Indian Land Claims in the Canadian North: Some Fundamental Issues

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Indian land claims present an extraordinary mix of history, law, and governmental policy shaped by politics and power. It is a fascinating subject, but a complex one.

Land claims I will cover are the comprehensive claims based on what is most commonly referred to in Canada as "Indian Title", although various other terms are sometimes employed, such as "Aboriginal title" or "Native title". Indian title, in this context rests on the simple fact that when the Europeans arrived in North America a comparatively short time ago, much of what is now Canada was occupied by Indians who were organized into societies, and who had occupied the land into the indefinite past. Claims based on Indian title are to the effect that the Indian right of occupancy has either never been lawfully extinguished or, if it has been extinguished, has never been properly compensated for.

I will not deal with land claims which, in contrast to these comprehensive Indian title questions, deal with more limited and specific issues, such as failure to comply with promises in an Indian Treaty to set aside reserve lands, or situations where Indian reserve lands were improperly taken or not compensated for.

I will be focussing primarily on the area north of the sixtieth parallel consisting of the Yukon and the Northwest Territories. There the public lands are administered by the Federal government, unlike the situation in the rest of Canada where the public lands belong to the Provinces. North of 60, the Federal government has full constitutional and legal authority to negotiate and implement land claims settlements involving not only money, but land, governmental structures, and all the rest.

I will single out for attention a few issues which appear to me to be of paramount importance in understanding the present state of play in the north. Let me identify at the outset three such fundamental issues.

One issue, or cluster of issues, has to do with a new political dimension added to claims settlement proposals advanced by certain Indian organizations in the last few years. In addition to the traditional economic components involving land and money compensation, some recent proposals have featured demands for separate governmental institutions for the native people.

A second fundamental question relates to whether, or to what extent, major development projects will be permitted to proceed prior to settlement of land claims. We shall be hearing a good deal more about this in the near future as a result of the approval given by the national energy board a few weeks ago to the construction of a pipeline south along the Mackenzie Valley from Norman Wells in the Northwest Territories. The matter is now before the Federal Cabinet and a decision is expected in the late summer or early fall.

The third important development is a spin-off from the great constitutional debate presently raging in Canada. The Federal government, over the objections of eight of the ten Provinces, is proposing a package of constitutional amendments. Whether or not these constitutional amendments will be proceeded with very much depends on the outcome of a case argued before the supreme court of Canada less than two months ago. The federal government and all ten of the provinces were represented on this appeal, and it is widely regarded as the most important constitutional case ever to come before the court. The package the court has been asked to rule upon includes amendments which would give express constitutional recognition to aboriginal and treaty rights. Constitutional entrenchment of such rights, in turn, carries implications for Indian land claims, the legal status of which is presently uncertain.

To assess the significance of these recent developments it is necessary to supply some historical context for the treatment of Indian claims in Canada. In particular, it is important to appreciate the extent to which a number of important developments over the last decade have radically changed the framework within which the land claim negotiations are proceeding.

Until the 1970's, governmental policy in Canada toward Indian title basically took one of two approaches. One was simply non-response, ignoring Indian title or denying its existence. The other approach was to enter into treaties with the Indians for a cession of Indian title in return for which they were typically promised cash compensation, reserves, hunting and fishing rights, and various other benefits. About half of what is now Canada has been the subject of land cession treaties negotiated with the Indians and, in very general terms, the territory covered by such treaties is that between the Quebec/Ontario border on the east and the Rocky Mountains on the west.

Still addressing the situation prior to the 1970's, there is one respect in which the pattern in the United States has differed from that in Canada. In the United States, a number of claims for compensation based on extinguishment of Indian title had been the subject of adjudication either in the court of claims or in the Indian Claims Commission, an administrative tribunal created in 1946 to hear and determine Indian claims outstanding at that time. Such a claim, typically, would be that of a particular tribe to a defined area of land and, if successful, the end result of such proceedings would be a money judgment—cash compensation—based on the market value of the land at the time of extinguishment of the Indian title, which might have been a century or more ago.

In Canada we have had no such history of adjudication by a court or tribunal of

claims for compensation based on extinguishment of Indian title. In fact, coming into the 1970's, we had no authoritative judicial decision that dealt squarely with the question of the legal status of Indian title, although it had been raised obliquely in a few cases in the context of determining rights and obligations of federal and provincial governments over land surrendered by Indian treaties. But none of those cases involved an assertion of Indian title by Indian claimants.

