REASONS FOR JUDGMENT

MAHONEY, J.

INTRODUCTION

The Plaintiffs assert an existing aboriginal title over an undefined portion of the Northwest Territories of Canada including approximately 78,000 square kilometers around the community of Baker Lake. That specified area is hereafter called the "Baker Lake Area". The boundaries of the Baker Lake Area coincide with the boundaries of the lands withdrawn from disposal under the *Territorial Lands Act*[1] by Order in Council P.C. 1977-1153.[2] The boundaries are set forth in Schedule 'A'. Schedule 'B' is a map of Canada indicating the location of the Baker Lake Area. Schedule 'C' is a map of most of the District of Keewatin indicating locations of the more important geographic features hereafter referred to.

The Plaintiffs, The Hamlet of Baker Lake, The Baker Lake Hunters and Trappers Association and Inuit Tapirisat of Canada are all incorporated entities. The other Plaintiffs are individual Inuit who presently live, hunt and fish in the Baker Lake Area.

The Defendants, other than the Attorney General of Canada and the mining companies, are the Minister of Indian Affairs and Northern Development and certain officers of the Government of Canada responsible, under him, for the administration of mining laws in the Northwest Territories. The Minister and his officials, along with the Attorney General of Canada, who is sued as representative of Her Majesty the Queen in right of Canada, are hereafter collectively called the "government Defendants". The Defendants, Urangesellshaft Canada Limited, Noranda Exploration Company Limited (No Personal Liability), Pan Ocean Oil Ltd., Cominco Ltd., Western Mines Limited and Essex Minerals Company Limited,

---

[1] R.S.C. 1970, c.T-6.

[2] C.R.C. 1978, c.1538.

are hereafter collectively called the "Defendant mining companies". They are not necessarily the only persons or entities carrying on mining exploration activities in the Baker Lake Area; rather they are the only ones who applied to be joined as parties defendant to the action. That application was granted on agreed terms.

The government Defendants admitted in pleading that the individual Plaintiffs and their predecessors have occupied and used the Baker Lake Area since time immemorial and sought to withdraw that admission at the close of evidence and, I note, did not repeat it in the Further Amended Statement of Defense filed after the trial. The Defendant mining companies made no such admission and disputed the existence ever of an aboriginal title in the individual Plaintiffs or their ancestors. All Defendants say that, if an aboriginal title ever existed, it was entirely extinguished, if not by the Royal Charter of 1670 granting Rupert's Land to the Hudson's Bay Company, then by the admission of Rupert's Land to Canada, or by subsequent legislation.

The Defendants assert the validity of the *Territorial Lands Act*, the Territorial Land Use Regulations[3] and the Canada Mining Regulations[4] and that those laws, hereafter generally referred to as the "mining laws", have full force and effect in the Baker Lake Area. In the conduct of their activities there, the Defendant mining companies say that they have and will comply with the conditions attached to various authorizations obtained from the government Defendants, other than the Attorney General, where such are required by the mining laws. They also have and intend to continue to conduct other activities for which no authorization is required by the mining laws. For their part, those government Defendants

---

[3] C.R.C. 1978, c.1524.

[4] C.R.C. 1978, c.1516.

intend to continue to issue required authorizations and to permit those existing to remain in force in accordance with the mining laws. The Plaintiffs assert that the activities so permitted are unlawful invasions of their rights under the Inuit's aboriginal title. In particular, the right to hunt caribou is said to have been gravely impaired thereby.

The relief sought by the Plaintiffs, in summary, is:

(a) an order restraining the government Defendants from issuing land use permits, prospecting permits, granting mining leases and recording mining claims which would allow mining activities in the Baker Lake Area;

(b) an order restraining the Defendant mining companies from carrying on such activities there;

(c) a declaration that the lands comprising the Baker Lake Area are "subject to the aboriginal right and title of the Inuit residing in or near that area to hunt and fish thereon";

(d) a declaration that the lands comprising the Baker Lake Area are neither "territorial lands" nor "public lands" as defined respectively in the *Territorial Lands Act* and the *Public Lands Grants Act*[5] nor subject to the Canada Mining Regulations;

(e) a declaration that, until such time as the terms of the Imperial Order in Council[6] which admitted Rupert's Land into Canada are fulfilled by Canada, Canada lacks legislative jurisdiction to abrogate Inuit aboriginal rights in the Baker Lake Area;

(f) as an alternative to (e), a declaration that, until such aboriginal rights are *expressly* abrogated by Parliament, no one is entitled to deal with the Baker Lake Area in a manner inconsistent with Inuit aboriginal rights, notwithstanding other statutory authority;

---

[5] R.S.C. 1970, c.P-29.

[6] R.S.C. 1970, Appendices, Appendix I, No. 9.

(g) a declaration that the Inuit resident in the Baker Lake Area have "rights previously acquired" and are "holders of surface rights" within the meaning of the mining laws with respect to the Baker Lake Area;

(h) costs.

I am conscious that, throughout the Statement of Claim, the term "Baker Lake Area" is used to embrace a broad, undefined territory inclusive of the defined area to which I have applied it. I saw no need to be meticulous about that distinction in the foregoing summary.

The government Defendants ask that the action be dismissed with costs. The Defendant mining companies ask that the action be dismissed and some, by counterclaim, for declarations that the lands within the Baker Lake area are "territorial" and "public" lands and that the Inuit resident there do not have "rights previously acquired" and are not "holders of surface rights". They also challenge the jurisdiction of this Court to grant the declaratory relief sought against them. The Plaintiffs assert that the terms of the order by which the Defendant mining companies were joined as parties defendant prohibit a claim for relief by counterclaim. All Defendants challenged, in argument but not in pleadings, the status of the corporate Plaintiffs to maintain the action.

In reviewing the evidence, I intend first to describe the geography of the Baker Lake Area and its environs and then its occupation by humans from pre-historic times to the present. Finally, I will deal with current mining activity and its effect on the caribou and the Inuit's hunting of them. It is to be noted that the Inuktutuk word "Inuit" has only rather recently gained currency and that previously "Eskimo", variously spelled, an adaption of an Algonquin word, was the accepted English term for the Inuit. I shall use "Inuit" wherever possible. It means "the people".

