

**PROVIDING LAND
AND RESOURCES FOR
ABORIGINAL PEOPLES**

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PREFACE

Section 37 of the *Constitution Act, 1982*, (as amended) required the holding of a series of conferences by 1987 to deal with "constitutional matters that directly affect the aboriginal peoples of Canada." Discussion leading up to and during the First Ministers' Conferences on Aboriginal Constitutional Matters quickly focused on the task of making constitutional provisions for aboriginal self-government. Many involved in the process openly questioned the meaning of "aboriginal self-government".

In view of the importance of this subject, in May of 1984 the Institute of Intergovernmental Relations launched a research project on "Aboriginal Peoples and Constitutional Reform." Phase One of the project responded to concerns that emerged at the outset of the constitutional negotiating process. As indicated by its title, "Aboriginal Self-Government: What Does It Mean?", Phase One examined various models, forms and proposals for aboriginal self-government. This included an exploration of the citizenship rights of aboriginal peoples, the experience of aboriginal self-government in other nations, and a review of Canadian developments over the past few years. The results of these investigations were compared to the positions taken by parties to the constitutional negotiations, in an effort to identify areas of emerging conflict and consensus. These findings were elaborated in five Background Papers, a Discussion Paper and a Workshop, which was held two months prior to the 1985 First Ministers' Conference (FMC).

Developments in 1985, subsequent to the First Ministers' Conference, may have had a dramatic impact on the constitutional

negotiation process. At a meeting of government ministers and aboriginal leaders held in June, 1985, several governments indicated their intention to pursue the negotiation of individual self-government agreements, and then to consider their entrenchment in the constitution (the "bottom-up" approach). This contrasts with the proposal, which has thus far dominated discussions, to entrench the right to aboriginal self-government in the constitution, and then to negotiate individual agreements (the "principles first" approach). The result was that, in addition to multilateral negotiations at the national level, negotiations proceeded on a bilateral or trilateral basis, at the local, regional and provincial/territorial levels.

Phase Two of the project is entitled "Aboriginal Self-Government: Can It Be Implemented?", and responded to concerns emerging later in the negotiations. This phase of the Institute's project therefore focused initially on arrangements for the design and administration of public services by and to aboriginal peoples. The research examined the practical problems in designing mechanisms and making arrangements for implementing self-government agreements. It concluded, in its initial year, with a Workshop on "Implementing Aboriginal Self-Government: Problems and Prospects", held in May of 1986.

As the 1987 FMC approached, attention became more concentrated on the multilateral constitutional forum (the FMC). The research agenda in the second year of Phase Two anticipated this shift in preoccupation, with the focus turning to the search for a constitutional accommodation in 1987. It was necessary first to inquire into, and then to resolve or assuage a number of genuine concerns about aboriginal self-government and its implications for federal, provincial and territorial governments. A third Workshop, on "Issues in Entrenching Aboriginal Self-Government", was held in February, 1987.

The Institute wishes to acknowledge the financial support it received for Phase Two of the project from the Donner Canadian Foundation, the Canadian Studies program (Secretary of State) of the Government of Canada, the Government of Ontario, the Government of Quebec, the Government of Alberta, the Government of Manitoba, the Government of Saskatchewan, the Government of New Brunswick, the Government of the Northwest Territories, the Government of the Yukon, the Assembly of First Nations, the Inuit

Committee on National Issues, the Métis National Council and the Native Council of Canada.

This background paper, the last in the Phase Two series, is based on the assumption that "...significant areas of land will be restored to aboriginal control in some parts of the country, while current *de facto* indigenous control over traditional territories will be recognized in part or in full in other regions of Canada". In *Providing Land and Resources for Aboriginal Peoples*, Brad Morse examines the various ways in which aboriginal peoples can "acquire" land, and under what terms and conditions. His analysis is incisive, and replete with innovative approaches from other nations, particularly Australia (e.g., granting inalienable title to the traditional aboriginal owners of national and provincial parks).

Professor Brad Morse is in the Faculty of Law at the University of Ottawa, and is a noted scholar on aboriginal peoples and the law.

David C. Hawkes
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I would like to express my thanks to Mr. Kazi Hamid for providing some research services in the early stages of this project; to the School of Law of Macquarie University for offering a quiet and comfortable place in which to work during my appointment there as the Canadian Visiting Fellow of 1987 so that I could finally manage to complete this monograph; and to Mr. Ron Moss, computer consultant to the School of Law, for his considerable assistance in guiding me through their computer system and being so patient with my many problems. Finally, I would especially like to acknowledge with sincere appreciation the work of Mr. David Hawkes on this overall project as well as for the kindness and understanding he has offered me regarding my delays in tendering the final manuscript.

Bradford W. Morse

ABSTRACT

For a variety of reasons ranging from judicial declarations of aboriginal title, to fulfillment of treaty terms, to evident economic need, there will be the affirmation of certain lands as being for the exclusive use of defined Indian, Métis or Inuit peoples. This paper explores the different means through which to implement the decision to recognize such lands for aboriginal peoples. It examines the various mechanisms through which aboriginal peoples can "acquire" land, and the regimes through which they can hold title to these lands. A central question is how to preserve indigenous lands for future generations. Also briefly considered are such issues as the use of a land registry system, and taxation of aboriginal lands.

SOMMAIRE

Pour des raisons aussi diverses que des revendications judiciaires de droit de propriété pour les autochtones, l'exécution des termes des traités, ou pour des besoins économiques évidents, il y aura toujours des demandes concernant l'usage exclusif de territoires pour les peuples Indiens, Métis ou Inuit. Cette étude analyse les différents moyens par lesquels peuvent être mises en oeuvre les décisions reconnaissant ces territoires aux peuples autochtones. Elle examine aussi les divers mécanismes permettant aux peuples autochtones de "prendre possession" de ces territoires, et également les différents régimes leur permettant de détenir légalement les droits de propriété de ces territoires. Une question centrale est de prévoir de quelle façon préserver ces territoires autochtones pour les générations futures. Il sera aussi question de sujet tel que l'usage d'un système d'enregistrement, et de taxation de ces territoires.

1 INTRODUCTION

It should no longer be necessary in contemporary Canada to need to discuss and debate the presence of aboriginal peoples as the original occupants and owners of Canada prior to European colonization. Although it has been too long in coming, it is now overwhelmingly accepted by Canadian society that the aboriginal peoples are, as the words aboriginal or indigenous indicate, the first peoples of this great land who possess a special position of prominence in our history and our future.

There is, however, still lingering debate concerning the entitlement of the Indian, Métis and Inuit peoples residing in what is now called Canada to a guaranteed land base under the jurisdiction of their own governments. Some provincial governments, such as British Columbia, ardently declare that the indigenous peoples of that province have no right to any lands additional to the existing reserves based on their aboriginal title. On the other hand, several provinces accept at least the possible legitimacy of land claims based on aboriginal title for some aboriginal peoples within their borders. For example, the Province of Quebec is negotiating a land claim settlement with the federal government and the Conseil Attikamek-Montagnais while the Newfoundland government is doing likewise with the Labrador Inuit Association. Even here, however, the same federal and provincial governments are denying the validity of similar claims brought by other indigenous peoples (i.e., the constituents of the Native Alliance of Quebec, the Labrador Métis Association, the Federation of Newfoundland Indians and the Conne River Band). A number of

other provinces, such as Alberta, comfortably assert that the treaty-making process extinguished all Indian claims to continued aboriginal title, while the Métis are stated to have no aboriginal rights to land.

This paper is not intended, however, to discuss the basis for aboriginal claims to land or their legitimacy; nor will it review the disgraceful side of Canada's history in which many of the original owners were dispossessed of their traditional lands so as to become economically and territorially marginalized. Nor will I analyze the federal comprehensive claims policy¹ or the law on aboriginal title.² Instead, I will merely note that section 35 of the *Constitution Act, 1982* and the previous Canadian case law³ have demonstrated sufficient merit to these positions to warrant the negotiation of comprehensive land claims agreements for some indigenous peoples in some parts of the country. Pending litigation in British Columbia, Manitoba and Ontario may result in further negotiations occurring in the future. It is also simply noted that many Treaty Indians in the Prairies are pursuing their desires for land by seeking to have the promises of reserves contained within their treaties (treaty land entitlement) fully and properly implemented. Many Indian First Nations are also entitled to lands due to prior unlawful conduct by the Crown in its dealing with reserves.⁴

A further possible method of meeting the aspirations for land of some aboriginal communities may be through the treaty adhesion process or via the "renovation" of treaties to reflect their true spirit and intent in modern terms.

Two final approaches to be mentioned have emanated from the multilateral First Ministers Conference (hereinafter called FMC) process mandated by s.37 (now s.37.1) of the *Constitution Act, 1982*, as amended. As a result of a private interchange between the Minister of Indian Affairs and Northern Development and the leadership of the Native Council of Canada during a break in the FMC in 1985, the Prime Minister publicly stated:

Both I and the federal government accept that the Métis and non-status people have unique problems regarding the protection of their rights. I, of course, confirm today - as I have in other circumstances - a commitment to attempt to recognize their special need. I am going to be convening

a meeting which I will personally chair with the leaders of the Métis and the non-status people, with Mr. Crombie and Mr. Crosbie, to examine ways in which we can work together to guarantee their rights and obtain that equality which the Constitution Act envisaged. It is somewhat overdue.⁵

After a short recess and some opening remarks by the Prime Minister the following exchange occurred:

MR. HARRY DANIELS (Native Council of Canada): Thank you, Mr. Prime Minister. I have one question for you only before I make my statement vis-a-vis your willingness to set up a bilateral process or some talks with the Métis and non-status Indians with regard to our unique rights and our special needs. Did that include the discussion on a need for a land base for our people?

THE CHAIRMAN: Yes.

MR. HARRY DANIELS (Native Council of Canada): In that regard, Mr. Prime Minister, we can support you, and I am dismayed we have been conciliatory, compromising, could not support you in a much greater fashion. You have our support.⁶

These commitments suggested that bilateral discussions would be pursued between the Government of Canada and the Métis and Non-Status Indian (hereinafter referred to as MNSI) people to seek a solution for the land and resources requirements of the MNSI based upon their economic needs. Although this promise generated high expectations in April of 1985, these hopes for the development of a meaningful dialogue with the Government of Canada have been largely dashed by an apparent lack of seriousness by the federal government. It is unclear at present as to whether or not this "process" (if it can be called that) still exists at all, let alone its likelihood to bear fruit.

A separate, yet related process has evolved from the attention in recent FMCs upon the right of aboriginal peoples to self-

government. One response to the previous lack of the requisite provincial support necessary in order to obtain an amendment to the Canadian Constitution has been the suggestion that negotiations on self-government agreements should nevertheless be pursued on a federal-provincial-aboriginal basis. It was hoped that any progress demonstrated by these regional tripartite discussions could positively influence the FMC forum such that the magic number of 7 provinces could be reached to support an amendment acceptable to the aboriginal organizations (the Assembly of First Nations, the Inuit Committee on National Issues, the Métis National Council and the Native Council of Canada) and the Government of Canada. The relevance of the tripartite self-government process to this paper is that one issue on the agenda at those talks would be the need for and size of a land base to be assured to the aboriginal peoples within the territory concerned.

Several provinces, such as New Brunswick, have refused to pursue self-government negotiations in the absence of a constitutional amendment, while others have set pre-conditions that suggest an unwillingness to participate. The federal government has itself refused to join in these discussions in Nova Scotia because the Indian bands (through the Union of Nova Scotia Indians), the off-reserve status and non-status Indians (through the Native Council of Nova Scotia), the Council of the Micmac Nation and the province wished to pursue self-government talks for all aboriginal peoples of Nova Scotia in one arena.

The provincial governments of Manitoba and Saskatchewan have, begun, albeit in a very small way, to address the land question through tripartite self-government negotiations with the Manitoba Métis Federation and the Association of Métis and Non-Status Indians of Saskatchewan respectively. One plot of land in each province has been transferred to the use of Métis communities. The Ontario government signed a Declaration of Political Intent with Indian First Nations and the federal government in December of 1985 to guide future self-government negotiations on a number of issues, including land. This has led to substantive talks involving the Nishnawbe Aski Nation of Northern Ontario regarding land. The province has indicated a willingness to make land available to be transferred into reserve status so long as the provincial government is paid fair market value. An attempt by

the Ontario Métis and Non-Status Indian Association to initiate similar talks for its constituents has been stalled at a preliminary stage by provincial pre-conditions to involve several other aboriginal organizations all in the same negotiation process. The Governments of Prince Edward Island and Canada have begun such a dialogue with the Native Council of P.E.I.. However, the initial thrust of these discussions is on social service delivery systems. It must also be realized that many Indian First Nations are refusing to participate in this form of negotiation, as they see it as representing a federal government effort to transfer its responsibility under s. 91(24) of the *Constitution Act, 1867* for "Indians, and Lands reserved for the Indians" to the provinces. There is, thus, a distinct fear that the officially disavowed federal Indian policy contained in the White Paper of 1969 has been revived in this different form. The concern stems from the tripartite nature of this self-government negotiation process, in that it involves the provinces in discussions that many First Nations would regard as being exclusively within the federal sphere represented by s. 91(24).

If this paper does not intend to address the previous matters, then what will it cover? This monograph is predicated upon the assumption that significant areas of land will be restored to aboriginal control in some parts of the country, while current *de facto* indigenous control over traditional territories will be recognized in part or in full in other regions of Canada. The rationale for such action may vary from judicial declarations of aboriginal title, to fulfillment of treaty terms, to governmental acceptance of outstanding lawful obligations, to political expediency, to evident economic need, to goodwill. The common result, however, will be legal affirmation of certain lands as being for the exclusive use of defined Indian, Métis or Inuit peoples.

This, then, is the starting point for this study. Its basic purpose is to explore different legal mechanisms through which the decision to recognize these lands for aboriginal peoples can be implemented. It will also investigate a range of options available for the way in which legal title can be held, so as to preserve the lands as indigenous lands for future generations.

Since the land issue is so heavily interconnected (although not exclusively so) with the restoration and implementation of

aboriginal self-government, it is appropriate to conclude this introductory chapter with the words of former Prime Minister Trudeau in his opening statement at the 1984 First Ministers' Conference:

There is nothing revolutionary or threatening about the prospect of aboriginal self-government. Aboriginal communities have rightful aspirations to have more say in the management of their affairs, to exercise more responsibility for decisions affecting them. These functions are normal, and essential to the sense of self-worth that distinguishes individuals in a free society.

