

RESOURCE DEVELOPMENT AND ABORIGINAL RIGHTS IN THE CANADIAN NORTHLANDS

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Introduction

In this paper native claims and treaties in Canada are outlined then a more detailed examination of current comprehensive claims in the north is made. The resource base of the region is indicated then a more detailed study is attempted of the James Bay and Nunavut settlements paying particular attention to the provisions covering the use and development of both renewable and non-renewable resources.

Defining the Canadian North is an ongoing geographical exercise¹. In this paper it is taken simply in broad terms to cover the Yukon, Northwest territory and northern Quebec and Labrador - an area where native peoples are mostly in a majority of the permanent population.

Land Claims and Settlements

At the arrival of the European colonisers, the aboriginal peoples of what is now Canada had developed a land tenure system whereby communally owned land, with loose but generally accepted boundaries, was based on tribal territorial units and was of a size which bore some relationship to the territory's resource base. The colonisers, with a different system of private property and clearly defined and delimited land ownership title, set out to clarify land rights in a series of declarations and treaties, securing formal and, in European eyes, legal title to aboriginal land. A succession of treaties from the Royal Proclamation in 1763 to the eleven numbered treaties between 1871 and 1921 marked the westward expansion of European settlement in Canada. By 1930 about half of Canada had been covered by treaties, the main exceptions being Labrador, N.W.T., Yukon and the Northern parts of British Columbia and Quebec, i.e. most of northern Canada².

Yet the law remained unclear over native title and aboriginal rights. Indeed, until 1973, government policy had been to deny their existence. The Canadian Supreme Court decision of 1888 had given some limited recognition to native title, whereby aboriginal rights could be exercised subject to Federal

and provincial regulation but could be withdrawn without consent. A landmark decision came with the Calder case in 1973 whereby the Canadian Supreme Court affirmed that native peoples possess rights by virtue of ancient possession of their lands and they held these rights independent of any legislative enactment, executive order or treaty. Although dismissed on a technicality, the case and its subsequent review led the Federal government to announce its willingness to negotiate land claims based on outstanding aboriginal title. This marked a government 'U' turn from its 1969 White Paper on native policy which had proposed ending aboriginal rights and treaty negotiations in an attempt to assimilate native peoples fully into Canadian society.

According to Berger³, the Calder decision marked the start of a new era in the struggle for aboriginal rights and the pursuit of land claims. In 1973 the Federal government announced its readiness to negotiate two types of native claims: specific and comprehensive. Specific claims arise where, it is argued, the provisions of treaties and formal agreements previously entered into have not been fulfilled and specific submissions have to be resolved. Comprehensive claims occur where aboriginal title has not previously been dealt with by treaty or agreement, that is for most of Northern Canada, though even parts of Southern Canada including Southern Ontario and Southern Quebec remain for which no valid treaty nor agreement currently exists. Claims are comprehensive in scope when covering land title, hunting and fishing rights, financial compensation, other rights and benefits and, in the case of the Nunavut claim, a degree of political autonomy. The Federal government set up the Native Claims Office in 1974 to deal with both types of claim. Furthermore, the Constitution Act of 1982 gave wide recognition of aboriginal rights and included clauses acknowledging that unresolved land claims, based on aboriginal title, should go to settlement by negotiation.

The specific claims now forthcoming are, by their nature, affecting mainly small groups and limited tracts of land are confined mainly to southern Canada and resolution is slow. Even slower has been the progress made under the comprehensive claims covering large parts of northern Canada. The first to be signed in 1975 and 1978 were the James Bay Agreements in northern Quebec. Then came the Western Arctic Agreement in 1984, followed by agreements with the Yukon Indians and the Dene and Métis of N.W.T. though the future of this latter settlement is uncertain. Other treaties are in the process of negotiation, notably those covering much of Labrador and Quebec but some 20 comprehensive claims still await settlement. Protracted discussions are largely, it is argued, the result of a lack of will to

resolve the issues at federal level and active opposition at provincial level and have led to mounting native frustration⁴.

Land claim negotiations between provinces and their native peoples have met with little success. It has been suggested that the provinces, whilst wishing to extend their jurisdiction over Indian lands and particularly over resource development, are apprehensive about adopting the federal approach of treating native peoples as deserving special rights and status. Consequently, native peoples for the most part continue to resist any moves by the Federal government to transfer their obligations to the provinces, though accepting that their social and economic development would be more readily advanced through the better provincial resources and infrastructures. Native distrust is particularly marked where they feel that provincial governments are subject to powerful pressure from other interests, particularly from the resource industries⁵. So it would be useful at this point to briefly consider the resource of Northern Canada.

