatives of the Government of Canada, as well as the companies Urangesell Schaft Can. Ltd., Noranda, Pan Ocean Oil Co., Cominco, Western Mines and Essex Minerals Co.

On April 24, 1978, Mr. Justice Patrick Mahoney of the Federal Court of Canada, Trial Division, granted an interlocutory injunction to the plaintiffs.<sup>21</sup> He noted that the disputed issue of fact in the motion was the nature and extent of the effects of mining and exploration activities on the caribou, and not whether there would be any effect. He also pointed out that the existence of a special relationship between the Inuit and the caribou was undisputed. He adopted the approach of the House of Lords in *American Cyanamid v. Ethicon Ltd.*<sup>22</sup> That case held that if in determining whether an interim injunction should be granted, it can be established that there is a serious question to be tried, the court must go on to consider whether damages would adequately compensate the plaintiff for any loss he might sustain as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages would be inappropriate, this approach requires that the court then must consider the balance of convenience as between the parties in deciding whether or not to grant the interim injunction. In this case, Mr. Justice Mahoney concluded that the basis of the plaintiffs' action (an assertion of aboriginal rights by the Inuit) raised a serious question to be tried. Moreover, if the plaintiffs were to succeed at trial, damages would be an inadequate remedy. He

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19. S.O.R./77-900.

20. *Supra* note 12.

21. Baker Lake Interlocutory Injunction Case, *supra* note 5.

22. [1975] A.C. 396.

held that "the balance of convenience falls plainly on the side of granting an interim injunction. The minerals, if there, will remain; the caribou, presently there, may not."<sup>23</sup>

The interim injunction was limited in its scope. It permitted activities to proceed, but subject to certain conditions. First, the recommendations of the Baker Lake Report were required to be imposed upon land use permits, rendering them invalid within 4.8 kilometers of identified major water crossings, within identified calving grounds between May 15 and June 30, and within identified post-calving grounds during July in any year. Second, the same conditions were also applied to prospecting permits under the Canada Mining Regulations. Third, the use of helicopters and other low-flying aircraft over prescribed areas was prohibited. Finally, permitted activity could not proceed beyond exploration to mining prior to the trial of the action.

The case came to trial in the spring of 1979 and judgment was issued near the end of that year.<sup>24</sup> The result may be viewed as a partial victory for both sides. Mr. Justice Mahoney of the Federal Court found that the plaintiffs were entitled to a declaration as to their aboriginal right and title to hunt and fish over much of the claimed area.<sup>25</sup> He dismissed the balance of their action on the ground that the impugned mining laws were valid and must prevail in the event of a conflict with the aboriginal rights, leaving open the possibility that, if the mining laws diminished the aboriginal rights, the Inuit might be entitled to compensation.<sup>26</sup> While accepting the evidence that the Kaminuriak caribou herd was in serious decline, he was unable to find, on a balance of probabilities, that the causes were mineral exploration activities.<sup>27</sup>

It is possible to draw from the *Baker Lake* case a number of observations concerning the process of resource allocation and development in Northern Canada.

First, both our society and its legal system have yet to come fully to grips with the land and related rights being asserted by its aboriginal peoples. Such rights were clearly recognized by Canada's early administrators and governors, through the treaty process which occurred as settlement took place. In the North and other isolated areas, however,

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23. *Supra* note 5, at 348.

24. *Hamlet of Baker Lake v. Minister of Indian Affairs & N. Dev.*, 107 D.L.R.3d 513 (1979) [hereinafter referred to as the Baker Lake decision].

25. *Id.* at 560.

26. *Id.* at 557.

27. *Id.* at 534.



these claims were ignored and/or denied until the early 1970's. In the absence of negotiated settlements, the federal government has refused to make significant alterations to the development process and has acted as though the rights are non-existent.<sup>28</sup> On the one hand, it has funded aboriginal organizations to research and prepare settlement proposals for negotiation. At the same time, and specifically so in the context of the *Baker Lake* case, it has adopted a very narrow legal approach to the existence and nature of aboriginal rights. Not surprisingly, this contradictory behaviour has puzzled aboriginal groups and weakened their confidence in the negotiating process. This has sometimes led them to the courts, which by their nature are of limited usefulness in resolving the complex questions arising from aboriginal claims.

