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Regional Agreements for Indigenous Lands and Cultures in Canada

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REGIONAL AGREEMENTS

for indigenous lands and cultures in Canada

A Discussion Paper

Benjamin J Richardson

Donna Craig

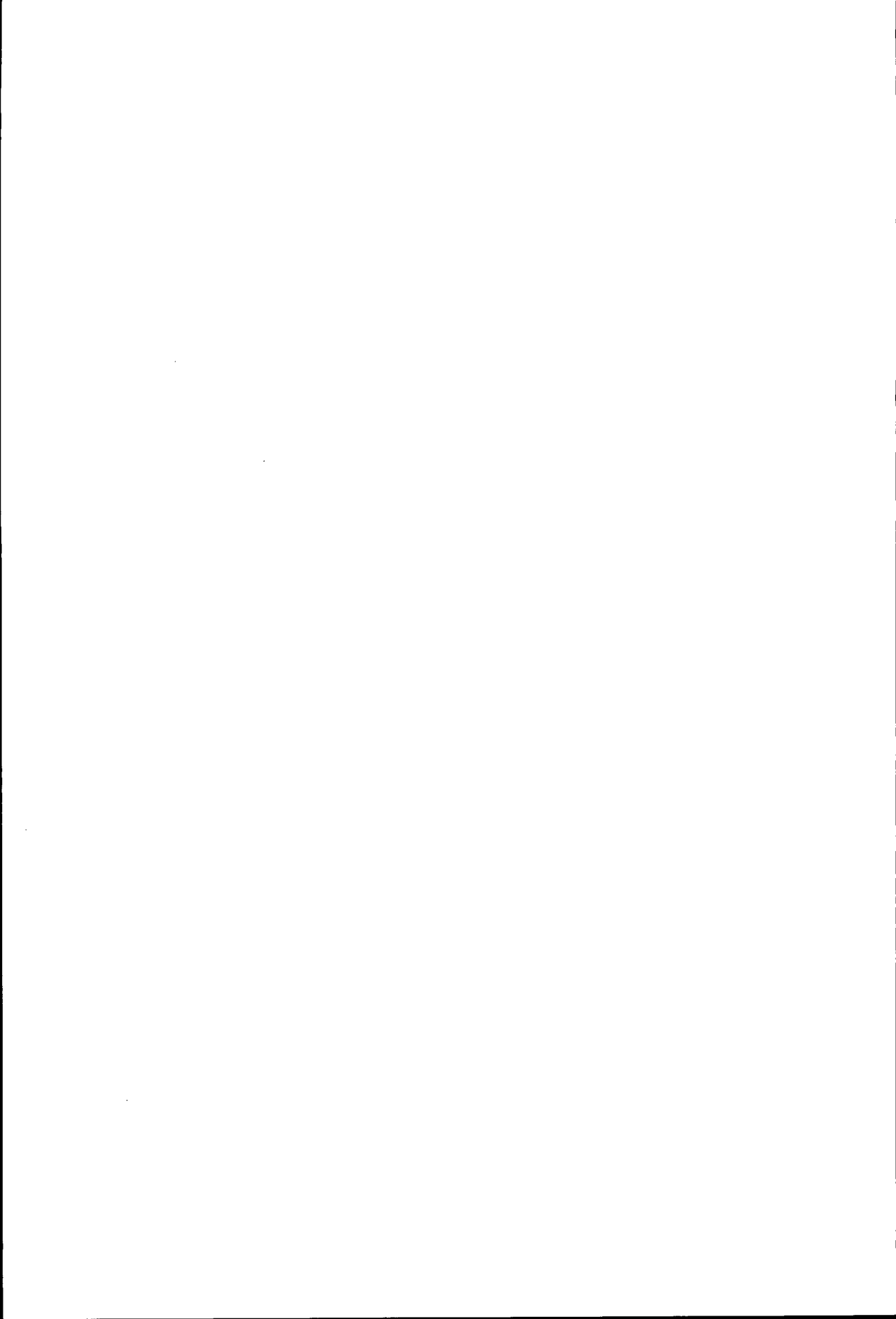
Ben Boer

NORTH AUSTRALIA RESEARCH UNIT

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About the Authors

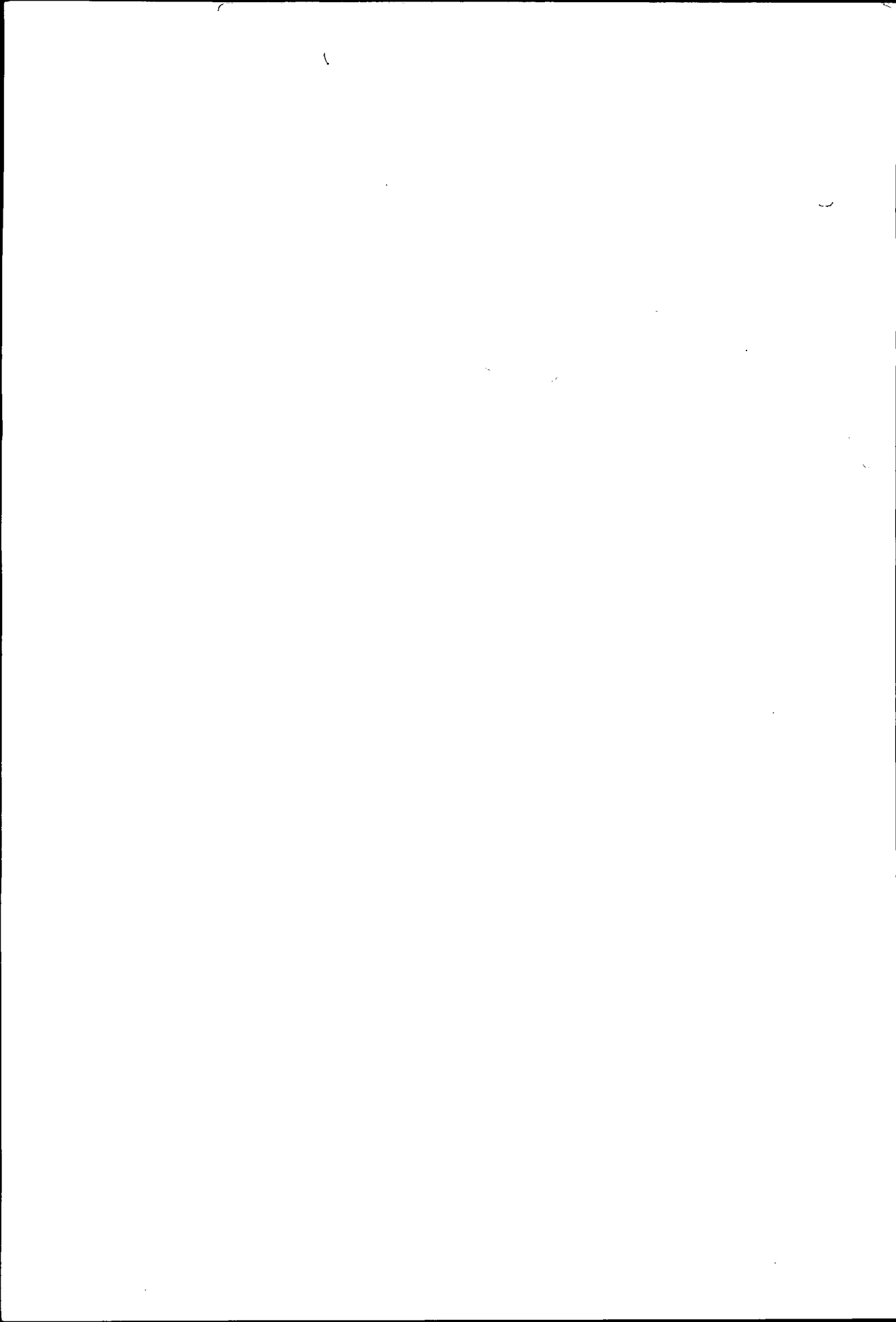
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Abstract

The Canadian experience of negotiated regional agreements is one approach which indigenous peoples and relevant governments in Australia and elsewhere could consider for new institutional arrangements for indigenous participation in environmental decision-making and resource management.

The Canadian agreements establish, among other matters, legal and administrative frameworks on a regional basis for environmental and resource management in a way that accommodates the traditional rights and contemporary needs of indigenous peoples and the interests of government and industry. Recognition of indigenous rights at common law and in the Canadian constitution has been important in facilitating the resolution of native land claims. The Canadian government's *Comprehensive Land Claims Policy* provides the framework for the negotiation of the regional agreements. To date, six major agreements have been finalised. This paper focuses on the historic James Bay and Northern Quebec Agreement (1975), and the more recent Inuvialuit Final Agreement (1984), the Yukon Umbrella Final Agreement (1990) and the Nunavut Final Agreement (1993). The negotiation of the agreements has been a very complex and protracted process. The agreements give the indigenous parties: legislatively-defined freehold and usufructuary rights to areas traditionally occupied and used; financial compensation for land given up; and rights to advise government agencies and share in the making of decisions regarding wildlife conservation and resource development.

The implementation of some of the Canadian regional agreements has been difficult and controversial, particularly in terms of reconciling indigenous and Western views of environmental management in the co-management provisions of the agreements. Further, indigenous participation in the new management structures has been a very demanding and costly exercise which has affected the cohesiveness of their communities. In some instances, governments have shown a lack of commitment in providing indigenous peoples with the full range of benefits promised in the agreements.

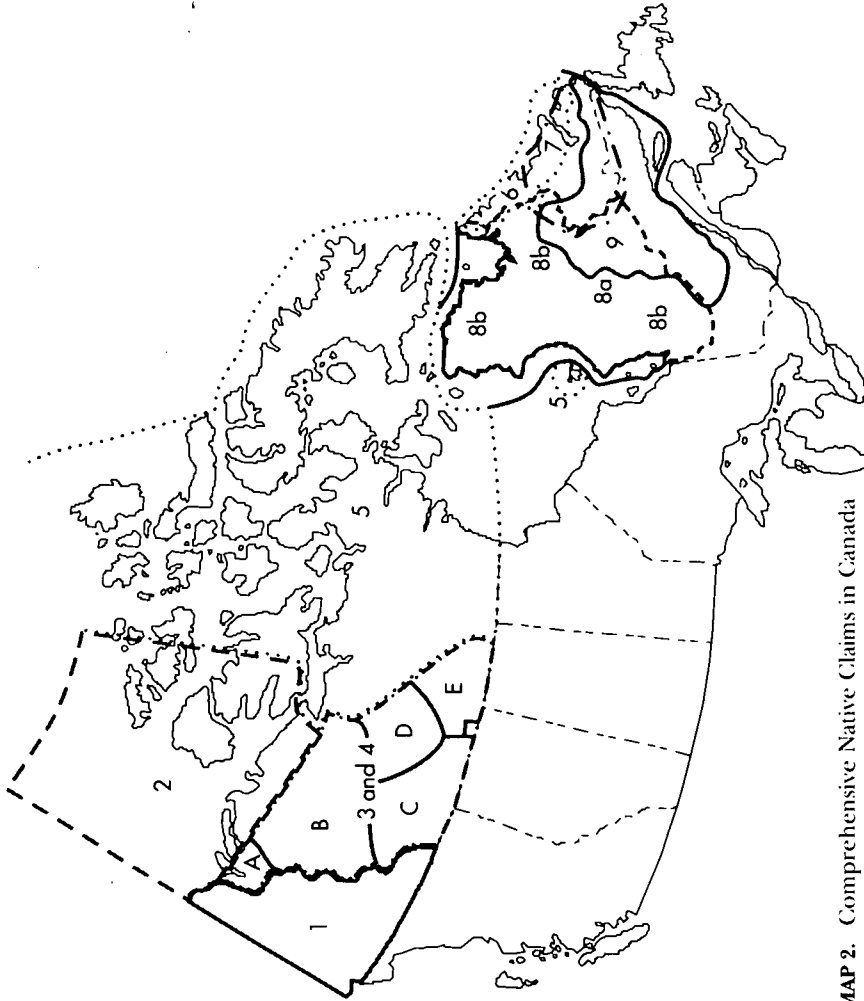
In its conclusion, the paper briefly examines the prospects for regional agreements between indigenous peoples and relevant governments in Australia.

See map 3 for B.C. claims.

The areas indicated on this map represent approximate boundaries of the area in which native associations have claimed an interest, as of October 1991. Only claims accepted for negotiation are included.

1. Council for Yukon Indians (CYI)
 2. Inuvialuit Settlement Region—areas covered under the Inuvialuit Final Agreement
 3. Dene Nation
 4. Metis Nation
- Areas 3 & 4 have been subdivided into 5 individual claim areas:
- A. Gwich'in Settlement Area;
 - B. Sahnlu;
 - C. Deh Cho;
 - D. North Slave;
 - E. South Slave.
5. Tungavik Federation of Nunavut (TFN)
 6. Labrador Inuit Association (LIA)
 7. Innu Nation
 - 8a. Territory under James Bay and Northern Quebec Agreement and Northeastern Quebec Agreement
 - 8b. Land areas selected by the Crees, Inuit of Quebec and Naskapis of Shefferville under the James Bay and Northern Quebec Agreement
 9. Conseil des Atikamekw et des Montagnais

Note: claims 2 and 8 have been settled.



MAP 2. Comprehensive Native Claims in Canada

1

Introduction

What are regional agreements?

Over the past two decades, some indigenous peoples¹ in Canada, particularly in northern Canada, have sought to achieve self-government and a better framework for economic development and environmental management through the negotiation of regional agreements with Federal and Provincial governments. The Canadian regional agreements involve the exchange of indeterminate native title rights for a clear legislatively-defined land tenure regime. Under this regime, indigenous peoples enjoy a gradation of land and marine rights, relating to land, land-use and marine resources. These range from absolute freehold title to surface and sub-surface resources in a core area, to usufructuary rights, such as for hunting and fishing, in other areas, and rights over a larger area to participate in the management of land, through involvement on regional planning and development control bodies. In addition to these property rights, indigenous peoples have received a package of social and economic benefits which provide them with the necessary funds and skills to establish and service their own community infrastructure. The agreements are seen by many Canadian indigenous peoples as recognition of their historical position as original inhabitants and as some guarantee for their continued social and cultural distinctiveness in the future. Negotiated regional agreements in Canada are thus seen as a long-term strategy for indigenous communities which puts their interests within a stronger legal framework. It is realised that the needs of indigenous peoples cannot be met in hasty settlements which are finalised in the shadow of development proposals coming from outside their communities.

At the heart of the Canadian agreements is the idea that they should be both *regional* and *comprehensive*. This means that the agreements are much more than a land tenure settlement for native land claims. It is the unique relationship of indigenous peoples to the land and the sea which is the basis for their political and legal claims. The agreements are designed to provide a legal framework, procedures and rights for linking indigenous self-determination with social justice, economic development and environmental protection over large regions. As the most recent agreements particularly illustrate, they are not 'one-off' packages, but are meant to establish an on-going policy framework whereby indigenous and non-indigenous interests can co-exist and cooperate through bi-cultural institutions for land management and planning. The regional nature of the settlement is important to indigenous peoples because proper environmental management and protection of environmental rights (eg hunting and fishing rights) can only succeed where decision making is organised over a sufficiently large area to enable the various ecological and social interactions to be dealt with adequately by the responsible public agencies. Environmental management is an essential component of the regional agreements strategy, not only because of the central role of land care in indigenous culture and the indigenous value system, but also because indigenous peoples cannot expect to determine their economic and social development without control over the forces which govern, and which can otherwise undermine, their natural resource base.

With the possible exception of the most recent Nunavut Agreement, regional agreements in Canada have not resulted in indigenous peoples obtaining sovereignty over their traditional territories. However, all of the agreements have provided a range of political, economic and social benefits that do give a significant degree of self-management and autonomy. For the indigenous participants, the core objectives in pursuing regional agreements appear to have been to:

- define a new legal and political relationship between themselves and Canadian governments (the Federal government and the relevant Provincial and Territory governments);
- establish a clear framework concerning access to and use of land and resources that accommodates the needs of indigenous peoples and other interests;
- preserve and enhance the cultural and social well-being of indigenous societies;
- enable indigenous societies to develop self-governing institutions and an economic base which will assist them to participate effectively in decisions which affect their interests.

Nevertheless, as Usher (1993a, 30–34) notes, there has been considerable diversity in the models and strategies pursued among claimants, ranging from self-determination and political autonomy, to participation as full citizens in established Canadian institutional processes.

The Canadian experience suggests that a regional land claims agreement can assist indigenous peoples to redefine their relations with the dominant society and achieve greater self-management of their affairs. Existing political institutions and administrative systems do not adequately allow for the articulation and resolution of indigenous concerns. Regional agreements which provide for land tenure and self-government are more likely to meet the needs of indigenous peoples (Jull 1992a, 1). A regional agreement can establish institutional structures and mechanisms for a more equal and constructive relationship between indigenous communities and the government, as well as providing the resources with which indigenous beneficiaries can continue to actively pursue their traditional lifestyle. Regional agreements can also be an institutional vehicle for re-introducing concepts of sustainable development relevant to indigenous peoples to areas until now disturbed by mining, pastoralism and other environmentally problematic activities. The process of negotiating regional agreements is also an important educative process for non-indigenous peoples, and can facilitate the development of bi-cultural institutions in wider areas of law and policy. The negotiation process has helped indigenous peoples acquire political, administrative and technical skills to enable the effective implementation of the agreements. However, no agreement can answer or foresee all problems, and a settlement which contains flexible mechanisms whereby the terms of agreement can be adjusted to accommodate new issues or circumstances, is likely to be more sustainable.

The development of regional agreements in Canada

The Canadian government's Comprehensive Land Claims Policy of 1973 provided the initial framework for the negotiation of regional agreements. Following a major Supreme Court ruling in the *Calder* case,² which affirmed the continuing existence of native land title and rights in British Columbia and, potentially, other parts of Canada, the Canadian Federal government agreed to enter into negotiations regarding indigenous claims where rights of traditional use and occupancy had not been extinguished by treaty or superseded by law. The development of the comprehensive claims process was also influenced by several other events (Coates 1992, 2). First, there was the ratification in 1971 of the Alaska Native Claims Settlement, a major agreement made between the United States government and the Inuit people of Alaska. Second, separate

claims negotiations were proceeding between the Quebec Provincial government and indigenous groups in the James Bay area of eastern Canada. More generally, publicity from the 1960s surrounding the process of decolonisation of the British Empire and the influence of the United States civil rights movement helped foster a political climate more conducive to addressing outstanding indigenous peoples' grievances within Canada.

The James Bay Agreement was the first modern agreement in Canada. The negotiation and implementation of this document was flawed and failed to provide the indigenous beneficiaries with many of the benefits promised. The recognition of native and treaty rights in the 1982 constitutional settlement gave further impetus to the land claims process, resulting in the revision of the 1973 policy and the negotiation of several improved regional agreements. Under the new *Constitution Act 1982*, no government could in future extinguish or modify native rights without the consent of the indigenous peoples concerned or without a further constitutional amendment. The superior status of native rights has been recognised in a number of Supreme Court decisions, the most significant being the recent *Sparrow* and *Sioui* cases.³ In accordance with the new constitutional protection accorded to native rights, the Comprehensive Land Claims Policy was revised to ensure that negotiated settlements would provide for the maintenance rather than the extinguishment of traditional native rights. Consideration would also be given to the negotiation of indigenous self-government agreements. However, some Canadian indigenous communities assert that the revised claims policy does not adequately provide for either of these two objectives.

To date, six major regional agreements have been finalised, with several claims advanced to settlement in principle. The final agreements are:

James Bay and Northern Quebec Agreement (1975)

Northeastern Quebec Agreement (1978)

Inuvialuit Final Agreement (1984)

Yukon Umbrella Final Agreement (1990)

Gwich'in Final Agreement (1992)

Nunavut Final Agreement and Nunavut Self-Governing Territory (1993)

The terms of the agreements generally are that the indigenous claimants renounce all their claims of native title to the relevant territory, and in exchange receive:

- fee simple title to relatively small portions of land traditionally used and occupied;

- usufructuary rights to hunt, fish and trap wildlife over a larger area of surrounding land;
- rights to advise government authorities, or share in the making of decisions, regarding environmental management and wildlife conservation in the regulation of non-renewable resource development; and
- financial compensation for past, unauthorised use of this land and in consideration for land given up.

Some settlements also provide rights to share profits from resource exploitation and some self-government powers over matters like administration of funds, law and order, community development and provision of social services such as education and health.

Some inadequacies of the Canadian agreements

The 'extinguishment' provisions of the Canadian regional agreements have been the most controversial part of these settlements from the perspective of indigenous peoples. Much of the controversy surrounding the 'extinguishment' issue stems from the apparent complexity of the legal issues. In a practical sense, the Canadian regional agreements involve exchanging one form of land title for another, albeit for generally much smaller areas of land. Native title recognised at common law is ill-defined and not immune to expropriation by the Crown, albeit subject to some form of due process and payment of compensation. Regional agreements provide for the exchange of this form of land title for a different type of title defined by negotiated agreement and enshrined in legislation. Nevertheless, given the fundamental and binding cultural, social and economic relationship indigenous peoples have with the land and sea, any attempt to diminish the depth and integrity of that relationship is bound to be controversial.

The controversy over the 'extinguishment' provisions has been overtaken in recent years by the push for indigenous self-government. The negotiation of the Yukon and Nunavut Agreements dragged on; for example, not because of the extinguishment issue, but because of disagreements over the scope of indigenous self-government, and whether these agreements would enjoy constitutional protection.

Although comprehensive claims agreements offer a bundle of benefits and rights, none of the Canadian agreements negotiated to date have given the indigenous beneficiaries total community control over environmental and resource policy making in their Territory. Regional agreements do not amount to giving indigenous peoples full sovereignty over traditional lands. The Canadian

government has generally insisted on achieving final settlements through the blanket extinguishment of all outstanding native rights pertaining to land. For the Canadian and Provincial/Territory governments, one of the primary objects of entering into comprehensive claim negotiations has been to clear common law-based native title to make way for lucrative resource development. For example, under the James Bay and Northern Quebec Agreement the native title was extinguished to make way for the construction of hydro-power projects in the James Bay catchment. In the Western Arctic region, the Inuvialuit Final Agreement was facilitated by development interests pressuring for the exploration of oil and gas in the Beaufort Sea. Canadian indigenous peoples are offered equal or minority membership on advisory and decision making bodies, although in many cases the relevant government Minister still makes the final decision. Only in the core areas where indigenous peoples receive fee simple title (land ownership) do they enjoy a predominant say over how their land is utilised. Further, the government excluded issues of constitutional development and indigenous self-government as topics for negotiation in the first three regional agreements, except self-government powers on limited local administration matters. The recent Yukon and Nunavut Agreements are more generous in providing for greater indigenous self-government. However, clause 4(3) of the Inuvialuit Final Agreement allows the indigenous participants in that Agreement to expand the ambit of their claim, in relation to self-government measures secured by other indigenous peoples in later regional agreements in the Western Arctic.

Without effective influence over economic activities in the whole of their region, indigenous peoples have sometimes had considerable difficulty in insulating their local environment from external development pressures. This problem has been experienced in particular with the James Bay Agreement of 1975 in Quebec. This agreement has been in danger of collapsing because indigenous groups have rejected the Quebec government's plans to proceed with a massive new hydro-power scheme that threatens to devastate the environment and undermine the subsistence economy of local communities.