Resources

These can be divided into two categories: renewable and non-renewable. Renewable resources are those harvested from land and water as a result of hunting, trapping, fishing and logging. With the exception of the forests such resources are of little, if any, interest to outside developers now that trading for furs and skins has virtually ceased. For example, in 1990 less than 3000 pelts were harvested in N.W.T. compared with some 223,000 in 1980 and, forests excepted, non-renewable resources now account for less than 1 per cent of the exports of the Northern territories. However, such resources are of major significance to native lifestyles and are still an important source of food and materials to many native communities. Fishing and hunting could become of some commercial significance⁶ if the very limited tourist industry is to develop in the North. Although the Boreal Forest covers much of the Southern part of the region, logging has seldom played much part in the native economy, for the Indians have used the forest mainly for hunting and trapping. In any case, away from the thin line of logging camps along the Southernmost margins of the region, much of the Northern forest is not commercially viable as yet due to difficulties of access, deteriorating tree size and increasing sparseness of cover northwards as taiga gives way to tundra.

Of more immediate interest to commercial developers are the vast and, as yet, incompletely charted mineral resources of the Northlands. These

resources include uranium, lead, zinc, nickel, copper, gold, silver, iron-ore and asbestos. Mining of these fluctuates greatly for, with no dependent local industries, they must all be exported to outside markets which are extremely volatile. Perhaps providing a somewhat more reliable demand are the markets for the North's oil and gas resources, though the main problem here is that of the immense costs of transferring the oil and gas for processing in the South. High load transmission lines mean that the export of electricity from Northern generating stations to Southern markets poses no such problem to the development of the H.E.P. potential of Canadian Northern rivers.

The development or, if you will, the exploitation of the North's non-renewable resources, lies at the heart of current land claim problems. Whilst there was a manageable demand for renewable resources from the North then native economies and societies could exist in harmony and in profit with white Canada's demands. However, as the vast mineral and power resources of the North are gradually being realised, so the need for precise title to the land becomes necessary, as much traditional land use and ownership becomes incompatible with the demands of an industrial, capitalist society. The Northland, for so long regarded as virtually useless by the white man and, consequently, left treaty-less to its sparse, mainly native population, is now seen as a vast storehouse of wealth for all of Canada. To the native peoples, the North is home; to many Canadians it is a resource frontier. So the question arises: how far is it possible to reconcile the two through comprehensive land claim settlements? Further, are there grounds for optimism from what has transpired so far?

I shall attempt to throw some light on the situation by looking briefly at two of the treaties - that covering the James Bay area and that covering Nunavut - the former the first and the latter the most recent of Canada's comprehensive treaties, the one concluded with a provincial government, the other with the Federal government.

James Bay

The James Bay and Northern Quebec Agreement was signed in 1975. Work was started in 1971 on one of the biggest engineering projects ever undertaken, which was to harness the generating potential of the rivers flowing into the Eastern shore of James Bay. In the process, an area the size of France was to be affected, transforming not only the physical landscape but causing massive social and economic repercussions to the local Cree and Inuit peoples who had not been consulted but who started litigation, not aimed at

settling land claims initially, but at opposing a specific development. Neither the Quebec government nor the native people wanted protracted litigation so the J.B.N.Q.A. was signed in November 1975⁷.

Under the Agreement, the Cree and Inuit surrendered title to over 980,000 sq. kms. of territory and, by implication, surrendered their existing aboriginal rights under former imperial laws. In return, under this comprehensive claims settlement, they were to receive \$150 million in grants immediately and royalties from the electricity generated for the next 50 years. The land was divided into 3 Categories: nearly 14,000 sq. kms. or 1.3 per cent of the total was Category 1 land for the exclusive use of native people; Category 2 - some 150,000 sq. kms. or nearly 16 per cent gave exclusive hunting, fishing and trapping rights to native people but not surface rights. The remaining 83 per cent is Category 3 open to native and non-native alike where the natives can hunt and fish without permits and have harvest rights over several animal species but have no rights of ownership.