Second, although our understanding about the interaction between certain wildlife species and man's activities remains imperfect, industrial activities are proceeding. Moreover, we have failed to deal effectively with scientific ambiguities or differences of opinion. Mr. Justice Mahoney, for example, accepted the fact that the Kaminuriak herd was in serious decline, observing:

The causes of that decline were the subject of considerable recrimination between the Inuit hunters and the Government wildlife experts who testified. It is beyond the scope of this action to determine what the causes are, as long as, on a balance of probabilities, on the evidence before me, it has not been mineral exploration activities. While the overall caribou population of the Baker Lake Area appears to have declined and the ability of the Baker Lake hunters to satisfy their

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28. The Northern Pipelines Act, R.S.C. 1977-78, c.20, which authorized the construction of the Alaska Highway gas pipeline recognizes aboriginal claims. Section 23.1 provides as follows:

23.1 Native claims unaffected.) Notwithstanding this Act, any native claim, right, title or interest that the native people of Canada may have had prior to the coming into force of this Act in and to the land on which the pipeline will be situated continues to exist until a settlement in respect of any such claim, right, title or interest is effected.

Reference is also made to native claims in 1974 amendments to the National Parks Act, R.S.C. 1970, c.N-13, discussed in C. HUNT, R. MILLER & D. TINGLEY, *LEGISLATIVE ALTERNATIVES FOR THE ESTABLISHMENT OF A WILDERNESS AREA IN THE NORTHERN YUKON* 80 (1979) (Published by the Canadian Arctic Resources Committee, Ottawa). Negotiated settlements have been reached in two areas of Northern Canada. See *The James Bay and Northern Quebec Agreement* (Quebec: Editeur Officiel du Quebec, 1976) supplemented by the *Northeastern Quebec Agreement* in 1978; and *The Inuvialuit Final Agreement* (Indian and Northern Affairs Canada, 1985). Lack of progress in negotiating claims led the government of Canada to commission a major policy review in 1985. See CANADA, *TASK FORCE TO REVIEW COMPREHENSIVE CLAIMS POLICY, LIVING TREATIES, LASTING AGREEMENTS: REPORT OF THE TASK FORCE TO REVIEW COMPREHENSIVE CLAIMS POLICY* (1985) (Published by the Dept. of Indian Affairs & N. Development).

needs from that population has undoubtedly been impaired, the balance of probabilities, on the evidence, is that activities associated with mineral exploration are not a significant factor in the population decline.<sup>29</sup>

In the event of scientific uncertainty, it seems, doubts will be resolved in favour of the status quo.

Third, there remain significant gaps in our system of environmental regulation. Specific shortcomings were identified and remedied by Mr. Justice Mahoney in the Baker Lake area, but are unresolved in other areas of the North (for example, the lack of controls on mineral prospecting).

Fourth, even to the extent that the environmental regulation system is effective from an ecological viewpoint, it is still weak from a social perspective. For instance, the I.D.S. Report pointed out the ineffectiveness of the Land Use Regulations from the point of view of introducing local concerns into the process. This concern has been constantly stressed by environmental and aboriginal groups, but problems remain.<sup>30</sup>

Fifth, our approach to development in the North has focused very little on the social impacts of industrial activity. Lawyers for the Baker Lake Inuit asserted that, without caribou, the Inuit cannot survive: "This case is about the preservation of Inuit who are an endangered species, and to do that we have to protect caribou."<sup>31</sup> Testimony in the *Baker Lake* case suggested that even Inuit art forms were threatened by the destruction of wildlife, since people draw and make prints of the animals they see on the land.