THE BARREN LANDS

The "barren lands" is the name applied to that part of the interior of mainland Canada lying north and east of the tree line which meanders from Hudson Bay, north of Churchill, Manitoba, to the Mackenzie River delta north of Inuvik, N.W.T. They are strewn with lakes and laced by rivers and streams. The Baker Lake Area lies entirely within the barren lands. The hamlet, roughly in the centre of the Area, is on the lake's north shore toward its west end, a few kilometers from the mouth of the Thelon River.

Schultz, Aberdeen and Beverly Lakes are strung upstream along the Thelon. The Dubaunt River enters Beverly Lake from the south, upstream are Marjorie and Wharton Lakes, within the Area, and Grant and Dubaunt Lakes, outside it. The Kazan River enters Baker Lake from the south, across from and some distance east of the hamlet; a short distance upstream are Kazan Falls and Thirty Mile Lake, within the Area, and further along, outside it, are Yathkyed and Angikuni Lakes. Upstream on the Kunwak River system, which joins the Kazan from the west at Thirty Mile Lake, are Princess Mary, Mallery and Tebesjuak Lakes, all within the Area. Christopher Island is at the east end of Baker Lake which drains eastward into Chesterfield Inlet and Hudson Bay. The Back River, which flows into Chantrey Inlet and the Arctic Ocean, drains the territory northwest of the Area, including Garry and Sand Lakes. The Ferguson River drains the southerly extremity of the Area, including Kaminuriak Lake, into the Hudson Bay.

The vicinities of Kazan Falls, Christopher Island, and the lakes within the Baker Lake Area, were identified by the Inuit as places where they have recently hunted caribou. Before their settlement, they hunted around all the lakes mentioned, both within and without the Area, and many more.

The tree line is a band of varying width across which the vegetation changes from that of the boreal forest to that of the tundra. The end of growth of spruce trees

marks the edge of the boreal forest. The willows beyond are considered to be bushes rather than trees. Clumps of spruce can be found well north of the tree line but not forests of them.

The tree line has not, over centuries, been stationery. It moves with long term climatic changes. The boreal forest appears to have reached its maximum northern penetration, in the area with which this action is concerned, about 6000 years ago, when it reached the Thelon River valley. It retreated southward after 1500 B.C. and was again north of its present position by 1100 A.D. It is postulated that the location of the tree line at a given time was significant in determining the degree of penetration of what is now barren land in and near the Baker Lake Area by Indians who normally lived in the boreal forest and, on the other hand, the degree of occupation of that same territory by Inuit.

While there are other food resources, including fish and muskox, the evidence was, for all practical purposes, entirely of the caribou. It is the key to human survival on the barrens. Its availability was the only reason for Indian penetration of the barrens and for the survival of the Plaintiffs' ancestors living there year round.

THE PREHISTORIC PERIOD

The Court was fortunate to have the evidence of two leading archeologists who have actually worked in and around the Baker Lake Area. They are Dr. Elmer Harp, Jr., Professor Emeritus of Archaeology at Dartmouth College, Hanover, New Hampshire and Dr. J.V. Wright, Head of the Scientific Division of the Archaeological Survey of Canada, part of the National Museum of Man. Their professional qualifications are impeccable. Dr. Wright's evidence was admitted as

rebuttal evidence only. He did not cast any doubts on the validity of Dr. Harp's overview of the Inuit occupation of the North American Arctic generally but, rather, dealt with the crucial question of the extent, if any, of Inuit occupation of the Baker Lake Area prior to the historic period.

The first population of Arctic North America is believed to have begun with a migration from Siberia to Alaska 45,000 or so years ago and to have progressed eastward in the succeeding millenia. The earliest identified human manifestation in Canada's central and eastern Arctic is labeled the pre-Dorset culture, the later Dorset culture having been identified earlier. Needless to say, all dates postulated are highly approximate. The pre-Dorset period extended from around 2000 to 1000 B.C. The pre-Dorset culture was oriented to the land rather than the sea. Most known pre-Dorset sites are in the interior and the evidence found indicates an emphasis on caribou hunting. The pre-Dorset people cannot be positively identified as Inuit; they left no skeletal remains. The ensuing Dorset culture, from 1000 B.C. to 800 A.D., disclosed a strong orientation to the hunting of sea mammals, on land and on the ice. Most known sites are coastal. The little bit of skeletal evidence available leads to the conclusion that the Dorset people were Inuit. It appears that, seasonally, the Dorset Inuit also hunted caribou inland. The Thule culture began in Alaska around 1000 A.D. and spread rapidly eastward until, between 1200 and 1400, it had absorbed or eliminated the Dorset culture. The Thule culture was marked by advanced navigation, larger boats and the hunting of large sea mammals on the water and, for the first time,

the use of dogs as traction animals. The people of the Thule culture were Inuit. They, too, hunted caribou inland seasonally.

Around 1400 something happened; there are various theories but no consensus as to what it was. The Thule people appear to have retreated westward leaving small groups thinly scattered about the central and eastern Arctic. There is evidence of overlapping occupation of some places by the Dorset and Thule Inuit. Dr. Harp's theory is that the Thule Inuit assimilated the Dorset Inuit over a period of time. In any event, it is generally agreed that the Thule Inuit are the direct ancestors of the Caribou Eskimos.

The prehistoric ancestors of the Algonquin speaking Indians, including the Chipewyan, moved northward from the American plains with the post-Ice Age deglaciation. They adapted to life in the boreal forest and also hunted caribou on the barrens seasonally.

In the summer of 1958, Dr. Harp and a colleague made the first extensive archaeological reconnaisance of the Thelon River country west of Baker Lake. They discovered 42 sites of archaeological significance and investigated four previously known sites. All were located at or near major caribou water crossings; ten at the westerly end of Baker Lake, twelve on Schultz Lake, nine around Aberdeen Lake, 13 on Beverly Lake and two on Grant Lake. The two most westerly sites on Beverly Lake appear to be outside the Baker Lake Area. The other sites, from east to west, on Baker, Schultz and Aberdeen and the easterly portion of Beverly Lake, were all within the Area. Grant Lake is outside it.