The Government of Canada remains committed to the establishment of aboriginal self-government, and it is my impression that the provinces are very much of the same mind. And so we are not here to consider whether there should be institutions of self-government but how these institutions should be brought into being; what should be their jurisdictions, their powers; how they should fit into the interlocking system of jurisdictions by which Canada is governed...

I acknowledge the importance the aboriginal peoples attach to self-government and I understand why. But we should remember that self-government is not an end in itself. It can be no more than a means to the attainment of the political and social objectives of a people.⁷

2 MECHANISMS TO "ACQUIRE" LAND

The Indian, Métis and Inuit peoples are, of course, the original inhabitants of the territory now known as Canada. Their occupation and complete ownership in a collective sense was never challenged before the arrival of European explorers and colonists. One could readily argue that this ownership continued to be respected officially in many ways - the negotiation of treaties commencing in the seventeenth century,⁸ the determination of the courts as early as the beginning of the 1700s in *Mohegan Indians v. Connecticut*,⁹ codification of British government policy in the Royal Proclamation of 1763,¹⁰ the purchase of Indian lands, and the elaboration of the law in the writings of scholars like de Vittoria and Blackstone.¹¹ This view of indigenous sovereignty and ownership of the newly "discovered" lands, however, changed over time so as to become the doctrine of aboriginal title.¹² Total sovereignty, in the sense understood in international law, was unilaterally declared to be lost as a result of historical developments (i.e., colonization)¹³ and the terms of many treaties, and to be replaced by domestic dependant nationhood in the United States¹⁴ or assumed subservience in Canada.

Aboriginal title has never truly been defined by the Canadian courts or the Judicial Committee of the Privy Council, which instead have relied upon "unhelpful" analogies such as the usufruct.¹⁵ Nevertheless, the attitude of our judiciary over the last century has been clear in its refusal to give full weight to indigenous ownership, as it would bring into question fundamental elements of the world to which they belong, including: illegal

colonization and occupation of territory; the shaky foundations of the reception of British and French law; and the absence of jurisdiction for the courts. As an alternative, a legal construct was created - namely, the doctrine of aboriginal title - that involved the recognition of an interest in land possessed by the original inhabitants (if they could meet certain pre-conditions established by the foreign legal system), the preservation of traditional means of subsistence, and the prerogative of the Crown to diminish, restrict or eliminate already reduced legal rights. The jurisprudence that has evolved in Canada has largely concentrated upon the scope of the detailed restraints to be imposed upon the aboriginal peoples, and the means by which the Crown can further intrude upon what has survived.

Consequently, most Indian people in Canada today find themselves occupying small tracts of their traditional territory either left to them by the treaties, or set aside for their use based on economic needs and a desire to segregate them from the rest of the dominant society. Northern peoples have predominantly continued to occupy almost all their lands, although this has largely been due to a lack of interest or competing pressure from non-aboriginal society. Outside of the settlements of Alberta, or "colonies" as they were once so ironically called, the Métis are even worse off as they are officially "squatters" in Canada.

Governments appear at long last to be willing to alter the legal position of aboriginal peoples regarding landholdings. Whether this results from a sudden realization that the chances for success through litigation by traditional owners is far greater than previously appreciated, or is spurred on by judicial pronouncements and public support, or reflects a sudden desire to ensure that justice is finally done (due to pressure from native and other groups) is not the subject for examination here. If one can assume that the current governmental change of policy is genuine, or that it will be forced to do so if its willingness begins to falter, then the immediate questions that arise are concerning how it will be done. What are the means through which the indigenous population will "acquire" land (or more accurately in many circumstances, the ways in which their outstanding interests are to be reflected in full and free enjoyment under Canada law)? What will be the nature and extent of the title to the land which they will have? Who will

hold the title and on what terms? What legislative framework will apply to the lands and how will they fit with the regimes currently in place? What will the status of the lands be in a constitutional sense?

The purpose of this monograph is to attempt to move analysis of these critical questions and related ones forward, without embarking upon the varying rationales for governmental action in the first place. In doing so, I will begin to explore potential answers in a general sense, so that they may be of some utility across the country. Unfortunately, generalizing about anything is an endeavour fraught with dangers. As a result, the subsequent discussion will need to be examined in a local context. Nor is it intended to serve as a national blueprint.

In this chapter I will briefly inspect the alternative methods of acquiring title to real property. The differing avenues of approach are directly dependent upon its current ownership, that is, is it Crown land or is title in the hands of a third party.

A. Crown Land

The easiest situation to address on a superficial level is where title to the land in question resides in the Crown. For the purpose of this consideration it is not germane as to whether it is the Crown in right of Canada or the Crown in right of a province, so long as the government involved is prepared to relinquish its dominion over the land concerned.

Putting aside for the next chapter the issue of the precise legal mechanisms for transferring title into aboriginal hands, there are two obvious ways of meeting the objective of increasing the quantity of land that is recognized as properly being in the lawful possession of Indian, Métis or Inuit communities. First, there is the model of the comprehensive land claims process in Canada. The "new" federal claims policy describes one option as being that the settlement could include:

the cession and surrender of aboriginal title in non-reserved areas, while allowing any aboriginal title that exists to continue in specified or reserved areas.¹⁶

This is merely the historic approach used in the land surrender treaties in Upper Canada commencing with the Treaty of 1795. The effect of this approach today is that aboriginal title continues as before with certain vital differences. The boundaries of the retained land are fixed by the agreement, and these aboriginal title lands cannot be extinguished at the whim of the Sovereign through general legislation. The lands are clearly recognized as being for the exclusive use of the signatories and their descendants, and will continue as such unless released by them for fair compensation or other land. The change in status results from the fact that the agreement receives the benefit of constitutional protection by virtue of subsection 35(3) and its inclusion thereby within subsection 35(1) of the *Constitution Act, 1982*, as amended.

The obvious limitation on this method is that it is restricted to situations in which aboriginal title is still outstanding and is recognized as such by the Crown, and in which the Crown is also willing to enter into a land claims settlement.

The second approach is the equally historic one of Crown land grants. The Crown, both in the pre-confederation and post-confederation eras, has had a long tradition of "giving" vacant lands to various groups and individuals. Religious orders have received tens of thousands of acres over the years to use for churches, cemeteries and missions. The United Empire Loyalists also benefitted from this spirit of generosity (during which time many Indian allies of the King crossed into what remained of British North America and received land grants as well), as did veterans returning from both World Wars, along with those involved in earlier conflicts with the Americans and Indian Nations. The venerable Hudson Bay Company and the railroads are probably the best examples of entities which received massive amounts of land from the Crown *ex gratia*. Various Indian communities and the Inuit of Labrador have direct experience with this procedure through grants to religious groups specifically to establish missions to recruit aboriginal followers; while many Indian men became enfranchised to receive land grants available only to "non-Indian" veterans. In addition, efforts to populate significant regions of the country by non-indigenous peoples have often involved homestead grants at little or no charge.

Many existing Indian reserves are themselves examples of a variation on this theme, as they were officially created from the large pool of "vacant" Crown land in portions of the country not covered by land cession treaties (even though it was already aboriginal land). A further recent illustration of this practice, although due to an outstanding lawful obligation, is contained in the transfer of provincial Crown lands in Saskatchewan to complete unfulfilled land entitlements under treaty provisions.

The common thread of these differing incidents is that they all involve recognition by Canadian governments that specified lands are to be assigned to designated individuals, groups or corporate entities, rather than inure to the exclusive benefit of the Crown in right of a province or of Canada. Although the policy objectives are clearly not the same, both the results and the broad means of achieving them are similar. The Crown is always at liberty to allocate any of its assets to any party, which includes issuing grants or patents or real estate.

Canadian governments are blessed by being beneficial owners of massive portions of the country, with the exception of the Governments of Nova Scotia and Prince Edward Island. They can therefore, frequently meet the demands and needs of aboriginal peoples for land out of their existing holdings, although this may not meet the locational preferences of the local Indian and Métis groups. It must be recognized that much of the available Crown land is not fully "vacant" in a legal sense, in that it is subject to mining and petroleum licences or timber leases. This burden on the title does not have to prove to be an impediment, however, as the land can be allocated to aboriginal communities subject to the continued valid existence of third party interests. The effect, then, is to change the identity of the landlord without damaging the rights of the licensee or lessee. This arrangement has already been utilized in several land claims settlements.¹⁷ This can also provide an initial basis for the development of some level of economic self-sufficiency for the indigenous community, through the receipt of the rental or royalty payment. The sole question will be whether the third party interest is to be terminated upon the expiration of the licence or lease so as to free the land from this burden for the aboriginal group, subject of course to their own wish to negotiate a

new arrangement, or if the third party will be given the same rights of renewal that they would have had from the Crown.

This approach will not always fit the particular circumstances of some Indian and Métis peoples due to the limited availability of Crown land in parts of southern Canada. One interesting possibility can arise where significant pieces of land have been dedicated as national or provincial parks. The Commonwealth government of Australia adopted the novel approach of granting inalienable freehold title to the traditional Aboriginal owners of what are known as the Kakadu National Park and the Uluru (Ayers Rock) National Park in the Northern Territory as a result of the *Aboriginal Land Rights (Northern Territory) Act, 1976*. A further park has been created in the Cobourg Peninsula by the Northern Territory Government on land owned by Aborigines with the consent of the latter. These initiatives have not in any way disrupted their use as parks since the grants of title were immediately followed by 99 year leases to the Commonwealth or Northern Territory governments respectively.

This has involved more than paying lip service to aboriginal rights, as the benefits to the local Aboriginal owners have been significant. The traditional owners receive: an annual rental payment (currently amounting to \$75,000 in the case of the Gagudju Association regarding the Kakadu National Park, subject to renegotiation after five years); the promise of training and employment in the parks as rangers, mechanics, heavy equipment operators, cultural advisors, etc.; the opportunity to develop tourist operations (for example, the Gagudju Association presently owns one of the two hotels in the Kakadu National Park, is building another and runs several stores); and most importantly, the right to be involved in the management of the park. For example, the Uluru National Park is governed by a Board of Management with majority Aboriginal membership. The Director of the Australian National Parks and Wildlife Service (ANPWS) is required by law to develop a plan of management for the park every five years for approval by Parliament; however, this plan occurs in consultation with, and must be first approved by, the Board of Management. While the Director of ANPWS is responsible for the day-to-day operations of Uluru through his staff, the Board of Management decides broad policy issues within the framework of the official plan.¹⁸

Not only does this system provide the opportunity for income and skills development for Aborigines, it also ensures that Aboriginal knowledge of the environment is incorporated alongside western scientific information for the better protection of the park. In addition, it guarantees to the traditional owners that their sacred sites will be respected and not disturbed unwittingly. This arrangement further assures the continued traditional use of the flora and fauna by the local Aboriginal population, while always respecting the need for public safety and conservation through closing areas to non-Aborigines and/or regulating the harvesting of certain species by the public and, conceivably, by the local Aboriginal owners. Finally, this scheme allows the traditional owners to be able to continue to reside on their land, to uphold their obligations to it, to respect their law and to draw sustenance from their homeland as a whole, while carefully sharing a portion of it with others.

Similar arrangements could be pursued regarding some parks in southern Canada, such as Algonquin Provincial Park in Ontario, La Venderye Provincial Park in Quebec, Banff National Park, etc. A limited version of the aforementioned Australian model has been pursued in the Fort Chippewyan treaty land entitlement claim in Northern Alberta regarding the Wood Buffalo National Park, and as part of the creation of several parks in the Arctic.

B. Non-Crown Land

There are, however, many places in Canada where there simply are little or no Crown lands available in any form to meet the needs of aboriginal peoples. This is especially true in urban or highly agrarian regions of the country. The general approach of the federal government in these circumstances is to provide monetary compensation in lieu of land when it has attempted to settle specific land claims. It should be realized that there are alternatives worthy of consideration that would result in land being made available for aboriginal use.

One natural option is expropriation. This has been used by federal and provincial governments with some frequency for the creation or expansion of airports, the installation of hydro-electric dams or transmission lines, oil and gas pipelines, the development

of railways, the establishment of parks and green belts, the building of highways, and various other purposes viewed as beneficial to the public. It is interesting to note that many Indian reserves have particularly suffered from the use of the expropriation power expressly set out in section 35 of the *Indian Act*. It is, thus, a distinct means through which the Crown can obtain real property when it feels a compelling need or desire. Furthermore, the law of expropriation has evolved to such a degree that statutory provisions exist to facilitate the taking of land while the private owners can be assured of receiving compensation reflecting fair market value. Nevertheless, this is the choice of last resort and would likely give rise to significant political pressures on the government against its use for this objective, along with fears of promoting a racial backlash.

A far more preferable approach is the one that is usually attempted before expropriation, that is, simple purchase on the open market by the Crown. There is obviously nothing to preclude the federal government from buying the property necessary to fulfill this commitment to the original owners who are landless or land-poor today. This is probably the only realistic alternative if any land is to be provided to aboriginal peoples in urban and developed areas. DIAND does have a policy permitting the acquisition of land for reserves on an *ad hoc* basis tied to extreme need for existing bands. However, it is rarely used and contains no detailed standards for its application.

Australia again provides an interesting variation on this approach worthy of examination. The Commonwealth created the Aboriginal Land Fund Commission in 1974 with its primary mandate being to acquire land for Aboriginal communities who were landless.¹⁹ It subsequently evolved so as to generally exclude any group that was eligible to pursue a claim under the limited terms and geographic scope of the *Aboriginal Land Rights (Northern Territory) Act, 1976*. This Commission was later merged with the Aboriginal Loans Commission and reconstituted in 1980 as the Aboriginal Development Commission. The rationale for the latter Commission is outlined in its enabling statute as follows:

3. The purpose of this Act is to further the economic and social development of people of the Aboriginal race of Australia

and people who are descendants of indigenous inhabitants of the Torres Strait Islands and, in particular, (as a recognition of the past dispossession and dispersal of such people) to establish a Capital Account with the object of promoting their development, self-management and self-sufficiency.²⁰

This broad mandate has meant that, in addition to fulfilling the housing roles equivalent to CMHC and DIAND and the economic enhancement function of the Native Economic Development Program (NEDP), the Aboriginal Development Commission (ADC) is empowered to purchase land for Aboriginal communities based on social needs, spiritual concerns or economic self-sufficiency potential.²¹ It is currently the largest "private" landholder in Australia, and has embarked upon a process of conveying title to some of its portfolio to the individual communities resident on ADC land.²² As of June 30, 1986, the ADC and the former Aboriginal Land Fund Commission had spent \$20 million on acquiring approximately 60,000 square kilometres of land.