Finally, our ability to carry out resource development economically is reduced by the degree to which the above issues are unresolved at the time the development process commences, a point underscored by the *Baker Lake* case. The failure to resolve social, environmental and legal issues in advance of exploration activities led to litigation, which delayed the prosecution of mining permits by industry. Delays imply costs, create uncertainty and discourage investment. Thus, the lack of planning may have a depressing effect on the rate and extent of resource development activities, a result that may be contrary to our national economic interests.

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29. Baker Lake decision, *supra* note 24, at 534.

30. One of the earliest expressions of this problem is found in P.J. USHER & G. BEAKHUST, *LAND USE REGULATION IN THE CANADIAN NORTH* (1973) (Published by the Canadian Arctic Resources Committee, Ottawa). It is discussed in detail in Lucas & Peterson, *supra* note 16, at 67 et seq.

31. I.T.C. NEWS, *supra* note 1, at 4, Statement by counsel to the Inuit, Mr. Aubrey Golden.

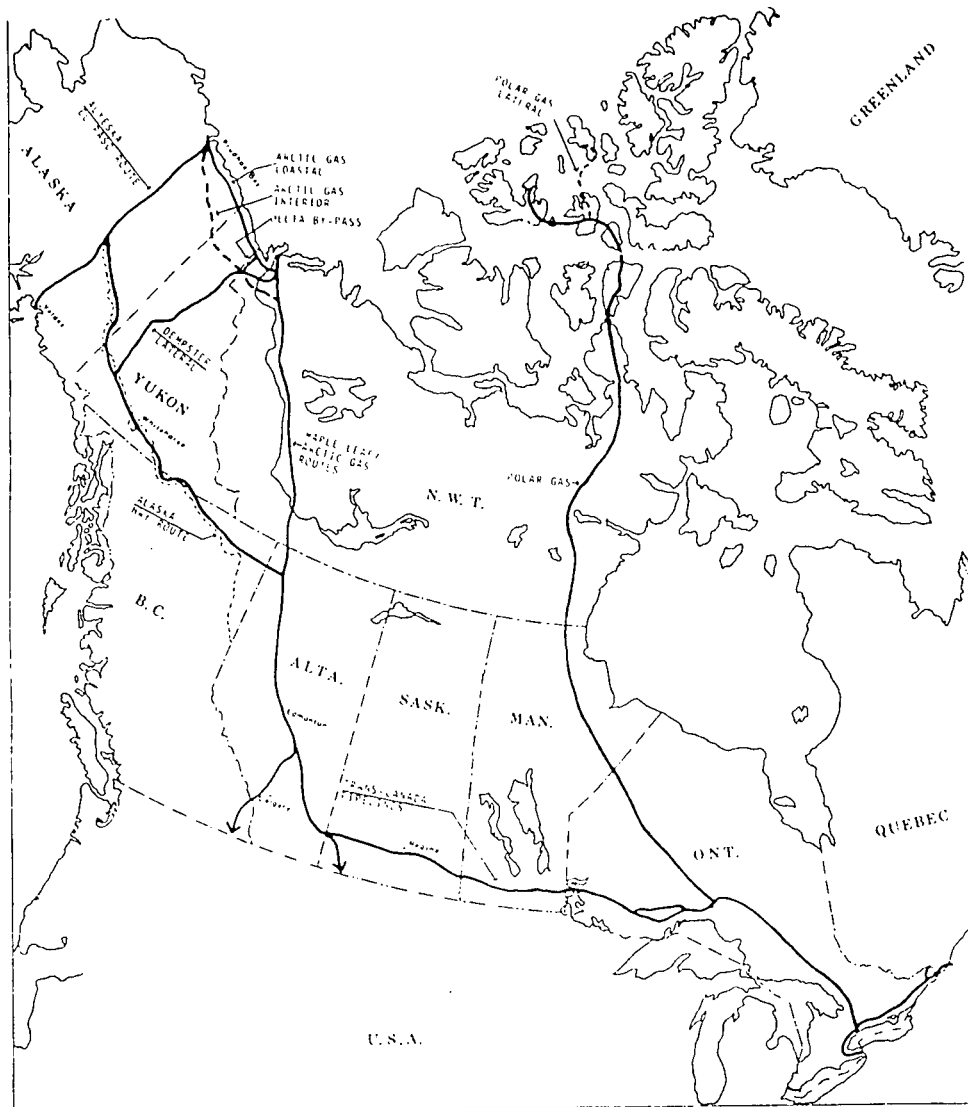
### **III. Oil and Gas Pipeline Proposals and Associated Events in Yukon and the Western Northwest Territories**

