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