The ADC is of particular interest to Canadian policy-makers for several reasons. First, it amply demonstrates that purchasing real property for Aboriginal use can readily be done, and without the necessity to rely upon or prove aboriginal title claims to justify this result. Second, the ADC is run by Aborigines. They are able to determine, within the limits of the ADC's financial resources, how best to meet the needs for land of the many Australian Aborigines who have become dispossessed in their own territory. Third, its structure is far superior to the Canadian approaches of DIAND or even NEDP. It does in fact make decisions, rather than only submitting recommendations to a Minister for his/her approval, rejection or alteration as s/he sees fit, as is the case with the NEDP. The ADC can receive general directions from the federal Minister of Aboriginal Affairs if delivered in writing and tabled in Parliament.²³ This means that the ADC can respond with sufficient speed to take advantage of business or land acquisition opportunities when they present themselves, which is not possible with the NEDP structure.

The ADC and its ten Commissioners are responsible directly to Parliament rather than to the Commonwealth government. They have their own legislative base, defend their budget and operations,

receive their annual appropriations, and submit annual reports all through Parliament so as to ensure their independence and accountability. All revenue and interest income on their capital endowment remains within their possession for future use, while any profits emanating from individual properties belong to the local Aboriginal inhabitants. This approach encourages prudent management by both the ADC and any communities residing on land to which title is held by the Commission.

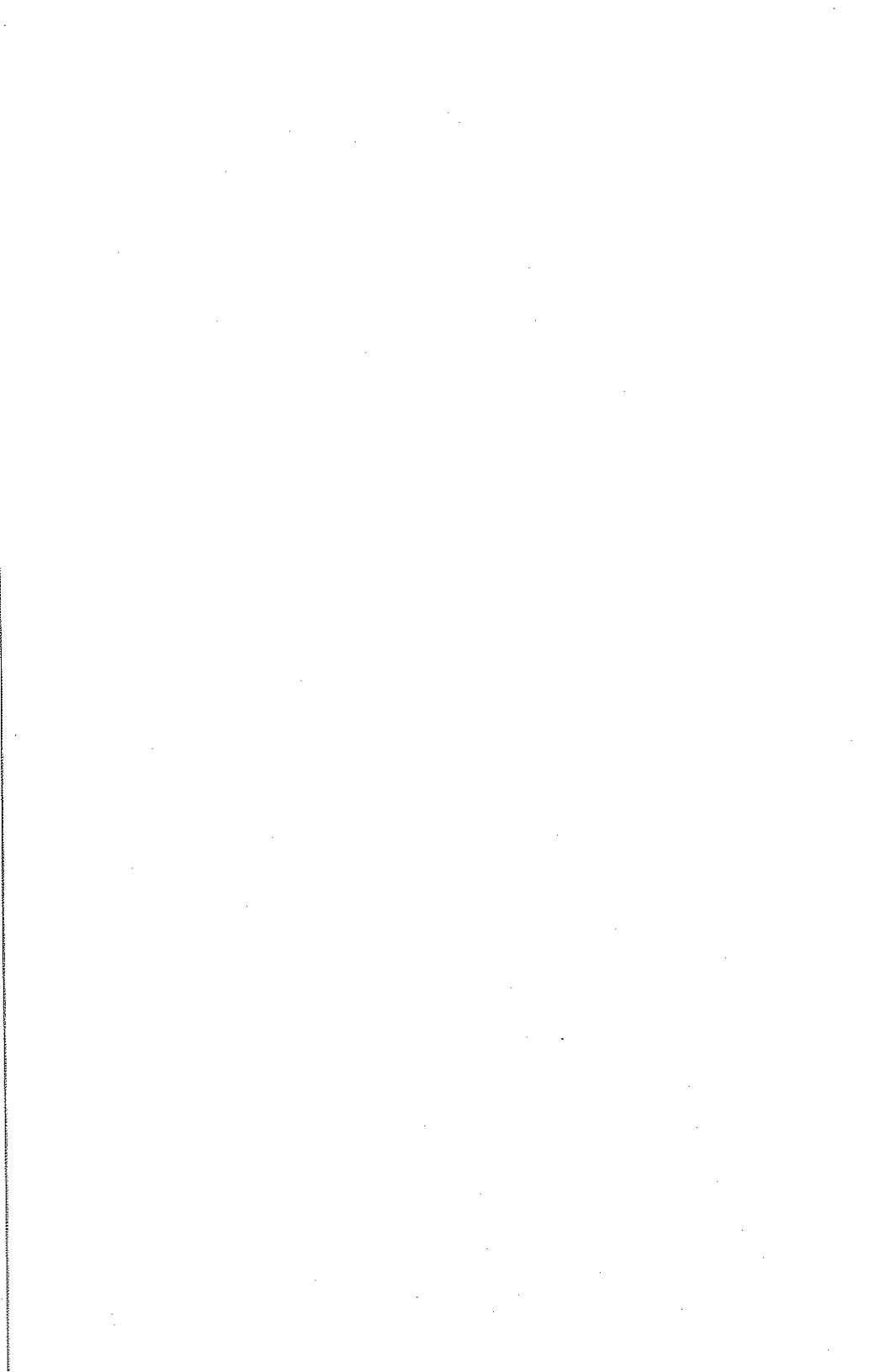
Finally, the ADC has provided a vehicle for the gradual transition from direct governmental administration of programs to Aboriginal control. Part of the ADC's original mandate on its establishment on July 1, 1980 was responsibility for the enterprise grants function of the federal Department of Aboriginal Affairs (DAA). During its second year of operation it assumed control over the housing grants program of the DAA. This has been followed over the subsequent years by the transfer of authority over the Commonwealth Community Employment Program, sporting assistance from the National Aboriginal Sports Foundation, the capital program for sport and recreation of DAA, homemaker and tenant services from DAA, and the provision of essential community infrastructure components to the housing grants program previously obtained.²⁴ These developments also contain interesting suggestions for Canadians as they reflect a means to meet both the desire of the Parliamentary Committee on Indian Self-Government of 1983 and the current federal policy to downsize DIAND, while at the same time providing a way to ensure a high level of accountability for the expenditure of public funds and maintaining the coordination of national programs. Furthermore, this model removes much of the decision-making from a faceless civil service and puts it in the hands of Aboriginal peoples themselves. The objective, after all, is not simply to reduce the size of DIAND as a cost-sharing measure, but to transfer power and responsibility from the federal government to the people most directly affected, so that they can determine their own future (also likely to produce a more efficient use of the funds).

The ADC has suffered from some stinging criticism, however, as the Commissioners are appointed by the Governor General without any requirement for effective consultation with Aboriginal peoples.²⁵ Complaints have also arisen charging the ADC with being

overly bureaucratic, costing too much for the operation of its 27 offices across the country with over 300 staff, tending to be too remote from community concerns, and not fully reflecting the objectives of Aborigines. In partial counterbalance to this, it should be realized that 84 per cent of its current annual budget of approximately \$90 million (Aus) is allocated to program expenditures. The ADC has also made some significant changes to its operation as a result of a Parliamentary Committee review in 1984 and the development of an internal comprehensive Corporate Plan in 1986.²⁶

Local and regional Aboriginal Land Councils have also been created in the Northern Territory, New South Wales and Victoria that possess the authority to purchase leaseholds or fee simple title to real estate. These acquisitions are financed from income derived from existing holdings or from other sources, including the government. The objective again is to provide a viable land base for Aboriginal communities and business enterprises.

The only Canadian comparison to this arises when individual Indian bands use their own moneys or the proceeds of a land acquisition fund created under a claims settlement to buy more property to add to their existing reserves. The model of the ADC does offer considerable promise to meet the needs of many Aboriginal people, especially the Métis and Non-Status Indians, while best reflecting the acceptance of the drive for self-government and self-determination. It would have to be revised extensively to meet the different needs, circumstances and aspirations of the Indian, Métis and Inuit peoples of Canada.



3 MECHANISMS TO TRANSFER LAND TO THE BENEFIT OF ABORIGINAL PEOPLES

Having chosen the particular method through which real property is to be acquired, one must then select the precise legal device to be utilized to ensure that the aboriginal peoples or communities concerned receive the actual beneficial interest. The range of options available is in part dependent upon the previous decision. It is also affected by the particular attitudes, expectations, desires and concerns of the parties involved. For example, a solicitor would traditionally presume that a conveyance of a fee simple title would be conducted under the prevailing provincial real property legislation, whereas many Indian and federal officials might logically assume that the longstanding practice of creating reserves under the *Indian Act* would be followed. Other alternatives exist through the standard private law (such as the unilateral declaration of trust) or new statutory creations. These alternatives do not merely reflect different technical legal ways of achieving precisely the same legal result. They can, instead, affect who actually holds title to the land, whether there is a division between the equitable (or beneficial) and legal interests or not, whether legislative change is necessary, the status of the land in relation to the application of various legal rules imposing restraints upon enjoyment or extending certain benefits, and the continuing role of the Crown and the Constitution. All of these issues must be considered before a final selection is made.

A. Indian Act Reserves

A natural place to start on this exploration is with the concept of a reserve as it has existed in some form in Canada in relation to Indian communities for over two centuries. There are well over 2000 regular reserves held by the Crown today under the *Indian Act*. The Act defines a reserve as meaning

a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band.²⁷

The definition clearly identifies three constituent elements to a reserve, namely:

- (1) legal title officially resides with the Crown;
- (2) the Crown has consciously decided to go through the action of isolating the property from its other landholdings; and
- (3) the rationale for this conduct was to provide a territorial base for the beneficial use of a group of Indians recognized as a band.

This definition is notably silent as to how the setting apart is to occur, as is the rest of the Act, and by which Crown (Canada or a province). Section 73 empowers the Governor in Council to make regulations providing for a number of matters but does not include the creation of reserves within its list. The Act describes a series of ways in which the Minister can authorize the use of reserve land in subsection 18(2), or divide it when a new band is created from an existing one in subsection 17(2). However, these are obviously predicated upon the land having the character of being a reserve in the first place. The provision which might initially cause one to believe that it addresses this matter is the following:

18(1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

This provision actually offers little guidance, even if one discounts all the caveats, as it largely repeats the definition of reserve and adds a role for the Governor in Council (i.e., federal Cabinet) in deciding what is a type of use that benefits a band. Although the *Indian Act* contains numerous provisions that deal with reserve land, and its antecedents extend back to 1850, Parliament has not seen fit to legislate on how land obtains this special quality. The first definition of band itself leads us back to where we began by generally restating the definition of reserve, with the addition that the land was set apart for the "use and benefit" of the "body of Indians...in common" (s.2(1)).

The Trial Division of the Federal Court noted in *Hay River v. Regina*²⁸ that the Act never deals with the creation of a reserve, but only with its definition. The court stated:

...the authority to set apart Crown lands for an Indian reserve in the Northwest Territories appears to remain based entirely on the Royal Prerogative, not subject to any statutory limitation.²⁹

Once this Royal Prerogative has been effectively exercised, then the Act comes into effect to govern the administration of the land as a reserve. The land will retain this unique quality until it has been validly expropriated under section 35 or until it has been validly surrendered for sale under sections 37-41 and a fee simple has been conveyed to a third party,³⁰ which can include an individual Indian.³¹

As a result, the process by which reserves are created remains a mystery to the public as well as to the overwhelming majority of Indians, lawyers and civil servants.

The existing regular reserves have actually been created quite simply in a superficial sense, in that they only required the issuance of an order in council, proclamation or declaration in the name of the Crown.³² Naturally, this has been possible solely where title to the land in question was already in the name of the Crown (either through fee simple acquisition, or as a result of the combined effects of how the doctrines of discovery and aboriginal title have been articulated so as to extend the underlying title to all land initially to the Crown).

Since this scheme did not reflect the reality of many of the reserves created by the French in New France or during the early periods of English colonization, an accommodation had to be made. Therefore, the Act contains the following section:

36. Where lands have been set apart for the use and benefit of a band and the legal title thereto is not vested in Her Majesty, this Act applies as though the lands were a reserve within the meaning of this Act.

This section was designed to incorporate the many instances in which Indian communities were located on lands initially granted to religious orders to establish Indian missions, where the Indian First Nation received a Crown land grant directly, or where the band purchased the land with its own funds.

It should be realized, however, that lands can only be set aside as reserves *per se* under the Act if it is done "for the use and benefit of the band." Conversely, one definition of a band is a community for whom a reserve is set aside. Apparently, the sole limit on the Crown's freedom to create a regular reserve is that legal title must be vested in Her Majesty and that it must be for a "body of Indians", with the former restraint disappearing regarding special reserves. The term Indian is defined as encompassing any person who is registered under the Act (s.2(1)). One way to be entitled to be registered is to be "a member of a body of persons that has been declared by the Governor in Council...to be a band" (s.6(1)(b)). Perhaps to compound this confusion, Parliament is free to alter the definition of, and the criteria of registration for Indianness at any time, as it did in 1985 through Bill C-31.

The result is that the federal government could, from a legal standpoint, clearly radically transform the situation regarding Indian reserves by

- (1) supplementing the size of reserve holdings for existing bands;
- (2) creating reserves for those recognized bands that currently do not possess any (e.g., all but one of the Dene bands in the Northwest Territories, the Caldwell Band of southern Ontario and the "new" bands belonging to the Nishnawbe Aski (Nation)); and
- (3) providing reserves for groups of people who are being registered under the amended Indian Act so as to recognize them as new bands (see paragraph 17(1)(b) and its reference to the "Indian Register").

All of the foregoing can be accomplished without resorting to Parliament so long as Cabinet is amenable and Crown land, or property held by a third party, is available for this purpose. The Government of Canada is free to purchase land to carry out this objective, to draw upon existing surplus holdings, or to use the aforementioned approach of providing the requisite financial resources to aboriginal peoples to buy property on the open market.³³

The same approach is theoretically possible regarding the Inuit, as they are clearly within s.91(24) of the *Constitution Act, 1867*.³⁴ This would require either amending the current *Indian Act* due to the express clause excluding them in subsection 4(1), or separate legislation. There is no evident desire on the part of anyone to pursue the former, and little attention has been paid to the latter due to concentration on addressing this general objective through the land claims process.