For the other regional agreements, it is too early to tell whether they will last. However, it is likely for a number of reasons that they will be more durable than the James Bay Agreement.

First, the James Bay Agreement was primarily negotiated between the Province and the James Bay Cree and Inuit, whereas the other regional agreements were made between the indigenous peoples and the Federal government in respect of the Territories. Under the Canadian Constitution, mineral and other resources are owned by the Provinces, whereas in the Territories they fall under Federal government jurisdiction. Consequently, the Territory governments were in a less

powerful position to resist the claims of the indigenous participants in the Inuvialuit and Nunavut Agreements, compared with the authority enjoyed by the Quebec government in the James Bay Agreement, which was skewed in favour of the government and development interests. Furthermore, the Canadian north has proportionally larger areas of Crown land available for land claims compared with southern Canada (Bone 1992, 217). The menu of issues negotiated under the James Bay Agreement did not include anywhere near the range of items under consideration in the later agreements, such as mining and forestry management.

Second, unlike the James Bay Agreement, the latest regional agreements provide for greater self-government. Although the James Bay Agreement gave the indigenous partners certain rights to organise their communities into new institutional structures, this did not amount to self-government over a wide region such as that provided for in the Nunavut Agreement. Finally, as it was the first agreement of its type, the indigenous negotiators in the James Bay Agreement were operating in a difficult legal and political milieu. Other First Nations were able to learn from these experiences in later negotiations. Nevertheless, given the lack of time and money devoted to the making of the James Bay Agreement, some scholars still consider it to be an accord that 'compares well with subsequent agreements for which it broke ground' (Crowe 1990, 18).

An important distinction of the more recent agreements, such as the Inuvialuit Final Agreement, is that they provide for on-going negotiation of land management arrangements in the settlement area. This provision has allowed the indigenous beneficiaries to gradually increase their influence over regional development, rather than being locked into an unworkable rigid framework such as the James Bay Cree have found themselves in. Additionally, the Nunavut Final Agreement has stronger provisions for environmental protection than the James Bay Agreement.

Stricter forms of environmental regulation, however, may be a mixed blessing because the regulation can impinge upon the rights of indigenous peoples to continue their traditional subsistence economy and engage in hunting and trapping activities. The decision of the Canadian Supreme Court in the *Sparrow* case shows that Federal government regulation of traditional fishing rights can be consistent with the constitutional sanctity of native rights. But there are substantial difficulties in reconciling indigenous 'traditional knowledge' and western paradigms of resource management in the co-management provisions of the regional agreements. The biological idiom of populations, productivity and allowable harvest is not necessarily shared as key concepts by traditional hunters (Usher 1993a, 73-75; Berkes 1993). The general pattern among the regional agreements is that the allocation and licensing is delegated to the co-management

boards and the local harvester committees, but management for conservation is reserved to governments (Usher 1993a, 77).

Similar tensions with cross-cultural environmental management apply to the planning and impact assessment regimes. According to Usher (1993a, 79), indigenous participation in these management structures has been a demanding and costly exercise, requiring 'constant attention, expert research and advice and extensive travel'. Further, the assessment of social and environmental impacts is conceptually very problematic when applied to measuring the adverse effects on tradition and subsistence living (Usher 1993b). This problem extends to determining compensation payments for disturbance or loss of traditional lands. It is difficult to value in monetary terms the importance of subsistence living which cannot be exchanged in the market place. Compensation tends to be limited to property and production losses and not social and cultural disruption.

Finally, the existence of traditional native land rights has been a fundamental basis for all of the negotiated settlements in Canada. No agreement has been negotiated simply on the basis of the social or economic needs of indigenous peoples. The Canadian Federal government has dismissed land claims where the applicants cannot demonstrate continuing association to their traditional land, or where native title has been extinguished by treaty or other valid actions. Usher (1993a, 87-88) has identified the following variables which influence outcomes in the Canadian regional agreements:

- **Geopolitical realities:** claimants are less likely to receive a favourable settlement where: Provincial jurisdiction is involved; there is a large non-indigenous population with competing interests in resources; and a development project is perceived as a matter of national importance.
- **Experience with settlement and development:** the degree of existing poverty and despair among the claimants and the relative urgency of development pressures will shape what compromises are necessary or acceptable.
- **Unity of claimants:** disunity undermines the negotiating strength of claimants.
- **Experience and capabilities of indigenous leadership:** the personal education, experience and ideological orientation of the leaders of the claimant group and their previous experience of negotiating with governments are important factors.
- **Knowledge of existing models and precedents:** the demonstration effect of other settlements can influence negotiating positions.
- **Public attitudes:** public support for claims, either locally or nationally, can lead to significant strategic alliances (eg with environmental groups).

2

Treatment of indigenous rights in Canada prior to the development of regional agreements

Canadian legal framework for indigenous peoples

Indigenous peoples in Canada have endured a history of oppression and discrimination which has served to suppress their interest in maintaining and developing culturally distinct societies (Upton 1973; Tobias 1976). Earlier government policy, aimed at the assimilation of indigenous peoples into the dominant white culture, has left Canada's original inhabitants as one of the most disadvantaged social groups according to basic economic and social indicators – affected by widespread unemployment, inadequate housing, low income, poor health and lower life expectancy (DIAND 1980; Brecher *et al.* 1985). Many First Nations reside on reserves, some of which are remote and which are too small to provide them with a sustainable livelihood from hunting, trapping, fishing and other subsistence activities. The decline of traditionally-based economies has been hastened by conservation groups' opposition to the fur trade and sea mammal hunting.

The relationship of indigenous peoples with the land is central to their collective identity and welfare. Within the indigenous cosmology, people and land are inextricably linked. The following testimony of a Indian witness at the hearings of the Mackenzie Valley Pipeline Inquiry captures that relationship:

It is very clear to me that it is an important and special thing to be an Indian. Being an Indian means being able to understand and live with this world in a very special way. It means living with the land, with the animals, with the birds and fish, as though they were your sisters and brothers. It means saying the land is an old friend and an old friend that your father knew, your grandfather knew, indeed your people always have known ... we see our land as much, much more than the white man sees it. To the Indian people our land is really our life. Without our land we cannot – we could no longer exist as people. If our land is destroyed, we too are destroyed. If your people ever take our land, you will be taking our life (quoted in Berger 1980, 87–89).

However, the suppression of indigenous culture did not prevent the first colonial authorities from acknowledging the existence of a certain indigenous interest in the land. In 1763, the British Crown made a Royal Proclamation which confirmed native title to lands west of the colonies then proclaimed, and stipulated that such lands could be alienated only to the Crown with the consent of the indigenous landowners. Subsequently, numerous treaties were signed by the British Crown and various Indian tribes in the western territories, typically providing for the surrender of First Nation lands in return for various benefits such as maintenance of native fishing and hunting rights (Frideres 1983). With confederation in 1867, the *British North America Act*^A gave the Federal government responsibility for 'Indians and Lands reserved for the Indians' (s.91(24)). With this power, the Federal government then entered into another series of land cession treaties, a process that concluded in 1923. Section 50 of the *Constitution Act 1982* gave the nine Provinces exclusive authority over the management and use of non-renewable natural resources and forestry in their territory. This provision has limited the capacity of the Federal government to respond to indigenous demands for access to and use of land under the ostensible control of the Provinces. On the other hand, Crown land in the Yukon and Northwest Territories generally rests with the Federal government, which makes it easier for the Federal government to settle land claims in these areas.

The *Indian Act* (1868 as amended) has been the main vehicle for the expression of government policy concerned with 'Indian' peoples (DIAND 1983; Bartlett 1978). Canada has four indigenous groupings: registered or status Indians (490 178), the Inuit (32 620) (Courchene 1993), and perhaps between 1/2 and 1 million non-status Indians and Metis. Non-status Indians are persons of Indian ancestry who have for some reason lost or been denied their status as registered Indians, and the Metis are persons who are part indigenous and (mostly) part European. The *Indian Act* provided for the establishment of a system of Indian reserves, in which the indigenous governing institutions were displaced by Band Councils that functioned as agents of the Federal government, exercising a limited range of delegated powers under Federal supervision. The Department of

Indian Affairs and Northern Development (DIAND) has been responsible for administering government policy on Indian affairs. The appropriateness of the objectives of the *Indian Act* has been the subject of several government inquiries. After the Second World War, Canadian authorities debated giving indigenous communities greater autonomy and self-management powers. Various parliamentary inquiries were instituted during the 1950s and 1960s in an effort to redefine and clarify objectives in government policy towards Indians. These initiatives resulted merely in the expurgation of some of the Act's more overtly racist sections, with no change in the underlying philosophy about the relationship between indigenous peoples and the dominant white society (Frideres 1983, 31). In 1969, the Trudeau administration released a *White Paper on Indian Policy* which proposed to eliminate all legal distinctions between Indians and other citizens by repealing the *Indian Act* and to transfer responsibility for Indian policy from Federal to Provincial authority (Chrétien 1969). The White Paper cast native claims as of only limited significance, at least in so far as they tended to emphasise special rights and status within Canadian society. The only consolation was a promise to appoint an advisory Indian Claims Commissioner, with a mandate to hear certain grievances, such as cases concerning failure to discharge treaty obligations, and to recommend appropriate remedial measures. But the government was not prepared to accept broad-based native claims for self-determination. These claims, noted the *White Paper*:

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 ...

The terms and effects of the treaties ... are widely misunderstood. A plain reading of the words in the treaties reveals the limited and minimal promises which were included in them ... The significance of the treaties in meeting the economic, educational, health and welfare needs of the Indian people has always been limited and will continue to decline ... (Chrétien 1969).

Although the White Paper was essentially motivated by social justice for indigenous peoples, some governmental and business interests saw it as an opportunity to open up the remaining 2200-plus native reserve lands, held by about 600 Indian bands, to large scale economic development (Frideres 1983, 32). The 'under-utilisation' of indigenous land is seen as wasteful and incongruous with the demands of a modernising and expanding national economy. The desire to maximise the development of natural resources for profit is generally at variance with the value systems of indigenous cultures. The pressure to develop and exploit traditional indigenous lands has contributed to the re-assertion of native claims in Canada in recent years.

When the Canadian Federal government assumed political control over indigenous peoples, it became the target of their grievances and claims respecting control of land and other resources. First Nations peoples have sought to establish their own special, unique position in Canadian society, rejecting the philosophy of the *White Paper* as simply 'a new articulation of the long-resisted policy of assimilation' (Frideres 1983, 104). The notion of indigenous rights underlies all native claims. First Nations peoples claim that their rights to land derive from the original occupancy, prior to the arrival of the colonial powers. The various claims of indigenous peoples fall into three broad categories:

- **Indigenous rights:** inadequate recognition of unextinguished native title rights relating to land, sea, inland waters and natural resources;
- **Treaty grievances:** failure to honour treaty obligations; and
- **Band claims:** wrongful expropriation of reserve lands.

The most contentious claims relate to the continuation of indigenous rights. Native land title was not dealt with by treaty in large areas of Canada, including northeast Quebec, parts of British Columbia, the Yukon, the Inuit areas of the Northwest Territories and the Maritime Provinces. In these areas, indigenous communities have sought to achieve settlements which recognise the primacy of indigenous control of land as a basis for their active participation in its development. As in many communities, land is central to indigenous peoples' needs and aspirations. They have sought not merely title to land that they have traditionally used and occupied, but also a key role in determining the way in which land and resources are used and managed, as well as benefits derived from any exploitation.

Recognition of indigenous rights in the courts

Canadian courts have long played a critical role in defining indigenous rights recognised at common law. Subject to the Constitution, although the sovereign Parliament may legislate to extinguish or modify these indigenous rights, it can be difficult to legitimate overtly discriminatory legislation in the absence of compelling circumstances. For this reason, the Canadian government has attempted to limit indigenous peoples' access to the courts. For example, in 1927, in response to the attempt of the Allied Tribes of British Columbia to directly petition the Privy Council, the Federal government amended the *Indian Act*, making it an offence (s.141) for any person to raise funds from indigenous persons for the prosecution of any native claim (Dyck 1981). In 1933, the Department of Indian Affairs stipulated that indigenous persons could not make

complaints directly to heads of government or to the Privy Council, but instead had to route them through the official channels. Even where indigenous peoples can secure representation in the courts, they continue to be disadvantaged by their comparative lack of resources to sustain lengthy litigation, as well as the judiciary's general lack of understanding of the values of indigenous peoples (O'Reilly 1988, 43).

Under the jurisdiction of the British Privy Council, the Canadian courts initially did not follow the United States common law jurisprudence (Henderson 1985). In the United States, the Supreme Court identified an Aboriginal right of occupancy or usufruct that existed independent of treaty, statute or other formal government action, and which was inalienable except by surrender to the Crown and extinguishable by the Crown only (Williams 1990, 233–234). In the leading case of *Johnson v. McIntosh* (1823), Chief Justice Marshall explained the nature of native title:

The rights of the original inhabitants were ... admitted to be the rightful occupants of the soil, with legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it (at 574).⁵

The Supreme Court also determined that the rights of indigenous peoples already in possession must be recognised by any sovereign body claiming title on the basis of mere 'discovery' of territory. In *Worcester v. State of Georgia* (1832), Marshall C. J. held:

[the principle of discovery] gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it ... but could not affect the rights of those already in possession either as aboriginal occupants or as occupants by virtue of a discovery made before the memory of man.

In Canada, indigenous rights were regarded as having been superseded by the colonising European power, which became sovereign of the 'newly discovered' lands. Thus, in *St. Catherine Milling and Lumber Co. v. The Queen* (1888), a case which concerned a jurisdictional dispute over Indian lands between the Federal government and the Province of Ontario, the Privy Council denied that indigenous peoples, at any time, had 'ownership' of their land in a European sense, and concluded '[t]hat the tenure of the Indians, was a personal and usufructuary right, dependent upon the good will of the sovereign' (at 55). But the Privy Council left undecided whether native title might arise independently

of the Royal Proclamation of 1763, which was an instrument by which the Crown recognised certain native rights in the then eastern, settled Provinces of Canada.

Since the 1970s, the Canadian courts have given greater countenance to traditional indigenous rights (Canadian Bar Association 1988). In cases such as *Calder et al. v. The Queen* (1973), *Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development* (1980) and *R. v. Guerin et al.* (1984), native title has been recognised as a distinct legal right derived from their historic occupation and use of tribal lands. It was the Canadian Supreme Court's ruling in the *Calder* case which provided the critical breakthrough in the judicial view of native title at common law, and laid the basis for a new governmental approach to assessing indigenous claims.

The *Calder* decision entrenched native title in Canadian common law. In this case, the representative plaintiffs, being members of the Nisga'a Indian tribe of British Columbia (also known as Nishga), sought a declaration that the native title to their traditional lands had never been extinguished. The Supreme Court held unanimously that native title existed at common law irrespective of any formal recognition. However, there was no agreement on the fundamental questions of how such rights might be extinguished. Three of the judges held that indigenous rights could be extinguished implicitly through legislation denying their existence. Three other judges declared that indigenous rights cannot be extinguished without compensation or without legislation specifically removing the right to compensation. Occupation, they commented, was proof of the continued existence of indigenous rights and the Nisga'a appeared to be in possession of the disputed territories from time immemorial; they had never agreed to surrender their lands to the Crown. Although the Nisga'a ultimately lost their appeal on a collateral technical issue,⁶ the Court's substantive recognition of native title at common law stands. As Hall J. stated:

An aboriginal Indian interest [is] usufructuary in nature which is a burden on the title of the Crown, and is inalienable except to the Crown and extinguishable only by a legislative enactment of the Parliament of Canada. This aboriginal title does not depend on treaty, executive order or legislative enactment but flows from the fact that the owners of the interest have from time immemorial occupied the areas in question and have established a pre-existing right of possession. In the absence of any indication that the sovereign intends to extinguish that right the aboriginal title continues (*Calder* 1973, 200).

In reaching this conclusion, the Canadian Supreme Court referred to the recently decided Australian case of *Milirrpum v. Nabalco Property Ltd* (1971). The Court discounted *Milirrpum* because of its erroneous understanding of native title at common law.

Further, Judson J. after declaring that the Royal Proclamation of 1763 was not the exclusive source of title, pronounced:

Although I think it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies, and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal or usufructuary right'. What they are ascertaining in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was 'dependent on the goodwill of the sovereign' (*Calder* 1973, 152).

Although *Calder* clearly established that native title exists independently of the sovereign Crown, the case left much to be decided, for the court gave no explicit definition of the content of native title and associated rights to the land.

The *Calder* view of indigenous rights was reaffirmed in the *Baker Lake* case. The plaintiffs, Inuit inhabitants of the Nunavut region of the Northwest Territories, sought an injunction restraining the authorisation of mining activity on their traditional lands. Justice Mahoney acknowledged the dependence of the Inuit on hunting and fishing for their livelihood and the importance of the caribou hunt to Inuit culture. He found that the Baker Lake Inuit had a native right and title to hunt and fish on certain lands, the breach of which could not be adequately compensated by an award of damages. Although the injunction was denied on the basis that the native title had been curtailed by Federal mining legislation, the *Baker Lake* case remains an important precedent in consolidating the common law recognition of indigenous relationships to their land. In general, indigenous rights in Canadian law are considered to be *sui generis* rather than fitting an existing category of beneficial interest or being some sort of personal usufructuary right. They include rights to fish, hunt and trap on traditional lands (*R. v. The Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, (1982)). These rights are collective as they are based on communal occupation of the land, but also individual as members of a tribe have personal rights to harvesting resources (Johnston 1989).

The protection accorded to indigenous rights recognised at common law has been extended by the courts to the affirmation of indigenous rights enshrined in treaties. In the landmark case of *R. v. Sioui* (1990) the Canadian Supreme Court upheld the treaty rights of the Huron Indian Band of Quebec to utilise forest products on a Crown reserve. The contested rights were the subject of a treaty between the Hurons and the British made in 1760, and protected by s.88 of the *Indian Act*. The Court ruled that it was for the Crown to prove that the treaty was extinguished, and that the terms of a valid treaty must be given a just and liberal construction.

3

James Bay and Northern Quebec Agreement

Dispute over hydro-power development project

The James Bay and Northern Quebec Agreement (JBNQA) marked a new approach to the resolution of native claims through the negotiation of a broad-based settlement. The impetus to the negotiation of the JBNQA was a dispute over plans of the Quebec Provincial government to proceed with the James Bay Hydroelectric Project, in an area which was historically occupied by the Cree and Inuit peoples who engaged in a subsistence hunting economy (Richardson 1972; Richardson 1975). The project involved the damming of several major rivers flowing into James Bay, resulting in the inundation of 8800 km² of the lands utilised by the indigenous inhabitants. The original environmental impact statement (EIS) forecast that the proposed hydroelectric project would have a severe effect on the ecology of the region and specifically on the traditional livelihood of the indigenous communities. The Quebec government did not recognise that the indigenous peoples had any title or special rights to the James Bay area, and nor did it believe it should consult with the affected people, despite being under a statutory obligation to do so under the *Boundary Extension Acts 1912*. This Act provided for the transfer of the land in question from the Federal government to the Province of Quebec, on the condition that Quebec would continue to recognise the rights of the indigenous inhabitants in the territory.

At the beginning of the dispute, the Cree numbered about 8000 people grouped in eight bands, many of which still pursued traditional subsistence hunting and fishing. Although there were some kinship and friendship linkages across band boundaries, the Cree had no unifying administrative or political organisation that bound them as a distinct community. The Inuit numbered 4500 people and inhabited 12 villages. In developing a response to this crisis, the Cree and Inuit were not initially seeking a broad settlement of native rights, but rather, were searching for a way to stop a specific development project (Feit 1983).

Following the failure of the Quebec government to negotiate with the Cree and Inuit over the proposed hydroelectric scheme, the Cree took legal proceedings against the Provincial government and the James Bay Development Corporation, seeking an injunction restraining construction of the project until their indigenous interests had been addressed. Injunctive relief was granted at first instance (*Kanatewat et al. v. James Bay Development Corporation & Attorney-General*, 1974; Penn 1975). After a six month hearing, Mr Justice Malouf ruled that there was clear evidence that the Cree and Inuit had possessed indigenous rights over the territory since time immemorial. In reviewing the nature and extent of Indian title, Justice Malouf concluded:

Since the application presently before me is for an interlocutory order of injunction, it is unnecessary to define the exact nature and extent of the Indian title to land. Suffice it to say that the material examined in this part clearly shows that at the very least the Cree Indian and Eskimo have been exercising personal usufructuary rights over the territory and the lands adjacent thereto. They have been in possession and occupation of these lands and exercising fishing, hunting and trapping rights therein since time immemorial. It has been shown that the government of Canada entered into treaties with Indians whenever it desired to obtain lands for the purposes of settlement or otherwise. In view of the obligation assumed by the Province of Quebec in the Legislation of 1912 it appears that the Province of Quebec cannot develop or otherwise open up these lands for settlement without acting in the same manner, that is, without the prior agreement of the Indians and Eskimo (Diamond 1985, 276-277, case unreported).

On appeal, and in a hearing which lasted a few days, this decision was overturned by the Quebec Court of Appeal (*James Bay Development Corporation et al. v. Kanatewat et al.* (1975)). Mr Justice Owen of the Court reasoned that the Cree had failed to show that they would suffer any great inconvenience if the dam was to be built and that the balance of convenience favoured the continuation of the construction work. Mr Justice Turgeon thought that the indigenous peoples had abandoned their traditional way of life and had taken up modern conveniences. In addition, Turgeon opined that the energy crisis facing Quebec required that the hydro-power development proceed despite indications that the project could have adverse environmental consequences.

Although the Cree and Inuit failed to secure judicial recognition of their indigenous rights, the court case became a means for their political mobilisation. With a final appeal to be heard by the Canadian Supreme Court, there was a strong possibility of further costly disruptions and stoppages to the project. Faced with the loss of potential investors in the development and cost overruns, the Quebec government turned to a negotiated settlement.

In choosing to tackle the James Bay dispute through a negotiated settlement, both parties were influenced by the recently concluded Alaska Native Claims Settlement (ANCSA) made between the United States government and the indigenous peoples of Alaska (Walsh 1985, Work 1987). In the Alaskan negotiations, the indigenous communities laid claim to almost all the land area of the State, an area which they continued to use and occupy. The claim, which was spurred by the intensification of oil and gas mining activity in their homeland, resulted in a land freeze in 1966 pending resolution of outstanding grievances. The negotiations culminated in the enactment of the *Alaska Native Claims Settlement Act 1971*. This Act provided for the transfer to the claimants of 40 million acres of land and payment of US\$1 billion compensation, to be administered by 12 native-controlled corporations. In addition, a land-use planning commission, with indigenous membership, was established to supervise and coordinate development of the indigenous lands. The Alaska Native Claims Settlement aimed not only to satisfy specific legal and moral claims but also to provide a broad foundation for the social and economic advancement of the indigenous beneficiaries. Although the Alaskan settlement has been subsequently discredited for various reasons, at the time it appeared to be a useful model upon which to settle native claims (Berger 1985). The assimilationist objectives and practical implementation problems of ANCSA were only really perceived, by many people, at a much later date.