In many ways, this first Northern comprehensive agreement was not unlike the earlier numbered treaties in that some land was set aside solely for Indian use and financial compensation was provided. Similarly, it was an offer the native peoples could not refuse for they had little choice but to sign, though this modern treaty had the force of both federal and provincial law to implement its provision and ensure environmental reviews. But, as with its historical counterparts, the 1975 treaty leaves the native peoples in a very weak position to participate in the development of their natural resources. While controlled development of renewable resources was envisaged in which native people were to be involved, the development of non-renewable resources and hydro-electric generation was out of their hands. Mineral rights remain vested with the provincial government and consent for non-renewable resource development is required only for Category 1 land where the Cree and Inuit are entitled to reasonable compensation.

Conducted in a very short time, the James Bay agreement was hailed as a big victory by the Cree at the time bringing, according to Chief Billy Diamond, 'many rights, privileges and benefits'. However, the same Billy Diamond was writing in 1990 'if I had known in 1975 what I know now about the way solemn commitments become twisted and interpreted, I would have refused to sign the agreement.'⁸ Despite some improvements in material terms and in education overall, the treaty has not delivered the expected benefits. Unemployment remains at over 60 per cent in some native communities, environmental protection processes remain to be fully implemented, housing shortages remain acute and non-natives are using the new communications

infrastructure to deplete those hunting and fishing grounds not yet contaminated by mercury poisoning. Traditional uses of non-renewable resources were being curtailed by the HEP developments and, lacking mineral rights, the native peoples were being left out of managerial roles in non-renewable resource development.

This first comprehensive treaty in the North then is a poor model. A strong judicial recognition of aboriginal rights was not established, the Cree and Inuit being primarily interested in those particular rights which they felt would help them with their immediate and peculiar problems so that the treaty, although a first step towards recognition of native rights and claims was, in reality, a local response to a particular set of circumstances. Other native groups have now learned that 'the negotiation of a claim settlement is only half the battle and implementation is the other half'. In any case, native peoples are now looking for more political power and wider regional autonomy as in the case with the Nunavut Settlement.

Nunavut Settlement

Dividing up N.W.T. has had something of a chequered history since it was first mooted in 1962⁹. Much of the earlier initiatives came from native groups in the western half of the Territory where the non-renewable resources of the Western Arctic and Mackenzie Valley seemed to offer a basis for native development over a relatively short period of time. The Western Arctic settlement of 1984 has, to date, brought little benefit to the native groups there, whilst the Dene and Métis of the Mackenzie region are experiencing major internal divisions over their land claims. Meanwhile, a territorial wide plebiscite receiving overwhelming support from the Inuit but opposition or indifference elsewhere led to the decision to create the new territory of Nunavut in 1982, covering the Eastern part of mainland N.W.T. and most of the Arctic islands - home to some 17,500 of Canada's 25,000 Inuit and where they will make up some 80 of a population total showing a density of only 0.01 per sq. km. or one of the world's lowest.

The 41 articles of the Agreement drawn up in 1993 establish clear rules of ownership and control over land and resources in an area covering one-fifth of Canada¹⁰. In exchange for surrender to the Crown of their aboriginal title to the lands, waters and adjacent offshore of the new territory, the Inuit of Nunavut will receive a variety of rights and benefits. Briefly, these includes title to 350,000 kms. of land (or just over 18 per cent of the new territories total) of which some 35,000 sq. kms. or nearly 2 per cent in

some 1500 parcels will include mineral rights, representational rights on management boards for land, water, wildlife, environment and resources development, capital transfer payments over 14 years totalling over \$1 billion and other economic rights including a share of royalties from oil, gas and minerals on land to which Inuit hold surface rights. In the renewable resource sector, the Inuit will be guaranteed, subject to the principles of conservation, the right to harvest marine and territorial wildlife throughout the new territory sufficient to meet their consumption needs and will be given special consideration for commercial fishing in adjacent seas. The government of N.W.T. will cease to have responsibility for the two sub-divisions in 1999 and by 2008 Nunavut will become a full self-governing territory with its own legislative assembly with powers similar to those of the existing N.W.T. legislature.