There are also a number of communities of Indian people who do not fit readily under the current "re-instatement" process. These are the communities that were never registered by the federal department responsible at the time due to their geographic remoteness (e.g., the so-called "isolated communities" of northern

Alberta) or due to lack of a registration policy (i.e., the three bands represented by the Federation of Newfoundland Indians). It is somewhat unclear as to whether they could qualify for reserves under the Act as it stands. Since there is the linkage between "band" and "body of Indians" that leads to the definition of Indian, one must determine whether or not any of these people of Indian ancestry are registerable. If there are at least two people who are "entitled to be registered" (which is part of the definition of "Indian" in s.2(1)), then there is a "body of Indians" that can be "declared by the Governor in Council to be a band" (which is the salient part of the definition of "band" in s.2(1)(c)). If they are already registered, then the Minister is free to constitute them as a new band under paragraph 17(1)(b). This band is then eligible to receive a reserve and can also pass a membership code under section 10 to bring in the rest of their people (i.e., those who would continue to be non-status Indians or Métis as not falling within any of the categories of section 6 in their own right). These latter individuals could then assert their eligibility to be registered under the Act as members "of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band" (ss.6(1)(b) and 11(1)(b)).³⁵

Where there are no persons present who can qualify by virtue of an ancestral link to another band so as already to be status Indians or to be eligible to be reinstated under paragraphs 6(1)(c)-(f) or subsection 6(2), only two existing options arise. The Minister of Indian Affairs could choose to rely upon paragraph 6(1)(a) by launching a special process to enroll all those who can demonstrate their Indian ancestry prior to April 17, 1985. This was accomplished most recently for the Conne River Band in Newfoundland in 1984, and reflects the historic pattern used to register non-treaty Indians (due to the absence of treaty annuity lists). The applicable legislative standards would be those under the Act prior to its amendment by Bill C-31.

The second approach necessitates a liberal interpretation be given to paragraph 6(1)(b) and the definition of band. A strict view would suggest that paragraph 6(1)(b) is largely duplicative of the third alternative definition of a band in section 2, and is only present in the list of eligible categories in section 6 so as to clarify that there is a further way that a person can acquire

status. An opposing perspective requires one to argue that paragraphs 2(1)(c) and 6(1)(b) separately authorize the Governor in Council to, in effect, create bands. The former largely remains within the untouched definition to reflect the fact that there are outstanding bands which were recognized as such prior to Bill C-31, but that do not fall within the precise terms of the first two categories.

This submission would suggest that the intent of paragraph 6(1)(b) and its use of the general expression "body of persons" rather than "body of Indians" was designed to increase the flexibility for Cabinet, and not to limit the power to create bands to situations involving already registered Indians. This argument is not a very impressive one for several reasons. First, it is worth noting that the term "Indians" does not appear anywhere within section 6. The reason is likely a function of the purpose of the section itself. That is, it would be tautological to create criteria that render a person eligible to be registered as an Indian if they were already an Indian, or a member of a group of Indians as defined under the Act where this is the sole section that is determinative of that status. Second, paragraph 6(1)(b) focuses on the person's eligibility for registration, and simply describes the collectivity by reference to the band's creation by the Governor in Council. In doing so, it uses the phrase "has been declared" so as to suggest that this declaration occurs via the exercise of a power present in another clause. On the other hand, it is extremely unusual (to say the least) if a definitional section offers the exclusive statutory basis for the exercise of such a fundamental power as the creation or recognition of an Indian community as a band. Not only are there the implications arising under the *Indian Act* itself, but obtaining this legal position gives rise to significant consequences under other federal and provincial legislation, as well as under international human rights law (such as the International Covenant on Civil and Political Rights), with which Canada is very familiar through the *Lovelace* case.

An alternative explanation would be that the power to declare a group to be a band is an incident of a royal prerogative such that neither of these paragraphs establish a statutory power, but merely respect the continuation of the prerogative. The two paragraphs would then only fill the role of clarifying the effects of

such a decision by the Crown's advisors. This latter view is, of course, in keeping with the history of relations between the Crown and Indian Nations. From the British perspective, it was the Crown alone who decided with whom to enter into treaties, or for whose benefit to create reserves without any statutory mandate or restraint. This opinion would generate the same result as a liberal interpretation of the Act such that, in practical terms, the Minister of Indian Affairs, with support from his Cabinet colleagues, is free to recognize any group of Indian people as a band. It should be noted, however, that this is likely only in the circumstances described earlier, namely, involving longstanding Indian communities which have somehow been overlooked during the era of registering people or negotiating treaties.

It hardly needs mentioning that adopting the narrow perception of the Governor in Council's power in this regard may render it impossible to accommodate these communities under the Act as it currently stands. The only way then to use the *Indian Act* reserve system approach would be to amend the Act.

B. Crown Reserves

There is, of course, no requirement that the *Indian Act* and the details of its reserve system must be utilized in relation to the regulation of any new reserves. Parliament is free at any time to exercise its 91(24) jurisdiction to enact new legislation to provide a separate regime of reserves. There is precedent for this, as there were two parallel federal statutes on Indians in place for many decades starting in the late 19th century. Although this historical example was designed to distinguish between the "advanced" Indian bands and the rest, which now survives in the form of section 83 of the *Indian Act*, it does demonstrate the possibility of maintaining two separate schemes for administering reserve lands. Contemporary examples also exist of special arrangements through the *Cree-Naskapi (of Quebec) Act*³⁶ and the *Sechelt Indian Self-Government Act*.³⁷

The rationale for special legislation that would create a different form of reserve system would presumably be the desire to meet several discrete objectives. First, it would be to provide an alternative mechanism through which aboriginal groups other than

Indian bands could obtain lands for their use. Second, it would entail the setting aside of these lands on a basis that retains the critical elements of regular *Indian Act* reserves, that is:

- (a) underlying title in the Crown;
- (b) exclusive use and occupation by a defined community;
- (c) possession of a perpetual beneficial interest held in common by all the members;
- (d) federal legislative jurisdiction;
- (f) a federal administrative role in the development of the lands.

Third, it would reflect a psychologically and politically influenced desire to see a clear recognition of a special system tied to the aboriginality of the communities and the special relationship with the Crown.

Once the special legislation was in place, the Crown could then fill the empty vessel by declaring specified territory as being reserves within the scope of the statute.

C. Crown Trusteeship

A further alternative is to rely upon the private law of trusts as the basis for creating recognized aboriginal lands. That is, the Crown could unilaterally declare itself henceforth a trustee of designated lands to which legal title was previously vested with the Crown for a defined class of indigenous beneficiaries. The effect of such an initiative would be to extend an equitable estate to the described aboriginal group, so as to place a burden on the Crown's legal title without the necessity for any formal conveyance of the latter. This could only give rise to this precise result where the Crown was in possession of the full legal and beneficial interest prior to the creation of the trust.

There are certain distinct advantages to this approach. Since it relies upon the usage of a well established branch of the private

law, the declaration of trust can be readily drafted and implemented without a requirement for legislative action. The law of trusts is sufficiently flexible to allow the inclusion of any appropriate conditions. Since this could be viewed as a trust for a charitable purpose, there should be no problem with the rule against perpetuities. It also fits naturally within the way in which the Supreme Court of Canada articulated the special Crown-Indian relationship involving Indian assets in *Guerin v. The Queen* as either being a trust (per Wilson J.) or a fiduciary obligation (per Dickson J.). Either the federal or provincial government could adopt this method, being a part of the common law. Since no special legislation is required, the Crown in right of a province could declare itself a trustee of land for a particular aboriginal group without violating section 91(24) so as to be unconstitutional.

Perhaps not surprisingly, there are also disadvantages to such an arrangement. Aboriginal groups are likely to feel less than confident about their security of tenure. Even if the declaration of trust contains an express clause stating that the Crown has no right of revocation, there may be concern regarding the ability of the government to terminate the trust by statute at any time. If the private law of trusts is used alone, then there would be no statutory foundation that recognizes the unique legal and constitutional position of the original peoples of Canada. Furthermore, this format does not allow for any role for the aboriginal group to govern themselves. Other than being able collectively to instruct the trustee as to how to administer or develop the lands concerned, which advice the trustee is not required to follow, the aboriginal people would have no jurisdiction to control their destiny. They would be subject to the common law and all federal, provincial and municipal legislation just like any other Canadians resident in that region. This approach is not then in keeping with the spirit of the movement for aboriginal self-government, nor would it provide the protection of subsection 35(1) of the *Constitution Act, 1982* to these lands.

Therefore, the sole meaningful benefit to this method would be that it would result in the setting aside of lands for aboriginal use and occupation. The other attractions would not seem to outweigh the flaws. As such, this option is not likely to gain much favour

from aboriginal organizations in comparison with the other alternatives.

D. Crown Grant

Possibly the most obvious approach to a solicitor would be straight land grants from the Crown to aboriginal peoples. This has been historically the most common way of providing land and it has been used extensively with the Hudson Bay Company, the railroads, military veterans, the Loyalists, homesteaders, churches, etc. Although originally carried out under the terms of the common law, specific legislation has existed for over a century to regulate how the provincial and federal governments have dispensed Crown land. Recent practice has overwhelmingly favoured the sale of surplus Crown land for the same reasons that sales were also common previously, namely, as a means of raising revenue to offset governmental expenses. Nevertheless, both the federal and provincial governments would quite properly be free to give land back to aboriginal peoples in recognition both of their original ownership and their current economic needs.

Grants of land could be conducted under general public land legislation, or through a special statutory scheme as has been done in the past.³⁸ If the latter is chosen, then the legislation could contain specific provisions affecting the nature of the title, as well as how and by whom it is to be held. The closer such a statute came to approximating the *Indian Act*, the more it could suffer from complaints against that paternalistic system. In addition, special legislation regarding land grants to aboriginal people that appeared to affect or rely upon the aboriginality of the recipients could likely be challenged as unconstitutional for violating section 91(24) if enacted by a province (unless the scheme is only for the Métis and the courts conclude that they are not "Indians" within that head of federal power). Therefore, any provincial government amenable to embarking upon such an initiative would either have to work in conjunction with the federal government (perhaps including compatible federal legislation), or would have to draft its legislation very carefully indeed.

E. Aboriginal Purchase

Finally, if aboriginal groups acquire land on the open market, then they would be doing so under the prevailing private property law, in the absence again of some new legislative scheme. As private landholders, they could only obtain the extent of title that the vendor had to sell, and this would be subject to the full scope of federal, provincial and local law. It is possible to meet the general aboriginal desire for communal ownership and inalienability under the common law, as did the Hutterites in Alberta,³⁹ or to enact special legislation to meet this objective for them as occurred in Manitoba.⁴⁰ Once again, the comments regarding special legislation and Crown grants would apply with equal vigour in the case of aboriginal purchases of land.

4 REGIMES OF HOLDING TITLE

The next step in the logical progression of dedicating land for aboriginal use, or recognizing original ownership, is to examine the nature of the title to be possessed by the aboriginal group or community as well as its extent. This inevitably requires considering precisely who is to hold the legal interest in the real property, and how do aboriginal people as individuals and/or as a group influence the titleholder. Several aspects of these issues are interconnected with the choice of which mechanism is to be used to "transfer" the land. For example, if the Crown reserve or *Indian Act* reserve options are selected, then it presumably determines that it will be the Crown who will hold legal title. Even here, however, certain matters must be carefully addressed. Special reserves are possible under the *Indian Act* where the legal estate is not vested in Her Majesty, while reserves could be created with title in the Crown in right of a province rather than in right of Canada.

A. Nature and Extent of Title

It is axiomatic that the largest possible interest that could be received by the aboriginal group is only what was possessed by the transferor. If the latter was a private party, then they could transfer at most what they actually held, whether that be a fee simple title, a leasehold, life estate, or some lesser interest. This interest would naturally be regulated by prevailing rules of real property law. The aboriginal group could, of course, acquire less

than the full interest held by the transferor such that the latter would retain that which was not released.

In the case of the Crown, however, the situation is slightly more complex, as it depends on the way in which the Crown acquired title as well as the extent of the title so acquired. If it is land that has never been in the hands of a third party, then one could say that the Crown has full or perfect title (*plenum dominium*) subject only to the burden of any existing aboriginal title.⁴¹ That is, the Crown would possess a "true" fee simple if aboriginal title was extinguished, in that it would include all rights to exploit any natural resources above and below the surface, ownership of bodies of water and air rights, as well as the normal enjoyment of the land and its fruits. If the Crown acquires a freehold estate from someone else (i.e., a recipient of a Crown patent or a successor in title to such a grantee) through purchase, gift or expropriation, it can merge this fee simple with any interests in the land that were previously reserved by the Crown, such as designated petroleum or mineral rights.⁴² The net effect would be to restore the Crown to its original position after extinguishment of aboriginal title as possessor of the complete dominion over this property. This situation occurs with either of the two branches of the Crown in Canada, and will also arise in the acquisition of an interest less than a fee simple where it is the Crown that already holds all reversionary interests.

The position is significantly different when the Crown has obtained an interest in land less than a freehold estate (e.g., a lease) from a source that does possess the fee simple title. This circumstance is then similar to one where the aboriginal group is acquiring a lesser interest directly from the third party, as again the Crown can provide no more than it actually possesses.

The Crown is also free to choose not to transfer its full interest to the aboriginal group. It can retain any aspect of its interest, as it has done with Indian reserves that it has created in which the Crown has retained legal title and, in effect, conveyed only an equitable interest to the band. Likewise, certain rights in land can be reserved to the benefit of the Crown. For example, the Government of British Columbia has reserved the right to resume up to 1/20 of any Indian reserve in that province for roads, road materials or other public purposes,⁴³ while several provinces have

rights to share in the proceeds from the extraction of designated resources from Indian reserves.⁴⁴

The most likely interests that could be acquired by an aboriginal group would be a fee simple, a lease or a beneficial interest. All three have been used in relation to indigenous people such that there is extensive experience on which to draw.

1. Equitable Estate

The primary scheme used in Canada by non-indigenous governments in relation to Indian nations has been the reserve, which involves recognition of only a beneficial interest residing in the band as a whole. The basic elements of this system, which derive their inspiration from the Royal Proclamation of 1763, are as follows:

- (1) legal title is vested in the Crown (except for the anomalous special reserves);
- (2) actual use and occupation is by the Indian band giving it a beneficial or equitable interest in the land so as to give rise to a trust or fiduciary relationship;
- (3) the Indian interest is held in common and is not fully severable;
- (4) there is a restraint on alienation in that the Indian interest can only be surrendered to the Crown; and
- (5) the land is vulnerable to expropriation, termination or forced severance, although it appears that such action will give rise to a claim for compensation.