Negotiation of the Agreement

In choosing negotiation rather than litigation to resolve the opposition of the Cree and Inuit to the hydro-power development, the Quebec government assumed an advantageous position that led to a lop-sided agreement (La Rusic *et al.* 1979). In the negotiations, the native tribes were represented respectively by the Grand Council of the Cree and the Northern Quebec Inuit Association. The other parties were the Quebec and Federal governments and three business organisations involved in the development project, the James Bay Development Corporation, the James Bay Energy Corporation and Hydro-Quebec. The Quebec government sought to:

- preserve its sovereignty over the northern regions of the Province;
- open this territory for controlled development;
- extinguish any outstanding native rights;
- maintain the economic integrity of the hydro-power project; and
- limit royalty payments to the indigenous inhabitants.

The Canadian government was not active in the negotiations, but it wanted to ensure that they would not result in a precedent that would compromise the Federal government in the settlement of land claims elsewhere in Canada. For the Cree and Inuit, the essential positions were to:

- maintain their subsistence economy;
- ensure that adequate land be set aside for their communities;
- modify the hydro-power project to reduce its environmental impacts (direct and indirect);
- ensure community control over the provision of social services; and
- secure substantial monetary compensation for any loss of land.

La Rusic *et al.* (1979, 43) assert that by not challenging Quebec's assertion of sovereignty over the disputed area, the Cree and Inuit were prevented from securing a fair and sustainable settlement. The Cree and Inuit appeared to believe that by being able to administer their affairs, as against full political control, that they could secure the economic and cultural autonomy of their societies. Thus, the content of the negotiations never had to consider a sharing of political power, only the administrative structures which would apply to the indigenous homelands. In addition to the substantive arguments canvassed in the negotiations, the actual style of the negotiations undermined the claims of the indigenous participants. The presentation of arguments and evidence was dominated by hired legal and other professionals, which resulted in the negotiations having a highly bureaucratic style, an anathema to the way the Cree or Inuit traditionally resolved disputes among themselves. Expert consultants became indispensable, not only to present technical arguments before the government's experts, but also to interpret the technical responses and their implications in terms which could be understood by the Cree or Inuit (La Rusic *et al.* 1979, 48). The legalistic approach to the dispute resulted in a highly legalistic settlement not easily comprehensible to indigenous peoples.

Structure and scope of the James Bay Agreement

The James Bay and North Quebec Agreement provided for the extinguishment of the native title and concomitant rights in northern Quebec, in return for which the Cree and Inuit were promised land, financial compensation, wildlife use rights, economic and social benefits, and participation in regional environmental planning and management.⁷ The main parts of the agreement, as laid down in the *James Bay and Northern Quebec Native Claims Settlement Act 1976-77*, were:

- land regime (ss.5-8);
- Cree local/regional government structures (ss.9-13);
- health and social services (ss.14-15);
- indigenous education (ss.16-17);
- police and administration of justice (ss.18-21);
- environmental management and development control (ss.22-23);
- wildlife use rights (s.24);
- compensation and taxation (s.25); and
- economic and social development (s.28-29).

Compensation and financial management

A total compensation package of C\$225 million (1975 values) was divided 60:40 between the Cree and Inuit. Of this sum, C\$150 million was in consideration for the surrender of native title in northern Quebec and C\$75 million was compensation for the impact of future development in their homelands. The compensation monies would be paid over a 22 year period ending in 1997, but without adjustment for inflation. This extended disbursement period has resulted in a considerable diminution in the real value of the compensation payments. A Cree Board of Compensation (CBC), composed of mixed Cree and government representation, was established to receive, administer and invest this money. The Agreement also set up the James Bay Native Development Corporation (JBND), as a subsidiary of the James Bay Development Corporation, to receive C\$15 million of capital to invest in Cree enterprises or joint ventures with Cree entrepreneurs.

Land regime

In dealing with the indigenous lands, the JBNQA incorporated both a 'surrender-grant-back' approach and the simple 'extinguishment' reminiscent of early

treaties. The latter approach is provided for in clause 2.6 which directs that the enabling Federal legislation: 'shall extinguish all native claims, rights, title and interests of all Indians and all Inuit in and to the Territory'. The former approach involves the surrender of land to the government which in turn grants back some indigenous rights which now flow from the agreement rather than from the original native title. This is reflected where the Agreement states:

The James Bay Cree 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 ... (cl.2.1).

Quebec and Canada ... hereby give, grant, recognize and provide to the James Bay Cree and the Inuit of Quebec the rights, privileges and benefits specified herein. (cl.2.2).

The JBNQA created a four-tiered land regime, each with specific provisions regarding access to resources by the Cree.

- Category IA: lands transferred to Federal jurisdiction for the use of Cree bands
- Category IB: lands transferred to Provincial jurisdiction for the Cree Village Corporation
- Category II: Provincial lands to which the Cree enjoy exclusive hunting and trapping rights
- Category III: unoccupied Provincial lands earmarked for future development activities

Cree and Inuit rights are specified for the areas that they occupy as well as legal rights to participate in the management of wider areas, the development of which affects their lands.

Environmental protection and wildlife use

The principal mechanisms established under the JBNQA for protecting the environmental resources of the indigenous communities are the Hunting, Fishing and Trapping Coordinating Committee (HFTC), and the Advisory Committee on the Environment (ACE). These bodies, which have a mixed membership of Cree, Inuit, developers and government interests, are mandated to advise the relevant Provincial and Federal Ministers.

The Cree received exclusive hunting and trapping rights on Category I and II lands, and preferential harvesting rights to wildlife resources on Category III lands which are to be shared with other users (cl.24.6.3). The JBNQA recognises the efficacy of indigenous wildlife management and provides that although all

harvesting is subject to the principle of conservation (cl.24.2), there is to be only a 'minimum of control and regulation' on the harvesting practices (cl.24.3.30b). The principle of 'conservation' is defined in the JBNQA as: 'the pursuit of the optimum natural productivity of all living resources, and the protection of the ecological systems of the Territory so as to protect endangered species and to ensure primarily the continuance of the traditional pursuits of the Native people, and secondarily the satisfaction of the needs of non-Native people for sport hunting and fishing' (cl.24.1.5). There is also an income security program for Cree hunters and trappers which provides cash income to supplement local subsistence economies (cl.30) (Scott & Feit 1984). The income security program is said to be very costly, while an increasing Cree population may lead to unsustainable wildlife harvesting (Bone 1992, 223–227).

Under the Agreement, environmental impact studies are mandatory for all major development projects. An Environmental Quality Commission and the James Bay Environmental Review Board, with indigenous representation, are responsible for overseeing the EIA process. However, the hydro-power development is not subject to any of the environment terms of the JBNQA (cl.27.7.2). There are no provisions in the Agreement to provide for the exchange of environmental information on the development project between the corporation, the government and the indigenous groups. As for damages, the JBNQA also released the James Bay Corporation from all claims based on the environmental impacts of their hydro-power projects.

Municipal government

Separate systems of municipal government were established for the Cree and Inuit at both local and regional levels. Indian band councils were invested with local governmental powers over IA lands; Village Corporations managed IB lands as municipalities under Provincial law; and a Cree Regional Authority was created to coordinate and administer the affairs of the Cree bands at the regional level. In addition, there is provision for native involvement in the delivery of community services such as education, health, and community law enforcement. Advisory Consultative Committees, with joint Cree and Quebec government representation, function to help define the administration of Provincial services to the native people.

The Cree Regional Authority (CRA), which is headed by a board of directors composed of Cree chiefs, functions as an organ of municipal government, coordinating and advising on a range of matters including environmental policy, community services, cultural programs and economic development. The CRA is financed by income from investments made by the Cree Board of Compensation.

Four separate agencies operate under the CRA umbrella. There is a Traditional Pursuits Agency which is concerned with the maintenance of hunting/trapping rights, conservation and environmental impact assessment, and the preservation of Cree culture. There are provisions recognising the use of the Cree and Inuit languages in administration. There is a Cree School Board and Kativik School Board to develop a curriculum to preserve and transmit the language and culture of the native people. The Community Services Agency implements local police and legal services, oversees housing and community infrastructure construction and coordinates recreational services. The Human Resources Agency assists in the training of administrative personnel and in job creation schemes. Finally, the Economic Enterprises Agency is responsible for promoting economic self-sufficiency at the community level through the coordination of sectoral developments, as well as identifying potentially feasible projects and locating funding sources for them.

Implementation of the James Bay Agreement

The social and economic deterioration of indigenous life

In accepting a negotiated settlement, the James Bay Cree and Inuit initially received scathing criticism from other indigenous communities, such as the National Indian Brotherhood, who branded their actions a 'sell out' and a cave-in to Federal and Provincial pressure. Critics branded the James Bay Agreement as no more than a sophisticated version of the colonial-era treaties. This criticism seems to have been partially borne out in the history of the implementation of the James Bay Agreement which apparently has in some ways actually worsened the social and economic conditions of the Cree and Inuit beneficiaries. Although 40% of the Cree still live off their traditional pursuits, such as hunting and trapping, over 50% are now unemployed. Alcoholism, drug misuse and domestic violence are widespread. There has been an increasing monetarisation and urbanisation of the indigenous economy, which has coincided with the rapid erosion of indigenous cultural traditions and values (Richardson 1989a; Salisbury 1982, 135-150).

Implementation of the JBNQA has been undermined by the reluctance of the Federal and Provincial governments to fully acknowledge the extent of their financial obligations under the Agreement (Moss 1985, 688; Salisbury 1979). Both governments have shown a lack of goodwill to implement the spirit of the JBNQA (Moses 1988). The services and benefits specified in the Agreement have been withheld, delayed or refused until the Cree and Inuit have fought for their delivery. The absence of a single body responsible for the coordination and

planning of the JBNQA has hampered implementation efforts by fostering inter-governmental disputes over jurisdictional responsibilities. This has been compounded by disputes over the interpretation of the Agreement's often vague and imprecise wording, particularly in relation to the standards of performance expected from the relevant government authorities.

The Cree and Inuit hoped that the legal rights and compensation secured by the JBNQA would strengthen their autonomy and the political recognition accorded them by senior governments. However, by renouncing all claims to their traditional territories and having accepted an administrative regime largely framed by Provincial bureaucratic imperatives, the Cree and Inuit lost 'effective control over the resources needed to achieve any measure of long-term self-sufficiency in the region' (Thalassa 1983, 70). For example, the land regime established by the JBNQA left the Cree with a severely truncated natural resource base. The Category IA lands reserved for exclusive Cree use are too small to allow extensive social and economic development. The IB lands are larger, but subject to Provincial authority and hence less secure than IA lands. Category III lands afford a broader base for harvesting wildlife, but other resources such as subsurface mineral rights remain under Provincial jurisdiction. There has been a paucity of community-based development initiatives in the indigenous communities, in part because of a bias by some officials against community-owned enterprises (Thalassa 1983, 68). The James Bay Native Development Corporation (JBNDP), which was envisaged as the primary vehicle through which Quebec could contribute to Cree economic development, has tended to fund only individuals who can be held accountable for financial performance and is prejudiced against non-individual forms of business organisation such as band-owned enterprises (Thalassa 1983, 69).

The level and nature of indigenous participation in the environmental planning process established by the JBNQA has not matched the expectations of the Cree or Inuit. Participation on the various administrative bodies set up for environmental management has necessitated that the Cree and Inuit make a major commitment of personnel, technical and financial resources in order to make these new bodies work. This has increased the dependence of the Cree and Inuit on lawyers and other professionals for technical expertise on these agencies. Berkes (1989, 195) has noted that the deliberations of the Hunting Fishing and Trapping Coordinating Committee and the Advisory Committee on the Environment advisory bodies are grounded in Euro-Canadian epistemologies of resource management which is anathema to traditional Cree hunters and fishermen. The introduction of a 'scientific' approach to wildlife management based on biological criteria has not accorded easily with Cree customary practices based on empirical experience. Thus, finds Berkes, the HFTC

'effectively prevents the traditional fishermen-hunters from participating, and limits representation to articulate, southern-educated people who are comfortable in committee settings' (Berkes 1989, 195). There is also a concern that indigenous knowledge about wildlife, environment and resources is seriously 'under-valued' in this context.

The wildlife management regime established by the JBNQA is undermined in other ways. For instance, the main Quebec authority which receives recommendations from the advisory committee is the Ministry of Recreation, Game and Fish (MRGF). The MRGF is oriented to serving tourist and recreational interests, and does not cater for extensive indigenous subsistence use of fauna. Not surprisingly, many of the HFTC's recommendations are ignored where they are inconsistent with the MRGF's goals. In this situation, some Cree communities have by-passed official administrative processes to negotiate directly with the regional energy corporations on issues affecting wildlife and environmental conservation. But this tactic is having an adverse effect on the traditional Cree economy as long-term development goals are traded for short-term benefits, usually compensation. According to La Rusic *et al.* (1979, 151-153):

if the new strategy of re-negotiations can be seen as a trend then the principle of conservation which is perhaps fundamental to assure the prosperity and continuity of subsistence activities is somewhat under a cloud. The re-negotiations have implied a loss of productive zones however minor they may have been which have been traded for substantial compensation.

Although the JBNQA purports to provide for greater indigenous participation in environmental planning and development control functions, the decision making processes under the Agreement continue to adopt a centralised, bureaucratic character insofar as much of the control of the relevant principles of the Agreement, and ultimately their particular applications, is retained by the appropriate Minister. Little faith is placed in the ability of the Cree or Inuit to make substantive input into final policy decisions. Persistent discretionary powers are reposed to the presiding Minister, which allows for effective executive control of politically sensitive decisions. Such discretionary powers are not readily susceptible to judicial scrutiny. In implementing the Agreement's various objectives, no positive technique is provided to weigh the multiplicity of 'pros' and 'cons' that appear as a result of the environmental planning and development control process.

The problems faced by the Cree and Inuit in securing proper implementation of the JBNQA have been compounded by the more general failure of SAGMAI (Secretariat des Activités Gouvernementales en Milieu Amerindien et Inuit), the key Provincial agency for coordinating Indian affairs, to consult with indigenous

(Secretariat des Activities Gouvernementales en Milieu Amerindien et Inuit), the key Provincial agency for coordinating Indian affairs, to consult with indigenous communities. At one stage the Cree completely dissociated from SAGMAI and instead liaised directly with the various Provincial departments. This situation has been aggravated by the insistence of the Quebec government to tie performance of its obligations under the JBNQA to a reduction in Federal jurisdiction over indigenous communities in its Province, as well as clear recognition by the Cree of Quebec's sovereignty over their lands.

In a major analysis of the JBNQA, Thalassa Research Associates (1983, 72) concluded that the Agreement is 'fundamentally flawed' because it fails to 'establish a viable self-sufficient economic base as a foundation for Indian self-government' and has 'simply rearranged the traditional dependency pattern'. The Agreement provides for the continuance of dependency transfer-payments to the indigenous communities through rationalising their delivery and devolving administrative responsibilities to Cree regional organisations under Provincial jurisdiction. The JBNQA, concludes the Thalassa report (1983, 73-74), 'is unserviceable as a model for land claims, economic development or Indian self-government' and is instead merely a model for the 'municipalization of Indian bands'. The introduction of Western-style administrative agencies has shifted decision making away from the indigenous communities and has undermined the authority of the Band Councils. The staffing requirements of the Cree Regional Authority and associated agencies have drained the Cree communities of the skilled people needed for local development initiatives. The technical complexity of the administrative regime established by the JBNQA has increased the dependence of the Cree on non-indigenous lawyers and other advisers. Cree society is said to have become more differentiated and heterogeneous as a new strata of Cree bureaucrats and business interests has emerged, physically separated from their original communities and now closely tied in with government administrative networks (La Rusic *et al.* 1979, 153-155).

In sum, the JBNQA has not prevented the Cree and Inuit from losing further control of development activities in their homelands. The energy corporations and Hydro-Quebec have grown to be the predominant powers in the James Bay region, dictating the pace and scope of development. This is combined with the overarching influence of Provincial authority into indigenous society. The Cree and Inuit have had to develop alliances with Provincial bureaucrats as a principal means of securing indigenous interests. The control of local and regional administration has not secured economic or political independence for the Cree or Inuit. They remain largely dependent on bureaucratic discretion to have access to the programs which they can then administer (La Rusic *et al.* 1979, 59).

Implementation review

Continuing complaints and protest by the Cree and Inuit were acknowledged by the government only when the national media took notice of their plight. The unsatisfactory outcome of the JBNQA provoked the House of Commons Standing Committee on Indian Affairs and Northern Development to acknowledge on March 26 1981, in a specially drafted statement, the legitimacy of the indigenous peoples' grievances and the failure of the Federal and Provincial governments to implement properly the major provisions of the JBNQA. At the same time, Cree and Inuit representatives launched joint legal proceedings against both governments regarding their intransigence. In response, the Federal government agreed to sponsor a review of its performance under the Agreement.

The review, which was appreciated by many indigenous organisations, greatly facilitated debate on the issues and exposed many government failings. Nevertheless, the final *Tait Report* was negotiated through many drafts and concluded:

the review team discovered several significant areas of implementation with regard to which there have been serious problems ... unresolved disputes, and in some cases a failure to fully implement the Agreement in both its spirit and letter. These problems of implementing the Agreement cannot be attributed to any one party to the Agreement ... [However] Canada has not committed any legal breaches of the Agreement (DIAND 1982, 9).

A major area of disagreement has been allegations that Canada violated the JBNQA by failing to provide Federal programs, services and benefits which were promised to continue to apply to the indigenous beneficiaries. The least effectively implemented parts of the Agreement have been in regard to Health and Social Services (cls.14-15), Economic and Social Development (cls.28-89) and Education (cls.16-17). The Federal government thought it had protected itself by limiting its obligations to whatever programs and services it periodically ran and that the services promised to the Cree and Inuit were to be funded from regular yearly departmental budgets. The latter, however, believed that the Federal government was committed to achieving the social and economic objectives specified and that special appropriations should be allocated if the funds could not be found in ordinary departmental budgets.

Many of the problems stem from the relocation of the Cree to new settlements after their hunting/trapping grounds were flooded by the dam. These settlements were constructed hastily, with minimal municipal infrastructure, such as housing, water and sanitation services, and roads (Mohawk 1984). During 1980, several epidemics of gastroenteritis swept through Cree communities resulting in the

deaths of numerous children (Mohawk 1984). The Inuit have also suffered and have objected strongly to the *Northern Quebec Transfer Agreement* (13 Feb 1981), to which they were not a party, under which the Federal government transferred its responsibilities for municipal services to Quebec. The Inuit maintain that the Federal government should have required Quebec to maintain specified levels of services and infrastructure as a condition of the transfer. Forced into a continual state of crisis management, the Cree and Inuit have had sparse opportunity to engage in long-term socio-economic planning (Moss 1985, 691). Substantial sums of their compensation money has been spent on services and projects which the government has neglected to provide.

The *Tait Report* largely absolved the Canadian government of responsibility for the poor implementation efforts. It suggested that the pressure under which the JBNQA was negotiated resulted in a document with many provisions which are 'vague, ambiguous and open to disparate interpretations', and that the Agreement's precise details were to be worked out over a 'lengthy process of implementation' (DIAND 1982, 6) Further, it notes that 'many of the key obligations assumed by Canada are worded in such a way as to give Canada a wide discretion in fulfilling them [and thus these are] matters of public policy and not law' (DIAND 1982, 9). Federal budgetary restraints were also cited as playing a major role in circumscribing implementation. Nevertheless, despite the fact that the JBNQA was originally promoted by Quebec Premier Bourassa as a '*comprehensive* settlement that would establish, once and for all' a new relationship between the First Nations peoples and Canadian society (James Bay and Northern Quebec Agreement 1975, xxiii), the *Tait Report* (DIAND 1982, 14) played-down the JBNQA's significance by asserting that:

The Agreement was not designed to solve all the problems of the Cree and Inuit ... [it] was intended as a foundation, or a *minimum statement*, of the rights and benefits to be enjoyed by the native parties. (emphasis added)

The *Tait Report* recommended a set of principles to govern future efforts to implement the JBNQA. These principles were approved by the Federal Cabinet and a James Bay Agreement Implementation Secretariat was set up under DIAND to provide better coordination of implementation efforts. In July 1982, Cabinet agreed that further monies were to be disbursed to compensate for past transgressions and to remedy current problems. A sum of C\$32 million was given to the Cree and C\$29 million to the Inuit to allow them to improve their community infrastructure and municipal services.

Challenge to the James Bay Agreement

In the early 1990s a proposal by Hydro-Quebec to dramatically enlarge the James Bay hydro-power scheme pushed relations between the Cree and the Provincial government to a new low and threatened to irreparably rupture the James Bay Agreement (Picard 1990). At issue is a C\$50 billion electricity-generation project, known as the Great Whale River Complex, involving the construction of hundreds of additional dams and dykes on the wild rivers that flow into James Bay and Hudson Bay. As part of this scheme, the Quebec government has agreed to provide 800 megawatt of power to New York State in order to raise revenue to fund further hydro-power development (*Reuters* 1 February 1993). The Great Whale River Complex is the first part of the James Bay Phase II Project. The Cree have attacked the project for its potential to flood prime wildlife habitat and replace natural waterways with huge reservoirs (*PR Newswire* 30 January 1993). This will disrupt the hunting and fishing activities of the Cree and Inuit people living in these areas. The new phase of hydro-power development has divided the Cree and Inuit; the Cree totally oppose the project, whereas the Inuit are prepared to negotiate the conditions for further development in return for cash compensation (Jull 1991, 8). In July 1991, indigenous and environmental groups in Canada formed an alliance to force a delay in the hydro-power project (Picard & Seguin 1991). The latest controversy to engulf the JBNQA reflects a fundamental difference of opinion between the Quebec government and the Cree on what the Agreement stands for. Whereas Quebec saw it as a permanent and final agreement, the indigenous participants have always regarded the JBNQA as a document that, although comprehensive in its scope, was to be periodically revised to accommodate new exigencies, such as environmental changes. The Quebec government has refused to reopen the JBNQA to accommodate the concerns of the Cree (*Financial Post* 30 October 1992).

The Cree have taken the lead in challenging the legal validity of the Great Whale River Complex. In negotiating the James Bay Agreement, the Cree argue that they only ever consented to La Grande Complex or James Bay Phase I (*PR Newswire* 30 January 1993). The latest round of hydro-power development is seen as a separate initiative, that cannot be justified by reference to the JBNQA, but requires additional authorisation from the affected native people. The Quebec government argues that the JBNQA authorised both Phase I and II of the James Bay hydro-power developments.

The Cree have challenged the development proposal as a breach of Federal and Provincial environmental impact assessment (EIA) procedures. In response to these concerns, in October 1992, the Federal government set new stringent environmental review guidelines for Hydro-Quebec's Great Whale River

Complex. The guidelines request information on the impact of the proposal on energy demand, ecosystems, economic development and wildlife. (*PR Newswire* 19 October 1992). The guidelines also request assessment of the project on the social and cultural life of the Cree and Inuit communities, including the effect on health, food, social cohesion and family values. Approval by the government of Quebec and the Federal and Provincial administrators of the JBNQA is needed before a decision can be made as to whether the project can proceed.

In April 1990, the Cree applied to the Quebec Superior Court for an injunction to permanently restrain work on the project, as well as a declaration that the JBNQA be declared null and void. This case ended up in the Federal Court of Appeal, which in December 1992 found that the James Bay Agreement was a freely negotiated agreement, that could not be overturned. The Court viewed the Agreement as a 'modern' document, which was signed by the representatives of the Cree and Inuit peoples with full knowledge of the circumstances. It held:

The principle that ambiguities must be construed in favor of the Aboriginals rests, in the case of historic treaties, on the unique vulnerability of the Aboriginal parties, who were not educated and were compelled to negotiate with parties who had a superior bargaining position ... In this case, there was simply no such vulnerability (*PR Newswire* 8 December 1992, case unreported).