The discovery of oil in Alaska's Prudhoe Bay in 1968 has had both direct and indirect ramifications for the Canadian North. It hastened the search for oil and gas in the Mackenzie Delta and the Beaufort Sea, made more obvious the need to complete the Dempster Highway and, in the period 1974-81, led to a number of proposals for oil and gas pipelines from the North. Although only one pipeline was eventually constructed and falling oil prices have temporarily dampened the petroleum industry's interest in the North, the prospect of these massive resource developments has influenced the shape of northern resource decision-making and heightened sensitivity both about conservation and aboriginal claims.

On May 21, 1974, a consortium of companies filed the Arctic Gas proposal before the National Energy Board (N.E.B.), proposing the transportation of Prudhoe Bay and Mackenzie Delta gas to southern markets. (See Figure 1.) In anticipation of this application, many had argued that the N.E.B. lacked the expertise to consider the social and environmental issues that were bound to arise from this massive proposal. The government's response was to appoint Mr. Justice Berger of Vancouver to inquire into the social, environmental and regional economic impacts of the proposed pipeline.<sup>32</sup> When Foothills Pipelines submitted a competing proposal to the N.E.B. in the spring of 1975 (known as the Maple Leaf line because it involved only the transportation of Canadian gas), it was also put under Mr. Justice Berger's consideration. The Berger Commission first reported in May, 1977.

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32. P.C. 1974-641, March 21, 1974.



Source: W. G. MACLEOD, THE DEMPSTER HIGHWAY 19 (1979).

Meanwhile, on August 30, 1976, Foothills Pipelines had applied to the N.E.B. for permission to construct a gas pipeline from Alaska, along the Alaska Highway. This proposal, involving the possibility of a spur line along the Dempster Highway for the eventual transportation of gas from the Mackenzie Delta and the Beaufort Sea (Figure 1), was considered by the N.E.B. simultaneously with the Arctic Gas application. The federal government established two other hearings in association with the Alaska Highway proposal. On March 21, 1977, an Environmental Assessment Panel was established under the government's environmental assessment review process (EARP). A three-person Board of Inquiry under the Chairmanship of Dean Kenneth Lysyk of the University of British Columbia Law Faculty was also appointed to identify and report upon socio-economic impacts of the pipelines.

A great deal was written<sup>33</sup> about these and other events during the four years leading up to the N.E.B.'s decision concerning northern pipelines on July 4, 1977. For present purposes it is sufficient to observe that, at the time, this was the most complete and lengthy review process ever applied to a northern project. The Berger Commission captured the attention of Canadians everywhere. In part this was due to the unique approach Mr. Justice Berger adopted to the hearing process. In addition to formal, technical hearings in Yellowknife, he visited all the communities which would be affected by the pipeline and gave local people an opportunity to express their concerns in their own language and in a familiar environment.

The N.E.B.'s 1977 decision rejected the Arctic Gas proposal in favour of the Alaska Highway proposal. One condition of the approval was that Foothills carry out feasibility studies and apply by July 1, 1979 for the construction of the Dempster link to the Mackenzie Delta and Beaufort Sea gas reserves.<sup>34</sup> The N.E.B. decision likely resulted from a number of factors. Mr. Justice Berger had tentatively favoured the Alaska Highway route, while stressing the need for careful assessment of its social-economic and environmental impact.<sup>35</sup> The Lysyk Inquiry had found the route to

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33. See, e.g., EARLE GRAY, *SUPER PIPE: THE ARCTIC PIPELINE, WORLD'S GREATEST FIASCO?* (1979); FRANCOIS BREGHA, *BOB BLAIR'S PIPELINE: THE BUSINESS & POLITICS OF NORTHERN ENERGY DEVELOPMENT PROJECTS* (1979).