This framework also generally applies, with slight modifications, in the continental United States for Indian reservations.

In creating a new system based on the model of conveying only an equitable estate, it would be possible to revamp the foregoing in several ways. For example, the fifth criteria could be expressly eliminated either in the declaration of trust (i.e., the private law approach if the Crown is the trustee) or the enabling statute.

Likewise, the restraint on alienation could be modified to permit the aboriginal group (i.e., the beneficiary) to manage the land in all ways falling short of an absolute surrender for sale (which is possible with Indian reserve land through invoking the powers set out in sections 53 and 60 of the *Indian Act*).

It would also be possible to modify the collective interest in land reserved for an aboriginal community. The *Indian Act* itself has done so to a degree via creating the system of Certificates of Possession (formerly called Location Tickets) and Occupation.⁴⁵ This does not constitute a severance of the communal title, but rather provides a form of licence to use and occupy the land included within the certificate. This licence can be sold, given or inherited so long as it remains with a person who is a member of the band.⁴⁶ The rationale for this system is to provide some certainty to band members as to their personal rights in specified property, so that they are free to build or develop their land while, at the same time, ensuring that the property remains reserve land subject to band by-laws, is exempt from provincial and local realty-based taxes and other laws, and is still held for the benefit of the band as a whole. It should be noted that many bands have not opted for this approach and have instead allocated land under customary law or informal means.

It does appear that Indian, Métis and Inuit peoples across Canada are seeking solely a communal interest in land with personal rights of use rather than individual ownership.⁴⁷ The latter approach was the situation under the halfbreed land and money scrip system of the Prairies and part of the Northwest Territories, initially reflecting the negotiations between the Métis and the federal government that culminated in the *Manitoba Act, 1870*.⁴⁸ Perhaps in part due to that disastrous experience, buttressed by similar resentment to the allotment scheme happening almost simultaneously across the border in the U.S., and the subsequent White Paper of 1969, no aboriginal group currently favours the provision of individual landholdings as a means to redress the need for land.

It might be natural then to assume that aboriginal organizations seeking land would readily desire the implementation of the reserve system. Not only is it the best known, but it has demonstrated its ability ultimately to withstand non-Indian pressure

for Indian land through the sheer survival of this regime for well over two centuries. Although it is obvious that many reserves have diminished drastically in size or disappeared over the years due to governmental pressure or misconduct, this form of land management has still resulted in the continued existence of a land base for over 550 Indian bands. Nevertheless, there is still a desire to alter the status quo, as present legislation hamstrings the ability of the recognized bands to develop their own lands.

One could meet this desire for change while retaining crucial components of the reserve approach through a device conveying an equitable estate while the Crown holds legal title. There are at least three alternative ways of proceeding regarding the transfer of "new" land to the benefit of aboriginal communities. As mentioned earlier, the normal law of trusts could be utilized through the Crown declaring itself to be a trustee over specified lands. The terms of such a declaration of trust could be negotiated between the appropriate government department and the aboriginal group concerned. Presumably, the trust would not contain a right of revocation clause, as to do so would eliminate any security of tenure for the aboriginal community. Since the rule against perpetuities does not apply to the Crown, there would be no difficulty in describing the beneficiaries as a class in such a way that future generations would continue to fit within its terms. The effect, of course, of such a declaration would be to constitute the Crown clearly as a trustee so as to resolve the difference of opinion that existed among the members of the Supreme Court of Canada in *Guerin v. The Queen*.⁴⁹ Furthermore, being a form of Crown land it would be exempt from property taxes and land laws enacted by the other representative of the Crown.

In order to ensure that the specific subject matter of the trust - the designated land - continued to remain intact, the drafter would have to limit the trustee's common right to sell, mortgage and lease land, at least by including the requirement for the consent of the beneficiaries. Standard form clauses could not be used if one wishes to grant the aboriginal group as a whole, or its representatives, any guaranteed role in the management of the land (a trustee is otherwise not obliged to take directions from the beneficiaries).

The declaration of trust device, however, may be viewed as containing several disadvantages. Being a private law approach that would at most entail ratification by order in council, creating such a trust need not require formal approval by the legislative branch. It would not then obtain the level of publicity and official sanction that some might desire. On the other hand, some might believe that this is preferable. It would also be subject to statutory modification or repeal, as our doctrine of parliamentary supremacy would not permit the declaration of trust to be immune from legislation. The declaration of trust could itself attempt to alleviate this latter concern by containing a compensation clause if the trust was breached or legislatively terminated. Even in the absence of such a clause, the Crown would be hard pressed to defeat an action for damages for breach of trust if it had altered or revoked the private trust by statute.

One byproduct of this mechanism is the difficulty in varying or terminating the trust. The latter could not occur in the normal way - that is, all the beneficiaries agreeing to end the trust and imposing this decision on the trustee. Even if one could obtain unanimity for this action among the adults, the courts will not permit the beneficiaries to decide unless all beneficiaries are ascertained, adult, competent and consent. In the type of perpetual trust under consideration here, such circumstances could not arise as many beneficiaries will be children while future generations yet unborn have an interest to be considered. In this situation, therefore, the sole method of altering or terminating the trust would be under provincial variation of trusts legislation. These statutes give full discretion to a superior court judge to receive proposals to change the terms of the trust, and only to approve any change if the court is satisfied that it is in the interests of all those actual and potential beneficiaries who are unable to give a valid consent in law for themselves. This would obviously be a very cumbersome process, although this very fact does provide a fair degree of comfort to those who might fear that the trust could be too easily altered.

Finally, and most importantly in light of the emphasis upon aboriginal self-government, a declaration of trust could not, no matter how creatively drafted, recognize or "create" aboriginal governments. Such a declaration, on its own, could really do little

more than provide the land base and a role for the beneficiaries in its management. It cannot serve as a means to empower a community to govern itself or to obtain law-making power over themselves and their land. Thus, the subject matter of the trust would be, under prevailing law, subject only to the impact of Crown immunity and the potential exemption from laws enacted by any other body including another level of the Crown. Providing a governmental capacity for aboriginal people would require the declaration to be supplemented by judicial recognition of sovereign status, legislation or constitutional action.⁵⁰ Furthermore, a declaration of trust alone could not cloak the land with rights under section 35 of the *Constitution Act, 1982*. It might be possible, however, to assert that the beneficiaries have certain aboriginal or treaty rights on the land if it is within their traditional territory, or depending upon the terms of any applicable treaties, so long as these unique legal rights had not been extinguished.

It should be noted, however, that the declaration of trust device can be implemented by either the federal or provincial government. So long as legislation is not part of the package, then no question of constitutionality arises in the face of the federal 91(24) jurisdiction. Supplementing the declaration of trust by statute would directly raise this jurisdictional issue so as to restrict this aspect to the federal government (at least concerning Indians and Inuit although probably regarding the Métis as well). This factor is critical where a province is prepared to act unilaterally only, or where the federal government refuses to be a participant.

The second way of conveying an equitable estate is to utilize the *Indian Act*, but in keeping with the current spirit of change, one could envision a demand to amend this Act to modify the land administration provisions so as to authorize greater aboriginal autonomy. The third alternative is closely related as it involves the enactment of a parallel statute designed to overcome the deficiencies in the *Indian Act*, as well as to encompass the needs of indigenous peoples who do not come within the definition of Indian and Indian band within that Act. The net result of either of these initiatives would be that the Crown would designate the land under that Act and hold the legal title in accordance with the

terms of that statute. These approaches could only be pursued by Parliament, although they do allow for the opportunity to address broader issues.

2. Leasehold

Another possible method is for the Crown to lease some of its land to aboriginal groups. This clearly is unlikely to be an attractive option from an indigenous perspective, as it defines the Crown-aboriginal relationship as being one of landlord and tenant. Not only would it run counter to the prevailing philosophical orientation of the Indian, Inuit and Métis peoples to their land, but it would stand their view of history on its head. That is, aboriginal peoples as the original owners of the land would be reduced to being lessees of their own country from a colonizing landlord. Nevertheless, a leasehold interest is conceivable and it should be examined.

Since aboriginal people are seeking a secure land base for themselves and future generations, they would not favour short term leases. The Western Australia government's aboriginal lands policy provides an example of the leasehold approach. It is currently developing a package to respond to the demands of Aborigines for land rights that will include 99 year leases of some unoccupied state-owned lands without fee. The government believes that this offer is fair and meets the needs of Aboriginal people to have a legal interest in land so that they can develop their communities and engage in economic activities.⁵¹ It is unclear at present what this draft policy will propose to happen at the expiration of the 99 year term. One option of course, would be to include a clause making the lease automatically renewable upon the request of the lessee for further periods. Some of the Indian nations in southern Ontario have had their own experiences with long term leases, albeit in a very different context, in which Indian land was leased to settlers for terms of up to 999 years.

A potentially more attractive variation has been used in the western part of New South Wales. Aboriginal Land Councils are eligible to obtain perpetual leases from the state government for that property which is subject to the *Western Lands Act, 1901* and where the land meets the definition of "claimable Crown land"

under the *Aboriginal Land Rights Act, 1983*.⁵² Receiving a lease in perpetuity naturally eliminates any concern about future dispossession upon the expiration of a lease for a fixed term.

However, a lease would be undesirable if it precluded the aboriginal tenant from fully enjoying or developing the land. Even without such a drawback, this route to providing land also suffers from the same disadvantages as the declaration of trust unless it is supplemented by legislation. Furthermore, it is not in keeping with the spirit of the special Crown relationship and the unique legal position of aboriginal peoples in Canada. The indigenous population is seeking much more than a normal lease subject to all relevant law of the dominant society, and without the particular rights pertaining to aboriginal peoples "recognized and affirmed" by the Constitution.

3. Freehold

The generally favoured approach of recent vintage has been for indigenous peoples to receive title to land in fee simple. The Inuvialuit, represented by COPE, negotiated a settlement whereby they received 35,000 square miles of territory in the Western Arctic in fee simple.⁵³ The Inuit also received their lands from the Crown in fee simple in the *James Bay and Northern Quebec Agreement*.⁵⁴ The James Bay Cree adopted a slightly different approach by taking part of their lands as Indian reserves (Category IA) and part in freehold (Category IB). The Naskapi followed the Cree approach in the *Northeastern Quebec Agreement* in which they accepted 16 square miles as reserve lands and a further 110 square miles in fee simple.⁵⁵ All three of these land claims settlements involved an initial surrender of aboriginal title to the Crown with a small segment of the surrendered territory being conveyed back to the aboriginal claimants.

Land claims settlements are not the only example of the current preference for the fee simple title approach in Canada. The Sechelt Band obtained title to its reserve land pursuant to the following provision of the *Sechelt Indian Band Self-Government Act*:⁵⁶

23(1) The title to all lands that were, immediately prior to the coming into force of this section, reserves, within the meaning of the *Indian Act*, of the *Indian Act* Sechelt band is hereby transferred in fee simple to the Band, subject to the rights, interests and conditions referred to in section 24.

The Australian experience also demonstrates a preference for a shift away from reserves to freehold title over the last 11 years. The first initiative to respond to the demand of Aborigines for lands was by the Commonwealth in 1976 regarding the Northern Territory.⁵⁷ Existing reserves were immediately transferred as grants "of an estate of fee simple in that land",⁵⁸ while land claims that were upheld by the Commissioner and granted by the Minister regarding eligible Crown land were also to be conveyed in freehold.⁵⁹ The two major settlements in South Australia that followed also granted title on the same basis.⁶⁰ In addition, the governments of New South Wales⁶¹ and Victoria⁶² have adopted this same approach.

Conveying land in fee simple could be done through the operation of the common law on real property. Doing this, however, would eliminate public debate and official approval by parliamentarians. It may also render the land subject to all provincial property legislation, as it would be arguably outside the scope of the immunity extended to section 81(24) lands as not being "Lands reserved for Indians" within the federal jurisdiction, but merely lands privately conveyed by the Crown. On the other hand, a willing provincial government can probably grant fee simple title only through a normal conveyance in the absence of active federal participation.

The practice in the USA, Canada and Australia, however, has been to use special legislation to vest freehold title or to ratify agreements negotiated with the representatives of the aboriginal peoples concerned. Such legislation or agreement can, of course, address any conceivably related issue that cannot be encompassed within a deed to land. Special legislation has also been used in reference to certain religious colonies who wish to hold their land communally, such as the Hutterite communities in Manitoba.⁶³

B. Right to Full Use and Enjoyment of Land

Obtaining an interest in land that is recognized by the dominant legal system is by no means the last matter to consider. Choosing the nature of title to be conveyed leads directly to the next question - that is, how extensive is the interest received by the particular indigenous group. Obviously, an Indian, Métis or Inuit community will seek to obtain as broad or expansive an interest as possible, while the Crown will tend to desire to limit what is being conveyed. As this will be a matter for negotiation, it is appropriate here only to mention the issues that may arise.

The one that has perhaps received the most attention in North America, and has caused the most pain in Australia, has been ownership of subsurface resources. The legislation in force in the Northern Territory⁶⁴ and South Australia⁶⁵ expressly retains ownership of all subsurface resources for the government, as does the new law for Victoria.⁶⁶ The New South Wales legislation is slightly more generous as it retains Crown ownership over only gold, silver, coal and petroleum, while also allowing all outstanding mining licences for other minerals to continue and to be eligible for renewal.⁶⁷

A similar pattern has occurred in recent years in Canada in land claims settlements. The Cree and Inuit relinquished all subsurface resources to the Province of Quebec in the *James Bay Agreement*⁶⁸ other than for soapstone.⁶⁹ The Inuvialuit fared somewhat better as they received 5000 square miles on terms that included all "minerals whether solid, liquid or gaseous and all granular materials."⁷⁰ The further 30,000 square miles transferred does not include petroleum, coal, native sulphur, base metals and precious metals, but it does give rights to use soapstone, sand, gravel and other building materials.⁷¹ The Government of Canada is also committed to providing coal mining permits free of charge to the Inuvialuit Development Corporation if it is for local use.⁷² The situation on Indian reserve lands varies across the country, although it can generally be asserted that bands possess some level of subsurface resource rights.⁷³

The most valuable resource represented by water can also instigate major debates. Indian tribes in the USA are recognized as having ownership rights to beds of water and rights to guaranteed

quantities of water.⁷⁴ The position of Indian reserve lands in Canada on this topic is far from clear, as is the situation under the aboriginal title doctrine.⁷⁵ The James Bay Agreement is less than precise on this matter, although it appears that the Cree and Inuit do own the water and its beds as well as control its use in circumstances where more than 50 per cent of the adjoining land has been set aside for their exclusive use, while the province owns the resources under the beds and all other waters.⁷⁶ The Inuvialuit do obtain clear "title in fee simple absolute to the beds of all lakes, rivers and other water bodies found in Inuvialuit lands."⁷⁷ However, they have no interest in the water itself⁷⁸ nor any control over its use.⁷⁹

There will also be a need to clarify the right to enjoy the surface resources in full. The aboriginal group will wish to be certain that they have the ability to till the soil, log the timber, harvest the wildlife and gather the flora without being subject to a charge that they are violating the old property law doctrine of committing "waste". This problem could particularly arise if the interest conveyed is an equitable estate or a leasehold.