The Court also determined that the fiduciary relationship between the Federal government and the indigenous peoples could not be invoked systematically to resolve all ambiguities in the applicants' favour. It stated: 'When the Crown negotiates land agreements today with the Aboriginals, it need not and cannot have only their interests in mind. It must seek a compromise between that interest and the interest of the whole of society, which it also represents and of which the Aboriginals are a part ...' (*PR Newswire* 8 December 1992, case unreported). It is likely that the dispute will be further litigated in the Supreme Court of Canada.

Ironically, the problems faced by the Cree and Inuit of the James Bay in securing recognition and protection of their claim for a distinct culture parallel the efforts of the Province of Quebec to realise its claim for autonomy as a distinct society within the wider Canadian federation. Political independence for Quebec can realistically only be built on economic self-sufficiency, and hydro-electric power can provide Quebec with a secure independent energy source for that purpose. The volatility of world petroleum prices over the past two decades has made hydro-power an attractive alternative energy source. But in an effort to establish its own 'distinct society', Quebec threatens to sacrifice the distinctiveness of indigenous culture. The Inuit, and to a lesser extent the Cree, have sought reconciliation with Quebec, but they prefer to continue with current Federalist arrangements in which the national government is responsible for protecting their

native rights, while the Provincial governments are responsible for land management.

Although the James Bay Agreement has so far generally failed to secure the social and economic objectives sought by the indigenous participants, it has helped the Cree and Inuit to strengthen bonds among communities, create greater regional cooperation in social and economic development, and argue for their cultural values in a politically sophisticated way. As Salisbury (1982, 147-148) puts it, in reviewing the evolution of Cree society in the decade following the JBNQA:

The *crisis* of 1971 ... is the obvious factor that created regional unity. It created unity because, for the first time, an issue emerged in which the interests of the previously fragmented Cree villages were all alike. The crisis opposed this unitary common interest to an external threat, and it used a highly valued traditional symbolic language, that of the animals, the land and the hunter, to articulate that opposition. Without a crisis it would have been impossible for the Cree to rise above factionalism and the everyday problems of existence, and to proceed to the creative and innovative activity which ensued ... Without a dramatic crisis and an identifiably external threat, it would be hard to visualize the achievement of regional unity and a regional government.

4

Comprehensive land claims policy and constitutional recognition of indigenous rights

Evolution of the policy

In the aftermath of the historic *Calder* decision, the Federal government on August 8 1973 released a major policy statement regarding indigenous rights. The then Minister of Indian Affairs and Northern Development, the Honourable Jean Chrétien, announced that his government was prepared to recognise and accept its responsibilities under the *British North America Act 1867* for Indian people, and that it was now willing to negotiate regarding claims of native title where rights of traditional use and occupancy had not been extinguished by treaty or superseded by statutory law. 'The Government', it stated, 'is now ready to negotiate with authorised representatives of these indigenous peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit will be provided to indigenous peoples in return for their interest' (DIAND 1973). The settlements were to encourage indigenous self-reliance and economic development. But the statement offered nothing in relation to treaty claims and individual band claims. They excluded from consideration claims from southern Quebec and the Atlantic Provinces, where the indigenous claims were argued to be of a different character

from those in regions where original land rights were recognised (Frideres 1983, 109).⁸

The comprehensive claims policy differed from the discredited colonial-era treaties made with First Nations in the 18th and 19th centuries in the following main ways:

- the land quantum to be negotiated was far greater;
- the lands selected would be held directly by an indigenous corporate entity rather than by Canada in trust;
- cash compensation for lands would be substantial;
- hunting and fishing rights would be exclusive or preferential; and
- indigenous peoples would have some input into wildlife and environmental management policy (Usher 1993a, 28).

Although the James Bay Agreement was a 'comprehensive' settlement, it was not formally a result of a comprehensive land claims process. The then Minister of Indian and Northern Affairs stated that the JBNQA was not to be regarded as an archetype or model for the settlement of land claims by First Nations elsewhere in Canada (Frideres 1983, 113). However, the Canadian government showed a clear desire for negotiated settlements rather than costly protracted litigation (Colvin 1980). The comprehensive claims policy has been continually refined and amended since 1973, but it is still concerned with the clearance of native title to lands earmarked for large-scale resource development. According to Peter Usher (1993a, 26–27):

The claims process was at first seen largely as a means of compensating aboriginal people for the loss of their land and for their traditional way of life which was regarded as doomed. Claims policy was therefore a form of social policy designed to provide aboriginal people with a material basis for integration and participation in Canadian society ... By the late 1970s, however, compensation was no longer the stated objective of claims. It was, instead, to translate the concept of aboriginal interest into concrete benefits, that would promote the social, cultural and economic continuity of aboriginal life.

Further clarifications of the comprehensive claims policy were made in 1981 and December 1986 (DIAND 1981, DIAND 1987a). The 1981 comprehensive claims policy was revised in 1986 in the light of a number of significant changes to the Canadian constitution which strengthened the legal position of indigenous rights (DIAND 1985). The *Constitution Act* 1982 and the accompanying *Canadian Charter of Rights and Freedoms* was a watershed in the evolution of indigenous and non-indigenous relations in Canada (Pentney 1988). In accordance with the new constitutional protection accorded to native rights, the Comprehensive Land

Claims Policy was revised to ensure that negotiated settlements would provide for the maintenance rather than the extinguishment of traditional native rights. Consideration would also be given to the negotiation of indigenous self-government agreements.

Although the Canadian government has provided a clear mechanism for the negotiation of native claims, some native peoples occasionally resort to litigation to press their claims. This has occurred with the Gitksan and Wet'suwet'en First Nations who have fought against the government of British Columbia to have their land claims recognised in the Provincial courts (*Financial Post* 26 June 1993).

The major comprehensive claims to be negotiated are as follows.

1. Dene and Metis of the Northwest Territories

Although earlier provisional agreements foundered, negotiations are continuing between regional indigenous organisations and the Federal and Northwest Territories governments. One of the first agreements to be made under the renewed negotiations is the Sahtu Dene and Metis Agreement, signed on 4 March 1993.

2. Conseil Atikamekw-Montagnais (CAM)

CAM represents Indian claimants in the Saquenay and Mauricie areas of Quebec. CAM's claim was accepted for negotiation by the Federal government in 1979 and the Quebec government in 1980. No final Agreement has yet been reached, although in April 1989 an Interim Protection Measures Agreement was signed between the Indian groups and Quebec (DIAND 1990a, 30). This unique agreement intends to safeguard the interests of the claimants during the negotiation period and to facilitate their participation in certain development projects.

3. Inuit of Labrador

The Naskapi-Montagnais Inuit Association of Labrador has been struggling for 15 years to settle a land claim. In March 1990, a framework agreement was made with the government, outlining the scope and parameters of substantive negotiations towards an Agreement-in-Principle (DIAND 1990a, 30). But in 1992, the Federal government pulled out of negotiations because of disagreements with the Newfoundland government over a cost-sharing scheme for compensating Labrador's 5000 Inuit (*Financial Post* 10 March 1993).

4. British Columbia

Some of the most complex and largest unresolved land claims occur in British Columbia (Cassidy 1992). Claims negotiations have been difficult because of the

hostility of the Provincial government and forestry and fishery companies. One of the most prominent land claims is that of the Nisga'a First Nation. In 1976, the Nisga'a Tribal Council (NTC) submitted a land claim to the Federal government asserting title to 14 760 km² of the Nass River valley. In 1991, British Columbia was included in the negotiations and a Nisga'a Comprehensive Land Claims Agreement was reached, setting the parameters for making an agreement-in-principle and final agreement. Other Indian First Nations have sought to advance their claims through the courts. However, in the controversial case of *Delgamuuku v. British Columbia and the Attorney General of Canada* (1991), the Provincial Supreme Court dismissed the native title claims of the Gitksan and Wet'suwet'en chiefs. The Supreme Court's ruling was later significantly modified on appeal to the British Columbia Court of Appeals in June 1993. This case is now being heard in the Supreme Court of Canada. Most of the outstanding claims are expected to take to the year 2000 to be resolved (*Financial Post* 22 June 1993).

Negotiation procedure

Comprehensive claims are settled by a process of structured negotiations. An Office of Native Claims (ONC) was established in 1974 within DIAND to coordinate all Federal negotiations concerning indigenous claims and to represent the Federal government in negotiations.⁹ The ONC is also responsible for conducting research into claims and assisting in the formulation of policies for the negotiation of claims. In deciding to consider a land claim, the Canadian government makes only a commitment to consider the negotiation of a framework agreement for the issues under contention.

The claims process begins with the preparation of a statement of claim and supporting evidential documentation by the claimant group. Upon receipt of the claim by the ONC, the responsible Minister reviews the submission. In cases of rejection, reasons are given in writing. If the claim is accepted as historically and legally well-founded, negotiations commence towards the development of a framework agreement which will determine the scope, process, topics and parameters for negotiation, as well as the order and timetable for negotiations. If a claim applies to an area within a Province, the Federal government has stated that it will not consider the claim unless the concerned Province agrees to participate in the negotiations. The Minister will normally accept a claim for negotiation if it is judged that the likelihood of successful negotiations is high and the settlement of claims in the area is a priority. Because of financial constraints, the Canadian government has a policy of only negotiating six comprehensive claims at any one time. To encourage impartiality in considering

indigenous claims, since 1980 chief negotiators have been appointed from outside the public service. But this solution has led to problems where the outside negotiators have been less effective in influencing DIAND, whose approval must still be sought on the terms of a proposed agreement. First Nations peoples continue to argue that there is a basic conflict of interest in the way their claims are considered because there is no independent forum to impartially arbitrate upon claims (Assembly of First Nations 1987).

The negotiating parties first aim to secure an Agreement-in-Principle, which must be endorsed by both the Federal Cabinet and the claimant's constituency. This leads to the negotiation of a Final Agreement, accompanied by implementation plans, which must be ratified by the respective parties. Settlement legislation is then passed to give legal effect to the agreements reached. All elements of the agreement related to land, title, use and management of resources and financial arrangements are final. However, provisions relating to the structure and operation of the institutional mechanisms to implement each agreement are subject to review if the parties concur.

Funding for the research and negotiation of claims is provided by DIAND in the form of contributions and loans. Contributions are made to First Nations groups for the initial preparation of the basic statement of claim. In the second stage of negotiations towards an Agreement-in-Principle, the indigenous claimants are provided with interest-free loans. In the formulation of a Final Agreement, negotiations are financed by interest-bearing loans to support the negotiations. This is usually deducted from compensation provided to indigenous claimants in the Final Agreement. It would appear that the increasingly restrictive terms upon which financial assistance is available tends to pressure the indigenous claimants into settling on terms which are favourable to the government.

The negotiation of comprehensive claims is complicated by the special role accorded to the Provinces. The claims policy stipulates that framework agreements will not be negotiated for native claims south of 60 degrees latitude (marking the northern boundary of all the Provinces) unless a Provincial government agrees to participate in negotiations. Provincial government contribution to the costs of settling land claims is sought by the Federal government in exchange for giving certainty of title to Provincial Crown lands. This extends to allowing for the continuation of Provincial laws of general application to settlement areas unless the claims agreement explicitly stipulates otherwise (in many cases, claims settlements do provide for this). Although the Provincial and Federal government are often in conflict over the terms of claims settlements, there is an underlying commonality of interest in limiting the extent of indigenous land claims. The Indian Assembly of First Nations (1987, 3) puts it this way: 'in most cases, the Province will probably adopt the "bad guy" role and

the Federal government will be the "good guy" with pressure on the aboriginal nation to take what they can get at the table because of the adamant and regressive stance of the Province'. This position contradicts the bilateral relationship between Indians and the national government which was confirmed by the Proclamation of 1763.

The negotiation of claims is also compromised by the inequality of bargaining power between the indigenous claimants and the government. The ONC attempted to negotiate hundreds of land disputes in the 1970s, but reached few settlements because most indigenous peoples would not accept the government's 'take it or leave it offer' (Barsh 1988). Where agreements have been reached, it is sometimes because the representatives negotiating for the particular First Nation have cultivated a vested interest in achieving an agreement. The representatives of the indigenous groups negotiating complex settlements are sometimes major beneficiaries of the new institutional arrangements established, in part because they have the best understanding of settlement provisions and have forged effective relationships with the various parties involved.

The negotiation of claim settlements can become a highly bureaucratic and legalistic affair which has been said to disadvantage indigenous claimants (Ciaccio 1977). Federal government bureaucrats have considerable discretionary power to shape the outcome of particular claims, without adequate direction from the Federal Cabinet and without focused public debate. Other government authorities and departments have been often uncooperative in assisting the negotiation of indigenous claims, jealously guarding their own interests and jurisdiction. At stake is the capacity to control how land is to be used and who profits from any usage. Because of this lack of cooperation, coupled with the paucity of government money available to process claims, there is now a considerable backlog of land claims to be considered. Nevertheless, the Federal government has sought to review every claim within one year of submission.

Issues negotiated

Under the 1981 *In All Fairness* policy, First Nations peoples were required to extinguish all of their indigenous rights and title under common law. In exchange, they would receive statutory fee simple title to relatively small portions of land traditionally used and occupied, as well as financial compensation for past, unauthorised use of this land and in consideration for land ceded. Settlements could provide for preferential or exclusive wildlife harvesting rights, and the right to advise government authorities on environmental management and wildlife conservation in the regulation of non-renewable resource development (often through boards of joint management or indigenous

participation in other management processes). Although resource revenue sharing was not ruled out by the Federal government, it was strongly resisted. But the government tried to exclude issues of constitutional development and indigenous self-determination as topics for negotiation.

The revised 1986 policy differs in its emphasis, in that settlements should be more than mere real estate transactions and that the government no longer seeks the blanket extinguishment of all indigenous rights and title. Instead, the policy says new settlements should 'encourage self-reliance and economic development as well as cultural and social well-being' (DIAND 1987, 9-10). Thus, the government accepts that indigenous peoples should receive a fair portion of Federal royalties from natural resource development on Crown land in settlement areas. However, monies earned from resource development revenue are to be deducted from the total compensation figures owed. Further, resource revenue sharing arrangements do not imply resource ownership rights nor indigenous co-management of development projects. Sub-surface resources generally are to remain under Federal or Provincial jurisdiction, although limited mineral rights may be granted over some Federal land in sites close to community living areas or in critical wildlife habitat areas. But the comprehensive claims process gives no way of prioritising conflicting resource-use goals, particularly as between non-renewable resource development and wildlife use rights, other than to provide for compensation where indigenous lands are damaged.

The policy also emphasises that only land-related rights are at issue in negotiations and that any other rights which may exist will remain unaffected by comprehensive land claims agreements. Thus, the beneficiaries of land claims settlements will retain their eligibility for government social welfare programs. Compensation monies provided under settlements are not taxable. However, once they are invested and begin to generate revenue, they will be subject to income taxation legislation. This can make it more difficult for First Nations peoples to develop their own revenue base to provide an adequate social and economic milieu for their communities. Finally, laws of general application are to apply on all lands included in claims settlements, except where those laws are inconsistent with the settlement agreement. Provision is to be made for the protection of third party non-indigenous interests, such as public right-of-way and access to reserved Indian lands for recreational activities and for holders of sub-surface development rights (Thompson 1991).

The revised policy acknowledges the need for greater indigenous participation in environmental management in settlement areas (DIAND 1987, 14). Indigenous peoples are to share in government bodies that have decision making powers through the negotiation of new institutional frameworks for managing natural resources, in which government and indigenous peoples are to be equally

represented. Settlement areas are to be managed by corporate structures designed by the claimant groups, which are to assist in the sustainable utilisation of settlement areas. In the most recent settlements, such as the Nunavut Final Agreement, indigenous peoples have been more successful in negotiating for regional self-government. But the government has reserved an overriding obligation to protect the interests of all users and to respect international environmental agreements.

Perhaps the most controversial aspect of the *In All Fairness* policy statement was the insistence on finality of settlements. The Canadian government was hostile to any features of a settlement that would allow for re-negotiation and adjustment over time:

What this statement contains above all, in this time of political uncertainty and general financial restraint, is a formal reaffirmation of a commitment: that commitment is to bring a full and satisfactory conclusion, the resolution of Native land claims (DIAND 1981, 3).

Consequently, many First Nation peoples concluded that the comprehensive land claims policy was essentially a vehicle for their assimilation into the dominant white Canadian society (Dacks 1985). The perception was that the Federal government's basic objective in claim negotiations has been to extinguish indigenous rights as speedily and cheaply as possible so that it can distribute resource use rights to would-be developers without fear of legal objections by indigenous communities based upon their native title.

The revised policy of 1986 envisages a more flexible, on-going relationship between indigenous and non-indigenous interests. This policy presents two options for achieving greater certainty in the surrender of land-based rights in exchange for more clearly defined social and economic rights and benefits:

- cession of native title claimed throughout all of the settlement area, but without a requirement for the use of the terminology of extinguishment, together with a grant back of some rights in specified areas; or
- cession by the indigenous group of the native title to certain specified lands within the claimed area; native title would remain undisturbed in other lands selected by the claimant group.

The policy, however, restricts land available for selection to lands or marine areas 'currently' occupied and used, thereby tending to limit access to lands indigenous peoples have been displaced from.

Constitutional protection of indigenous rights

Introduction

The *Constitution Act 1982* and the accompanying *Canadian Charter of Rights and Freedoms*¹⁰ had important implications for the Comprehensive Land Claims Policy. Two provisions of this constitutional document specifically address the position of First Nations people. Section 25 of the *Canadian Charter of Rights and Freedoms* shields 'aboriginal, treaty and other rights' from diminution by other guarantees in the *Charter*. Section 35 of the *Constitution Act* is a substantive guarantee of 'existing aboriginal and treaty rights of the Aboriginal peoples of Canada'. The Act also provided for the convening of a First Ministers Conference on indigenous matters, to which indigenous representatives would be invited as participants (s.37). As a result of these changes, Parliament could no longer unilaterally extinguish or modify indigenous rights. Changes in existing indigenous rights require the consent of the First Nations peoples concerned or a constitutional amendment.

The Charter of Rights and Freedoms

Section 25 of the Charter states:

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 now exist by way of land claims agreements or may be so acquired.¹¹

Section 25 is not an independently enforceable guarantee of indigenous and treaty rights. Rather, it is a shield which protects indigenous rights from being adversely affected by other rights recognised by the Charter, such as the equality of treatment rights guaranteed by section 15. Thus, rights acquired by First Nations peoples through land claim settlements are beyond the prerogative of Parliament to amend unilaterally and are enforceable in the courts. However, the rights and freedoms protected by the Charter are qualified by such 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society' (s.1). This proviso refers to substantive rights actually created by the Charter and not to the indigenous rights which are independently affirmed in section 35 of the *Constitution Act*.

A conceptual problem of the Charter is the way it embraces an individualistic notion of human rights in contradistinction to the more collective expression of rights among traditional indigenous communities. A dominant Western liberal-democratic doctrine of human rights is said to be premised on a view of society as a simple aggregate of private, self-interested individuals, the purpose of law being to provide the necessary social cohesion in the face of ontological competitive individualism (Van Dyke 1982; Svenson 1979). This contrasts to an indigenous conception of society in which a people exist in an interdependent communitarian order where 'the individual is characterized as the repository of responsibilities rather than as a claimant of rights. In such a society there is no concept of inherent individual claims to inalienable rights' (Boldt & Long 1985, 166). Consequently, the Charter has been criticised as articulating a view of human rights which may 'undermine the Indians' capacity to act in accord with their perceived self-interest' (Boldt & Long 1985, 173; see also Saunders 1983; Hogg 1983). It has been suggested that the Charter fails to provide a principled approach to the judicial resolution of conflicts between individual and collective rights. Ironically, First Nations have expressed fear that the Charter's prohibitions on racial discrimination could result in the judicial subordination of the *Indian Act* to the Charter, thereby eroding their special group status and rendering all of their group rights as Indian bands inoperative on the ground of discrimination (Morton 1985, 79). The Charter may have to be the subject of constitutional review when the United Nations' 'Universal Declaration on the Rights of Indigenous Peoples' is finalised.

Recognition of indigenous rights

Rights protected by s.35 are not subject to the general limitation on rights and freedoms under the Charter. Section 35 provides that:

- (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.
- (3) For greater certainty, in subsection (i) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

The supreme status of section 35 over other laws is enshrined by section 52:

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

The effect of s.52(i) is to give legal paramountcy to the Constitution, including s.35 of the *Constitution Act 1982*, over Federal and Provincial statutes and the common law. Prior to this Act, it had been ruled by the Canadian Supreme Court in *R. v. Sikiyon* (1964) that the *British North America Act 1867* could not prevent the Federal Parliament from unilaterally diminishing or extinguishing an indigenous treaty right by legislation. In this case, the Court held that Federal regulations validly made under the *Migratory Birds Convention Act 1952* (Can.) abrogated a treaty-protected right to hunt. The new constitutional recognition and protection of indigenous rights has legally and politically strengthened the position of First Nations peoples seeking comprehensive settlements.

The word 'existing' in s.35 appears to indicate that only un-extinguished indigenous and treaty rights gained constitutional protection. The scope of this proviso has been the subject of much debate. It seems that 'existing' could include indigenous or treaty rights that have a continuing factual basis but which have been subject to inconsistent laws. A number of courts have taken the position that 'existing' means being in actuality at the time of the enactment of the *Constitution Act* in 1982: *Ontario (Attorney-General) v. Bear Island Foundation* (1984), *Martin v. The Queen* (1985) and *R. v. Agawa* (1988). The concluding words of s.35 proclaim that aboriginal and treaty rights 'are hereby recognized and affirmed'. Thus, the provision seems to be intended to be remedial and restorative of rights that have a factual basis but which have been compromised or abrogated by law.

The current judicial interpretation of s.35 is that it does not give indigenous rights immunity from government regulation but that such regulation should not be assumed to 'extinguish' such rights. The major issue has been the extent to which indigenous rights to harvest wildlife can be limited by government legislation concerned with environmental protection. In *R. v. Eninew* (1984) and *R. v. Hare and Deabssige* (1985) it was determined that indigenous and treaty rights could be limited by government regulations directed for the purposes of the management and conservation of wildlife resources.

In the leading decision, *R. v. Sparrow* (1990), the Canadian Supreme Court held that the indigenous right to fish on traditional territory was not immune to governmental control. In this case, an Indian fisherman from the Musqueam Band of British Columbia was charged with breach of fishing licence conditions under the *Federal Fisheries Act 1970*. The defendant, Sparrow, was caught

fishing for salmon in the mouth of the Fraser River using a drift-net which exceeded the Indian band's food fishing licence. Sparrow claimed in defence that he was exercising his traditional indigenous right to fish which could not be compromised by the licence conditions. The question for the court was whether this right had been extinguished, and if not, what protection it received under s.35(1). The Court found that Sparrow's right to fish had not been extinguished merely because it had been closely regulated for many years and the relevant legislation manifested no clear and plain intention to extinguish the indigenous fishing right. In a powerful judgment, Dickson C. J. C. and La Forest J. ruled:

The word 'existing' makes it clear that the aboriginal rights to which s.35(1) applies are those that were in existence when the *Constitution Act 1982*, came into effect. Thus extinguished rights are not revived by the *Constitution Act* ... However, the term 'existing' means unextinguished rather than exercisable at a certain time in history ... While [the defendant's] right has been progressively restricted and regulated by Federal legislation it had not been extinguished. In this context, an aboriginal right can be extinguished if it is shown that the sovereign's intention was clear and plain to extinguish an aboriginal right (at 395-397).