34. CANADA. NATIONAL ENERGY BOARD. *REASONS FOR DECISION: NORTHERN PIPELINES* (1977) (PUBLISHED BY SUPPLY AND SERVICES, OTTAWA).

35. I MR. JUSTICE THOMAS R. BERGER, *NORTHERN FRONTIER, NORTHERN HOMELAND: REPORT OF THE MACKENZIE VALLEY PIPELINE INQUIRY* xiv (1977) (Published by the Minister of Supply and Services Canada, Ottawa) [hereinafter referred to as *The Berger Report*].

be generally acceptable, although it felt there was insufficient evidence upon which to assess the proposed Dempster Link.<sup>36</sup> The initial report of the E.A.R.P. Panel came to a similar conclusion.<sup>37</sup>

Meanwhile, construction of the Dempster Highway continued. Commenced in 1959, this project had never been the subject of considered environmental or social impact assessment. It received little attention until the discovery of Prudhoe Bay oil. Thereafter, the progress of the highway was shaped significantly by the various pipeline proposals, because it was recognized that it would be critical to their construction. The environmental and social impact of the Dempster Highway became a major issue before the Berger, Lysyk and E.A.R.P. hearings and thus its impact was brought to public attention.

Social and environmental concerns related to the highway included its impact upon the Porcupine caribou herd, whose migration routes have been dissected by the highway; the rate of social change in previously-isolated native communities; and increased competition for wildlife resources resulting from the growth of the tourist industry. None of these issues were properly addressed before construction of the highway. As one study of the project concluded:

As a result, without a formal public assessment and planning procedure regulating highway development, the social and environmental issues were not brought home to those planning the highway until it was almost completed. Even then the various problems were chiefly revealed as a result of the pipeline inquiries. Efforts to deal with social and environmental issues have necessarily been rendered "after the fact" and accordingly less effective.

What was needed was a concerted effort prior to construction, to ascertain the problems likely to be caused by the highway and to consider alternative plans or options to meet those problems - including the option of not building, or not completing, the highway. Such planning, as the experience of the Dempster Highway demonstrates, is the only sound way to proceed with the development of northern roads.<sup>38</sup>

The N.E.B.'s approval of the Alaska Highway pipeline was ratified by the Canadian government, which then concluded a treaty with the

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36. CANADA. ALASKA HIGHWAY PIPELINE INQUIRY (1977) (Published by the Department of Indian Affairs & N. Dev. Ottawa).

37. See generally, Alaska Highway Pipeline Report of the Environmental Assessment Panel (Ottawa: Fisheries and Environment Canada, 1977).

38. WILLIAM G. MACLEOD, THE DEMPSTER HIGHWAY 50 (1979) (Published by the Canadian Arctic Resources Committee, Ottawa).

United States concerning construction of the pipeline.<sup>39</sup> Changing economic and energy circumstances, however, decreed that the northern section of the pipeline would not be built: by 1980, it had been decided that only the southern or "pre-built" section of the pipeline would proceed at that time.<sup>40</sup>

Notwithstanding this result, the events which took place during the intensive period of northern pipeline decision-making have had a lasting legacy for the North. For example, when Interprovincial Pipe Line (NW) Ltd. applied in 1980 for permission to construct a small-diameter oil pipeline from its Norman Wells facility in the Northwest Territories, regulators such as the N.E.B. were much better-equipped to deal with issues surrounding a northern project than they had been in the early 1970's.<sup>41</sup> In approving the pipeline, the N.E.B. imposed a series of socio-economic and environmental conditions, including ones relating to cultural and traditional resource harvesting, effects on communities, regional effects and matters of compensation and monitoring.<sup>42</sup> Other conditions were recommended as a result of a report of an Environmental Assessment Panel concerning the proposed pipeline,<sup>43</sup> which is now in operation.