Not all of the sites yielded sufficient evidence to permit classification. Four, all at the west end of Baker Lake, are identified, by Dr. Harp, as belonging to the pre-Dorset stage. He found no evidence anywhere of Dorset Inuit occupation. Six sites are identified as Thule Inuit. Eighteen of the sites are identified as having been occupied by prehistoric Indians at two distinct stages of cultural development. Twelve of those sites were occupied by Indians still closely connected to the culture of the grasslands while the rest were sites of Indians well adapted to the boreal forest. The Grant Lake sites were both Indian. No Indian sites were identified on Baker Lake. Both Thule Inuit and Indian sites were classified on the remaining lakes although the Indian sites on Schultz Lake, the most easterly next to Baker Lake, were all of the earlier period. The sites were of two kinds and Thule Inuit and Indians occupied both kinds. About half of the classified sites had been subject of more or less lengthy, which is not to say continuous, occupation while the balance were "lookout-workshop sites" where hunters would wait for game and pass the time making quartzite points for their weapons.

Dr. Harp's conclusions, to the extent they are relevant to this action, were that the Thelon area had not been inhabited until sometime after 3000 B.C. and that it was thereafter occupied, in sequence, by:

a. Early Indian hunters exhibiting limited trait diffusion from Archaic Stage bison-hunting cultures on the High Plains.

b. Pre-Dorset Eskimos from the central arctic region.

c. Later Archaic stage Indian hunters from the interior.

d. Eskimos of the Thule culture.

e. Recent Caribou Eskimos.

Dr. Harp also concluded that the Caribou Eskimos are the descendants of the Thule Inuit and that, prior to the Caribou Eskimos, "all of those occupations were sporadic and based primarily on the summer hunting of caribou".

The term "Caribou Eskimos" is used to distinguish Inuit who habitually lived inland from others who ordinarily lived on the coast. With a few exceptions, the individual Plaintiffs and their ancestors, for as far back as the evidence can be treated as reliable, are and were Caribou Eskimos. The term has no ethnic connotation. It had great significance in the context of an earlier theory, no longer current largely as a result of Dr. Harp's work, that at least some Eskimos had originated inland and migrated to the coast, those remaining behind being the Caribou Eskimos. All Inuit, from Alaska to Greenland, constitute a discrete ethnic group.

Dr. Wright's work was undertaken after Dr. Harp's and, in many ways, was its direct follow up. He has had the advantage of applying radiocarbon dating techniques to some of his artifacts. Regretably, that process is far from finished. He undertook major excavations at Grant Lake, at the extreme west end of Aberdeen Lake and on the lower reaches of the Back River near Chantrey Inlet, some distance north of the Baker Lake Area. Insofar as Grant and Aberdeen Lakes were concerned, all evidence of an Inuit presence pertained to the 19th and 20th centuries. Evidence indicates an Indian presence from 500 B.C. through the late 18th century. The survey north of the Baker Lake Area disclosed nothing but evidence of continuous Inuit occupation. The evidence thinned rapidly as the distance from the coast increased. With reference to Dr. Harp's work on Schultz Lake and the eastern end of Aberdeen Lake, Dr. Wright's opinion was that only

Indian occupation, seven or eight thousand years ago, was proved. The evidence of later prehistoric human occupation was conclusive but insufficient to assign it to Inuit or Indian. He agreed that the Baker Lake evidence all pointed to exclusive prehistoric Eskimo occupation but did not accept that it proved continuous *in situ* development from Thule Inuit to Caribou Eskimo.

The process by which Dr. Harp arrived at the conclusion that such *in situ* development had occurred is set out at page 68 of his published report.[7] It must be read in the context of its principal objective, namely the refuting of the earlier theory that Eskimos, or Inuit, originated inland and moved coastward. He was, at the time, directing his mind to the origins of the Caribou Eskimos, not to the nature and extent of the occupation of a particular area, in competition with the Indians, by either Thule Inuit or Caribou Eskimos. When his mind was focused on the issue at the trial, Dr. Harp had this to say:*

> ...In my own mind I consider the Northern Arctic Tundra, lying above the tree line, to be essentially Eskimo country. In my opinion, it has been the Indian people in the past who, I would regard, as the intruders of that country. Maybe I am overstating that case. Maybe one, to be fairer, ought to admit that both of these peoples have, from time to time, penetrated this transitional zone so as to exploit it for their own cultural purposes. ...In the final analysis, both of them have not been able to maintain successfully, for any significant length of time, permanent occupation in this country. They have each had to retreat or withdraw, whether southward or northward, out to the coast, to more congenial environments, which they knew how to cope with and exploit with a greater degree of success.

---

[7] *The Archaeology of the Lower and Middle Thelon, Northwest Territories*, Arctic Institute of North America, Technical Paper No. 8, December, 1961.

* Transcript, Vol. IX, p. 1195 ff.

THE HISTORIC PERIOD

History around Baker Lake began with Henry Hudson's voyage into Hudson and James Bays in 1610 and 1611. That voyage constituted the basis for England's claims to that part of Canada. It did not record the observation of human habitation anywhere near Chesterfield Inlet.

The Baker Lake Area lies within the former proprietary colony of Rupert's Land, the territory granted to the Hudson's Bay Company by Royal Charter of Charles II May 2, 1670. It is common ground that Rupert's Land was a settled colony, rather than a conquered or ceded colony. It is to be noted that the particular legal consequences of settlement, as distinct from conquest or cession, insofar as the domestic laws of a colony were concerned, was not articulated in a reported case until 1693.[8] The distinction developed in response to the needs of the English settlers and was not, in its early development, extended to the resolution of disputes involving the indiginous population. I am bound to hold that *The Royal Proclamation* of 1763[9] does not and never did apply to Rupert's Land.[10]

Subsequent to the admission of Rupert's Land to Canada in 1870, portions of its territory have been subject of a number of treaties between the aborigines and governments, most recently the James Bay Agreement in 1976. The only settlement that occurred before 1870 was subject of the Selkirk Treaty in 1817. While no such treaties are in evidence, it would appear to have been company policy, as early as 1683, to obtain land required for trading posts by treaty.[11]

The first European penetration of the Baker Lake Area occurred in August, 1762. The sloop *Churchill* and the cutter *Strivewell*, under command of William Christopher and Moses Norton, respectively, out of Prince of Wales' Fort, i.e. Churchill, Manitoba, entered Baker Lake through

---

[8] *Blankard v Galdy* 90 E.R. 1089; also 87 E.R. 359, 90 E.R. 445 and 91 E.R. 356.