C. Conditions on the Interest in Land

There are other possible matters to address as well as the foregoing ones. One of the greatest concerns of Indian, Métis and Inuit peoples has been the fact that they will lose their land base over time. The history of indigenous peoples around the world gives ample substance to this fear since it demonstrates a not uncommon pattern of dispossession. This has particularly been the case in the Americas, Australia and New Zealand. Indian and Métis people have especially felt the pressure to move ever north or west away from the expanding encroachment of waves of European settlers. Those who were located on reserves have also experienced a continual decline in the size of their remaining land through expropriations and surrenders (many of which were illegal and have given rise to the specific claims process). They do not wish to see this history repeated yet again regarding any lands that will return to their control in the future.

What this raises is a question about the vulnerability of any "new" lands to be lost once more. Putting this in legal terminology,

aboriginal groups will be concerned about the alienability of these lands, whether they will be subject to compulsory acquisition of seizure and will be mortgageable.

Pursuant to the doctrine of aboriginal title, lands of the original peoples were under a restraint on alienation. The Royal Proclamation of 1763 codified the earlier British policy on this point clearly, by outlining that the "several Nations or Tribes of Indians" could only sell their land to the Crown and not to any other in accordance with a delineated process in these terms:

And We do hereby strictly forbid, on Pain of our Displeasure, all our loving subjects from making any Purchase or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for the Purpose first obtained...

And Whereas Great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the Great Prejudice of our Interests, and to the Great Dissatisfaction of the said Indians; in Order, therefore, to prevent such Irregularities for the future, and to the End that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for the Purpose of the Governor or Commander in Chief of our Colony respectively within which they shall lie; and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for the Purpose;...

The *Indian Act* has maintained this tradition by rendering void any agreements regarding unsurrendered reserve land (s.28(1)), and by establishing a mechanism through which reserves or portions thereof can lawfully be surrendered solely to the Crown (ss.37-41). Would such a scheme be applied to any interest in land in the future?

In answering this question, some guidance may be drawn from recent developments. The *Alaska Native Claims Settlement Act* of 1971 conveyed title in fee simple to designated lands to a series of corporations created by the Act. These corporations are free to dispose of the land received with the sole restraint being one on the shares of the corporations themselves - that is, the aboriginal shareholders are unable to convey their shares for a period of 20 years. The forthcoming expiration of this period has sparked a significant increase in the level of distress about the possible loss of the remainder of their homeland.⁸⁰

Australian Aborigines have generally sought to avoid this possible result by demanding land rights in the form of inalienable freehold. The legislation applicable in the Northern Territory specifically exempts aboriginal land from resumption, expropriation or forfeiture under territorial law,⁸¹ nor can a road be constructed without the consent of the appropriate Land Council.⁸² A Land Trust may, however, grant a lease or licence in respect of the land vested in it, transfer land to another Land Trust, or surrender it to the Crown if certain conditions are met.⁸³ The *Pitjantjatjara Land Rights Act, 1981* of South Australia is even more simple and specific in stating that:

17...no estate or interest in land -

(a) may be alienated from Anangu Pitjantjatjaraku; or

(b) may be compulsorily acquired, resumed or forfeited under the law of this state.

There are, however, provisions that authorize the issuance of mining and petroleum leases and exploration licences.⁸⁴ An Aboriginal Land Council in New South Wales may lease and grant

easements over its land, but the Council shall not sell, mortgage or dispose of any of the land vested in it.⁸⁵ The Commonwealth legislation that applies to Victoria also permits only leases, other than allowing transfers to a different Aboriginal organization.⁸⁶

Land claims settlements in Canada that result in designation of lands as reserves naturally result in the imposition of the restraints on alienation contained in the *Indian Act* along with the protections afforded thereby.⁸⁷ Other lands are subject to the regime negotiated in the settlements themselves, otherwise the relevant property legislation will apply.

Aboriginal recipients of land will wish to address their attention to this vital issue. On the other hand, seeking freehold title that is both inalienable and not subject to expropriation or seizure provides the maximum possible level of protection so as to ensure that the land will be available to their future generations. It must be realized, however, that a complete veto on the right to sell, lease or mortgage dramatically impinges upon the objective of obtaining economic self-sufficiency, as it makes it exceedingly difficult to attract business and capital. The *Indian Act* system blocks the seizure of realty and Indian-owned personally situated on a reserve (ss.29 and 89(1)) and, as a result, it has been almost impossible to borrow money from regular financial institutions where there are no other assets to pledge as security. Leases are permitted via going through a conditional surrender to the Crown (s.38(2)) or under delegated power from the Governor in Council (S.60). The ill-fated *Indian Self-Government Bill* of the Trudeau Government (Bill C-52) attempted to accommodate this dilemma, but without complete success, in a slightly different way by empowering the Indian Nation to "sell or otherwise dispose of such property or interest" in their lands (s.13(1)(b)), while at the same time declaring that such lands "may not be pledged, mortgaged or hypothecated as security" (s.13(2)). The *Sechelt Indian Band Self-Government Act* also grants the Sechelt Band full power to dispose of its land with the sole restraint being that it be done in accordance with the provisions governing such disposition set out in the Band's constitution.⁸⁸ The best approach to meet these conflicting concerns may be for an Aboriginal group to structure its arrangement such that it readily has the power to lease land, but can only fully alienate it where an overwhelming majority of

the community (e.g., 80 per cent) consents. Likewise, it may be viewed as appropriate to permit mortgages while imposing restraints on the right of foreclosure when in default (e.g., to allow a sale through foreclosure proceedings only to members of the community or to restrict the lender to seizing chattels).

It should be remembered that opting for any form of Crown reserve system will likely entail a blockage on alienation to anyone other than Her Majesty.

The aboriginal recipients may also want to focus their attention on the individual rights of their members in the communal title—that is, whether or not there should be a formal scheme of providing security of tenure to any residents. The options include a type of certificate of possession (as under the *Indian Act*), leaseholds, easements and severance so as to eliminate the collective interest.

A further remaining point is the question of expropriation. Aboriginal groups will inevitably wish to preclude any right of the Crown to acquire their land compulsorily, as has been accomplished in several jurisdictions in Australia.⁸⁹ Failing this, the alternative is to state expressly within the arrangement with the applicable federal and/or provincial government that land can be expropriated solely on condition that alternative land of equivalent quality and quantity is made available (as under the *James Bay and Northern Quebec Agreement*), or that full and fair market value, including accounting for its special significance as aboriginal land, is provided as compensation.

Due particularly to the status of Indian reserve lands as exempt from provincial and municipal taxation, one can anticipate that liability for property taxes will be an element for consideration. So long as the fee simple title remains in the hands of the Crown or is a special reserve under the *Indian Act*, the land should be exempt from such taxation. Any other regime would be liable to property taxes (which can, of course, include local school, water and sewage charges) unless a statutory provision to the contrary is enacted.

A slightly different situation would occur regarding the current exemption from taxation by status Indians for personal income earned on a reserve. As this is not a function of any aspect of Crown immunity to property assessments, the income tax exemption

is derived from the terms of sections 87 and 90 of the *Indian Act* (although certain Indians may also have an argument based on the terms of their treaties, over and above a general issue of sovereignty and sovereign immunity). Thus, exemption from personal or corporate taxes would only arise under the present jurisprudence through legislative action to which one could expect significant resistance. Non-liability to property taxation will be a matter of fundamental concern, as it is an essential element of ensuring that the land base remains in aboriginal hands in perpetuity. The American experience under its individual allotment scheme in the late 19th century demonstrated that an immense amount of former reservation land had disappeared from Indian possession within a few decades, in large part due to forfeiture proceedings for non-payment of taxes. Although one would hope that it would not happen again, the possibility of bankruptcy proceedings leading to the loss of Native lands in Alaska (starting in 1991) revives the foundation for this fear.

A final aspect that simply needs to be mentioned in this context is the matter of control over resource development. Regardless of who actually owns the natural resources in question, the right to authorize or veto subsurface or surface development is a vital aspect of both self-determination and preservation of the land in a form usable to its aboriginal occupants. This is more than the simple power to say yes or no to particular projects. It also includes the ability to impose conditions on any venture, and to receive benefits from any approved undertaking.

D. Who Holds Title?

Although this is not an issue in circumstances where the reserve model is pursued or where the Crown declares itself a trustee, it will definitely be a focal point when the aboriginal group is the direct recipient. It will arise both with grants in fee simple and leaseholds. There are, once again, a series of basic options to consider. A natural approach for Indian Nations is to have the transfer made directly to their government, as was the case with the Sechelt Band,⁹⁰ or to landholding corporations controlled by the aboriginal community, as was the case with the James Bay settlement.⁹¹ If aboriginal self-government becomes a full reality

for the Inuit and MNSI communities, then this option can apply for them as well. Whether the conveyance occurs through operation of a statutory provision or under normal property law, the enabling legislation or constitutional agreement that recognizes and empowers the aboriginal government would come into play so as to subject the land to the executive and legislative powers of that government. Thus, the land would be treated as an asset of the aboriginal government. It would be the aboriginal government that itself could be the recipient of the land, able to administer and manage it as a resource for the use and benefit of the entire community.

An alternative approach requires one to return to the trust model. If the Crown wishes to use a trust deed to convey its interest, then individuals would have to be designated as trustees for the aboriginal collectivity as a whole. The aboriginal community could select its own representatives to serve as trustees and could draft their terms of office, powers, duties and means of replacement. Several bands have used the trust device as a means of taking over the power to manage surrendered lands available under section 53(1) of the *Indian Act*, while also providing adequate safeguards so as to control the behaviour of the individuals who are nominated by the band to serve as trustees (with the formal appointment being made by the Minister). The Western Arctic Claim also used this method, and created the Inuvialuit Trust to own 100 per cent of the non-voting preferred shares of the Land Development and Investment Corporations.

One difference with utilizing solely the private law of trusts would be the problem invoked by the rule against perpetuities. The common law system generally will not permit property to be inalienable or held for the benefit of any party for longer than the perpetuity period (i.e., the lifespan of any designated person plus 21 years). Since a central objective of the push by indigenous peoples is to regain some of their land, not only for themselves but also for future generations, there would be a breach of the rule against perpetuities. Although perpetuities legislation in some provinces minimizes some of the restrictions inflicted under this rule, such statutes do not exist in all jurisdictions in Canada. In addition, the remedial provisions still do not allow a perpetual interest to survive as such. This fundamental flaw would be avoided

if the courts were to view this type of arrangement as a charitable trust, under either the category for the relief of poverty or for the advancement of other purposes beneficial to the community as charitable trusts are exempt from the operation of this rule.⁹² One cannot, of course, assert with any certainty that such an argument would find favour with the Canadian courts.

It is perhaps more likely that aboriginal organizations would feel more comfortable utilizing a statutory trust. This simply means that the essential terms of the trust are contained in legislation rather than in a private trust document. Four Australian state governments created trust schemes in the period 1966-1973 which transferred responsibility for the management of existing reserves from governmental departments and religious groups into aboriginal hands.⁹³ There was, however, considerable dissatisfaction with these arrangements as each created a single, state-wide body to administer the reserves. Although the trustees were selected by the Aborigines as a whole, it was felt by many that they were too far removed from the concerns of the individual reserves and not sufficiently accountable. The more recent wave of land rights legislation has attempted to respond to these complaints by decentralizing the trusteeship. Thus, for example, the reserves vested in the former Aboriginal Lands Trust are conveyed to Local Aboriginal Councils in New South Wales.⁹⁴ The Commonwealth legislation in force in the Northern Territory also uses local Aboriginal Land Trusts to hold title to the former reserves and to the lands transferred under the claims process.⁹⁵ Queensland has conveyed the former reserves by a "deed of grant in trust" to trustees who also serve as the local community council.⁹⁶

The standard pattern for this type of trust is that it is created by the community (or traditional owners), and then formally recognized or established by the relevant Minister under powers granted to the latter by the enabling statute. The trust is designed to receive the grant in fee simple and to hold this title for the benefit of the Aborigines who use and occupy that specific tract of land. The trust may also acquire the interests of any third party to that land or to other territory. The trust may further be empowered to exercise the normal functions of a landowner (i.e., to manage and administer the land). The local adult Aborigines will then elect the trustees directly or nominate them for appointment

by the Minister. The enabling statute invariably sets out precise provisions governing the method of selection, terms of office, duties and powers of the trustees, mechanisms to fill any vacancies, and related matters. Being normal legislation, these systems can be altered at any time by simple amendment.

A slightly different approach is to utilize a corporate model. Since the size of most aboriginal communities renders the private corporate model inapplicable, one can only consider the options of public and statutory corporations. The former is clearly very easy to establish, and is theoretically sufficient to meet the assignment of receiving interests in land of whatever form and managing property for the benefit of the shareholders. It is not possible, however, to avoid completely the problems experienced in Alaska—the transferability of shares, the "foreign" nature of the corporate model, the tension between the normal drive of a corporation for maximum profit and the desire of many in the aboriginal community to preserve their traditional lifestyle, the risk of bankruptcy, and the limited scope of a corporation⁹⁷ - without legislative action.