Furthermore, in 1981 the federal Minister of the Environment appointed the Beaufort Sea Environmental Assessment Panel "to identify the major positive and negative effects of hydrocarbon production and transportation from the Beaufort Sea-Mackenzie Delta region upon the human and natural environment in Canada's North, and to recommend ways and means of dealing with these effects."<sup>44</sup> This process was unique in that it was the first time an environmental assessment had been made in the absence of a specific project proposal. Perhaps because of its uniqueness, the panel's report was not filed for over three years. In the interim, extensive public hearings were held with the involvement of all northern communities likely to be affected by almost any aspect of Beaufort Sea hydrocarbon activity. Funding of approximately \$250,000

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39. Events surrounding these developments are chronicled in Bregha, *supra* note 33.

40. For an analysis of the events leading up to the "pre-build" decision, see F. Bregha, *Ironclad Commitments*, 8 NORTHERN PERSPECTIVES, no. 7 & 8, (1980).

41. Canada. National Energy Board. Reasons for Decision In the Matter of an Application under the National Energy Board Act of Interprovincial Pipe Line (NW) Ltd. (Ottawa: Supply and Services, March, 1981).

42. *Id.* Appendix I.

43. Federal Environmental Assessment Review Office. Norman Wells Oilfield Development and Pipeline Project (Ottawa: Supply and Services, January, 1981).

44. Federal Environmental Assessment Review Office. Beaufort Sea Hydrocarbon Production and Transportation Proposal 13 (Ottawa: Supply and Services, July, 1984).

was provided to aboriginal organizations, interest groups and community councils, to facilitate their participation in the hearings.<sup>45</sup> While no environmental assessment process since has duplicated the circumstances in which the Beaufort Sea review was carried out, the fact that it even happened demonstrates that the earlier decision-making experiences led to a willingness to experiment and try new approaches.

This spurt of activity in relation to oil and gas activities, pipelines and highways has had spinoffs in relation to conservation issues and aboriginal land claims.

One example concerns the establishment of a conservation area on the Northern Yukon coast to protect the Porcupine caribou, proposals for which date back to 1971.<sup>46</sup> Dormant for several years, such proposals received a boost with Mr. Justice Berger's 1977 suggestion that a "wilderness park" be established on the coast. In January, 1978, the Minister of Indian and Northern Affairs announced a process of public consultation relating to the establishment of five wilderness areas north of the sixtieth parallel, including one on the Yukon coast. A task force with representatives from a number of interest groups was convened to consider the future of the area. In July, 1978, some 15,000 square miles of land on the coast was withdrawn for "a national park and other conservation purposes."<sup>47</sup> Interestingly, the settlement of the Inuvialuit land claim in the Western Arctic in 1985 had a major influence on the shape to be taken by the conservation area.<sup>48</sup> The Inuvialuit had claimed aboriginal title to the area but, as part of the settlement, agreed to the establishment of a special conservation regime for the Yukon North Slope. The dominant purposes of the regime are conservation of wildlife, habitat and traditional native use. Development proposals for the area must be screened in advance to determine their impact and those that may have a significant negative impact must be subject to a public review process. A national park with a wilderness orientation will be established on part of the North Slope, the Inuvialuit will retain special harvesting rights in the area, and will be involved in advisory bodies that will oversee the management of the North Yukon Slope.

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45. M.P. S. BROWN, K.A. GRAHAM & M.J. WOJCIECHOWSKI, *EASTERN ARCTIC STUDY CASE STUDY SERIES: BEAUFORT SEA OIL AND GAS DEVELOPMENT 37* (Kingston: Centre for Resource Studies, March, 1985).