[9] R.S.C. 1970, Appendices, Appendix I, No. 1.

[10] *Sigeareak E1-53 v The Queen* [1966] S.C.R. 645.

[11] E.E. Rich, *Hudson's Bay Company 1670-1870*, Toronto, McClelland and Stewart Limited, 1960, 62-3, 102, 109, 145.

Chesterfield Inlet. The journals of Christopher and Norton, required by the company to be kept, repose in the archives of the Hudson's Bay Company in Winnipeg. Photographic copies of the entire journals are in evidence. The court is indebted to the company's archivist, Shirley Ann Smith, for reading into the record pertinent portions of the journals. They are difficult for the untrained to read.

According to Christopher's journal, at 5 a.m., August 8, he determined that the body of water they were on was entirely fresh, with no tidal action. He named it Baker's Lake. They appear to have concentrated their efforts on finding a navigable outlet northward from the lake, probably around what is now Christopher Island, rather than exploring the lake proper. On August 11, *Strivewell* was detached to explore where it was too shallow for *Churchill*. In the late afternoon of August 12, an Inuit encampment of two tents with two men, two women and seven children was encountered. It was at a place where there was tidal action, whether within or just outside the Baker Lake Area is not clearly established by the evidence. *Strivewell* proceeded up the channel it was exploring and, on returning, the encampment was again visited and presents given. The Inuit had nothing to trade. It is to be noted that, among other things, Christopher and Norton were looking for signs of mineral deposits. They recorded no contact with Indians.

The next European, also an agent of the company, to visit the Baker Lake Area was Samuel Hearne in 1770. By consent, a photocopy of chapters II and III of an edited and published version of his journal was received in evidence. On February 23, he set out overland from Prince of Wales' Fort on his second attempt to discover the copper deposits reported to be on the Arctic coast. He had in his company five Cree Indians. On that journey, Hearne's party penetrated

the southwesterly portion of the Baker Lake Area. The party approached it from the south reaching what was probably the Kazan River between Angikuni and Yathkyed Lakes on June 30. They were ferried across the river by strange Indians who "resided" on the north side of the river. On July 6, they moved on to the north up the west side of Yathkyed Lake. On July 22, they met more strange Indians. By then, they were, in all probability, within the Baker Lake Area. The party passed between Mallery and Tebesjuak Lakes, both within the Baker Lake Area, before July 30 when they turned westward. On that date, Hearne was convinced by his guide that it was too late in the season to attempt to reach the Arctic coast and that they should winter with the strange Indians who were still in their company. On July 30, there were at least 600 Indians in the group. The entire party proceeded west, out of the Baker Lake Area, on a path that took them between Tebesjuak and Wharton Lakes. His crossing of the Dubaunt River, sometime before August 6, must have been at a point outside the Area. They did not again approach the Baker Lake Area. On August 11, Hearne's quadrant was broken and, with his Cree, he returned to Prince of Wales' Fort, circling west around Dubaunt Lake and then southeasterly. Hearne recorded no encounter with Inuit on this journey as he did on others.

It is an historic fact that, at the time of Hearne's explorations, the Indians and Inuit were mortal foes and that the Indians, who had been provided firearms, had every advantage when they clashed. It is likewise an historic fact that the Indians were extremely susceptible to European diseases, notoriously smallpox. The smallpox epidemic that decimated the Chipewyan, the "strange Indians" encountered by Hearne, occurred in 1780; that which decimated the Cree occupying territory to the south of the Chipewyan, occurred

earlier. It is fair to assume that once Indians had been drawn into the fur trade, they would seek to occupy territory where the fur harvest would be better and that, by and large, the further one proceeded through the boreal forest toward the barrens, the less productive the hunt. Finally, it is an historic fact that no white settlement occurred in the Baker Lake Area until a Hudson's Bay post was established, at or near the present townsite, in 1914.

BEFORE THE SETTLEMENT

The Inuit witnesses, other than William Scottie, aged 22, all had a personal recollection of life before their settlement. Some spent many years of their adult life on the barrens, others moved to the hamlet with their families in their late teens. They spoke, as well, of the experiences of their forefathers. Their evidence, and that of Superintendent Dent, is complementary.

Aside from a handful employed in the settlement, the Inuit of the detachment area were nomads less than a quarter century ago. They hunted caribou in small camps of two or three families. The camps were units of a larger band level society consisting of a few hundred persons in many camps. Members of the same band spoke the same dialect, intermarried and exchanged hunting information among themselves more frequently than with members of other bands. If one camp met another, of the same or a different band, each made the other welcome but such aggregations did not last long. The exigencies of survival dictated a society composed of small scattered groups. The band itself had no political hierarchy; that existed only at the camp level. Major decisions all involved the hunt, conducted at the camp level, and were made by the oldest hunters. Neither individuals, camps nor bands claimed or recognized exclusive rights over a particular territory. The Inuit were few, the barrens were vast and they shared a

single imperative: survival in a harshly inhospitable environment. That demanded a high degree of tolerance of and cooperation with each other.