It was also the case that a decade ago the Federal government's policy was opposed to recognition of Indian title. As recently as 1969, the Prime Minister stated categorically that the federal government would *not* recognize Aboriginal rights.

That was the situation prior to the 1970's. Then a series of events occurred which, among other things, led to the issuance in 1973 of a policy statement by the Federal government reversing its previous position. This statement noted the existence of Indian title claims in certain parts of Canada "where Indian title was never extinguished by treaty or superseded by law," and stated that it was basic to the position of the government that "these claims must be settled and that the most promising avenue to settlement is through negotiation."

With respect to northern land claims, it might be added that in 1977 the Federal government reaffirmed its commitment to negotiate comprehensive claims settlements with various native groups in the Yukon and Northwest Territories. It also had something to say about the question of dealing with new political structures in the context of land claim settlement proposals, and I shall come back to that.

Two key developments seem to account for the change in climate with respect to Indian land claims in the 1970's.

The first was the appearance of a new kind of comprehensive land claims settlement. This involved negotiations between representatives of government and the native people concerning the terms upon which Indian title over a large geographic area would be extinguished, and with the negotiated agreement being followed by legislative ratification of the settlement. There have been only two of these comprehensive settlements in North America, one in the United States and one in Canada. The first involved Alaska, and culminated with the signing into law at the end of 1971 of the Alaska Native Claims Settlement Act. The second had to do with an area involving some 410,000 square miles in northern Quebec, the subject of the James Bay Agreement of 1975, and confirmed by legislation which came into force in 1977.

The second major development was litigation beginning in the early 1970's which raised Indian title questions in three different parts of Canada: British Columbia, Northern Quebec and the Northwest Territories. None of these court actions involved claims for compensation for extinguishment of Indian title, but they did raise the question of the extent to which, if at all, legal recognition and legal protection would be given to Indian title in Canadian law. This is still an unknown factor in the equation. The leading decision is that handed down by the supreme court of Canada in the Calder case in early 1973. Seven judges sat on that appeal, and on the merits the court divided 3:3; the seventh judge refrained from expressing an opinion on the merits and simply held that the action failed on a procedural ground.

This uncertain state of the law is one of the realities underlying the land claims negotiations, and all parties involved are acutely aware of it. (A similar situation prevailed with respect to the Alaskan native claims). Throughout the negotiations leading to settlement, differences of opinion continued to be expressed on the question of whether the native land claims were "legal" in nature, or whether they were founded simply in a moral obligation resting upon the government of the United States to compensate for the taking of native lands.

Legal counsel and spokesmen for the natives consistently maintained that their claims were supportable in law. The government, on the other hand, tended to view the question in terms of a moral obligation—a claim against the conscience of the United States—without conceding the existence of a legally enforceable right. And there was the further reality that whatever the existing state of the law, Congress retained the option of imposing a legislative solution unilaterally if a negotiated settlement should prove unattainable.

There were certain similarities in the two situations in which comprehensive land claims settlements have been achieved, and also in the kind of settlement arrived at.

In both jurisdictions, Alaska and Northern Quebec, the native land claims question had been outstanding for decades. In the case of Alaska, Aboriginal title claims respecting portions of Alaska had been brought both to the court of claims and to the Indian Claims Commission. But these adjudicative processes were time consuming and expensive. (In the Tlingit litigation relating to an area in the Alaskan panhandle, for example, more than 30 years elapsed between enactment of the jurisdictional statutes permitting suit and judgment in the Indians favour). And the legal uncertainties surrounding the unresolved native land claims tended to act as a brake on investment in Alaska by resource-based industries which, in turn, generated pressures on the government.

Two developments in the late 1960's lent urgency to the question of settling native land claims in Alaska. First, a "land freeze" imposed by the secretary of the interior at the end of 1966 prevented disposal of all public lands in the state which were subject to native claims based on Aboriginal title. The second development, arising out of the discovery of oil off the north slope of Alaska, was the proposal to run a pipeline across the state to an ice-free port on the south coast.

The United States government was anxious to clear the way for construction of the trans-Alaska pipeline system without the harassment of legal proceedings which might delay the project pending resolution of the native land claims. More than any other factor, this concern provided a catalyst for action by the administration and by congress, and immensely increased the bargaining power of the Alaskan natives.

Similarly, in Northern Quebec, the existence of a valid Indian claim to land had been explicitly recognized by Federal and Provincial legislation when Quebec's boundaries were extended northward in 1912. But the Indian title question did not really come to the fore until 1971 when Premier Bourassa announced what he described as the "project of the century," the massive James Bay power project. The following year the Indian chiefs from the James Bay area began an action for an injunction to halt the project, and the litigation provided a backdrop against which an agreement was, in due course, successfully negotiated.