The Court noted that those indigenous rights not extinguished were not to be frozen in time. Rather, s.35(1) allowed the evolution of indigenous rights over time and in contemporary form. On the impact of s.35(1) on the regulatory power of Parliament, it was stated:

[In interpreting s.35(1) it is to be borne in mind] that the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship (at 408).

[While] s.35(1) is not subject to s.1 of the *Canadian Charter of Rights and Freedoms* ... this does not mean that any law or regulation affecting aboriginal rights will be automatically of no force and effect by the operation of s.52 of the *Constitution Act 1982*. Legislation that affects the exercise of aboriginal rights will none the less be valid if it meets the test for justifying an interference with a right recognized and affirmed under s.35(1). Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s.91(24) of the *Constitution Act 1867* (at 409).

While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s.35(1) (at 410).

In propounding such a test of justification for a government regulation that *prima facie* infringes upon indigenous rights, the court stated there must be a 'valid legislative objective':

An objective aimed at preserving s.35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s.35(1) rights that would cause harm to the general populace or other objectives found to be compelling and substantial (at 412).

[But other questions to be asked are] whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available, and whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented (at 416-17).

However, the Court held that even if there is a valid legislative objection, the legislation will nevertheless not be justified if it violates the overarching special trust relationship of the government regarding First Nations peoples.

From *Sparrow*, it is clear that the Canadian courts are prepared to countenance significant governmental regulation of indigenous rights which diminish such rights but not extinguish them. Thus, indigenous rights subject to regulation before the 1982 constitutional changes can still be considered to 'exist' for the purposes of s.35(1). Another consequence of the *Sparrow* decision, suggests Isaac (1992), is that it may play an important role in the interpretation of land claims agreements because it sets out a certain approach by which indigenous rights are to be interpreted. Because land claims are 'treaty rights' for the purposes of s.35(1), the Supreme Court's suggestion that these rights be given a 'generous, liberal interpretation' means that vague or doubtful expressions in regional agreements must be similarly interpreted.

Although the *Constitution Act* recognises and affirms 'existing aboriginal and treaty rights', it does not define those rights. Instead, it established a process of Ministerial Conferences, at which leaders of the Federal, Provincial and Territory governments and of the leading First Nations organisations would attempt to identify those rights.¹² The major topic of the Conferences was that of indigenous self-government. The Federal government made it clear that self-government agreements reached at the claims table would not enjoy the constitutional protection that claims agreements are entitled to under s.35(1) of the Constitution. The constitutional negotiations on indigenous rights ended without any agreement in March 1987. The negotiations failed due to substantive differences on basic issues, such as the scope of governmental jurisdiction and financing indigenous governments, and the right to an autonomous land base.

Agreement was later reached between government and First Nations leaders in the 1992 Charlottetown Accord (see below) on proposed constitutional recognition of self-government. For example, section 41 of the Accord stated:

The Constitution should be amended to recognize that the Aboriginal peoples of Canada have the inherent right of self-government within Canada.

A contextual statement should be inserted in the Constitution, as follows:

The exercise of the right of self-government includes the authority of the duly constituted legislative bodies of Aboriginal peoples, each within its own jurisdiction:

- (a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and
- (b) to develop and strengthen their relationship with their lands, water and environment

so as to determine and control their relationship with their lands, waters and environment (Charlottetown Accord 1992, 14).

But the scope of native title and rights under Canadian law continues to remain ambiguous. Although the courts have accepted the existence of traditional harvesting rights such as hunting, gathering and fishing, the right to use other surface and sub-surface resources has not been settled. There is also no clear view on the scope of non-resource rights, such as cultural, linguistic or religious rights and preservation of customary indigenous law.

The continuing constitutional crisis over the relationship between Quebec and the rest of the Canadian federation has diverted attention and resources away from resolving indigenous claims for self-government. The failure on 23 June 1990 of the Meech Lake Accord to incorporate Quebec's special status in the Canadian Constitution, means that Quebec has tended to dominate the national political agenda in recent years. The Accord failed to be ratified after a Cree politician, Mr Elijah Harper, blocked its passage in the Manitoba Parliament, citing the country's historical failure to adequately address native grievances. A Citizens' Forum on Canada's Future (chaired by Keith Spicer) was set up in May 1990 following the political turmoil over the failed Meech Lake Accord (Valby 1991). The Forum was designed as the national vehicle to hear views from ordinary Canadians on the country's future. The Forum asked participants to comment on various aspects of European-indigenous relationships in Canada. In the Report of the Citizen's Forum, a number of commentators have drawn parallels between the situation of indigenous peoples and that of Quebec in their claims for protection as 'distinct societies'.

Indigenous self-government negotiations

Local government model

Many aspirations of Canadian indigenous peoples relating to environmental management, land-use and resources require a strong form of indigenous self-government. Therefore, it is not surprising that the comprehensive claims process has been paralleled by a campaign by indigenous peoples for greater powers of self-government. Both the 1981 and 1986 policy statements recognised that a limited form of self-government may be included in settlement agreements. The Canadian constitution does not recognise any indigenous right to self-government. Although some progress on this issue has been made with the United Nations' draft 'Universal Declaration on the Rights of Indigenous Peoples', international law also does not support a self-executing right of self-government for indigenous peoples, other than special measures being taken to confer autonomy on such peoples (Davies 1985). There are also some overseas precedents for self-government, such as the Home Rule arrangement through which the Inuit people of Greenland govern themselves while Denmark shares decision-making responsibility for development of non-renewable resources (Crowe 1991, 34). A further source of inspiration for indigenous self-government are the range of regional and international native organisations evolving, notably the Inuit Circumpolar Conference representing 100 000 people through the Arctic Circle.

Although the constitutional process established under s.37 of the *Constitution Act* produced a consensus across Canada among all major parties, it did not produce an agreed wording for a constitutional amendment for an indigenous right to self-government. However, such agreement was reached in 1992 following intense negotiations and was incorporated into the Charlottetown Accord.¹³ The Federal government has said it is prepared to entertain a limited form of First Nation self-government through new administrative structures established as part of claims settlements. The Nunavut and Yukon agreements provide for the greatest measure of self-government, albeit by different means. Elsewhere, 'self-government' has basically involved a right of community organisation with the transfer to indigenous communities of program administration rather than real control over policy formulation.

In December 1982, the Canadian Parliament set up a Special Committee on Indian Self-Government (SCISG) to examine how the *Indian Act* could be reformed in order to provide for greater First Nations self-government (House of Commons 1984; DIAND 1987b). Following a public inquiry process, the SCISG recommended that the Federal government redefine its relationship with the First

Nations by providing for indigenous self-government. The Committee argued that control of a strong economic base, with adequate land and natural resources, was essential for effective self-government. The SCISG emphasised the need for constitutional recognition of indigenous rights to self-government and that in the interim, new legislation should make possible the 'devolution' of self-government powers to Indian bands.

In April 1986, the Federal government released a policy on indigenous community self-government negotiations within the framework of the Constitution (DIAND 1987b). The policy involved program devolution enabling communities to assume greater administrative control and service delivery of Federally-sponsored programs (DIAND 1987b; 1990b). The DIAND was reorganised into 4 divisions, one designated as having responsibility for indigenous self-government. Activities of this departmental division have been directed to new forms of government established through special legislation and the devolution of greater responsibility for administration to band and village units within the terms of the *Indian Act*. The Canadian government's policy emphasises that approaches to community self-government must respect existing constitutional principles and be consistent with government practice. For communities domiciled north of 60 degrees latitude, the policy states that through the development of public government, 'political rights would not be reserved exclusively to indigenous peoples, but indigenous interests would be incorporated and represented in institutions of public government'.

No blueprint for community self-government is prescribed, but a schedule for negotiation of new governmental arrangements is laid down. First, a 'framework agreement' for further substantive negotiations is drafted. This leads to a Final Agreement which is submitted to community members and the Federal Cabinet for formal ratification. An implementation plan is a part of this agreement. Finally, enabling legislation is enacted. The subjects of negotiation for self-government agreements cover:

- institutions and procedures of government;
- membership;
- legal status and capacity;
- land and resource management;
- financial arrangements;
- education, health and other social services; and
- administration of justice (DIAND 1987b; 1990b).

Since June 1989, 10 Indian bands have been negotiating the final details of new self-government arrangements. An additional 29 bands are at the stage of framework negotiations and about 170 bands are at the initial developmental stage. Establishment of self-government structures has been slowed by the intransigence of other Federal government departments, such as Revenue, Finance, Environment and Health, which DIAND depends upon to facilitate the new administrative arrangements (*Financial Post* 17 April 1993).

Self-government agreements may also be included within the terms of a comprehensive claims agreement (Peters 1987). Under the James Bay and Northern Quebec Agreement, a self-government agreement was later reached, titled the *Cree-Naskapi Act 1984*. Other self-government legislation includes the *Act Concerning Northern Villages and the Kativik Regional Government 1986* and the *Sechelt Indian Band Self-Government Act 1986*. The latter Act gives British Columbia's Sechelt Band greater control of their lands, various natural resources, health and social services, education and local taxation functions.

A number of political initiatives were taken at the Provincial and Federal level in 1991 and 1992 to facilitate negotiations for indigenous self-government. The Ontario government agreed in August 1991 to recognise indigenous rights to self-government by signing a statement of political relationship with the Province's First Nations chiefs (*Keesing's Record of World Events* 1991, 383–384). The agreement foreshadowed greater indigenous autonomy in the fields of police and judicial affairs, social services and use of natural resources. An attempt to amend the Canadian Constitution to provide for an 'inherent right to self-government' for indigenous peoples was defeated when put to a popular referendum on 26 October 1992 (*Economist* 14 November 1992). With the constitutional proposal dead, the problems of native peoples and their aspirations for some form of self-rule now seem to be back at the bottom of the Canadian national agenda.

Cree-Naskapi (of Quebec) Act

A good example of the model of indigenous municipal government is the *Cree-Naskapi (of Quebec) Act*. The Act was adopted in 1984 pursuant to s.9 of the James Bay Northern Quebec Agreement which required the Canadian government to enact 'special legislation' establishing local governments on the lands held in trust by Canada for the use of the James Bay Cree, Naskapi and the Inuit bands of northern Quebec. The *Cree-Naskapi Act* replaced the Federal *Indian Act* in its application to these indigenous communities, thereby removing the direct control of the Minister of Indian and Northern Affairs. The Cree argue that the *Cree-Naskapi Act*, being a supplement to the JBNQA, has constitutional protection as an instrument of self-government which cannot be unilaterally

amended by the Canadian Parliament (Wolfe 1991, 140). The legislation leaves ownership of the lands in question in the hands of the Quebec government, but the exclusive use and benefit of the land remains with the indigenous communities (s.109 (1)–(2)). The *Cree-Naskapi Act* established a new political regime in the form of local governments which are directly accountable to their indigenous constituencies. The Act essentially forms a local constitution for the Indian bands on Category IA lands (ie those areas in which the Cree enjoy the greatest land rights under the JBNQA) and provides the following matters:

- incorporation of bands (s.12);
- objects and powers of bands and band councils (ss.21, 25–29);
- band council meetings (ss.30–39);
- procedures for making band by-laws on such matters as public order, public health/hygiene, land use zoning, local taxation, administration of municipal services (s.45);
- band elections (ss.63–78); and
- financial administration of bands (ss.89–100).

The Minister for DIAND retains important discretionary powers to selectively intervene in Cree administration, such as in relation to the harvesting and conservation of wildlife, and financial management. For example, the Minister may appoint an Administrator to administer the financial affairs of a band if its affairs are in 'serious disorder' (s.97). There is also a general 'prescription' power allowing for the application of Provincial laws to certain indigenous lands and the restriction on band financial powers.

To oversee the implementation of the *Cree-Naskapi Act*, the Cree-Naskapi Commission was established in 1984 as an independent, non-government organisation (George 1989). The Commission is empowered through the Act (ss.157–172) and a Federal Order-in-Council, to receive and investigate complaints from any persons or groups affected by the application of the Act. Through a biennial report to Parliament, the Commission makes recommendations regarding the implementation of the legislation.

A major worry for the Cree and Naskapi has been their on-going struggle to secure adequate funding for self-government. The Cree have argued for firm assurances for funding for the implementation of the *Cree-Naskapi Act*. During the Federal Liberal Party government of Prime Minister Turner (1980–1984), a *Statement of Understanding of Principle Points Agreed to by the Cree-Naskapi (of Quebec) Act Implementation Working Group* was negotiated between the Federal government and the Cree guaranteeing adequate funding to support Cree

self-government bands. However, the succeeding Conservative (Mulroney) administration repudiated the Statement and dismantled the James Bay Implementation Secretariat (Richardson 1989b). Prime Minister Mulroney portrayed the Cree as 'rich Indians' no longer deserving of public financial assistance. But the Cree-Naskapi Commission found that the Federal government had acted illegally in repudiating the Statement of Understanding. In May 1986, Mulroney secured a new accord with the Cree, entitled *Agreement Respecting Finance and Financial Administration Matters Related to the Implementation of the Cree-Naskapi (of Quebec) Act*. This agreement provides for payment of annual unconditional grants rather than conditional agreements because this is considered a better method for respecting the autonomy of local governments (cl.4.1).

Royal Commission on Aboriginal Peoples

A Royal Commission on Aboriginal Peoples was announced in August 1991 by the Canadian government to examine a broad array of issues concerning indigenous peoples in Canada (Office of the Prime Minister 1991). In determining the Commission's membership and terms of reference, the government appointed the Right Honourable Brian Dickson, former Chief Justice of the Supreme Court of Canada, to serve as a special representative of the then Prime Minister Mulroney in order to consult widely with native communities. The seven-person Commission was co-chaired by George Erasmus, former National Chief of the Assembly of First Nations and the Honourable René Dussault, Justice of the Quebec Court of Appeal. The other members of the Commission included a number of prominent indigenous political activists. Under its terms of reference, the Commission was directed to consider a smorgasbord of social, economic and political issues, including the experience of regional agreements and resolution of land claims. Among the more salient references given to the Commission were the following:

The Commission of Inquiry should investigate the evolution of the relationship among aboriginal people (Indian, Inuit and Metis), the Canadian government, and Canadian society as a whole. It should propose specific solutions, rooted in domestic and international experience, to the problems which have plagued those relationships and which confront aboriginal peoples today. The Commission should examine all issues which it deems to be relevant to any or all of the aboriginal peoples of Canada, and in particular, should investigate and make concrete recommendations concerning:

1. The history of relations between aboriginal people, the Canadian government and Canadian society as a whole.

2. The recognition and affirmation of aboriginal self-government; its origins, content and a strategy for progressive implementation.
3. The land base for aboriginal peoples, including the process for resolving comprehensive and specific claims, whether rooted in Canadian constitutional instruments, treaties or in aboriginal title.
4. The legal status, implementation and future evolution of aboriginal treaties, including modern-day agreements.

In exploring these issues, the Commission was directed to focus on solutions to problems confronting indigenous peoples, rather than simply propounding another 'study' into already well-documented problems.

The Commission was empowered to adopt its own procedures and methods for the conduct of the Inquiry. However, a number of procedures were suggested which the Commission could follow. These included the establishment of regional or issue-specific task forces or advisory bodies as required to assist the Commission in the examination of any aspect of its terms of reference. Further, the Commission was encouraged to travel extensively through native communities in Canada, so that indigenous peoples could present their stories in person in a setting in which they would be most comfortable.

In 1993, the Inquiry was continuing to hold hearings and receive submissions, having heard from 1461 people in 72 communities across Canada (*Financial Post* 17 April 1993). In its first interim report, the Royal Commission made various recommendations that Aborigines should have wider powers, including the constitutional right to self-government and that indigenous laws should take precedence over Federal and Provincial laws where there was an inconsistency between them.

5

Claims settlements in northern Canada

Northwest Territories and the Yukon Territory

Introduction

The pressure to open up and develop the remote Canadian north provided the impetus for a spate of land claims negotiations in the 1980s. The Northwest Territories and the Yukon Territory are regarded by government and industry as rich in oil, mineral and other precious resources accessible for exploitation (Bone 1992). The region is also populated by several indigenous societies, principally the Inuit and Inuvialuit. Indigenous peoples dominate the Northwest Territories, with the Inuit making up 35% and the Dene 23% of the region's population (Coates 1991, 152). In the Yukon, native people comprise 25% of the population (Coates 1991, 152). In order to secure the potential economic and strategic benefits of the Canadian north, the Federal government has sought to remove the uncertainties posed by undefined indigenous claims over the region. The Federal government retains substantial control over the affairs of the northern territories including natural resources. The Canada Oil and Gas Lands Administration (COGLA) is responsible for regulating exploitation and development of oil and gas on Canada's frontier lands. COGLA reports to the Minister for Indian Affairs and Northern Development, and the Minister of Energy, Mines and Resources. The Department of Indian Affairs and Northern Development is caught in a

frequently contradictory role of being responsible for co-ordinating northern development and promoting the welfare of indigenous peoples. Bone (1992, 216) observes that the Department has simplistically assumed that 'resource development can benefit Native people through job creation and business opportunities'.

For the indigenous communities, the negotiation of regional agreements has promised a degree of control over the scale and pace of northern development activities, as well as a mechanism for 'breaking loose from the paternalistic and suffocating administration of the Federal government'. (Coates 1991, 177). It promises an end to the crass frontier mentality and a 'get rich quick' exploitative approach to resource use (Jull 1992b). The long-term value of the regional agreements will be even greater in light of the threat posed by the 1989 Free Trade Agreement between Canada and the United States, which, over time, is expected to accentuate the development pressures and the flow of wealth away from the north to the United States (Bone 1992, 12). The 1993 amendment of this agreement (now known as the North American Free Trade Agreement or NAFTA) to include Mexico may accentuate this problem.

Several Canadian regional agreements in this region have already been negotiated under the comprehensive claims process, although it remains to be seen whether they will prove sustainable and ensure that the indigenous beneficiaries retain community control and management over their environment. The most significant settlement achieved to date was the Inuvialuit Final Agreement (1984). Other agreements are the Yukon Umbrella Final Agreement (1993) and most recently the Nunavut Final Agreement (1993). These agreements draw upon the framework established in the James Bay Agreement model, and are broadly alike in their basic scope, purpose and structure, although the most recent agreements are more favourable for indigenous peoples and have a more explicitly environmental conservation thrust. The northern regional agreements have essentially been a result of bilateral negotiations between regional indigenous organisations and the Federal government. Although the Yukon and Northwest governments have been involved in the formulation of the claims settlements, their inclusion has been 'more a matter of political courtesy than legal necessity' (Coates 1991, 180). The major First Nations involved in the negotiations have been the Yukon Native Brotherhood, Metis Association of the Northwest Territories, Dene Nation, Committee for Original Peoples' Entitlement (representing the Inuvialuit and Inuit of the Western Arctic) and the Inuit Tapirisat of Canada and the Tungavik Federation of Nunavut (Eastern Arctic). The empowerment of indigenous peoples in the Canadian north has not led to a demand for political independence. Indigenous peoples in the Territories

and Nunavut have indicated that they want to remain a part of the Canadian federation (Jull 1992b, 26).

Inuvialuit Final Agreement

Negotiation of the Agreement

The pressure to achieve a prompt settlement has weighed heavily on the Inuvialuit of the western Arctic who have been faced with the social and environmental dislocation posed by extensive hydrocarbon development in the Beaufort Sea. The Committee for Original Peoples' Entitlement (COPE), representing the 2500 Inuvialuit of this region, lodged a land claim in 1977 for negotiation. Through negotiation of a regional agreement, the Inuvialuit have sought to preserve their cultural heritage, to be participants in the sustainable development of northern society and to protect the Arctic environment. An Agreement-in-Principle was signed on October 1978 that provided for the extinguishment of Inuvialuit common law rights. In 1980, the Federal government repudiated this agreement and in 1982 a new Agreement-in-Principle was negotiated. The Inuvialuit Final Agreement (IFA) was eventually signed on 5 June 1984, making it the first comprehensive land claims agreement to be negotiated under the *In All Fairness* claims policy (DIAND 1984). The Agreement was ratified and executed through the *Western Arctic (Inuvialuit) Claims Settlement Act 1984* (WAICSA).¹⁴

Terms of the settlement

The Inuvialuit Agreement is considered one of the most generous regional agreements for indigenous peoples (Crowe 1990, 21). The agreement was the first in Canada to include land ownership to both surface and subsurface areas, as well as water bodies (Crowe 1990, 21). The quantities of land per capita are greater than in any other claims settlement (12 square miles per person) and give title to about 45% of the area traditionally occupied by the Inuvialuit (Crowe 1990, 21). In general, the settlement provided the Inuvialuit with land and resource use rights, together with cash compensation and rights to social and economic services (Keeping 1989a). The goals the Inuvialuit have sought to achieve through negotiation of their claims are enumerated in clauses 1 and 16 of the Agreement as being:

- to preserve Inuvialuit cultural identity and values within a changing northern society;

- to enable the Inuvialuit to be equal and meaningful participants in the northern and national economy;
- to facilitate Inuvialuit integration into Canadian society through development of an adequate level of economic self-reliance and a solid economic base; and
- to protect and preserve the Arctic wildlife, environment and biological productivity.

The IFA employs the controversial 'surrender-grant-back' formulation (the same as the earlier James Bay Agreement). It provides that:

in consideration of the rights and benefits in favour of the Inuvialuit set forth in this Agreement, the Inuvialuit cede, release, surrender and convey all their aboriginal claims, rights, title and interests [in the Settlement area]. (cl.3.4)

The Settlement Legislation approving, giving effect to and declaring valid this Agreement shall extinguish all aboriginal claims, rights, title and interests whatever they may be of all Inuvialuit. (cl.3.3)

[The Settlement Legislation] shall provide that Canada recognises and gives, grants and provides to the Inuvialuit the rights, privileges and benefits specified in this Agreement. (cl.3.1)

Under the Agreement, the Inuvialuit received title to about 91 000 km² of land in the Western Arctic, but of which only 13 000 km² were granted in fee simple absolute and conferring sub-surface rights. This total figure represents about half the onshore lands traditionally used by the Inuvialuit (Keeping 1989a, 11–12). This limited land conveyance is made subject to existing alienations, such as holders of oil and mineral rights (cl.7(93)). Lands granted to the Inuvialuit cannot be alienated to third parties (cl.2), but may be expropriated by the Federal government subject to provision of appropriate compensation (cl.7(50)–(58)). Financially, the Inuvialuit received C\$152 million in a series of compensatory payments between 1984–87, together with a one-off payment of C\$10 million to the Economic Enhancement Fund and C\$7.5 million to a fund to assist the Inuvialuit in social development. The Inuvialuit are also given preferential access to resource development rights on Crown lands in the Settlement Region (cl.16(9)).

The Agreement provided for a number of corporate structures to administer and manage the Settlement funds, lands and other benefits. The Inuvialuit Regional Corporation, composed of representatives of the six Inuvialuit Community Corporations, functions as an umbrella organisation of the Inuvialuit to receive initially the Settlement funds and lands, and to coordinate Inuvialuit implementation efforts (IRC 1993b). An Inuvialuit Land Corporation administers

the Settlement lands. The Inuvialuit Development Corporation and the Inuvialuit Investment Corporation carry out business on behalf of the Inuvialuit and invest Settlement funds on behalf of the beneficiaries (cl.6). The Final Agreement does not provide for regional self-government as desired by the Inuvialuit. However, the Inuvialuit continue to press for a form of regional government for their Western Arctic homeland, as they believe that the wording of the Final Agreement does not necessarily preclude this option.