The caribou provided the necessities of life: food, clothing and shelter in the summer. Fish supplemented caribou as food for humans and dogs. Dogs provided transportation in the winter and food in an emergency. Canoes were used in the summer. Snow houses provided winter shelter. The movement of the caribou dictated the Inuit's summer movements. The location of caches dictated their winter migration. Encampments tended to be located where experience taught concentrations of caribou might be found in the summer because that was where the hunting was best and that was where the game was cached. Those concentrations occurred where the caribou had to cross a major body of water. Caribou were easier to overtake and kill with primitive weapons when swimming than when on dry land and, while the advent of firearms made a difference, the seasonal concentrations remained at major water crossings. Muskox, much scarcer than caribou, birds and eggs also provided food. The muskox also provided merchantable goods as did the fox and wolf. However, the caribou was the staple. It shaped Inuit society on the barrens.

That the Inuit, before settlement, were a band level society is a conclusion of Dr. Milton J. Freeman, an expert witness called by the Plaintiffs. This aspect of his evidence will be considered at some length later in these reasons. William Noah and Simon Tookoome both said their fathers had been Illinlingmiut and their mothers Ukkusiksalmiut. Others referred to parents and grandparents as Hainingayormiut, Qaernermiut and Harvaqtormiut. The list may not be exhaustive. The connotation was entirely dialectic and geographic. They associated dialectic differences with particular geographic areas and the people who lived there

but, to them, Inuit were Inuit and they plainly had no conception that the people who lived in a particular area and spoke the dialect associated with it constituted any sort of a tribe or political subdivision within the larger body of Inuit, "the people".

The historic and archaeological evidence confirm that the basic life style described by the Inuit witnesses, as prevailing before settlement, prevailed as long as Inuit inhabited the barrens. That life style, in turn, is entirely consistent with the social and political order described by those witnesses. The snowmobile was not a factor prior to settlement. The acquisition of firearms was probably the single most important development since the harnessing of dogs but it merely provided more and longer range missiles for the hunt. There is no evidence or reason to infer that the Inuit's nomadic ways, relationship to the land and social and political order changed from prehistoric times until their settlement.

THE SETTLEMENT OF THE BAKER LAKE INUIT

Superintendent C.J. Dent arrived at Baker Lake as an R.C.M.P. constable in the fall of 1953 and was promoted to corporal and N.C.O. in charge of the detachment the following year. He served in that position until the summer of 1956 and, again, from the summer of 1958 until the summer of 1960. The detachment area, known as the E2 district, included almost the entire Baker Lake Area and much more, extending to the District of Mackenzie boundary on the west, beyond Kaminuriak Lake in the southeast and almost to the westerly end of Wager Bay in the northeast. When he arrived the settlement's population was between 40 and 50, of whom all but 17 were Inuit. There were a weather and a radio station, two church missions, the Hudson's Bay post and The R.C.M.P. detachment. All but one of the Inuit heads of family were employed by the various white establishments

The population of the entire detachment area was slightly over 400. Those not employed in the community lived on the land. They were scattered over the entire detachment area in groups of one, two or three families living and travelling together. They were nomads. Routine reports for the period stress the difficulties inherent in locating them. Their cash income from trapping and hunting was, by then, augmented by the family allowance. Cash notwithstanding, survival depended on the successful hunting of game, principally caribou.

Conditions varied throughout the detachment area from year to year and season to season and from one part of the area to another. During the winter and spring of 1957-58, Inuit deaths in the vicinity of Back River and Garry Lake, the same general area to which two families have recently returned, were numerous and well publicized in southern Canada. The cause, directly or indirectly, was starvation. The government adopted a policy of actively encouraging the Inuit to leave the land and locate in settlements where starvation, at least, could be avoided. Housing was provided. Children were encouraged, if not compelled, to attend school. When Dent left in 1960, the community's population was between 150 and 200. The nursing station and school had been built and other facilities expanded. That the policy succeeded is evident. Aside from two families recently returned to the land, aided by a new policy, all Inuit in the Baker Lake Area live in the hamlet. I infer, from its obvious profile, that the hamlet's Inuit population today owes something to reduced infant mortality, as well as to immigration from the land. With few exceptions, the immigrants originated within the detachment area, a good many of these within the Baker Lake Area.

THE COMMUNITY AND PEOPLE TODAY

The Baker Lake Area was defined after an extensive series of interviews with its resident Inuit commissioned by the Defendant Minister. All those Inuit, at the time, regularly resided within the Hamlet of Baker Lake. The interviews were designed to ascertain where they hunted, fished and trapped. The boundaries were then defined to encompass that entire area. The evidence confirms the conclusion that the Baker Lake Area embraces generally the whole of the land upon which the Inuit resident there now regularly carry on those traditional activities. It is prescribed by the range of their gasoline powered snowmobiles.

The caribou remains central to the existence of the Baker Lake Inuit. Its migrations dictated, almost totally, the traditional, nomadic, way of life of their ancestors. It provides both inspiration and raw materials for their contemporary art, a valuable economic as well as cultural activity. Its harvest continues to be an important element of their real income. When there is word of caribou in the vicinity, other activity is largely suspended and the men, including those employed at wages, go after the game. In season, the hunt is an almost universal male weekend activity. My impression is that ability to hunt caribou is a *sine qua non* of Inuit manhood; the degree of skill, a measure of that manhood.

The hamlet itself has a population of about 1000, almost entirely Inuit, a very large proportion of whom are children and teenagers. It has many of the attributes of any modern Canadian community of its size: an elementary school, nursing station, hotel, general store, a few churches and one R.C.M.P. officer. The Inuit live in small, conventional houses, rented from the government, of the sort and size to be seen on prairie Indian reservations. Some date

back to the early days of settlement, 20 or so years ago, while others are quite new. Exterior conditions vary with age. I was not invited inside one. Municipal services include electricity, water delivery, waste disposal and a volunteer fire brigade with water tanks mounted on all-terrain vehicles. Bilingual, English and Inuktutuk, signs at the intersections of its gravelled streets control vehicular traffic consisting of numerous snowmobiles, four wheel drive pickup trucks, motorcycles and all-terrain vehicles of all sizes and descriptions ranging from personal tricycles to heavy duty transports and the airport bus. A modern building houses the studios and workshops of local artists and craftsmen and their co-operative retail outlet. Television, via satellite, consists of network programming of the Canadian Broadcasting Corporation and local programming from St. John's, Newfoundland. The FM radio station transmits local productions and CBC-FM programming. Three scheduled flights weekly connect Baker Lake to southern Canada via Churchill and Winnipeg, Manitoba. The district hospital is at Churchill; the high school at Frobisher Bay.