What the Alaskan and the James Bay settlements suggest concerning the politi-

cal realities is this. First, the prospect of a large scale development project tends to capture the attention of government and to lend a sense of urgency to land claim negotiations which, in turn, provides a climate for a much more expeditious settlement than would otherwise be likely. Second, although the Alaskan and Quebec settlements have been criticized from various points of view they unquestionably represented the most generous settlements so far achieved by the Indian peoples of either the United States or Canada.

Let me just touch upon the main components to give some impression of the nature and scale of the two settlements. First, the money. The Alaskan settlement called for cash compensation of just short of a billion dollars—$962.5 million dollars to be precise. (As an historical footnote, when the United States bought Alaska from Russia in 1867, the price was $7 million). Under the James Bay Agreement the cash award was $225 million. In both cases, payment was to be spread over a period of years, with part of the payment to come from royalties—in the case of Alaska from mineral royalties, and in the case of James Bay from hydro-electric royalties.

The second part of the settlements was land. In the case of Alaska, the natives will receive title to a total of 40 million acres, including surface and subsurface rights, to be divided among 220 villages and 12 regional corporations. The land regime under the James Bay Agreement distinguishes in some respects between the Cree territory south of the 55th parallel and the Inuit territory to the north.

There are three categories of land, and the first category, consisting of lands immediately around the 22 Cree and Inuit Communities, corresponds roughly to Indian reserve lands elsewhere in Canada. Of these category one lands, the Inuit obtained approximately 3,250 square miles, and the Cree 2,150 square miles.

Third, the Alaskan settlement provided the machinery for administering the settlement through the village and regional corporations. The James Bay and Northern Quebec settlement contains elaborate provisions respecting municipal government.

The important point regarding outstanding land claims in the north is that the Alaskan and the James Bay settlements were primarily *economic* in nature. And while the government of Canada has taken the position that the James Bay settlement ought to provide a model for comprehensive land claim settlements elsewhere in Canada, this type of settlement has been

strongly attacked by some Indian organizations and spokesmen. The criticism is that such a settlement—dismissed as a "beads and blankets" approach—is wholly inadequate for achievement of the true objectives of the native people, and that what is required is a restructuring of governmental institutions, including the possibility of new political units reflecting the ethnic composition of particular areas.

This new political dimension to the land claims question has emerged most clearly in the Northwest Territories, where the situation is further complicated by the fact that in the land claims discussions native people have not been represented by a single organization. In the Mackenzie Valley, the proposals of the Dene nation have gone the furthest in terms of calling for new racially defined institutions.

The Federal government has made clear its opposition to proposals of this nature. With reference to those land claim settlement proposals that called for the creation of new separate territories, a government policy statement issued in the summer of 1977 stated that the government "does not favour the creation in the north of new political divisions, with boundaries and governmental structures based essentially on distinctions of race and involving a direct relationship with the Federal government."

In 1979 the then Minister of Indian and Northern Affairs was quoted in the press as stating that the Dene nation was seeking even more political power than Mr. Levesque for Quebec and according to the press report the minister went on to say:

"I think the proposals put forward by the Dene amount to sovereignty association in the north of something like 450,000 square miles. And I don't think any political party in Canada accepts that notion. They [the Dene] want to assume powers that are presently within the Federal government and most of the powers that are within the Provincial government."

Without going into the specific proposals, it is evident that the position of the Dene nation and the Federal government were, to put it mildly, some distance apart. In fact, the land claims negotiations were broken off and nothing much has happened over the last couple of years.

In the Northwest Territories, in the absence of a major development project to motivate the parties to seek an early settlement as a matter of urgency, with the fragmentation of the native organizations, and with the emergence of very difficult issues concerning political institutions, it has not been easy to be optimistic about an early resolution of land claims there. A new federal negotiator was appointed a couple of months ago, and it may be that the proposed pipeline down the Mackenzie Valley from Normal Wells, will give the talks new impetus. Nonetheless, a claim settlement is not likely to be achieved easily or quickly.

In the Yukon, the picture has been brighter. First, there is a single native organization, the council for Yukon Indians, which negotiates on behalf of all Yukon Indians. Second, from the beginning of the process, and until fairly recently, all parties to the discussions—the Council for Yukon Indians, the government of the Yukon, and the government of Canada—were committed to what was described as a one-government policy. The situation in the Yukon was very different from that in the Northwest Territories where there was (and is) no similar consensus on government structure.