The IFA establishes a number of institutions to deal with the various components of environmental management, including wildlife harvesting and environmental impact controls (Binder & Hanbidge 1993; Doubleday 1989). These structures are all managed by approximately equal numbers of government and Inuvialuit representatives, except in a few specified cases. Clause 7(82) states that there will be brought into being certain agencies 'for the purpose of coordinating land use planning for the Beaufort Sea Region' with guaranteed minimum levels of Inuvialuit representation.

A very complex and intricate wildlife management system is established under the Inuvialuit Final Agreement. The Inuvialuit possess exclusive and preferential harvesting rights to game except for certain migratory species. Compensation is to be provided to Inuvialuit hunters from developers for actual losses that occur as a result of any development undertaken in the Settlement Region (cl.13). At the local level, six exclusively Inuvialuit Hunters and Trappers Committees (HTCs) provide representation to each of the communities in wildlife management. The HTCs encourage and promote Inuvialuit involvement in sustainable wildlife utilisation and are collectively represented on the Inuvialuit Game Council (IGC). The Council was established under the Societies Ordinance of the Northwest Territories prior to the IFA. The IGC has responsibility for allocating quotas for the harvesting of wildlife among the Inuvialuit communities, as well as advising the two Wildlife Management Advisory Councils (one each for the Northwest Territories and the Yukon North Slope). These two authorities in turn advise the appropriate Minister on wildlife conservation matters. A Fisheries Joint Management Committee (FJMC) advises the Minister of Fisheries and Oceans on matters relating to fisheries and marine mammals in the Settlement Region. Finally, a Research Advisory Council, with multi-party representation, coordinates research activities into wildlife and environmental management in the Settlement Region.

In the implementation of this institutional arrangement, the Agreement spells out five operative principles for wildlife management:

1. protection and preservation of Arctic wildlife, environmental and biological productivity through the application of conservation principles and practices;

2. integration of wildlife and land management through various means, including the coordination of legislative authorities;
3. recognition of possible desirability of special protective measures under existing or future laws being applied to lands significant for wildlife, research or harvesting values;
4. integration of Inuvialuit into all bodies, functions and decisions pertaining to wildlife management and land management; and
5. the relevant knowledge and experience of both the Inuvialuit and the scientific communities should be employed in order to achieve conservation (cls.14-15).

Despite the scope for local participation in wildlife and fisheries management, the IFA does not decentralise wildlife harvesting rights to Inuvialuit communities. The power to regulate, allocate and control public access and Inuvialuit participation in management rests with the Wildlife Management Advisory Councils and Fisheries Joint Management Committee. The local Hunters and Trappers Committees and Game Council are left with the power to enforce and provide harvest data.

The IFA also establishes a comprehensive system of regional environmental planning and development control. The Agreement provides for an environmental impact assessment process through two agencies in which the Inuvialuit have rights to participate. It is stipulated that for 'every development of consequence to the Inuvialuit Settlement Region that is likely to cause a negative environmental impact' (cl.11), the development proponent must prepare an environmental impact statement for the assessment by an Environmental Impact Screening Committee (EISC) as to whether it 'could have a significant negative impact on present and future wildlife harvesting' (cl.11). An Environmental Impact Review Board (EIRB) undertakes the review of major development proposals referred to it by the EISC. However, the Agreement is silent as to what standards to apply in evaluating environmental threats posed by a development. The Board is to make advisory recommendations to the government body on whether or not the development in question should proceed, including any mitigative measures that it feels should be applied to a project to minimise its environmental impacts. The EISC and the EIRB both have seven members, divided among three Inuvialuit and three government representatives and a chairperson chosen by the Federal government with Inuvialuit approval.

The IFA provides for the establishment of an 11 member Arbitration Board to resolve disputes between the parties to the Agreement which may arise out of the interpretation or implementation of its provisions. The Board, which has a mixed membership from government, industry and indigenous groups, has the power to make enforceable rulings.

Implementation

To ensure oversight of the implementation of the Agreement, an Implementation Coordinating Committee was set up in 1986 for setting priorities (DIAND 1988b). This body complements the DIAND's Western Arctic (Inuvialuit) Claim Implementation Secretariat. The Agreement requires that, starting from the year 2000, and every five years after that, the Canadian government and the Inuvialuit are to review the 'efficacy' of the economic measures provided under clause 16 of the Agreement.

A major study of the implementation of the institutional provisions for joint environmental impact screening and review process under the IFA was released in April 1990. Prepared by Maureen Reed (1990, 47-50), the study concluded that the new environmental screening provisions have strengthened environmental assessment and provided for more broadly-based input at the local level at an early stage in development applications. Although the Screening Committee is designated as an advisory body only, the study found that through its ability to delay projects by requesting more information, the Committee had actually assumed a degree of *de facto* decision-making powers. Further, the recommendations of the Screening Committee have been adopted by the respective government authorities. The study noted that unfortunately the number of indigenous peoples with appropriate technical expertise is small and that they have been stretched across many boards and committees. The study recommended that greater resources should be devoted to education and training of the Inuvialuit to ensure their full representation on the various agencies, particularly the Screening Committee.

Another official study of the implementation of the environmental and wildlife provisions of the Inuvialuit Final Agreements found a strong commitment among parties to its implementation (Resources Future International (RFI) 1993, 6). The RFI study also found that the establishment of the various joint management bodies had been a trying process: 'It is difficult to proceed smoothly from a negotiating process which was often adversarial in nature to a co-management regime premised on consensus-building' (RFI 1993, 7).

Most recently, the Inuvialuit have sought to renegotiate a self-government agreement, based on clause 4(3) of the IFA, which allows them to claim additional, higher benefits, in relation to self-government for the Western Arctic where this is secured by other indigenous peoples in later regional agreements. A derivative settlement of the IFA is the 1992 Gwich'in Comprehensive Land Claim Agreement (GCLCA) which provides for negotiated self-government agreements (MacLachlan 1993). With the expected division of the Northwest Territories to make way for Nunavut, the Commission for Constitutional

Development (CCD) in the Northwest Territories recommended new governmental arrangements for the indigenous peoples of the remaining western territory not included in the Nunavut Agreement (Commission for Constitutional Development 1992). In pursuance of clause 4(3) of the IFA, a draft *Proposal for Inuvialuit Self-Government in the Western Arctic* was prepared by the Inuvialuit Regional Corporation in March 1993 (IRC 1993a). The options are separate indigenous self-governments for the Gwich'in and the Inuvialuit or an integrated regional government.

The Inuvialuit Agreement has not yet succumbed to the sort of controversy surrounding the implementation of the James Bay Agreement. Unlike that agreement, the Inuvialuit settlement seems to have benefited from the presence of a relatively cooperative and sympathetic territorial government. A significant factor here is that indigenous peoples form a large proportion of the population of the Northwest Territories which has given them considerably more influence over the territorial government. In contrast, the James Bay Cree never enjoyed such a status in Quebec and suffered as a marginalised and peripheral group in Provincial politics when the JBNQA commenced in the 1970s.

Yukon Umbrella Final Agreement

Negotiation of the Agreement

The most recent regional agreements, the Yukon and Nunavut settlements, were finalised in the early 1990s and illustrate the most recent developments in the comprehensive land claim and self-government process. The Yukon settlement was the first to reflect the Federal government's policy of 1986 of restricting the degree of surrender of indigenous rights (Crowe 1990, 21). The negotiation of a comprehensive claims agreement for the Yukon Territory has been an extremely protracted affair, taking about 17 years. The Council of Yukon Indians (CYI), which represents the 14 First Nations of the Yukon, first submitted a claim in 1973, entitled *Together Today for Our Children Tomorrow*. In May 1976, a draft Agreement-in-Principle was formulated by the representatives of the Yukon First Nations and the Federal government. Although this document received Cabinet approval, it was later repudiated by the Yukon indigenous communities who sought a large measure of control over the use of their land rather than a 'land for cash deal'. The claim was revised in 1979 as a *Proposal for Yukon Settlement*, that sought to create a separate Yukon Indian government for the approximately 5500 indigenous people the CYI represents. It sought entrenchment rather than extinguishment of the indigenous surface and sub-surface land rights in the Yukon. Behind their land claim lay a fear of Province-hood and the transfer of

lands and responsibilities to the development-hungry Yukon Territorial government. About 25% of the Yukon's 30 000 population are indigenous. In 1982, an Agreement-in-Principle was concluded on some aspects of the revised claim, but the outstanding issue remained the Canadian government's pursuit of extinguishment rather than entrenchment of indigenous rights to sub-surface resources. In 1984, a further Agreement-in-Principle was reached, but it was not ratified by a sufficient number of First Nations peoples. The agreement lapsed and negotiations were suspended for some time.

In 1989, another Agreement-in-Principle was reached and ratified by all parties. It consists of some 20 specific sub-agreements on hunting, fishing and trapping rights, land arrangements, financial compensation and management bodies. However, this Agreement-in-Principle does not impose any legal obligations upon the parties. An Umbrella Final Agreement was signed in March 1990, comprising 28 Sub-Agreements on various aspects of land management, non-renewable resources and implementation measures. The Agreement is to be ratified by each Yukon First Nation, a process that is expected to be completed in 1994. Other elements in this regional agreement package are a Self-Government Agreement and Financial Transfer Agreement, which provide the basis for negotiating individual self-government settlements with each of the 14 Yukon First Nations.

Terms of the Agreement

The Agreement gives the Yukon First Nations (YFN) title to 41 439 km², or 9% of the Yukon Territory (DIAND 1989a). Yukon settlement lands are parcelled into Category A and Category B lands. The YFN received the equivalent of fee simple title to both surface and sub-surface on Category A lands which comprise 25 899 km². On Category B lands, the YFN are to enjoy fee simple title to the surface only, as ownership of the sub-surface remains with the Federal Crown. There is no security of title to these lands. The Settlement lands may be expropriated subject to the approval of the Governor-in-Council, although where possible, alternative lands are to be provided as compensation in kind. An additional provision is that the settlement lands are to be subject to any existing interests in the land. Like the other comprehensive settlements, the Yukon Agreement provides:

[The Yukon people] shall be deemed to have ceded, released and surrendered to Her Majesty the Queen in Right of Canada all their aboriginal claims, rights, titles and interests, if any [to the settlement lands] (cl.2.16).

In selecting their lands from the total settlement area, the YFN may choose land with the following characteristics: hunting/trapping values; historical,

archaeological and spiritual areas; agriculture and forestry areas; and areas of economic development potential (some of these would necessarily overlap).

In consideration for all the comprehensive claims of the 14 YFNs, they are to receive financial compensation of C\$242 million to be disbursed over a 15 year period. From this sum will be deducted the monies borrowed to sustain the two decade negotiation process. The Agreement gives the Indians a share of resource royalties collected from mining activities in the settlement area. Settlement Corporations are to be constituted to carry out the various financial activities for the YFNs. A Sub-Agreement of Economic Development Measures commits the government to providing special economic opportunities to the Indians, such as preference in the allocation of licences related to natural resources development. A Sub-Agreement on Resource Royalty Sharing provides a formula whereby they are to receive a minimum share of Crown royalties from non-renewable resource development.

The Agreement proposes an environmental planning and land use control system for the settlement area. According to the Sub-Agreement on Land Use Planning, the objective is:

- To ensure social, cultural, economic and environmental policies are applied to the management and use of land resources in an integrated and coordinated manner;
- To minimize actual and potential land use conflicts;
- To fully utilize the knowledge and experience of the Yukon Indian People in order to achieve effective land use planning (cls.1.2-1.7).

The planning process is to be informed by ecological considerations and broad public participation in regulatory agencies of mixed Indian and government representation. A Regional Planning Commission is proposed to supervise environmental planning in the region. It will be complemented by an environmental impact assessment and review structure to scrutinise all major development proposals in the Yukon. It is suggested that Indian membership on the various panels of the committee will vary from one third to two thirds, depending on whether the development will impact on non-settlement lands only or on settlement lands.

A detailed institutional structure for managing wildlife is anticipated. In the territory of each YFN, a Renewable Resources Council (RRC) is to function as the primary instrument for fish and wildlife management. The RRC, which is to have equal Inuit and government representation, is to advise a Fish and Wildlife Management Board (FWMB) to coordinate regional wildlife policy. The FWMB is in turn to advise the appropriate Minister. Subject to conservation

requirements, the YFN will have exclusive hunting rights on Category A lands, and elsewhere are to receive preferential harvesting allocations, based on a 'basic need' for certain species of wildlife. Developers are expected to compensate for any damage caused to trap-lines. Each Yukon First Nation is to manage and allocate timber harvests on settlement lands and will participate in forestry management on non-settlement lands. The Agreement also envisages a C\$3.2 million government-funded Fish and Wildlife Enhancement Trust Fund. One exceptional feature of the Yukon Agreement is the establishment of a Yukon Heritage Board. The Board, which would have 50% Indians representation, would advise the appropriate government agencies on the conservation and management of the Yukon's cultural heritage resources.

To facilitate implementation of any final agreement reached, it is proposed to set up a special administrative training scheme and a dispute resolution process. A Sub-Agreement on Training for Settlement Implementation provides that the government will establish a Training Committee to impart the skills to the Indians necessary for their participation in the effective implementation process. A Sub-Agreement on Dispute Resolution provides for the use of mediation and arbitration processes. It is proposed to set up a Surface Rights Board, with one third indigenous representation, to adjudicate upon disputes between holders of surface and sub-surface interests in the Yukon. In the case of a dispute over the interpretation or implementation of the Agreement, arbitration and mediation procedures are to be used. Mediators and arbitrators are to be appointed from a panel of 12 persons nominated by the Federal and Territorial governments and the YFN. However, the use of informal conflict resolution techniques is not to be available in all situations, but only in relation to those issues clearly specified in the Agreement. Otherwise, the Minister retains the final say.

The Yukon Agreement also achieved a breakthrough on the role of self-government for indigenous communities. Although the Federal government had previously ruled out the inclusion of self-government clauses in regional agreements because of its fear that such clauses would attract constitutional protection under s.35(1) of the *Constitution Act*, the Yukon Agreement obliges the Canadian government to negotiate self-government agreements with each of the interested 14 Yukon First Nations. The significance of the change, according to Wolfe, is that:

each member nation of the [Council of Yukon Indians] with an established government has the opportunity to administer the rights conferred by the claim, even though that government is not protected by the constitution. In previous Claims Agreements, such as the Inuvialuit claim, rights bestowed by the claim settlement have been exercised by a specially constituted corporation, not by a government. In some cases ... the corporation has commanded power through its

control over the compensation funds, and its role in land and resource management, and the government has had to operate from a relatively weak base. Aboriginal people do not wish to separate land and resource management, which they view as critical to their economic and cultural survival, from their exercise of government (Wolfe 1991, 138).

In contrast to the Nunavut Agreement (discussed below), which creates a Territory-wide government for the people of the region of which the Inuit are the overwhelming majority, the Yukon Agreement is based on indigenous groups holding pockets of land that are non-contiguous. This model has some administrative antecedents, such as in the *Cree-Naskapi (of Quebec) Act 1984*. Courchene (1993, 12) believes the Yukon First Nations self-government agreements are likely to be a model agreement for the rest of the First Nations.

Self-government agreements had been negotiated with four First Nations by April 1993 (Courchene 1993, 13). Further agreements will be made according to the readiness of the various First Nations to undertake self-government responsibilities. Each self-government agreement spells out the nature of First Nations constitutions, financial reporting and other measures for ensuring that the self-government bodies are held accountable to their citizens. The type of broad legislative powers provided are illustrated in the case of the Champagne and Aishihik First Nations Self-Government Agreement. Clause 13 provides:

13.1 The Champagne and Aishihik First Nations shall have the *exclusive* power to enact laws in relation to the following matters:

(a) administration of Champagne and Aishihik First Nations affairs and operation and internal management of the Champagne and Aishihik First Nations;

13.2 The Champagne and Aishihik First Nations shall have the power to enact laws in relation to the following matters in the Yukon (both on and off the Settlement land):

(a) provision of programs and services in relation to their spiritual and cultural beliefs and practices; ...

(c) provision of health care and services to Citizens, except licensing and regulation of facility-based services off Settlement Land;

(d) provision of social and welfare services to Citizens, except licensing and regulation of facility-based services off Settlement Land;

(e) provision of training programs for Citizens, subject to Government certification requirements where applicable; ...

(h) provision of education programs and services for Citizens choosing to participate, except licensing and regulation of facility-based services off Settlement Land; ...

13.3 The Champagne and Aishihik First Nations shall have the power to enact laws of a local or private nature on Settlement Land in relation to the following matters:

- (a) use, management, administration, control and protection of Settlement Land,
...
- (c) use, management, administration and protection of natural resources under the ownership, control or jurisdiction of the Champagne and Aishihik First Nations;
- (d) gathering, hunting, trapping or fishing and the protection of fish, wildlife and habitat; ...
- (k) planning, zoning and land development; ...
- (q) administration of justice; ...
- (t) control or prevention of pollution and protection of the environment; ...
- (w) other matters coming within the good government of Citizens on Settlement Land.

A significant component of the self-government agreements is the authority given to the respective First Nations to provide some programs and services to their citizens *beyond* settlement lands, but within the Yukon. Courchene (1993, 17) interprets this arrangement as embodying a combination of a 'territorial model' (powers dependent on location) and 'citizenship model' (powers dependent on who one is). This legal framework places environmental management and protection within the self-government process of First Nations peoples.

Individual First Nations control over land management in the settlement lands is buttressed by the *Yukon Environment Act 1991* which seeks to enhance the participation of YFNs in regional environmental decision making. The Act is based on the principles of sustainable development, and its purpose is defined in s.2(1) as, *inter alia*:

- (a) to ensure that the lands and natural resources of the Yukon are managed, in public trust, for the benefit of present and future generations;
- (b) to ensure that undertakings in the Yukon contribute to and enhance socio-economic and biophysical sustainability; and
- (c) to ensure comprehensive and integrated consideration of biophysical and socio-economic effects in planning, implementation and regulation of all undertakings.

Section 4(1) of the *Yukon Environment Act* requires that the relevant Minister ensure that the application of the Act will:

- (a) recognize and enhance, to the extent practicable, the traditional economy of Yukon Indian People and their special relationship with the wilderness environment;
- (b) provide for the guaranteed participation of Yukon Indian People;
- (c) utilize the knowledge and experience of Yukon Indian People; and
- (d) protect and promote the well-being of Yukon Indian People and their communities.

In achieving these objectives, s.4(2) allows the Minister to enter into accords with First Nations concerning, for example, 'consultation and participation in the [Act's] regulatory processes' and cooperation and coordination in the enforcement and application of the Act. Such accords may be effected with the Renewable Resource Councils or other bodies established under any Yukon land claim final agreement. The legislation is in no way meant to prejudice the land claims negotiations.

Dene/Metis Agreement-in-Principle

Negotiation of the Agreement

For the past 15 years, the Dene and Metis peoples of the Northwest Territories have been negotiating a comprehensive land claims settlement and seeking new political and constitutional rights for indigenous self-government. The 8000 or so Dene are indigenous inhabitants of the region, while the 5000 or so Metis are the descendants of unions between the Dene and Europeans. Because their economic circumstances are similar, the Canadian government has insisted that their claims be negotiated as a single settlement (Coates 1992, 172). The Dene and Metis assert title to approximately 450 000 square miles of the Canadian north. Negotiations have focused around the level of benefits indigenous peoples should derive from the expansion of the Norman Wells oil field and the construction of a pipeline to carry the oil to the south (Bone 1992, 145-156). In September 1988, an Agreement-in-Principle for a comprehensive claims settlement was signed between the Dene/Metis and the Territorial and Federal governments (DIAND 1988a) Despite the 1987 revised comprehensive claims policy, which says that alternatives to extinguishment of indigenous rights would be considered, under this agreement the Dene/Metis are to renounce their claim to the land they have traditionally used and occupied in exchange for a bundle of rights, including some title to land, financial compensation, and rights to harvest and participate in the management of wildlife.

Like the Yukon settlement, negotiation of the Dene/Metis claim has been a tortuous affair (Keeping 1989b). The Federal government initially rejected the claim on the ground that whatever indigenous rights once existed, they were extinguished by treaties which the Dene and Metis leaders had signed in 1899 and 1920–21. In response to the Federal government's intransigence, the Dene lodged in 1973 a caveat over the disputed Mackenzie Valley. Justice Morrow of the Supreme Court of the Northwest Territories permitted the filing of the caveat, holding that:

The caveators ... have at least demonstrated the possibility of persuading the Federal Court ... that the two treaties are not effective instruments to terminate their aboriginal rights ... [because] the Federal government sought these treaties to reassure their dominant title only (DIAND 1983, 65).

Although the caveat was later removed on appeal to the Canadian Supreme Court, it was only on the technical ground that the Canadian *Land Titles Act* did not authorise the lodging of a caveat against unalienated Crown lands (*Re Paulette et al. and Registrar of Land Titles* (1973)). However, it was the public inquiry of the Berger Commission which was more influential in pushing the Dene claim into the national spotlight.

In 1974, the Canadian government commissioned Justice Thomas Berger, of the Supreme Court of British Columbia, to organise an inquiry concerning the social, economic and environmental consequences of a proposed 4160 km natural gas pipeline designed to traverse the ecologically sensitive Northwest Territories. Berger undertook a unique experiment in citizen participation, conducting extensive hearings in indigenous communities. Personal testimony of indigenous peoples was received on their concerns with the pipeline project. Berger's innovative inquiry process generated enormous attention in the national media. Berger recommended that no pipeline be built for 10 years, so as to allow the outstanding indigenous claims to be settled and the social and environmental impacts of the proposed project to be addressed (Berger 1977). He argued that during this time, new institutions and programs should be set up that would form 'the basis for Aboriginal self-government' (1977, 196). In arguing for self-determination for the Dene and Metis, Berger provided strong support for a negotiated settlement to satisfy the native claims.

While the Berger inquiry was still in progress, in 1975 the Dene leaders issued the *Dene Declaration*, a manifesto of their aims and demands for a comprehensive settlement providing for an independent Dene nation and Dene government. The Metis claim, titled *Proposed Agreement on Objectives between the Aboriginal Peoples of the Mackenzie Corridor and the Government for the Entrenchment of Rights to 'Our Land, Our Culture, Our Future'*, was less radical and did not propose political autonomy. The Federal government refused to

entertain the political and constitutional demands of the Dene and instead sought to negotiate one combined agreement with the Dene and Metis. With changing economic circumstances, the need to proceed with the Mackenzie Valley pipeline receded and the Federal government lost interest in further negotiations with the indigenous parties. Negotiations on the claim were delayed for four years by the withdrawal of necessary government funds. Negotiations only resumed when a proposal to build a shorter pipeline to link the Norman Wells pipeline oil field was filed before the National Energy Board. High levels of unemployment and an inability to generate sufficient cash from trapping, encouraged the Dene to accept the pipeline as a useful project providing economic returns to their communities (Bone 1992, 221). An Agreement-in-Principle was reached on 5 September 1988, but it seems to have foundered upon the requirement that the claimants surrender their indigenous rights to other lands, as well as differences between the Dene and Metis negotiating positions (Morrison 1992, 176). The Canadian government has since announced that it will renegotiate the land claims with each region among the Dene/Metis (Crowe 1991, 34).