Some of the observations above concerning the physical features, institutions and facilities of the community will not be found in the transcript of the evidence. They are among the gleanings of personal observation and enquiry during the week the Court spent in the community hearing the evidence of the Inuit witnesses. They are background information of a class known to the Courts about communities in southern Canada, not immediately relevant to the issues but helpful to an understanding of them. The acquisition by the Court of that background was a stated reason for the Plaintiffs' and government Defendants' request that the Court sit in Baker Lake. That request was acceded to before the Defendant mining companies were joined. I feel I should be remiss if I did not record at least some of it.

Employment opportunities exist with many of the institutions mentioned above. As well, some, at least, of the Defendant mining companies afford job opportunities. By far the largest single employer is the municipal government. 95% of its revenue is grants received from senior governments. In all, there are not nearly enough jobs for the present adult population to say nothing of the needs of the young people expecting soon to enter the labour market and wanting to stay home. Young adults who have taken advantage of government programs to acquire vocational skills have returned to the hamlet to find no demand for those skills. There is a quiet, genuine element of despair for the future that lends authenticity to the nostalgia of the Inuit witnesses for their former life style as some of the older ones recall and the younger believe it to have been and as, in a limited way, they still experience it when they hunt the caribou. But for that underlying desperation, such nostalgia might appear, to a southern Canadian, at best perverse, at worst contrived; it is neither.

James Avaala and Bill Martee, both Plaintiffs, are the Inuit who, with their families, do not now reside in the Hamlet of Baker Lake. Both men are about 30. The Avaalas have two children; the Martees one. In January, 1979, with government financial assistance, the two families returned to the land. They now live near Sand Lake in the northwesterly extremity of the Baker Lake Area. The Avaala, and I assume the Martee, family live in a 12'x 20' wooden house provided and airlifted to the site by the government. They are in two-way radio contact with Baker Lake. Oil and gas are subsidized but they must provide their other needs. Avaala seems to have been reasonably successful. Between his move in January, 1979, and his appearance as a witness May 16, 1979, he killed 20 or 25 caribou, one muskox, nine wolves and over 30 foxes.

Martee did not testify and there is little more in evidence about him except that he left the paying job of assistant secretary-manager of the municipality to return to the land. Avaala has returned to the area of his birth which he first left, seasonally to attend school, in 1958. His parents moved to Baker Lake in 1968. He attended school in Baker Lake, Rankin Inlet and Churchill and, following his education, occupied various paid positions with government agencies and the Hudson's Bay Company. He left a job with the municipality in the fall of 1978 to return to the land. It is obvious that Avaala and Martee, in taking their families back to the land, are motivated by more than a concern for their immediate economic well-being. The life they have chosen is manifestly by no means as isolated, harsh and precarious as that of their parents but it is immeasurably more so than that they left behind in the community.

I have no doubt as to the sincerity of all the Inuit witnesses when they testified to their feelings about the land. I do not find it necessary to review all that evidence. It was not disputed. The actions of Avaala and Martee speak for all of them. Their attachment to the land and life on it is genuine and deep.

MINING ACTIVITY AND THE CARIBOU

The evidence as to the nature, extent and location of mining activity was, by and large, adduced by way of admissions obtained on discovery. The individual Plaintiffs also testified as to their observations. All activity, to date, has been exploratory. The current spate of activity began about ten years ago and has been generally accelerating since. It appears that the trend will continue for the next several years. Prospecting permits now outstanding to the Defendant mining companies cover large blocks mainly in the southwesterly and northwesterly quadrants of the Baker Lake Area and smaller blocks not far north of the hamlet. As a

result of past preliminary exploration, the Defendant mining companies have staked large blocks of claims to the south, the west and the northwest of the lake, extending from south of Christopher Island to north of Schultz and Aberdeen Lakes. Disregarding the more sweeping claims to hunting grounds of individual Inuit, the blocks subject to prospecting permits and mining claims still impinge upon or include the great majority of the places where the Inuit who testified have, in the recent past, hunted caribou.

The exploration work under prospecting permits is of three kinds: geological reconnaisance, geochemical sampling and geophysical survey. I doubt that any two exploration programs would be identical; however, the evidence satisfies me that the following descriptions are fairly typical today. The movement of personnel, equipment and supplies is by air. The aircraft used are most often helicopters. Geological reconnaisance involves small parties of geologists on the ground. They work within walking distance of their camps. They and their camps are frequently moved by aircraft. Geochemical sampling involves an aircraft setting down on a lake, dropping a dredge and taking samples of the water and bottom sediment. Samples may be taken at half-mile intervals and are removed for analysis elsewhere. A geophysical survey involves an aircraft flying a grid pattern over an area. Initially the lines flown may be a mile or more apart and the altitude four or five hundred feet above the ground but, if the area is interesting, the grid may be flown on lines as close as an eighth of a mile apart at as little as one hundred feet. When work is done on the ground, grids are marked with stakes. Depending on the detail of the exploration, those stakes, two to three feet long, are driven into the ground at intervals of from 100 to 500 feet. To aid in spotting them, a few inches of bright, plastic ribbon is usually attached to the top of each. It flutters in any breeze. It rarely survives a winter and is known to have been eaten by caribou. The

colour is of no significance to the caribou; they are colour blind.

Similar stakes are used to mark the boundary of a claim. If the results of the preliminary work in the area of a prospecting permit warrant, claims within that area are staked and a diamond drilling program is undertaken. Test holes are drilled to depths of several hundred feet. Such a program can extend over a number of seasons. The season for mineral exploration in the Baker Lake Area ordinarily runs from late May to late August.