More recent developments in the Yukon, however, require a re-assessment. In 1978 Yukon Indian leaders advised the minister that they wished to review their position and to present a new comprehensive statement of their claims. The proposals subsequently put forward by the Council for Yukon Indians have not been made public, but press reports said to be based on documents "leaked" to the press state that the new proposals for administering an eventual land claim settlement were basically opposed to the one-government policy.

These reports referred to proposals for a central legislative body by which the Indian people could assert complete legislative and administrative authority over renewable resources in all of the Yukon, and over non-renewable resources situated on Indian lands. They stated further that the proposed central legislative body would also have complete administrative control over certain other areas directly affecting Indian people such as education, welfare, health care, local government, economic development services, justice, policing, housing and taxation.

With the emergence of the question of political institutions as an important new dimension, and with a corresponding de-emphasis on economic aspects, the prospects for an early settlement in the Yukon appeared to diminish. However, negotiations have continued throughout with respect to the Yukon. Moreover, while

information about the course of negotiations is not in the public realm, there are indications that significant progress has been made.

There are several other major claims in the North, at various stages of negotiation. There are the claims of Inuit (Eskimo) groups in the high arctic and also outstanding claims in Northern Quebec and in Labrador.

Other current issues are of particular importance.

The first is the matter of whether a major development project should be allowed to proceed in a land claim area before the claim has been settled. The Indian organizations naturally answer that question in the negative. The Federal government has so far been spared a decision. In 1977, a decision was taken not to route the Alaska gas pipeline down the Mackenzie Valley, thereby removing the immediate pressure for a settlement in the Northwest Territories. Instead, the gas pipeline would run through the Yukon along the Alaska Highway. But, financing of the pipeline has yet to be arranged and the start-up of the project continues to be a matter of conjecture.

The Federal government is now obliged to make a decision with respect to the proposed pipeline running down the Mackenzie Valley from Norman Wells. This project obtained approval from the National Energy Board and will come before Cabinet for a final decision within the next few weeks. It is apparent from the state of land claim negotiations in the Northwest Territories that prospects for achieving a land claim settlement there in the next few weeks or months are very slim indeed.

The tough question comes down to this. If the Cabinet sees the Norman Wells pipeline as important to the national interest, will it be prepared to postpone construction indefinitely until such time as a negotiated settlement can be achieved? If the government decides to go ahead now, it can be expected to take the position that the pipeline need not prejudice the negotiation of a settlement now, or later.

Yet the reality is, and all concerned are aware of it, that if the project proceeds despite the lack of a settlement this will drastically reduce the bargaining power of the Indians directly affected, and it will also create a precedent that is certain to have implications for claim settlements elsewhere in the north. In the Northwest Territories itself, whatever small momentum has been achieved through the recent revival of negotiations is likely to be lost and, in all likelihood, the prospect of a settlement set back still further into the future.

If this clause does become part of our constitution, and however it is ultimately interpreted by the courts, it can hardly fail to strengthen the case for legal recognition of Indian title.

In summary, the last decade has brought dramatic change or, more accurately, a series of changes in attitude and position on the part of both native organizations and government. The present situation with respect to northern land claims is complex and highly volatile. The usefulness of the James Bay and Alaskan models is now in question. A gulf has opened up between the positions of government and some Indian organizations on the question of political institutions and governmental structures. The forthcoming decision by the Federal cabinet concerning the Norman Wells pipeline in the Mackenzie Valley can be expected to intensify the pressures for settlement at the same time as it heats up the political climate. For good measure, a new factor has been injected as a result of Aboriginal rights being caught up in the constitutional debate.

Editor's Note: The following comes from an article printed in New Mexico's Chapter 53 newsletter.

INDIAN RIGHTS-OF-WAY—A council of Energy Resource Tribes report is encouraging Indian tribes to alter their methods for assigning value to *rights-of-way for pipelines across Indian lands*. The report, Rights-of-Way Proposals for Indian Lands: General Guidelines, encourages tribes to depart from their common practice of valuing rights-of-way by the "value-per-rod" method (a one time payment), and adopt a method based on a price "per unit of substance" transported through the pipeline. The Navajo Nation applied this method of valuation in negotiating its agreement with the Four Corners Pipe Line Co., a subsidiary of ARCO, for an oil pipeline across the Navajo reservation.