46. The history of the proposals is briefly reviewed in Hunt, Miller and Tingley, *supra* note 28, at 13.

47. P.C. 1978)2195.

48. The Inuvialuit Final Agreement, *supra* note 28, § 12.



Another important conservation offshoot of the various pipeline hearings has related to management of the Porcupine caribou herd. Northern residents had stressed, in the course of the hearings, the need to develop a cooperative caribou management agreement, administered by a board. In October 1985 the Porcupine Caribou Management Agreement was signed by the governments of Canada, Yukon and the Northwest Territories, as well as the Council for Yukon Indians, the Inuvialuit Game Council, the Dene Nation and the Metis Association of the Northwest Territories.<sup>49</sup> The Agreement establishes a Board with objectives that include cooperative management of the herd, participation by native users in the herd's management, protection of native harvesting rights and improvement of communication between governments, native users and others with respect to the herd. The Board's activities so far have included the development and implementation of a communications strategy, the preparation of recommendations for hunting regulations on the Dempster Highway, and participation in preparation for an agreement between Canada and the United States for international conservation of the herd. The Board itself has equal government and native representatives, with the native organizations selecting their representatives from among the communities that use the herd. Consideration of the pipeline proposals also focused public attention on the issue of aboriginal land rights. Mr. Justice Berger had recommended that any construction of a Mackenzie Valley gas pipeline be postponed for a period of ten years, to permit the settlement of outstanding aboriginal claims.<sup>50</sup> As we have seen in the context of the *Baker Lake* case, failure to resolve such claims in advance of resource development can lead to costly and time-consuming litigation. The government's policy of negotiating such claims has had some success in the North, with the settlement of the Inuvialuit claim in the Western Arctic.<sup>51</sup> Recent policy changes have been made by the federal government as a result of an independent review of its claims process in 1985.<sup>52</sup> The evidence as to whether such policy changes will facilitate the settlement of claims is, at present, somewhat ambiguous: in the summer of 1988, an agreement in principle to settle the claim of the Yukon Indians was achieved, but an agreement in principle to settle the Dene-Metis claim in the Northwest Territories was rejected by the Dene-Metis.

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49. Porcupine Caribou Management Board, 1st Annual Report, 1986-87. The information that follows is derived from the report.

50. The Berger Report, *supra* note 35, at 196.

51. Referred to *supra*, note 28.

52. See Living Treaties: Lasting Agreements, *supra* note 28.

What is to be learned from these developments of the past decade and a half? First, in my view the Berger Commission taught us something about how to involve indigenous populations in the resource decision-making process. Past efforts to "consult" native groups had generally failed. The Berger Commission demonstrated that there are methods whereby the concerns of isolated residents can be aired. The media were used effectively to communicate the progress of the hearings while translators ensured that information was relayed to people in their own language and that evidence could be given in native tongues. The informal nature of the community hearings reduced anxiety that many people must have felt about communicating their opinions in a foreign atmosphere. This approach was costly and time-consuming and, some would argue, created expectations in northern communities about the process of decision-making that would not necessarily be met again. Still, the Berger Commission indelibly inscribed upon our consciousness the fact that many groups have a stake in oil and gas developments and must be permitted access to the decision-making process. A good example of this result is the current involvement of aboriginal groups in the management of the Porcupine caribou herd and the Yukon North Slope.

Second, much was learned about the importance of environmental and social impact preplanning from the Dempster Highway. It was by chance that the advancement of pipeline proposals forced a consideration of previously-ignored impacts. Undoubtedly, we have now moved beyond the era when such major resource developments can proceed without an examination of their socio-economic and environmental effects.

Third, we have learned something about the necessity of assessing the impact of a particular development not on its own but within the broader context of other developments in the area and related developments that are likely to accompany it. For example, before the Berger Commission a pipeline through northern Canada was likened to a string across a football. Mr. Justice Berger replied:

This simile is misleading and is indicative of a utopian view of pipeline construction. . . . Although Arctic Gas proposes to lay 1,100 miles of pipeline across the Yukon and the Northwest Territories, their total requirement for the right-of-way and related facilities is only 40 square miles. Such a figure gives a mistaken impression of the magnitude of the construction project. It is not just a 120-foot right-of-way.<sup>53</sup>

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53. The Berger Report, *supra* note 35, at 16.