Terms of the Agreement

The Agreement-in-Principle covered 340 000 square miles of the Northwest Territories, of which the Dene/Metis would receive 70 000 square miles of land, with title to the surface of 66 100 square miles and to both surface and sub-surface of 3900 square miles. Financial compensation of C\$500 million was also promised. Further benefits would come through the right to influence the utilisation of sub-surface resources in the Settlement Area: oil and gas exploration would be conditional upon prior consultation with the Dene/Metis representatives, who would also be entitled to royalties from resource extraction. Special compensation of C\$75 million was included as payment for the surrender of rights to the Norman Wells proven oil field.

The Agreement provided for the establishment of a number of agencies that would exercise environmental planning and management functions throughout the Settlement Area. The Dene and Metis would enjoy near equal representation with the government on these environmental management agencies. It was proposed to establish an Environmental Impact Review Board, Land Use Planning Board, Land and Water Management Board and a Surface Rights Board. All development proposals would be subject to a rigorous environmental impact assessment process, with provision for public hearings in affected communities, although the final decision to approve any development would rest with the appropriate Minister. The Land Use Planning Board (LUPB) would develop plans for the use of the settlement area in consultation with affected

communities. The Land and Water Management Board (LWMB) would supervise the conservation and management of land and water resources. A Wildlife Harvesting and Management Board, with indigenous membership, was envisaged to formulate policies and propose regulations for the settlement area, but subject to Ministerial supervision. The Dene and Metis would enjoy preferential and exclusive harvesting rights. A national park and special conservation area was anticipated in the settlement area: the Nahanni National Park and the Squirrel Sunrise Management Area. These protected areas would be under a joint management structure comprising National Park Management Committees, with equal membership of government and Dene/Metis. The Surface Rights Board (SRB) would adjudicate and determine disputes between developers and indigenous groups concerning access to sites containing oil, gas and other mineral resources. An Arbitration Board would resolve other disputes concerning the interpretation and implementation of other provisions of the agreement.

Nunavut Final Agreement

Negotiation of the Agreement

The most recent comprehensive land claims settlement to be negotiated covers the 13 500 Inuit of the Eastern Arctic. Their claim was first presented by the Inuit Tapirisat of Canada (ITC) in 1976. The Inuit of the Northwest Territories, who still pursue a predominantly traditional lifestyle, sought to develop a 'mixed' economy based on utilisation of renewable and non-renewable resources (Brady 1978). Since the mid 1970s, the Inuit have articulated a model of political development and natural resource management which they want the Federal government to endorse (Merritt *et al.* 1989). The Inuit have sought the creation of a semi-autonomous territory carved out of the Northwest Territories, with control over land and sea use and resource-royalty sharing. The political demands of the Inuit have encountered some opposition from the government of the Northwest Territories which has viewed them as potentially compromising its own aspirations for Provincial status.

The course of the claims negotiations was very slow (Duffy 1988). The pressure of disruptive mineral exploration and the slow pace of negotiations led the Inuit of the Baker Lake region to sue in the Federal Court of Canada for a declaration as to their native title and for permanent injunctions to prohibit mining activity. In the case of *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* (1980), Justice Mahoney found that the Baker Lake Inuit enjoyed 'Aboriginal title' to the lands around their community, but he denied that their

title was capable of prevailing against Federal mining legislation so as to support a permanent injunction. In 1981, the parties reached a limited agreement entitled Wildlife Provisions of an Agreement-in-Principle. In 1982, the ITC was replaced by the Tungavik Federation of Nunavut (TFN), representing 17 500 Inuit. On 30 April 1990, the TFN signed, with representatives of the Federal and territorial governments, an Agreement-in-Principle to the Nunavut land claim. A Final Agreement was signed in 1993. A legislative framework has been drafted, entitled the Nunavut Land Claims Agreement Act. Despite the time taken to settle the land claims, Jull (1992a, 30–31) believes that the Inuit were more conciliatory negotiators than other First Nations peoples, because they have not experienced the 'intensity or length of historical grievance' with European people that other indigenous communities in Canada have endured.

Terms of the Agreement

The Nunavut Final Agreement is an extremely detailed and comprehensive document of nearly 300 pages. The Agreement was negotiated under the 1986 land claims policy and differs from its predecessors in that it gives considerably greater weight to environmental factors and provides for the establishment of statutory bodies, with substantial indigenous representation, to supervise use of natural resources and development in the settlement area (Fenge 1990; Crowe 1990 1991). The Agreement places strong limitations on the exercise of the powers of the Minister for Indian Affairs, which can generally be exercised only on specified grounds and with clear reasons.

The table of contents of the Nunavut Final Agreement is outlined in Appendix 1. Like other claims settlements, the Nunavut Final Agreement provides for the effective extinguishment of native title to lands and adjacent offshore in exchange for a variety of rights and benefits throughout the settlement area (Article 2(7)). In exchange for relinquishing native title to 1 600 000 km², or 82% of their traditional lands, the Inuit of Nunavut are to receive: title to approximately 350 000 km² of which 3 000 km² include title to sub-surface areas (Article 3); C\$580 million compensation, calculated in 1992 dollars and payable over 14 years; specific economic rights, such as a share of royalties from oil, gas and mineral development on Crown land. The Inuit are also guaranteed the right to harvest wildlife to meet subsistence needs (Article 5). The Inuit's rights to sub-surface areas apply to 139 parcels of land which were chosen by the Inuit negotiators for their mineral potential (*Financial Post* 17 November 1992). In these areas, existing interests held by mining companies must be honoured, but royalties that formerly were paid to the Federal government are now to go to the Nunavut Trust, which was set up to invest the compensation money (Articles 25

and 31). However, most mining projects in the Northwest Territories are outside the boundaries of the land claim settlement.

A number of institutions, with equal Inuit and government representation, are to be established as instruments of public administration for comprehensive environmental management and natural resources development of the settlement area (Merritt & Fenge 1990). The Final Agreement is to allow the Inuit to establish an integrated environmental planning and management regime, in contrast to the currently *ad hoc* resource development in the Arctic. Article 11.2.1 lists eight principles to guide land use planning, including the following terms:

- (a) people are a functional part of a dynamic biophysical environment, and land use cannot be planned and managed without reference to the human community; accordingly, social, cultural and economic endeavours of the human community must be central to land use planning and implementation;
- ...
- (d) the public planning process shall provide an opportunity for the active and informed participation and support of Inuit and other residents affected by the land use plans; such participation shall be protected through various means, including ready access to all relevant materials, appropriate and realistic schedules, recruitment and training of local residents to participate in comprehensive land use planning.

The resource management system includes a regional land use planning scheme to be conducted by a Nunavut Planning Commission and Nunavut Planning Policy Committee, water use planning and regulation to be dealt with by a Nunavut Water Board, a Surface Rights Tribunal and wildlife management to be effected by a Nunavut Wildlife Management Board. The Final Agreement outlines the jurisdiction, make-up, powers and procedures that each of these institutions should follow (Articles 11–13, 21).

Non-renewable resource development is to be subject to an environmental and social impact assessment process. A Nunavut Impact Review Board is to evaluate the environmental impacts of oil, gas and other resource developments, and is required to 'protect the ecosystemic integrity of the Nunavut Settlement Area' (Article 12). Other agencies are similarly mandated. The Final Agreement also commits the Canadian government to establish at least 3 national parks in Nunavut and additional conservation areas in the Arctic (*Financial Post* 17 November 1992). Co-operative management agreements are to be negotiated for each park and other conservation areas, by the government and Inuit (Article 8), but the Nunavut resource management boards are not put forward as institutions of indigenous self-government.

According to Fenge (1990), the increasing emphasis on environmental protection in claims settlements, particularly with the Nunavut Agreement, 'means that the settlement of land claims will not necessarily make non-renewable resource development in settlement areas quicker and easier, as once supposed'. For example, Fenge regards the Nunavut Wildlife Management Board as part of a 'new system of governance' which involves a:

significant departure from standard wildlife management procedures as a ... key institution to meld together [the Inuit's] experientially based and very detailed knowledge of the natural environment with the experimentally based and theoretically driven knowledge of scientists and regulators (Merritt & Fenge 1989, 271).

The Inuit participation on the various statutory decision making bodies established by this Agreement should ensure that the Inuit retain a powerful influence over land management in territory far beyond the limited areas excised for exclusive Inuit ownership and use.

Nunavut Territorial Government

The preparation of the Nunavut Final Agreement has coincided with the negotiation between the Federal government and representatives of the Inuit of a self-government agreement for the Nunavut region. Arrangements to divide the Northwest Territories into two self-governing units, Nunavut and Denendeh, were endorsed by the Northwest Territories legislature in January 1987 and were ratified in May 1992 by a plebiscite among Territory residents. In December 1991, specific terms for the creation of a semi-autonomous Nunavut Territory, covering about 2 000 000 km², were agreed by Inuit leaders and the Canadian government. In May 1993, Prime Minister Mulroney officially committed the Canadian government to the establishment of Nunavut (*Sydney Morning Herald* 27 May 1993). Article 4 of the Nunavut Final Agreement refers to the Canadian government's commitment to establish a new Nunavut Territory. Although the land is to remain part of Canada, with more than 80% being Crown land, the Nunavut Final Agreement ensures that the Inuit will collectively own some 350 000 km² of this area. Perhaps, surprisingly, some of the strongest opposition to the division of the Northwest Territories has come from the Dene First Nation in the western Arctic, Saskatchewan and Manitoba. The Dene are unhappy with the western boundary of Nunavut, which they claim cuts through their traditional hunting and burial grounds in several areas (*Financial Post* 17 November 1992).

Nunavut, which means 'our land' in Inuktitut, covers about 20% of the Canadian land mass, an area larger than Queensland, with over 80% of its 22 000 residents being Inuit. The predominance of the Inuit should ensure that any territorial

government will be effectively controlled by their representatives. Although Nunavut will not have as much power as Canada's 10 Provinces, with control of the institutions of public government the Inuit expect that they will be able to ensure proper implementation of the terms of the land claims agreement for the region. The Nunavut government, which will be phased in between now and 1999, will be modelled on the current territorial government, with an elected legislative assembly (*Financial Post* 17 November 1992). Both the regional land claims agreement and the arrangements establishing the Nunavut Territory are enshrined in Federal government legislation and are thus beyond the power of amendment by any future Nunavut legislature which might be 'captured' by non-Inuit settlers. With the protection of s.35(1) of the *Constitution Act*, the land claims settlement will also be protected from unilateral amendment by the Federal government (Isaac 1992).

Jull (1992a, 1-2) has argued that the Nunavut experience may have several important lessons for other indigenous communities desirous of establishing their own autonomous homeland. First, it demonstrates that a modern nation-state like Canada with fears of national fragmentation from indigenous and Quebec interests, can be persuaded to recognise significant indigenous autonomy. Second, Jull notes that the lack of conventional economic development in a region like Nunavut need not be a barrier to substantial political independence and self-government for indigenous peoples within a developed country.

6

Conclusion

Australian prospects for regional agreements

Although the Canadian experience shows that there have been some practical problems with the negotiation and implementation of land claims settlements, regional-type agreements could be used to empower indigenous peoples in other countries. The Canadian experience of negotiated regional agreements is a strategy that Aboriginal and Torres Strait Islander people could use in an effort to secure a more satisfactory settlement to the issues arising from the High Court ruling in the *Mabo and Ors v. State of Queensland* 1992, and in relation to law and social justice issues generally. The *Native Title Act 1993* (Cwlth) does not significantly enhance indigenous peoples' rights to participate in regional planning and environmental management. Much of the land claimable as native title has been severely degraded by mining and pastoral development. The *Native Title Act* and the accompanying social justice package fall far short of providing the range of rights enjoyed by indigenous peoples under the Canadian regional agreements.

Of course, not all Canadian regional agreements are an appropriate model for community control and management of the environment. The James Bay Agreement appears to have merely stripped the Cree and Inuit of their native land title and associated rights in order to make way for expanded resource development. Indigenous communities have not benefited significantly from this development paradigm. The more recently negotiated settlements in Canada, such as for the Yukon and Nunavut, attach greater weight to indigenous participation in environmental management and establish a stronger framework

for community self-government. This orientation may eventually prove to be an effective control and limitation to development which is considered inappropriate by indigenous peoples on their land.

Regional agreements are likely to be most useful to those indigenous communities in northern and outback Australia where sizeable communities remain in touch with their traditional lands, although agreements in relation to smaller areas should not be discounted. However, because of the enormous dispossession of indigenous peoples from their traditional lands in Australia, it presently seems unlikely that a large number of communities will be able to prove native title as a basis for negotiating a regional agreement under the *Native Title Act*. Consequently, unlike in Canada, the development of regional agreements in Australia should be extended to those indigenous communities which are unable to demonstrate native title at law, but whose claims rest on social and economic needs that cannot be equitably or efficiently addressed by the prevailing structures and policies. The nature and substance of agreements could be expected to be markedly different from one region to another (see further Coombs 1994, 228-229).

The negotiating position of Aboriginal and Torres Strait Islander peoples has changed with the *Mabo* ruling and the Native Title legislation. The *Native Title Act* may clarify some disputed Aboriginal land title claims, but it cannot be regarded as a once and for all settlement. The *Native Title Act* provides for negotiated agreements on a broader regional basis (s.21) but it is oriented to defining land tenure and facilitating development proposals. This contrasts with the Canadian situation where bi-cultural institutions provide for on-going negotiated decision-making on regional development planning and environmental management. The Australian legislation does not provide a satisfactory indigenous veto over unwanted development projects on traditional lands, and the State or Commonwealth governments are able to override indigenous opposition to a development initiative where it is regarded as in the national or State interest.

Therefore, *Mabo* and the Native Title legislation should be seen as a significant first step in a long process. Many of the claims of Aboriginal and Torres Strait Islander peoples on the basis of native title may prove to be unsuccessful and other strategies will be needed to assert their claims to management of land resources and to protect their environment. Through agreements with mining companies and participation in joint management of national parks, indigenous peoples in Australia have succeeded with some of these strategies in spite of the lack of support from governments and the non-Aboriginal public, and with few resources and, until the *Native Title Act*, a weak legal framework. It is suggested that Aboriginal and Torres Strait Islander peoples can look to recent Canadian

history as well as the experience of the past few years in Australia to determine whether or not they wish to develop a more comprehensive negotiating process for their claims, such as regional agreements.

The process of negotiation is central to the resolution of indigenous claims and the development of regional agreements. Based on the Canadian experience, negotiation of regional agreements would seem more likely to succeed where the following conditions occur:

- **Willingness:** negotiation often involves compromise. Negotiations must be bona fide, with indigenous peoples, governments, and interested private sector interests genuinely committed to settling outstanding grievances and negotiating a long-lasting comprehensive settlement. Negotiation cannot commence unless all the major players are willing to talk to each other. Recognition of native title is an important precursor to bringing disputing parties together. But indigenous peoples have a well founded distrust of the intentions of governments, and the bitter history of relations between indigenous and non-indigenous societies means that any negotiations on regional agreements will probably start on a tenuous footing.
- **Timing:** regional agreements cannot be negotiated quickly. The negotiating parties must be patient and adopt a long-term policy focus. The Canadian experience shows that the resolution of indigenous claims is a lengthy process and cannot be rushed. However, governments and business groups usually favour a quick resolution of indigenous claims because of the uncertainty posed to mining, pastoralist and other economic activities
- **Communication:** the cultural differences between indigenous and non-indigenous society can make it very difficult for the parties to understand each others' values, needs and aspirations. Consequently, negotiation must be buttressed by a program of education and information so as to bridge different negotiating positions.
- **Information and research:** disagreements over access and use of indigenous peoples' land are more likely to be resolved where there is a good information base-line about the issues in contention. Environmental, social and economic studies can play an important role in helping to identify the major issues and allow participants to evaluate the merits of the various options under negotiation. Where studies are necessary to fill gaps in the information base, indigenous peoples must participate in the formulation of research priorities.
- **Bargaining power:** to ensure a fair settlement, indigenous peoples must be able to speak from a position of strength. This does not require that there be absolute equality of power between the negotiating parties, but that at a

minimum, indigenous groups are able to exert some influence over the proceedings. Indigenous peoples need access to expert advice and financial resources to enhance their capacity to negotiate fair settlements. Without some comparability of bargaining power, governments may either refuse to negotiate in the first place or use the process to exploit the weaker party. The recent recognition of native title by the Australian High Court should enhance the ability of some Aborigines and Torres Strait Islanders to speak from a position of strength, but additional negotiating resources will obviously be required. This must include a funding mechanism to facilitate negotiation by indigenous claimants.

- **Unity:** each party to the negotiations should be a legitimate and effective representative of the interests it serves. Although a controversial issue, representation must always be determined by indigenous communities and their organisations. Not only are negotiations frustrated where a group is factionalised and does not speak with one voice, but there will also be great difficulty in implementing any final settlement where a sub-group feels that it was marginalised or misrepresented in negotiations.

Bargaining power is also influenced by the degree of unity and the level of organisation of indigenous peoples. Indigenous communities in Canada were brought together by the 1969 White Paper which was identified as a major threat to their indigenous rights. Solidarity among indigenous groups has been held together by peak organisations such as the National Indian Brotherhood and later the Indian Assembly of First Nations (Wright 1985, 93). The successful negotiation and development of the Inuvialuit Final Agreement has been partly due to the extremely effective organisational skills of the Inuvialuit people who have fought for their claims with one public voice. In contrast, the collapse of the Dene Agreement-in-Principle was due to bitter factionalism among the Dene people who could not agree among themselves on what they wanted out of a land claims settlement and were divided on the issue of the extinguishment of native title (Usher 1993a, 87).

Indigenous peoples' organisation has also been facilitated by the Canadian government's funding of native associations. According to Crowe (1990, 17), government funding 'has permitted native people to organize, communicate at home and abroad, and to criticize government to a degree unthinkable in most of the world'.

In conclusion, the experience of indigenous peoples in Canada suggests a number of principles that may be important to any Australian negotiations:

1. A regional agreement should be negotiated on the basis of the social and economic needs of indigenous peoples, as well as, or as an alternative to

traditional associations with land. If regional agreements are negotiated simply on the basis of traditional associations, then many indigenous peoples who have long been dispossessed from their lands will continue to be disadvantaged and marginalised.

2. An agreement should recognise and affirm existing native rights, as well as allow for native rights to be adequately defined and renewed over time.
3. Claims negotiations should proceed according to an agreed check-list of objectives and principles.
4. Negotiations should normally involve both Federal and State governments. However, the Federal government has the power to and should be prepared to negotiate solely with indigenous communities if a State government is unwilling to cooperate.
5. Regional agreements should provide for self-determination in indigenous territories and bi-cultural resource management institutions in the wider context, such as for regional land-use planning.
6. In areas not covered by a regional agreement but nevertheless containing specific sites of importance to indigenous communities, all development activity such as pastoralism and mining exploration should be subject to the rights of the affected indigenous communities, continued access to the area and appointment of indigenous representatives to monitor the development work.

Notes

- 1 By way of terminology, the expression 'indigenous peoples' is generally used in this paper to refer to Aboriginal peoples in both Australia and Canada. In Canada, indigenous peoples are also occasionally referred to as 'natives' or 'First Nations peoples' or 'Indians'. In the Australian context, the expression 'indigenous peoples' covers mainland Aborigines and Torres Strait Islanders.
- 2 *Calder et al. v. The Queen*, 1973, 34 DLR (3d) 59.
- 3 *R. v. Sioui*, 1990, 70 DLR (4th) 427; *R. v. Sparrow*, 1990, 70 DLR 385; 1 CNLR 145, 9 BCLR (2d) 300 (BCCA).
- 4 Renamed by the *Constitution Act 1982* as the *Constitution Act 1867*.
- 5 The doctrine of Aboriginal title was repeatedly affirmed by decisions of the United States Supreme Court: see *Cherokee Nation v. Georgia* (1831) 5 Pet. 1; *Worcester v. Georgia* (1832) 6 Pet. 515; *United States v. Cook* (1873) 86 U.S. 591.
- 6 The technical point was that the case could only properly come before the court with provincial government authorisation.
- 7 The JBNQA was later supplemented with the *North-eastern Quebec Agreement* (1978), which relates to the Naskapis de Schefferville band of Indians living in the territory covered by the JBNQA.
- 8 The comprehensive land claims policy was paralleled by a 'specific claims' policy to deal with disputes arising from the colonial-era treaties. These disputes concerned allegations of violated land rights by improper surrender procedures or plain trespass.
- 9 The ONC operates in addition to the various *ad hoc* special commissions that have been established to consider native claims, such as the Berger Commission and the Harlt and Lyshk Commissions.
- 10 *Canada Act*, 1982 (U.K.), c. 11, Schedule B. The government of Quebec did not sign the accord because of its position on the *Constitution Act*. The *Canadian Charter of Rights and Freedoms* is Part 1 of the *Constitution Act*, 1982 (Can.), the *Constitution Act* being, in turn Schedule B of the *Canada Act*, 1982 (UK).
- 11 The reference to land claims agreements in s.25(b) was added subsequently by virtue of the *Constitution Amendment Proclamation*, 1983: SI 84/102.
- 12 Those organisations are: the Assembly of First Nations, the Inuit Committee on National Issues, the Native Council of Canada and the Metis National Council.
- 13 Peter Jull assisted with the wording of the preceding two sentences.
- 14 Amendments to the Final Agreement were made by Order in Council P.C. 1985-1144, 4 April 1985, and Order in Council P.C. 1987-26, 15 January 1987.

Appendix 1

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References

- Assembly of First Nations, Canada, 1987. Analysis of Canada's Comprehensive Claims Policy, n.p.
- Barsh RL, 1988. Indigenous policy in Australia and North America, in Hocking B (ed), *International Law and Aboriginal Human Rights*, Law Book Company, Sydney, 95-109.
- Bartlett RH, 1978. The Indian Act of Canada, *Buffalo Law Review* 27, 581-615.
- Bartlett RH, 1983. Aboriginal land claims at common law, *Western Australian Law Review* 15, 293-346.
- Bartlett RH, 1993. *The Mabo Decision*, Butterworths, Sydney.
- Berger TR, 1977. *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry*, 2 vols, Minister of Supply and Services, Ottawa.
- Berger TR, 1980. The persistence of native values, in Goldstein JE & Bienvenue RM (eds), *Ethnicity and Ethnic Relations in Canada: A Book of Readings*, Butterworths, Toronto, 87-89.
- Berger TR, 1985. *Village Journey: The Report of the Alaska Native Review Commission*, Hill & Wang, New York.
- Berkes F, 1989. Co-management and the James Bay Agreement, in Pinkerton E (ed), *Co-Management of Local Fisheries: New Directions for Improved Management and Community Development*, University of British Columbia Press, Vancouver, 189-208.
- Berkes, F, 1993. Traditional ecological knowledge in perspective, in Inglis JT (ed), *Traditional Ecological Knowledge: Concepts and Cases*, International Program on Traditional Ecological Knowledge & International Development Research Centre, Ottawa, 1-9.
- Binder LN & Hanbidge H, 1993. Aboriginal people and resource co-management: the Inuvialuit of the Western Arctic and resource co-management under a land claims settlement, in Inglis JT (ed), *Traditional Ecological Knowledge: Concepts and Cases*, International Program on Traditional Ecological Knowledge & International Development Research, Ottawa, 121-132.
- Boldt MJA & Long JA (eds), 1985. *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*, University of Toronto Press, Toronto.
- Bone RM, 1992. *The Geography of the Canadian North: Issues and Challenges*, Oxford University Press, Toronto.
- Bourassa R, 1975. Philosophy of the Agreement, in *The James Bay and Northern Quebec Agreement*, Editeur Officiel du Quebec, Quebec.
- Brady H, 1978. Ecology, politics and change: the case of the Eskimo, *Development and Change* 9, 21-40.
- Brecher T et al, 1985. *1982 Census Highlights on Registered Indians: Annotated Tables*, Department of Indian Affairs and Northern Development, Ottawa.