In addition to the portable "fly camps" used for small ground crews, large base camps may accommodate as many as 30 or 40 people. While not occupied between August and the following May, they are not dismantled. Structures, equipment and caches of supplies may remain on site for several years. All movements in and out of these camps are by aircraft, frequently by helicopters. Notwithstanding regulations to the contrary and the efforts of the government Defendants to police them, debris is frequently left at abandoned camp sites. Sometimes it is washed up on lake and river banks. Oil drums, propane tanks and, in one instance, a bulldozer were mentioned in evidence. Likewise, notwithstanding regulations, it is a practical impossibility to police aircraft altitudes over the caribou which are, even for the trained observer, sometimes difficult to spot from the air.

Caribou herds are labelled by the area to which they customarily return annually to calve. The transfer of large numbers of caribou, 20 or 30 thousand, from one herd to another is an exceptional, but known, occurrence. The calving grounds of two major caribou populations lie partly within the Baker Lake Area. The Beverly herd migrates through the westerly and northerly portions of the area and the Kaminuriak herd through the southeasterly portion. The Kazan River marks the boundary between their usual ranges. A third population, not yet positively

identified with a specific herd, has recently taken to wintering north of Baker Lake. A migrating caribou herd is generally scattered thinly over many hundreds of square kilometers, concentrating only at major water crossings. Most major water crossings extend for several kilometers along their lake or river shores.

Several Inuit hunters and field employees of the Defendant mining companies testified as to the behaviour of caribou in relevant situations. Expert evidence was tendered by Dr. Valerius Geist, an ethologist or animal behaviour expert with a great deal of experience with other members of the deer family although not with barren ground caribou, called by the Plaintiffs, and Frank Miller, M.Sc., a wildlife biologist with the Canadian Wildlife Service, who has worked extensively with the Kaminuriak herd and other caribou, called by the government Defendants. In addition, Dr. G.W. Calef, wildlife biologist with the Wildlife Service of the territorial government was called by the government Defendants, *inter alia*, to rebut Dr. Geist's criticism of the methodology used to arrive at the official estimates of the sizes of the Beverly and Kaminuriak herds. As will appear, those estimates are highly approximate and, in my view, of marginal relevance. To the extent they are material to the issues, I accept them; there are no others.

The term "harassment" used by the expert witnesses means an outside stimulus producing a reaction in an animal. It is to be qualified by the intensity of the animal's response which may range from no apparent interest to panic. A mild reaction may not be discernable by external observation but can be measured by electrocardiogram. His work in this area led Dr. Geist to disagree with the conclusions drawn by Mr. Miller, on the basis of observation, that caribou did not react to certain things. However, I find no suggestion in Dr. Geist's evidence that such un-

observable reactions would have an effect on a caribou that would, in any significant way, influence its behaviour so as to render it more difficult to hunt unless the harassment generating those reactions were applied repeatedly and systematically. What might be achieved in that way by deliberate experimentation would be a highly improbable and coincidental result of the harassments associated with mining exploration activity that may well give rise to unobservable reactions. Even if one accepts the highly unlikely proposition that a few dozen, even several score, migrating caribou might be so continuously subjected to a harassment by exploration activity as to be conditioned by it, it confounds reason that a sufficient number could be conditioned so as to affect the collective behaviour of herds numbering in the tens of thousands. The Beverly and Kaminuriak herds are estimated to number 125,000 and 44,000 respectively, with a 35% margin of error either way.

The harassments that may arise out of mining activity beyond the exploration stage might well be sufficiently sustained to result in behavioural changes detrimental to the hunt but the evidence simply does not permit a meaningful finding on that point. I say "meaningful" because, while I conclude that the hunt would likely be impaired in the vicinity of a permanent mining installation, I have no basis to determine how extensive that vicinity might be. The evidence as to their observable reactions to base camp activity permits me to infer that there would be no change in general migration routes unless the installation directly and substantially interfered with access to a major water crossing.

The Kaminuriak and Beverly herds each come into contact with mining exploration activity during its calving and post-calving periods, which occur during June and July. The Inuit witnesses report instances of caribou in both areas

being frightened off by low flying aircraft as they were attempting to get a shot at them. A number of camp sites and a good deal of exploration activity have encroached upon major water crossings.

Ongoing activities, however noisy, do not result in anything like panic. Herds pass within a few hundred feet of round-the-clock diamond drilling for days on end. Similarly, they pass close to occupied camps and through deserted camps. They do not avoid stationery objects. Subject to a particular sensitivity of the females in the calving and post-calving periods and male aggressiveness in rutting season, when approached directly they may merely walk away maintaining a distance of from 20 or 30 feet to several hundred yards. On the other hand, they show alarm when approached obliquely and stealthily. High flying aircraft produce no observable reaction. It seems they are alarmed by abrupt occurences and by actions they associate with the behaviour of their predators.

Low flying aircraft are a different matter. I am entirely satisfied that the intermittent passage of low flying aircraft, fixed wing or helicopter, over caribou, such as occurs on take-off and landing and in the process of geophysical surveys, constitute a serious harassment of the caribou. While I think it unlikely that any number of individual caribou are subjected to repeated harassment leading to the conditioning projected by Dr. Geist, nevertheless, reaction to the harassment does range through a variety of degrees up to panic and flight and probably does result in the death and injury of individual caribou. Death may ensue if the animal is already in a weakened condition, if it injures itself in flight, if it miscarries or if cow and calf are separated. It is also possible to run such

an animal to death. There is no evidence that numerous deaths have occurred but clearly, some are distinctly possible, if not probable, in certain situations, particularly during the calving and post-calving periods and at places where the herds are concentrated. It is also clear that should harassment occur in the course of a hunt, the hunter would likely be frustrated. On the other hand, the suggestion of a cumulative, long-term detrimental effect on the caribou herds, by activities to date, is not supported by the evidence.

The use of fluttering ribbons is a classic method of deflecting animals from their chosen paths. No doubt the beribboned stakes have deflected countless caribou, on countless occasions, from their individual paths. There is no basis in the evidence for concluding that those deflections, however numerous, have involved more than a few hundred feet here and there nor that they have involved the deflection of large numbers of caribou.