Therefore, the statutory corporation is likely the only viable alternative for this purpose. Several jurisdictions in Australia have also utilized this device instead of the statutory trust.⁹⁸ Drawing upon this experience, one finds that the enabling legislation either creates the corporation itself or vests land and powers in an existing Aboriginal corporate body.⁹⁹ The statutory body is endowed with the full legal powers of a natural person, in addition to full powers to manage and control the land conveyed. The corporation usually may also acquire other land and money, negotiate leases for surface and subsurface resource development, regulate entry to the land, and generally represent the wishes of the community. The new legislation in force in Victoria carries this mandate further by delegating authority to protect sacred sites and to serve as a local municipal government, with power to enact by-laws regarding local matters (including wildlife harvesting, conservation economic enterprises, cultural activities, forestry and land use).¹⁰⁰

We also have some experience with a variation on the statutory corporate model through comprehensive claims settlements. The Inuvialuit Agreement created four central corporations and a local corporation for each community. The settlement reflected the desire both to use the corporate model and to minimize the negative

experiences arising close by in Alaska. The structure selected involves a distribution of the functions of owning the land, promoting business ventures, and seeking safe investments among three separate corporations. The Inuvialuit Regional Corporation holds 100 per cent of the voting common shares of the central corporations, while the Inuvialuit Trust owns all of the non-voting preferred shares. The Regional Corporation is owned by the community corporations, which are themselves controlled by the Inuvialuit residents in each community.

The rationale behind this somewhat complex scheme¹⁰¹ reflects an attempt to meet all of the critical objectives, namely to:

- (1) ensure continued Inuvialuit ownership (the beneficial interests are issued to each enrolled Inuvialuk for life and are non-transferable);
- (2) seek long-term financial security through prudent investments;
- (3) generate economic development through promoting businesses;
- (4) preserve the land base for traditional pursuits; and
- (5) permit regional co-operation and sharing of any non-renewable resource wealth while also allowing for significant local control.

Dividing the mandates assists in the pursuit of each of these goals without fostering contradictory strategies within any one corporation. Creating a special regime by way of an agreement that has been ratified by Parliament provides a way to eliminate what would otherwise be almost insurmountable obstacles, such as rendering the rule against perpetuities inapplicable, making the "shares" non-transferable and yet allowing each successive generation to benefit directly.¹⁰² Other less vital drawbacks, like the impact of any tax on share allotments, can also be remedied.¹⁰³ The Agreement, including this regime, now benefits from the scope subsection 35(1) of the *Constitution Act, 1982*.

The James Bay Cree and Inuit of northern Quebec have also opted to utilize the statutory corporate model to a significant degree. This has been implemented both *via* the Agreement itself and by a number of provincial statutes enacted in reference to specific corporations. Even the eight Cree bands and the Naskapi Band are now formally statutory corporations.¹⁰⁴

As is evident by the comprehensive claims settled to date, it is possible to use a combination of all of the options. The Inuvialuit have chosen to establish both corporations and a trust under their Agreement, while the James Bay Cree and Naskapis are using corporations, federal Crown reserves and local governments. There is no such thing as the one right choice as each model, or combination thereof, has its own attractions and disadvantages. Furthermore, aboriginal communities across Canada face dramatically different situations and possess markedly different aspirations. In many cases it may depend upon how one balances somewhat contradictory objectives, or with which type of legal device people will feel most comfortable. If there is a land claim settlement or treaty renovation involved, or where the applicable government is prepared to enact special legislation, then there is truly no limit on what can be constructed.

5 REMAINING ISSUES FOR CONSIDERATION

Before concluding, I would like to mention briefly a few additional matters that warrant examination by governments and aboriginal groups as part of this process. Conveying land to aboriginal associations, communities or governments, or recognizing their existing interests, will entail the inclusion of an accurate delineation of the land concerned. One of the essential details necessary to a claims settlement has been the selection of precise blocks of territory and their description by reference to a survey or topographical measurements. For the same reason, many of the Indian reserves promised by treaty could not be established officially until the surveyors had completed their task. Despite years of experience in creating reserves, DIAND and its antecedents regularly made critical mistakes in fulfilling what might seem to be a routine technical task. A number of these errors appear to fall into several categories. First, watercourses were often used as boundaries without clearly articulating whether any or all of the bodies of water were part of the territory set aside for the exclusive Indian use. Second, significant erosion and accretion occurring over decades impact upon imprecisely defined boundaries. Finally, place names were relied upon without accurate topographical descriptions for them, so that officially changing the place names subsequently altered the size or location of the reserves.

There is also the question of whether or not to record title (or an interest therein) in a land registry system. The obvious advantage of doing so is that it gives full notice to the world of the existence of the aboriginal interest. This reduces the chance that anyone acting in good faith might attempt to exercise dominion over that land. A decision in favour of registering the

interest gives rise to a concern as to where it is appropriate to do so. The normal pattern is to utilize the existing provincial regime, although the *Indian Act* demonstrates that it is possible to create a separate land registry (in fact, two have been created (ss.21 and 55)). It would, therefore, be possible for Parliament to build upon its current scheme for reserves and develop an aboriginal lands registry to cover all recognized aboriginal interests in land. Alternatively, federal legislation could be enacted to create a second registry for non-reserve lands. The former approach is obviously more cost-effective as well as making title searches simpler.

Probably the primary reason to do so might be a desire by the Indian, Métis and Inuit peoples to have a visible means of indicating that their lands are within the scope of section 91(24), rather than subject to provincial land legislation. Provincial registry statutes are designed not merely to provide information to potential purchasers and lenders, but also to provide a measure of indefeasibility of title to the owner. It is quite likely that provincial enactments cannot extend this latter benefit to aboriginal lands in any case, at least so long as they can be regarded as "Lands reserved for the Indians" within the scope of section 91(24). On the other hand, the land registry system established by the *Indian Act* can hardly be regarded as well known, and fails to meet the objective of effectively providing notice to the world.

It should be realized as well that the registry would be utilized for more than recording the initial entry of the aboriginal estate. Any subsequent long-term leases, mortgages and easements would in all likelihood also be entered. Furthermore, using a registry system that has the capacity to handle the unique nature of aboriginal landholding would permit the ability to record any individual allotments that have occurred within the community, through a specific form of entry that would still recognize the continuing communal nature of the underlying estate. There is no exact equivalent for such an interest in real property law, and hence one could not simply opt for the existing provincial scheme. It can be anticipated however, that financial institutions will insist upon some level of security of tenure before granting any business or housing loans. This reflects a desire not only for good security for the loan, but also for the borrower's interest in the land. As a result,

it appears that there are several strong incentives favouring the development of a federal aboriginal lands registry with a statutory basis.

Another matter to address is taxation, a multifaceted issue indicated earlier. It can easily be divided into a series of questions, namely:

Will the land be exempt from any provincial and municipal property-related taxes and charges?

Will the land give rise to a personal tax exemption for any income generated thereon?

Can the aboriginal community impose its own taxes and charges on the property and its use?

The answers would be in the affirmative if the land is designated as a reserve under the *Indian Act*, and all in the negative if a simple conveyance of fee simple title is used. Crown trusteeship or reserves would generate a positive answer to solely the first question. It is possible to resolve these matters through negotiation if a statutory model, or statutorily-ratified one, is to be developed.

It will also be important to consider the status of the land in a constitutional sense. That is, the realty formally within the particular jurisdiction of Parliament or the Legislatures. This is a crucial matter that extends beyond the threshold that would arise in terms of who has authority to pass any statutory regime accompanying the transfer of land. Under our constitutional arrangement, the resolution of this issue would also affect the applicability of a wide variety of other legislative enactments, such as those governing expropriation, land use, environmental protection, inheritance, forestry, non-renewable resources, traffic, etc. Although the parties to this arrangement could opt for a section 88 approach of referentially incorporating the legislation of the other representative of the Crown, this still denies the direct applicability of these property-related statutes in their own right. It also allows for negotiation concerning what general limits will be imposed on this operation of incorporation by reference, as occurs in section 88 itself.

Finally, there remains the vital issue of self-government. Once again, this monograph has not been designed to concentrate upon the potential systems possible under comprehensive land claims settlements or under a constitutionally entrenched self-government regime, whether as an inherent right or one based solely upon a negotiated agreement. The orientation instead has been to examine what can be accomplished regarding the provision of a land base, within the existing case law and constitutional arrangements, for those people who do not currently have other alternatives. In the absence of a dramatic decision by the courts or success at a future First Ministers' Conference (FMC), all that is available outside the modern treaty-making process or treaty renovations would be schemes authorizing local governments to exercise delegated powers. Given the intense efforts made to achieve constitutional change, there may be little interest in pursuing a subsidiary form of government. One cannot help but recall how quickly the Bill C-52 initiative of the Hon. John Munro disappeared from debate, or as the degree to which the Sechelt Band has been criticized by other Indian groups for the position it pursued. Nevertheless, DIAND has established a self-government Branch with part of its mandate being to pursue possibilities for Parliament to act to enhance powers of local government for Indian communities.

Furthermore, the "resounding non-success" of the FMC in March of 1987 does create a situation in which efforts to seek acceptable accommodations for aboriginal peoples via the constitution may unfortunately be put to the side. If this is the choice of the Prime Minister, then those who cannot access the land claims process are left with litigation to prove sovereign status, international action, or negotiation of delegated authority. Virtually any executive and legislative powers can be granted to aboriginal communities through the use of simple legislation. Local government could clearly be a component of any statutory scheme intended to regulate the nature and extent of title transferred, along with the identity and powers of any recipient body. It would be critical, however, to approach the negotiation of such arrangements with the intention of structuring the final results in such a way that facilitates any future transition from local management to true self-government.

6 CONCLUSION

The objective underlying this monograph has been to begin the process of exploring concrete approaches that will address the desperate need of so many aboriginal communities for a guaranteed land base. Although I hope that aspects of this paper may be of some utility to those aboriginal associations who are currently involved in redefining their future through the comprehensive claims process, as well as those waiting in line to enter it, my thrust has not been geared toward what is conceivable in that context. Instead, I have attempted to grapple with those issues that would be essential to address if land is to be officially restored to those aboriginal peoples who are landless or suffer from an inadequate territorial base. This means, in effect, that this study will primarily be of interest to Indian and Métis people in southern Canada who have no aboriginal title claims, or whose claims have fallen on deaf ears in federal and provincial governments to date, as well as those people interested in their situation. My own view and hope is that this will be only a transitional phase for these groups.

It is not possible to map out an ideal approach, or even a preferable one, for aboriginal groups and communities that are or will be negotiating land transfers with willing governments. The diversity of circumstances is so great for Indian and Métis people in the ten provinces, and their aspirations are so varied, that there is no single, perfect solution. Each group will have to weigh the advantages and disadvantages of the different options, and select

the approach that is best tailored to meet their needs and goals. They will also have to assess some of their own competing objectives and internal conflicts, and determine their own priorities.

I would expect that aboriginal people will seek the greatest level of security, the maximum amount of control, and the largest possible interest in the land, water and resources. At the same time, there will likely be a desire to strengthen the special relationship that exists with the Crown, and ensure the continued uniqueness reflected by section 91(24) and the federal role as fiduciary or trustee. There will be many different choices for aboriginal people to make in the years to come, especially given some level of incompatibility among these concepts and the drive toward a constitutionally protected right of self-government.

It is obvious, however, that aboriginal peoples - especially the Métis and non-status and new status Indians - have been incredibly marginalized in Canada. Far too many of the original owners are now largely just squatters in their own homeland in the eyes of Anglo-Canadian law. In light of the massive size of Canada, its sparse population, and the huge amount of unoccupied Crown land available, one cannot but expect that this injustice must and will be redressed in the near future. Accomplishing such a major task, however, will be no easy feat. It will require great care, flexibility and good faith. One can only hope that all of these attributes will be present in abundance within Canadian governments and Canadian society as a whole.

NOTES

1. The former federal policy is articulated through *In All Fairness - A Native Claims Policy - Comprehensive Claims*, Ottawa, Minister of Supply and Services Canada, 1981. This policy was extensively reviewed and criticized by an independent task force appointed by the Minister of Indian Affairs and Northern Development (*Living Treaties: Lasting Agreements*, Ottawa, 1986) whose recommendations were only partially implemented in a new federal policy announced by the Minister on December 18, 1986. The "new" policy has also been published as a booklet, Department of Indian Affairs and Northern Development, *Comprehensive Land Claims Policy*, Minister of Supply and Services Canada, Ottawa, 1986.
2. For further information see, for example, Bradford W. Morse ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada*, Carleton University Press, Ottawa, 1985.
3. See, e.g., *Calder et al. v. Attorney General of British Columbia*, [1973] S.C.R. 313; *Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development* (1980), 107 D.L.R. (rd) 513 (F.C.T.D.); *Guerin v. The Queen* (1985), 13 D.L.R. (4th) 321 (S.C.C.); and *Simon v. The Queen* (1986), 24 D.L.R. (4th) 390 (S.C.C.).
4. The specific claims process is described in another Federal Cabinet policy contained in *Outstanding Business - A Native Claims Policy - Specific Claims*, Minister of Supply and Services Canada, Ottawa, 1982.

5. Verbatim Transcript, First Ministers Conference on Aboriginal Constitutional Matters, April 3, 1985, Doc. 800-20/004, at 265-266.
6. *Id.* at 269.
7. "Opening Statement by the Prime Minister of Canada, The Right Honourable Pierre Elliot Trudeau to the Constitutional Conference of First Ministers on the Rights of Aboriginal Peoples," Ottawa, March 8, 1984, at 9-10 and 14.
8. For a general discussion of treaty-making in Canada see, Peter Cumming and Neil Mickenberg, eds., *Native Rights in Canada*, 2d ed, Toronto, General Publishing, 1972; Paul Williams, *The Covenant Chain*, LL.M. Thesis, York University, 1982; and Bradford W. Morse, ed., note 2, *supra*.
9. This judgement appears to be unreported, although it is discussed at great length in J.H. Smith, *Appeals to the Privy Council from the American Plantations*, New York, Columbia University Press, 1950.
10. See, e.g., Brian Slattery, *The Land Rights of Indigenous Canadian Populations*, D.Phil Thesis, Oxford, 1979.
11. For a general discussion see, Maureen Davies, "Aspects of Aboriginal Rights in International Law", in note 2, *supra*.
12. See, e.g., James Youngblood Henderson, "The Doctrine of Aboriginal Rights in Western Legal Tradition" in Menno Boldt and J. Anthony Long, eds., *The Quest for Justice*, Toronto, University of Toronto Press, 1985; Russell Barsh and James Youngblood Henderson, *The Road: Political Liberty and Indian Tribes*, Berkeley, University of California Press, 1979; and Felix Cohen, *Handbook of Federal Indian Law*, Washington, D.C., U.S. Government Printing Office, 1934.
13. See, e.g., the decisions of the Marshall Court in *Johnson v. M'Intosh*, 21 U.S. 543 (1823), *Cherokee Nation v. State of Georgia*, 30 U.S. 1(1831) and *Worcester v. Georgia*, 31 U.S. 350 (1832).
14. *Ibid.*
15. See the judgement of Mr. Justice Dickson, as he then was, in *Guerin v. The Queen*, note 3, *supra*.
16. Department of Indian Affairs and Northern Development, *Comprehensive Land Claims Policy*, Minister of Supply and Services Canada, Ottawa, 1986 at 12.