Similarly, the Alaska Pipeline Panel refused to consider the impact of the Dempster link in a vacuum, but examined its impact in concert with other activities occurring or likely to occur in the corridor. On the other hand, the Beaufort Sea hearings demonstrate the difficulty of conducting impact assessments *in the absence* of a specific proposal.

Finally, the experiences in the Yukon and the western part of the Northwest Territories clearly demonstrated the defects of *ad hoc* resource development: conservation interests were left by the wayside and aboriginal claims were swept under the carpet. While problems remain, the recent emergence of a land use planning process<sup>54</sup> in the Northwest Territories suggests that we may be moving in a more positive direction.

#### IV. Conclusion

This review of Canada's development experiences in two parts of the North leads to both positive and negative conclusions.

There can be little doubt that, over the past two decades, a great deal has been learned about the need for assessing the impact of major resource developments and the importance of evaluating projects in relation to associated developments and not in isolation. Contrast, for example, the circumstances under which the Dempster Highway was built and the scrutiny applied to northern pipeline proposals. The need to carry out social impact assessment has been recognized and techniques have been pioneered.

These are only first steps, however, as there will seldom be any doubt that major developments will have major socio-economic and environmental impacts. An important issue then becomes the extent to which negative impacts can be managed and controlled and their efforts mitigated. Some experience in this regard has been derived from the Norman Wells pipeline.

We continue to struggle in coping with uncertainty. Even if the law and the regulations regime can provide assistance in managing and controlling social and environmental impact, how can the legal system respond to situations where scientists simply do not know or where they disagree? As the *Baker Lake* case demonstrates, this is still a serious problem.

Important questions remain about the process whereby environmental and social impacts are considered and resource development decisions made. Industry has complained about costs and delay associated with

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54. See Northwest Territories Land Use Planning Commission, Annual Report 1986-87.

major hearings while other interest groups have also found the process a strain from the point of view of time and resources. One encouraging development in the North has been the increased participation by users, such as aboriginal peoples, in the management of resources. For example, for the past five years the Caribou Management Board, composed of five government representatives and eight aboriginal user representatives, has played a major role in the management of the Beverly and Kaminuriak caribou herds.<sup>55</sup> Such participation can help to ensure that local concerns are considered early in and throughout the decision-making process. The increased communication that can result may, in some cases, reduce the necessity of relying on public hearings.

Finally, our legal and political system continues to respond at best indifferently to the outstanding matter of aboriginal land claims. It can be said that land claims have found a place in the consciousness of both industry and government<sup>56</sup> and some flexibility has been demonstrated in responding to such claims. It is not clear, however, that the issue is being approached with sufficient imagination and good will. Where, as a result, negotiations fail to achieve a satisfactory resolution, resort to the courts is inevitable. The result will be uncertainty and the loss of development opportunities.

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55. The Caribou Management Board and other co-management regimes are discussed by Gail Osherenko, *Wildlife Management in the North American Arctic: The Case for Co-Management in TRADITIONAL KNOWLEDGE & RENEWABLE RESOURCE MANAGEMENT* 92 (M.M.R. Freeman & L. N. Carbyn, eds. 1988) (Published by the Boreal Institute for Northern Studies, Edmonton).

56. Since 1982, aboriginal rights have been specifically recognized in the Canadian Constitution. For a review of events surrounding the aboriginal rights amendments, see, B. SCHWARTZ, *FIRST PRINCIPLES, SECOND THOUGHTS: ABORIGINAL PEOPLES, CONSTITUTIONAL REFORM AND CANADIAN STATECRAFT* (1986) (Published by The Institute for Research on Public Policy, Montreal).