- Canada Year Book 1990*, Minister of Supply and Services, Ottawa.
- Canada: BC court quashes land claim ruling, Reuter Australasian Briefing, *Financial Post*, 26 June 1993.
- Canada: Canada's Aboriginals – unfinishable business, Reuter Australasian Briefing, *Economist*, 14 November 1992.
- Canada: Canada gives home rule to its Eskimos, Reuter Australasian Briefing, *Daily Telegraph*, 2 June 1993.
- Canada: Canadian natives to recover self-rule lost 500 years ago, Reuter Australasian Briefing, *Reuters News Service*, 11 October 1992.
- Canada: Crees oppose 800-megawatt contract between Hydro-Quebec and New York State, Reuter Australasian Briefing, *PR Newswire*, 30 January 1993.
- Canada: Crees oppose Hydro-Quebec Project in New York, Reuter Australasian Briefing, *Reuters News Service*, 1 February 1993.
- Canada: Find political will for native reforms, Reuter Australasian Briefing, *Financial Post*, 17 April 1993.
- Canada: Funding deal boosts BC land claim talks, Reuter Australasian Briefing, *Financial Post*, 22 June 1993.
- Canada: Inuit vote to change face of the Arctic – Nunavut natives first to gain self-government, Reuter Australasian Briefing, *Financial Post*, 17 November 1992.
- Canada: Labrador Inuit file demands in land claim, Reuter Australasian Briefing, *Financial Post*, 10 March 1993.
- Canada: New national parks will draw more tourists to High Arctic, Reuter Australasian Briefing, *Financial Post*, 17 November 1992.
- Canada: Nunavut creation leaves Western Arctic split, Reuter Australasian Briefing, *Financial Post*, 17 November 1992.
- Canada: Quebec firm on deal – James Bay Agreement, Reuter Australasian Briefing, *Financial Post*, 30 October 1992.
- Canada: Rigorous environmental review guidelines set for Hydro-Quebec's Great Whale Hydroelectric Project, Reuter Australasian Briefing, *PR Newswire*, 19 October 1992.
- Canada: Self-rule offer fails to win over all Aboriginals, Reuter Australasian Briefing, *Independent*, 26 October 1992.
- Canada: The James Bay Agreement – a freely negotiated agreement according to the Federal Court of Appeal, Reuter Australasian Briefing, *PR Newswire*, 8 December 1992.
- Canada: Yukon next on list for land-claims deal, Reuter Australasian Briefing, *Financial Post*, 2 January 1993.
- Canadian Bar Association, 1988. *Aboriginal Rights in Canada: An Agenda for Action*, CBA Committee Report, Ottawa.
- Cassidy F, 1992. Aboriginal land claims in British Columbia, in Coates K (ed), 11–44.

- Chrétien J, 1969. Statement of the Government of Canada on Indian Policy, 28th Parliament, June 1969.
- Ciaccio J, 1977. The settlement of native claims, *Alberta Law Review* 15, 556–562.
- Coates K, 1991. Yukon and Northwest Territories: the emerging north of native and non-native societies, in Jull P & Roberts S (eds), 147–182.
- Coates K (ed), 1992. *Aboriginal Land Claims in Canada: A Regional Perspective*, Copp Clark Pitman, Mississauga, Ontario.
- Colvin E, 1980. *Legal Process and the Resolution of Indian Claims*, Studies in Aboriginal Rights 3, Native Law Centre, University of Saskatchewan, Saskatoon.
- Commission for Constitutional Development, 1992. *Phase 1 Report: Working Toward a Common Future*, The Commission, Yellowknife, Northwest Territories.
- Content of Aboriginal Title at Common Law: a look at the Nishga Claim, 1982/83. *Saskatchewan Law Review* 47, 309–339.
- Coombs HC, 1994. *Aboriginal Autonomy: Issues and Strategies*, Cambridge University Press, Melbourne.
- Courchene TJ, 1993. *Aboriginal Self-Government in Canada*, Occasional Lecture Series, Australian Senate, 19 April 1993, Canberra.
- Crowe K, 1990. Claims on the land, *Arctic Circle* 1(3), 14–23.
- Crowe K, 1991. Claims on the land, *Arctic Circle* 1(4), 31–35.
- Dacks G, 1985. The politics of native claims in northern Canada, in Boldt M & Long JA (eds), 251–264.
- Davies M, 1985. Aboriginal rights in international law: human rights, in Hanks P & Keon-Cohen B (eds), *Aboriginal People and the Law*, Allen & Unwin, Sydney, 745–794.
- Department of Energy, Mines and Resources, 1987. *The Mineral and Metal Policy of the Government of Canada*, The Department, Ottawa.
- Department of Indian Affairs and Northern Development, 1973. *Statement on Claims of Indian and Inuit People*, Queen's Printer, Ottawa.
- Department of Indian Affairs and Northern Development, 1980. *Indian Conditions: A Survey*, DIAND, Ottawa.
- Department of Indian Affairs and Northern Development, 1983. *A History of Native Claims Processes in Canada, 1867–1979*, DIAND, Ottawa.
- Department of Indian Affairs and Northern Development, 1984. *The Western Arctic Claim. The Inuvialuit Final Agreement*, DIAND, Ottawa.
- Department of Indian Affairs and Northern Development, 1987a. *Comprehensive Land Claims Policy*, Ministry of Supply and Services, Ottawa.
- Department of Indian Affairs and Northern Development, 1987b. *Aboriginal Self-Government: What it Means*, DIAND, Ottawa.
- Department of Indian Affairs and Northern Development, 1988a. *Dene/Metis Comprehensive Land Claim, Agreement in Principle*, DIAND, Ottawa.

- Department of Indian Affairs and Northern Development, 1988b. *Western Arctic (Inuvialuit) Claim Implementation, Annual Report 1987-88*, DIAND, Ottawa.
- Department of Indian Affairs and Northern Development, 1989. *Comprehensive Land Claim Agreement in Principle between the Government of Canada, the Council for Yukon Indians and Government of the Yukon*, DIAND, Ottawa.
- Department of Indian Affairs and Northern Development, 1990a. *Annual Report 1989-1990*, DIAND, Ottawa.
- Department of Indian Affairs and Northern Development, 1990b. *Indian Self-Government Community Negotiations*, Information Sheet No. 35, DIAND, Ottawa.
- Department of Indian and Northern Affairs, 1981. *In All Fairness: A Native Claims Policy: Comprehensive Claims*, DIAND, Ottawa.
- Department of Indian and Northern Affairs, 1982. *James Bay and Northern Quebec Agreement Implementation Review*, DIAND, Ottawa.
- Diamond B, 1985. Aboriginal rights: the James Bay experience, in Boldt M & Long JA (eds), 265-285.
- Dorcey AHJ (ed), 1990. *Perspectives on Sustainable Development in Water Management: Towards Agreement in the Fraser River Basin*, University of British Columbia Press, Vancouver.
- Doubleday ND, 1989. Co-management provisions of the Inuvialuit Final Agreement, in Pinkerton E (ed), *Cooperative Management of Local Fisheries*, University of British Columbia Press, Vancouver, 209-227.
- Duffy RQ, 1988. *The Road to Nunavut: The Progress of the Eastern Arctic Inuit since the Second World War*, McGill-Queen's University Press, Kingston, Ontario.
- Dyck N, 1981. The politics of special status: Indian associations and the administration of Indian Affairs, in Dahlie J & Fernando T (eds), *Ethnicity, Power and Politics in Canada*, Methuen, Toronto, 279-291.
- Feit H, 1983. Negotiating recognition of aboriginal rights: history, strategies and reactions to the James Bay and Northern Quebec Agreement, in Peterson N & Langton M (eds), *Aborigines, Land and Land Rights*, Australian Institute of Aboriginal Studies, Canberra, 416-438.
- Fenge T, 1990. Toward Environmentally Sustainable Economic Development in the Canadian Arctic: The Potential Contribution of the Inuit Land Claim Settlement, unpublished paper, Ontario.
- Fenge T, 1992. Political development and environmental management in Northern Canada: the case of the Nunavut Agreement, *Inuit Studies* 16(1-2), 115-141.
- Frideres JS, 1983. *Native People in Canada: Contemporary Conflicts*, Prentice-Hall, Scarborough, Ontario.
- George GH, (ed) 1989. *The Cree-Naskapi Commission: A Profile 1987-1988*, Cree-Naskapi Commission, Ottawa.
- Goodrich LM, Hambro E & Simons AP, 1969. *Charter of the United Nations: Commentary and Documents*, 3rd ed, Columbia University Press, New York.

- Henderson JY, 1985. The doctrine of Aboriginal rights in western legal tradition, in Boldt M & Long JA (eds), 185–220.
- Hogg PW, 1983. The supremacy of the Canadian Charter of Rights and Freedoms, *Canadian Bar Review* 6, 339–353.
- House of Commons, 1983. *Indian Self-Government in Canada: Report of the Special Committee*, Queen's Printer, Ottawa.
- Inuit Circumpolar Conference, 1992. *Principles and Elements for a Comprehensive Arctic Policy*, McGill University, Montreal.
- Inuvialuit Regional Corporation, 1993a. *A Proposal for Inuvialuit Self-Government in the Western Arctic*, Inuvik, Canada.
- Inuvialuit Regional Corporation, 1993b. *Corporate Report*, IRC, Inuvik.
- Isaac T, 1992. The Nunavut Agreement-in-Principle and Section 35 of the Constitution Act 1982, *Manitoba Law Journal* 21, 390–405.
- Johnson RW, 1991. *What Legal Rights do Native Americans have? A Comparison of the United States and Canada. The Indian Struggle for Aboriginal Land and Self-Determination in Canada and the United States*, on file at the Australian Centre for Environmental Law, University of Sydney.
- Johnston DM, 1989. Native rights as collective rights: a question of group self-preservation, *Canadian Journal of Law and Jurisprudence* 2(1) 19–34.
- Jull P, 1991. *Australian Nationhood and Outback Indigenous peoples*, Discussion Paper No. 1, North Australia Research Unit (ANU), Darwin.
- Jull P, 1992a. *An Aboriginal Northern Territory: Creating Canada's Nunavut*, Discussion Paper No. 9, North Australia Research Unit (ANU), Darwin.
- Jull P, 1992b. The future and the frontier, *Policy Options* 13(9), 25–27.
- Jull, P & Roberts S (eds), 1991. *The Challenge of Northern Regions*, North Australia Research Unit (ANU), Darwin.
- Keeping JM, 1989a. *The Inuvialuit Final Agreement*, Canadian Institute of Resources Law, Calgary.
- Keeping J, 1989b. Dene/Metis Agreement in Principle, *Resources: Newsletter of the Canadian Institute of Resources Law* 25, 4–6.
- Keesing's Record of World Events July–August 1991*, 37(7–8), 383–384.
- Keon-Cohen B & Morse B, 1984. Indigenous land rights in Australia and Canada, in Hanks P & Keon-Cohen B (eds), *Aborigines and the Law*, Allen & Unwin, Sydney, 74–102.
- La Rusic I et al., 1979. *Negotiating a Way of Life: Initial Cree Experience with the Administrative Structure Arising from the James Bay Agreement*, DIAND, Ottawa.
- Loveday P, 1991. Australia's Northern Territory and Canadian Territories: constitutional and political development, in Jull P & Roberts S (eds), 17–30.
- Lyon, 1988. An essay on constitutional interpretation, *Osgoode Hall Law Journal* 26, 95.

- Lysyk K, 1982. The rights and freedoms of the Aboriginal peoples of Canada, in Tarnopolsky WS & Beaudoin GA (eds), *The Canadian Charter of Rights and Freedoms: Commentary*, Carswell, Toronto, 467-488.
- MacLachlan LJ, 1993. Northern Comprehensive Aboriginal Claims Agreements, Unpublished paper prepared for the Royal Commission on Aboriginal Peoples, Calgary.
- Merritt J, 1984. A review of Federal land-claims policy, in *National and Regional Interests in the North. Third National Workshop on People, Resources and the Environment North of 60°*, Yellowknife, Northwest Territories 1-3 June 1983, Canadian Arctic Resources Committee, Ottawa, 71-86.
- Merritt J, Ames R, Fenge T & Jull P, 1989. *Nunavut: Political Choices and Manifest Destiny*, Canadian Arctic Resources Committee, Ottawa.
- Merritt J & Fenge T, 1990. The Nunavut Land Claims Settlement: emerging issues in law and public administration, *Queen's Law Journal* 15, 255-277.
- Mohawk CC, 1984. HydroElectricity v. The Cree in James Bay, Canada, *Science for the People* May/June, 25-28.
- Moreton-Robinson A & Runciman C, 1990. Land rights in Kakadu: self-management or domination, *Journal for Social Justice Studies* 3, 75-88.
- Morrison WR, 1992. Aboriginal claims in the Canadian North, in Coates K (ed), 167-194.
- Morton FL, 1985. Group rights v. individual rights in the Charter: the special cases of Natives and Quebecois, in Nevitte N & Kornberg A (eds), *Minorities and the Canadian State*, Mosaic Press, Ontario, 71-85.
- Moses T, 1988. Speech, Eastmain Band, James Bay, 13 June 1988, Yellowknife, Northwest Territories (unpublished, on file at the Australian Environmental Law Centre, University of Sydney).
- Moss W, 1985. The implementation of the James Bay and Northern Quebec Agreement, in Morse BW (ed), *Aboriginal Peoples and the Law: Indian Metis and Inuit Rights in Canada*, Carleton University Press, Ottawa, 684-694.
- Nevitte N & Kornberg A (eds), 1985. *Minorities and the Canadian State*, Mosaic Press, Oakville, Ontario.
- Office of the Prime Minister, Canada, 1991. Royal Commission on Aboriginal Peoples, Press Release, 27 August.
- O'Reilly JA, 1988. The courts and community values: Litigation involving native peoples and resource development, *Alternatives* 15(2): 40-47.
- Penn AF, 1975. Development of James Bay: The role of environmental impact assessment in determining the legal right to an interlocutory injunction, *Journal of the Fisheries Research Board of Canada* 32(1), 136-160.
- Pentney W, 1988. The rights of the Aboriginal peoples of Canada and the Constitution Act 1982, *University of British Columbia Law Review* 22(1), 21-59; 22(2), 207-278.

- Peters EJ, 1987. *Aboriginal Self-Government Arrangements in Canada, Aboriginal Peoples and Constitutional Reform*, Background Paper 15, Queen's University Kingston, Ontario.
- Picard A, 1990. James Bay II, *Amicus Journal* 12(4), 10-16.
- Picard A & Seguin R, 1991. Quebec cancels hydro hearings, *Globe and Mail*, 28 June, 1-2.
- Raunet D, 1984. *Without Surrender, Without Consent: A History of the Nishga Land Claims*, Douglas and McIntyre, Vancouver.
- Reed MG, 1990. *Environmental Assessment and Aboriginal Claims: Implementation of the Inuvialuit Final Agreement*, Canadian Environmental Assessment Research Council.
- Resource Futures International, 1993. *Inuvialuit Final Agreement Environment and Wildlife Provisions: An Implementation Evaluation*, prepared for the Joint Evaluation Advisory Committee under the auspices of the Department of Indian Affairs and Northern Development by REF, Ottawa.
- Richardson B, 1972. *James Bay - The Plot to Drown the Woods*, Clarke, Irwin & Company, Toronto.
- Richardson B, 1975. *Strangers devour the Land: The Cree Hunters of the James Bay Area v. Premier Bourassa and the James Bay Development Corporation*, Mcmillan, Toronto.
- Richardson B, 1989a. Life in the model village, *Canadian Forum* 68(784), 16-18.
- Richardson B, 1989b. Concealed contempt, *Canadian Forum* 68(784), 15-20.
- Roberts J, 1978. *From Massacres to Mining: The Colonization of Aboriginal Australia*, Dove Communications, Blackburn, Victoria.
- Salisbury RF, 1979. Application and theory in Canadian anthropology: the James Bay Agreement, *Transactions of the Royal Society of Canada Series IV*, 229-241.
- Salisbury, RF 1986. *A Homeland for the Cree: Regional Development in James Bay 1971-1981*, McGill-Queen's University Press, Kingston, Ontario.
- Saunders D, 1983. The rights of the Aboriginal peoples of Canada, *Canadian Bar Review* 61, 314-353.
- Scott CH & Feit HA, 1984. *Income Security for Cree Hunters: Initial Socioeconomic Impacts and Long-Term Considerations*, McGill, Montreal.
- Sub-Committee of the Intergovernmental Working Group on the Mineral Industry, 1991. *It Can Be Done: Report on Native Participation in Mining*, Canada.
- Svenson F, 1979. Liberal democracy and group rights: the legacy of individualism and its impact on American Indian tribes, *Political Studies* 27, 421-439.
- Task Force to Review Comprehensive Claims Policy, 1985. *Living Treaties, Lasting Agreements: Report of the Task Force to Review Comprehensive Claims Policy*, DIAND, Ottawa.
- Thalassa Research Associates, 1983. *The Economic Foundation of Indian Self-Government*, Report prepared for the House of Commons Special Committee on Indian Self-Government, 31 May, Victoria, British Columbia.

- Theberge JB, 1981. Commentary. Conservation in the North: an ecological perspective, *Arctic* 34, 281–285.
- Thompson AR, 1991. Land claim settlements in Northern Canada: third party rights and obligations, *Saskatchewan Law Review* 55(1), 127–142.
- Tobias JL, 1976. Protection, civilization, assimilation: an outline of Canada's Indian policy, *Western Canadian Journal of Anthropology* 6(2), 13–36.
- Upton LFS, 1973. The origins of Canadian Indian policy, *Journal of Canadian Studies* 6(4), 51–61.
- Usher PJ, 1993a. Contemporary Aboriginal Lands, Resources, and Environment Regimes – Origins, Problems and Prospects, A Background Paper prepared for the Royal Commission on Aboriginal Peoples, June, Ottawa (unpublished).
- Usher PJ, 1993b. Northern development, impact assessment, and social change, in Dyck N & Waldram JB (eds), *Anthropology, Public Policy and Native peoples in Canada*, McGill–Queen's University Press, Montreal and Kingston, 98–130.
- Valby M, 1991. Provide leadership, Spicer tells Ottawa, *Globe and Mail* 28 June, 1, 6.
- Van Dyke V, 1982. Collective entities and moral rights: problems in liberal-democratic thought, *Journal of Politics* 44, 21–40.
- Walsh JF, 1985. Settling the Alaska Native Claims Settlement Act, *Stanford Law Review* 38, 227–263.
- Williams RA Jr, 1990. *The American Indian in Western Legal Thought: Discourses of Conquest*, Oxford University Press, New York.
- Wolfe J, 1991. Canada: current developments in aboriginal self-government, in Jull P & Roberts S (eds), 129–146.
- Wolfe J, 1989. Approaches to planning in native Canadian communities: a review and commentary on settlement problems and the effectiveness of planning practice, *Plan Canada* 29(2), 63–79.
- Wolfe J & Strachan M, 1987. Structures and values: constraint on effective development and planning in the Keewatin Northwest Territories, Canada, *Nordia* 21(1), 107–117.
- Work SD, 1987. The Alaska Native Claims Settlement Act: an illusion in the quest for native self-determination, *Oregon Law Review* 66(1) 195–218.
- Yukon Native Brotherhood, 1973. *Together Today for Our Children Tomorrow: A Statement of Grievances and an Approach to Settlement by the Yukon Indian People*, Yukon Native Brotherhood, Whitehorse.

Relevant Court Cases

- Calder et al. v. The Queen*, (1970) 8 DLR (3d) 59; (1973) 34 DLR (3d) 149.
- Cherokee Nation v. Georgia*, 1831, 5 Pet. 1.
- Delgamuuku v. British Columbia* 1991, 79 DLR (4th) 185.
- Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development* 1980, 107 DLR (3d) 513 (FCTD).
- James Bay Development Corporation et al. v. Kanatewat et al.* 1975, CA 166.
- Johnson v. McIntosh*, 1823, 8 Wheat. 543 (S.C.)
- Kanatewat et al. v. James Bay Development Corporation & Attorney-General* 1974, RP 38 (Quebec Supreme Court).
- Mabo and Ors v. State of Queensland* 1992, 107 ALR 1.
- MacMillan Bloedel Limited v. Muellen et al., Martin et al. v. R. in Right of British Columbia et al* 1985, 61 BCLR 145.
- Martin v. The Queen* 1985, 65 N. B. R. (2d) 21, 17 CRR 375 (N. B. Q. B.).
- Milirrpum v. Nabalco Property Ltd* 1971, 17 FLR 241. 53 ALJR 403.
- Ominayak et al. v. Norcen Energy Resources Limited et al.* 1983, 29 ALR (2d) 151.
- Ontario (Attorney-General) v. Bear Island Foundation* 1984, 15 DLR (4th) 321, 49 OR (2d) 353 (HCJ).
- R. v. Agawa* 1985, 43 CCC (3d) 266, 53 DLR (4th) 101, 28 OAC 201.
- R. v. Eninew* 1984, 12 CCC (3d) 365, 10 DLR (4th) 137, 32 Sask. R. 237, 11 CLR 180.
- R. v. Guerin* 1984, 13 DLR (4th) 321, [1984] 2 SCR 335, [1984], 6 WWR 481.
- R. v. Hare & Deabssige* 1985, 20 CCC (3d) 1. [1985] 3 CNLR 139.
- R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta* 1982, 2 All ER 118 (C. A.).
- R. v. Sikyon* 1964, 50 DLR (2d) 80, 46 WWR 65.
- R. v. Sioui* 1990, 70 DLR (4th) 427.
- R. v. Sparrow* 1990, 70 D. L. R. 385; 1 C. N. L. R. 145, 9 BCLR (2d) 300 (BCCA)
- Re Paulette et al. and Registrar of Land Titles (No. 2)* (1973), 42 DLR (3d) 8 (NWTSC).
- St. Catherine Milling and Lumber Co. v. The Queen*, 1888, 14 AC 46 (PC).
- United States v. Cook*, 1873, 86 US 591.
- Vayiesingii Jorayarsingii v. The Secretary of State for India*, 1924, JR 51 IA 357.
- Worcester v. State of Georgia*, 1832, 6 Pet 515.

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The Canadian experience of negotiated regional agreements is one approach which indigenous peoples in Australia and elsewhere could consider for new institutional arrangements for indigenous participation in environmental decision-making.

The Canadian agreements establish, among other matters, legal and administrative frameworks on a regional basis for environmental and resource management in a way that accommodates the traditional rights and contemporary needs of indigenous peoples and the interests of government and industry. Recognition of indigenous rights at common law and in the Canadian constitution have been important in facilitating the resolution of native land claims. The Canadian government's Comprehensive Land Claims Policy provides the framework for the negotiation of the regional agreements. To date, six major agreements have been finalised.

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