17. Third party interests have been expressly preserved until their expiration by provisions of the James Bay, Northeastern Quebec and Western Arctic agreements.
18. Personal conversation with personnel from ANPWS, the Gagudju Association, Northern Land Council and Central Land Council. See also, *Uluru National Park Plan of Management*, Australian Government Printing Service, Canberra, 1986; and *Kakadu National Park Plan of Management*, Australian Government Printing Services, Canberra, 1986.
19. Charles Rowley, "Aboriginal Land Fund Commission", in Nicolas Peterson, ed., *Aboriginal land rights: a handbook*, Australian Institute of Aboriginal Studies, Canberra, 1981.
20. *Aboriginal Development Commission Act 1980* (Cth), s. 3.
21. *Id.*, ss. 8, 9, 24-26 and 27-29.
22. Title to seven properties was transferred directly from the ADC to Aboriginal communities during 1985-86, Shirley MacPherson, "Aborigines and Land Use", speech delivered to Australian National University Public Affairs Conference, "Aborigines and Development in the East Kimberleys", May 1987 at 4.
23. Note 20, *supra*, s. 11.
24. Aboriginal Development Commission, *Annual Report 1985-86*, Australian Government Printing Service, Canberra, 1987 at 2-3.
25. Note 20, *supra*, s.13.
26. Note 24, *supra*.
27. R.S.C. 1970, c. 1-6, as amended, s.2(1).
28. *Hay River v. Regina*, [1980] 1 F.C. 262, 101 D.L.R. (3d) 184 (T.D.).
29. *Id.*, at 265.
30. See, for example, *Re Stony Plain Indian Reserve No. 135*, [1982] 1 W.W.R. 302, 130 D.L.R. (3d) 636 (Alta. C.A.); and *Corporation of Surrey v. Peace Arch Enterprises Ltd.* (1970), 74 W.W.R. 380 (B.C.C.A.).
31. *Attorney General of Canada v. Giroux* (1916), 53 S.C.R. 172.
32. The actual development of reserves has been far more complex than this statement implies and has involved significant historical and geographical differences. Richard Bartlett has

- written an excellent series of articles on this subject outlining the regional experiences in great detail.
33. It should be noted that there has been some suggestion in the jurisprudence that a band is not a legal entity such that it cannot acquire or hold property in its own right. See, for example, *Afton Band of Indians v. Attorney General of Nova Scotia* (1978), 85 D.L.R. (3d) 454 (N.S.T.D.); and *Regina v. Cochrane*, [1977] 3 W.W.R. 660 (Man. Co. Ct.). Even if this view were to prevail, bands could carry out this role through agents or trustees, such as the Chief and Councillors, as has regularly been done in pursuing litigation involving a band. See, e.g., *Mintuck v. Valley River Band No. 63A*, [1977] 2 W.W.R. 309, 75 D.L.R. (3d) 589 (Man. C.A.); *Joe v. Findlay*, [1981] 3 W.W.R. 60, 122 D.L.R. (3d) 377 (B.C.C.A.); and *Afton Band of Indians*, *supra*. Other legal devices, discussed in the next chapter, could be utilized to hold title for the benefit of the community.
 34. This has been settled law since the unanimous judgement of the Supreme Court of Canada in *Reference re Eskimos*, [1939] S.C.R. 104, despite some confusion evident in recent statements from several federal Ministers.
 35. This option is briefly discussed in Delia Opekokew, *The Political and Legal Inequities Among Aboriginal Peoples in Canada*, Institute of Intergovernmental Relations, Queen's University, Kingston, 1987, at 41.
 36. S.C. 1984.
 37. S.C. 1986.
 38. See, e.g., *Veterans' Land Act, 1942*, S.A. 1942.
 39. Although the Hutterites suffered from significant restrictions on their ability to purchase land from 1942 to 1947 (under *The Land Sales Prohibition Act*, S.A. 1942, as am.) and from 1947 to 1972 on their right to expand their holdings or create new colonies (see *The Communal Property Act*, S.A. 1947, as am.).
 40. See, e.g., *An Act to Incorporate the Huron Hutterian Mutual Corporation*, S.M. 1931.
 41. See, e.g., *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (J.C.P.C.); and *Calder et al. v. Attorney General of British Columbia*, [1973] S.C.R. 313 for their interpretation of s.109 of the *Constitution Act, 1867*.

42. See, e.g., *Commonwealth v. Maddalozzo* (1980), 29 A.L.R. 161 (Aust. H.C.).
43. For an analysis of this right of resumption see, *Moses v. Regina in Right of Canada*, [1979] 5 W.W.R. 100 (B.C.C.A.).
44. See, e.g., *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands*, S.C. 1924, c. 48. Somewhat different legislation exists for New Brunswick (S.C. 1959, c. 4), Nova Scotia (S.C. 1959, c. 50) and British Columbia.
45. *Indian Act*, R.S.C. c. 1-6, as am., ss.20-27.
46. It is now possible for the licensee to be a band member and not be eligible for registration as an Indian if the band has assumed control over its own membership under s. 10 in a way that differs from the standards set out under the Act by virtue of s. 4.1.
47. See, e.g., the views of Indian, Inuit and Metis leaders in the transcripts of the FMC and CCMC meetings as well as those contained in Leroy Little Bear, et al., eds, *Pathways to Self-Determination: Canadian Indians and the Canadian State*, University of Toronto Press, Toronto, 1984; and Menno Boldt and J. Anthony Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*, University of Toronto Press, Toronto, 1985.
48. 33 Vict., c. 3. The federal government set aside 1.4 million acres to be distributed among halfbreed families and their children specifically for the extinguishment of the Indian title of the Métis in section 31.
49. [1984] 2 S.C.R. 335. The debate among the judges concerned the most appropriate way to characterize the role of the Crown in relation to reserve land and the band with views favouring a fiduciary (4 judges), trustee (3 judges) and agent (1 judge).
50. Again it should be kept in mind that the land claims settlement option is not under consideration in this paper.
51. Hon. Ernie Bridge, Minister of Aboriginal Affairs of Western Australia, in a speech to the Australian National University Conference, "Aborigines and Development," May 12, 1987. Aboriginal groups and land councils have widely condemned this approach as falling far short of prior promises by the

- state government and the recommendations of a royal commission.
52. This arose as a result of the *Aboriginal Land Rights (Amendment) Act, 1986*, (NSW) s.36(9A). Under the *Aboriginal Land Rights Act, 1983*, (NSW) the claimant Aboriginal Land Council would have been eligible for a fee simple. Therefore, the 1986 amendments have been criticized by Aboriginal groups as representing a watering down of their legal rights.
 53. *The Western Arctic Claim - The Inuvialuit Final Agreement*, Department of Indian Affairs and Northern Development, Ottawa, 1984.
 54. Editeur officiel du Québec, Québec, 1976.
 55. *Northeastern Quebec Agreement*, Department of Indian Affairs and Northern Development, Ottawa, 1978.
 56. S.C. 1986.
 57. *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
 58. *Id.*, s.10(1).
 59. *Id.*, s.11(1).
 60. See, *Pitjantjatjara Land Rights Act, 1981* (S.A.); *Maralinga Tjarutja Land Rights Act, 1984* (S.A.). For an excellent description of the historical background to the former see, Phillip Toyne and Daniel Vachon, *Growing Up the Country*, McPhee Gribble/Penguin Books Australia Ltd., 1984.
 61. *Aboriginal Land Rights Act, 1983* (N.S.W.), ss.35(2) and 36(9).
 62. Victoria government was unable to get its land rights bill passed by the upper house of the Legislature. Therefore, it asked the Commonwealth Parliament to pass a statute for it. The *Aboriginal Land (Lake Condah and Framlingham Forest) Act, 1987* (Cth) was enacted in the dying days of Parliament in June of 1987, just prior to a federal election.
 63. The Legislature of Manitoba passed at least 13 special statutes for different Hutterite colonies in the 1930s; see, e.g., *An Act to Incorporate the Barickman Hutterian Mutual Corporation*, S.M. 1931, c. 103. It should be noted that, until 1972, quite discriminatory legislation was in force in Alberta that was designed solely to restrict the growth of the colonies, rather than to facilitate their existence on communal terms.
 64. Note 57, *supra*.
 65. Note 60, *supra*.

66. Note 62, *supra*.
67. Note 61, *supra*, s.45.
68. Note 54, *supra*, ss.2.1, 2.6, 5.12 and 7.1.7(a).
69. *Id.*, ss.5.1.10(b) and 7.1.15(b) for the Cree and Inuit respectively.
70. Note 53, *supra*, s.7(1)(a).
71. *Id.*, s.7(1)(b) and Annex M.
72. *Id.*, s.16(14).
73. See, e.g., Richard Bartlett, "Reserve Lands" in Bradford W. Morse, note 2, *supra*. For a more detailed review of this area see, Michael Barker, "Aborigines, Natural Resources and the Law" (1983) 15 *UWALR* 293; and John D. Leshey, "Indigenous Peoples, Land Claims and Control of Mineral Development: Australian and US Legal Systems Compared" (1985) 8 *UNSWLJ* 271.
74. See, e.g., *Winters v. United States* 207 U.S. 564 (1908); and *Arizona v. San Carlos Apache Tribe* 463 U.S. 545 (1983).
75. See, e.g., Richard H. Bartlett, "Indian Water Rights on the Prairies" (1980) 11 *Man. LJ* 59.
76. Note 54, *supra*.
77. Note 53, *supra*, s.7(2).
78. *Id.*, s.7(3).
79. *Id.*, ss.7(85)(a)-(c).
80. For an excellent discussion on these issues see the report prepared for the Inuit Circumpolar Conference, Thomas Berger, *A Village Journey - The Report of the Alaska Native Review Commission*, Hill and Wang, New York, 1985.
81. Note 57, *supra*, s.67.
82. *Id.*, s.68(1).
83. *Id.*, s.19. It should be noted that the Act has been amended on numerous occasions since its initial passage in 1976, so as to permit greater control by the federal Minister of Aboriginal Affairs; see, e.g., s.12C.
84. Note 60, *supra*. A similar situation exists under the *Maralinga Tjarutja Land Rights Act, 1984* (SA).
85. Note 61, *supra*, s.40.
86. Note 62, *supra*, ss.13 and 21.
87. This occurred initially for the James Bay Cree and Naskapis regarding Category IA and IA-N lands respectively, but was

- altered by the passage of the *Cree-Naskapi (of Quebec) Act*, S.C. 1984, C.26.
88. S.C. 1986, ss.6(b), 10(1)(f) and 26.
 89. See, e.g., note 60, *supra*, s.17(b).
 90. This occurs by operation of the *Sechelt Indian Band Self-Government Act*, S.C. 1986, ss.5(2) and 23 followed by the issuance of letters patent to the Sechelt Band from the Governor in Council as authorized by s.23(4).
 91. The situation under this Agreement is rather complex. In summary, regarding Category IA lands, this involved a series of events initiated by the Agreement including the issuance of a temporary deed to Canada by a Quebec order in council pursuant to s.21 of *An Act respecting the land regime in the James Bay and New Quebec territories*, S.Q. This was followed by a final deed to Canada under s.22 of the same statute further followed by the *Cree-Naskapi (of Quebec) Act*, S.C. Officially these lands are analogous to regular reserves in that bare title lies with the province and fee simple is with Canada. However, the latter statute clearly gives all aspects of control to the bands, along with ownership of all resources other than the subsurface rights. A similar pattern applies for the Naskapi.
 92. For an excellent analysis of the law of trusts in general, and on these points in particular (although in a different context), see Donovan Waters, *Law of Trusts in Canada*, 2d ed., Carswell Ltd., 1984.
 93. The legislation is, in order of appearance: *Aboriginal Land Trust Act 1966-1975* (SA); *Aboriginal Lands Act 1970* (Vic); *Aboriginal Affairs Planning Authority Act 1972-73* (WA); and *Aborigines (Amendment) Act 1973* (NSW).
 94. Note 61, *supra*, s.35.
 95. Note 57, *supra*, s.4.
 96. This occurs under ss.334-334F of the *Land Act 1962-1986*. Many of the powers of these councils are actually contained in the *Community Services (Aborigines) Act 1984* and the *Community Services (Torres Strait) Act 1984*. Further special legislation has been passed to authorize a system of leases to aboriginal individuals, *Aborigines and Torres Strait Islanders (Land Holding) Act 1985*.

97. Note 80, *supra*.
98. See, note 61, *supra* (re NSW); note 62, *supra* (re Vic); and note 60, *supra* (re SA).
99. The Commonwealth government has passed special legislation specifically designed to create a more flexible corporate regime for Aboriginal groups, *Aboriginal Councils and Associations Act* 1976.
100. Note 62, *supra*, ss. 15 and 23.
101. For the precise provisions regarding this corporate structure see s. 6 of the Agreement, note 53, *supra*.
102. *Id.*, ss. 6(3), 6(4)(a) and (d).
103. *Id.*, s.6(4)(b).
104. *Cree-Naskapi (of Quebec) Act*, S.C. 1986. s.12.



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1. Noel Lyon, *Aboriginal Self-Government: Rights of Citizenship and Access to Governmental Services*, 1984. (\$12)
2. David A. Boisvert, *Forms of Aboriginal Self-Government*, 1985. (\$12)
3. NOT AVAILABLE
4. Bradford Morse, *Aboriginal Self-Government in Australia and Canada*, 1985. (\$12)
5. Douglas E. Sanders, *Aboriginal Self-Government in the United States*, 1985. (\$12)
6. Bryan P. Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada 1982-1984*, 1985. (\$20)

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David C. Hawkes, *Aboriginal Self-Government: What Does It Mean?*, 1985. (\$12)
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7. David C. Hawkes, *Negotiating Aboriginal Self-Government, Developments Surrounding the 1985 First Ministers' Conference*, 1985. (\$5)
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