Clearly, the degree of autonomy will come to depend on the degree of self-sufficiency of this new Inuit homeland. The greater the amount of federal aid and the greater control of resources by outside interests, the less the autonomy of the new government. At first sight there seems cause for optimism, for the agreement encourages Inuit participation in the management of Nunavut's renewable and non-renewable resources. Quasi-judicial boards, on which both the Federal government and Inuit representatives will have equal representation, are to be set up. Resources are to be managed in an integrated and comprehensive manner with land use and marine planning, environmental assessments and social impacts overseen by the relevant boards. Such democratic control should have significant effects on the scale, pace, timing and location of most of the future socio-economic developments in the new territory, not least in the exploitation of oil, gas and mineral deposits. The Agreement gave the Inuit the opportunity to select areas important for renewable and non-renewable resources, including several areas of known or potential mineral deposits, in particular the uranium resources in Keewatin and lead, zinc and gold reserves in north Boffin and Kitimeot. With title to some 18 per cent of Nunavut and a share in royalties from non-renewable resources to Crown land, the new government should have sufficient financial assets to enable it to 'encourage self-reliance and economic development as well as cultural and social well-being.'

So opportunities exist for sustainable economic development and the Inuit appear to have achieved a fair amount of control over resource use and environmental preservation. Of all the land claims negotiated lately the Nunavut Agreement seems, on the face of it, the most promising in the opportunities it offers, and the most generous in its provisions. Yet to an

outside observer the Agreement is not without its shortcomings of which only resource use and management will be addressed here.

It has been argued, for example, that the control of resource development will not necessarily be under proper Inuit control¹¹. The Inuit will not have a veto over the activities of the resource management boards on which they will have to share power with representatives of the Federal government. Many funding, personnel and informational problems are foreseen for these boards¹². Differences over planning, allocating and managing resources, even when compromises are made, could lead to a gradual erosion of Inuit influence, especially if the likely centralising and departmentalising tendencies of the civil servants begin to obstruct the decision-making processes and obscure original intentions. When faced with such organised power, Inuit representatives could well find themselves at a disadvantage if they persist with their slower, albeit more thorough and democratic, methods of arriving at decisions acceptable to all their community.

Although gaining title to some promising mineral deposits, the Inuit could well have lost out considerably in this part of the settlement. Much of Nunavut's mineral resources remains to be fully mapped and assessed. Despite their local knowledge, the Inuit negotiators did not have the degree of input concerning sub-surface deposits enjoyed by government agencies and, in any case, many of the known deposits of minerals, oil and gas were already under lease, claim or permit to commercial enterprises. The Federal government retained control over much of these known reserves, allowing the Inuit to obtain only a fraction of the resource rich land. With only one opportunity to select land and with a limited knowledge of sub-surface potential deposits, the Inuit have been forced to gamble. Even if the gamble is successful, exploitation will depend on market forces so that the Nunavut economy is quite likely to experience the severe fluctuations in resource income that have so hindered stable economic growth elsewhere in the North. Claim payments and short-term booms in resource income have been often of little benefit locally to Northern communities. Due to lack of local investment opportunities, many Northern native groups are having to invest their windfalls elsewhere and a great deal of much needed capital is leaving the North. Faced with similar problems, the Nunavut economy could also falter, at least in its initial phases.

In Nunavut is to be a success then, aside from other issues not discussed here, the Inuit will have to make full use of the powers granted to them in the resource provisions of the Agreement. Because the Agreement

provides much stronger political powers than previous comprehensive treaties, then it is to be hoped that the considerable resources, both renewable and non-renewable of Nunavut, will be wisely used by the new territorial and Federal governments for the mutual benefit of both, but especially as they key factor underpinning this exciting experiment in native self-government.

Conclusion

Whilst the use of resources is not the only controversial issue in the settling of land claims in the Canadian North, it is my premise that the greater the control of the resource base by native groups the better the chances of a successful and meaningful comprehensive settlement. Lack of control over hydro electric development has been a major factor in leaving the James Bay Cree and Inuit feeling powerless to properly develop their own socio-economic systems whilst the resources of the western half of N.W.T. have brought little benefit to the settlement signatories there. The Nunavut Agreement, because it gives more political clout to the natives, could lead to a more satisfactory outcome if resource use is properly and fairly planned.

But the central issue remains. How far can any treaty, no matter how comprehensive, marry the claims of indigenous peoples to use what they regard as their land and their resources as they wish, with the competing claims of a Federal government acting in the wider national interest? Does the land of Northern Canada and its resources belong to its indigenous peoples or to all Canadians? I would argue that the comprehensive land claim settlements signed so far, whilst giving increasing recognition to many aboriginal claims, still indicate a desire on the part of 'white' Canada to retain overwhelming control of the mineral and power resources in particular. Yet with very little control of their own resources by the native peoples, one has to question the validity and viability of the current round of land claim settlements.

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Endnotes

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- ³ Berger, T.R. 1977
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