It is central to the Plaintiffs' claim for injunctive relief against the Defendant mining companies that the activities of those companies have contributed to the increased difficulty they have encountered in the caribou hunt in recent years. Consistent with that position, they necessarily dispute the position of the government Defendants that the population of the Kaminuriak herd is in serious decline. They say that the herd has been driven away from the Baker Lake Area by the exploration activities and that it may not be in decline at all. The Inuit are, beyond doubt, the most knowledgeable experts available on the subject of hunting caribou. The Plaintiffs' knowledge of the Kaminuriak herd is, however, pretty well restricted to the Baker Lake Area whereas provincial, territorial and federal wildlife services have observed the herd over its entire range for a good many years. That range, which in the 1950's extended from Ontario south of James Bay into Saskatchewan,

taking in the northern half of Manitoba, today encroaches only slightly into northern Manitoba and is otherwise entirely within the District of Keewatin. The decline is a fact. It is so rapid that, at its present rate, the Kaminuriak herd will be extinct within 15 years.

The causes of that decline were the subject of considerable recrimination between the Inuit hunters and the government wildlife experts who testified. It is beyond the scope of this action to determine what the causes are, as long as, on a balance of probabilities, on the evidence before me, it has not been mineral exploration activities. While the overall caribou population of the Baker Lake Area appears to have declined and the ability of the Baker Lake hunters to satisfy their needs from that population has undoubtedly been impaired, the balance of probabilities, on the evidence, is that activities associated with mineral exploration are not a significant factor in the population decline. Clearly, there have been a number of instances where low flying aircraft employed in those activities have interfered with particular hunters.

OBSERVATIONS AND RULINGS ON EVIDENCE

Rule 482, in its material parts, provides:

> RULE 482. (1) No evidence in chief of an expert witness shall be received at the trial (unless the Court otherwise orders in a particular case) in respect of any issue unless
>
> (a) that issue has been defined by the pleadings or by agreement of the parties filed under Rule 485,
>
> (b) a full statement of the proposed evidence in chief of the witness has been set out in an affidavit, the original of which has been served on the other party or parties not less than 10 days before the commencement of trial, and
>
> (c) the expert witness is available at the trial for cross-examination.

> (2) Subject to compliance with paragraph (1), evidence in chief of an expert witness may be tendered at the trial by
>
> (a) the reading of the whole of the affidavit referred to in paragraph (1), or such part thereof as the party decides to use at the trial, into evidence by the witness (unless the Court, with the consent of all parties, permits it to be taken as read), and
>
> (b) if the party so elects, verbal testimony by the witness
>
> (i) explaining or demonstrating what is in the affidavit or the part thereof that has been so put into evidence, as the case may be, and
>
> (ii) otherwise, be special leave of the Court subject to such terms if any as seem just.
>
> ...
>
> (5) Paragraph (1) does not apply in respect of rebutting evidence including, without limiting the generality thereof, the evidence of a witness who is called exlusively for the purpose of rebutting evidence given by an opposing side and rebutting evidence given by a witness who is called to give such evidence as well as evidence under paragraph (2).
>
> ...

Mr. Miller's evidence in chief, as to the causes of population decline of the Kaminuriak herd was the subject of an affidavit filed under Rule 482(1)(b). Dr. Kalef's evidence, directed to the same point, was not subject of such an affidavit and was objected to. I hold that expert evidence may be adduced, under the exception provided by Rule 482(5), to rebut any evidence given by an opposing party, not just expert evidence given by it.

Dr. Milton J. Freeman is a professor of anthropology at McMaster University, Hamilton, Ontario. He is a social anthropologist, which is to say that he is neither an archaeologist nor a linguist; he studies the social behaviour of people in the context of their society or culture. He has worked extensively with the Inuit. I did not find it necessary to review his evidence of Inuit use and occupancy of the land in the Baker Lake Area. His conclusions were

reached after extensive interviews with Inuit and on the basis of archaeological evidence. The court has archaeological evidence directly before it and has heard the testimony of a number of Inuit. My conclusions and his, on the subject of Inuit land use and occupancy, do not differ significantly, if at all.

In evidence in chief, purporting to explain or demonstrate what was in his expert affidavit, Dr. Freeman started to describe the Inuit society which he had concluded existed on the barrens prior to their settlement. It is an area within his competence as an expert. He said it was a "band level society" and he began to describe what he meant by that term. Objection was taken on the ground that nothing in his affidavit related to that evidence. The objection seemed to me to be well taken and I so indicated but let the examination continue on the understanding that what would emerge would be an explanation or demonstration of opinions expressed in paragraphs 7 and/or 9 of the affidavit as to the relationship of the Inuit with their environment. In paragraphs 7 and 9, Dr. Freeman had deposed:*

> 7. Since 1959 I have been actively engaged in study and research regarding Inuit land use. In the course of conducting this research I have acquired an understanding of the Inuit culture and how the Inuit relate to their environment.
>
> ...
>
> 9. Over the years that the Inuit have lived on the land they have evolved a very deep dependence upon the resources of the land. They developed a very comprehensive relationship with their environment as a necessary pre-condition to physiological and cultural survival. As far as the people in the Baker Lake area are concerned, their dependence on caribou is so great that I would assume that they have much greater knowledge than we have been able to elicit from them.

---

* Transcript, Vol. X, p. 1424.

Dr. Freeman had not used the term "band level society" in his affidavit. In explaining it, he said such a society has no chieftains or states or nations and went on:*

> ... Band level societies, generally, are societies which have quite a low population density. The people are nomadic and they tend to exploit a variety of resources in their areas, and tend to be generalists in terms of economic orientation, unless that's clearly impossible because of the restrictions on resources.
>
> They tend to be societies which have particular types of economic organization, social organization, and certain types of leadership, certain types of marriage patterns, so on. We sometimes regard them as being very flexible. One of the reasons for this is that they have problems often of dealing with environments which perhaps from our agricultural basis would be seen to be somewhat marginal. It is not at all necessarily true that they are marginal to the people concerned, but these tend to be areas that geographers would call marginal lands. They don't usually support agriculture.
>
> The people in question then have a particular type of organization and culture and values which best suit them for living in that type of an environment and exploiting resources which often themselves are nomadic. This is one of the bases in these societies. I think the important thing is that we look for patterns. We are not just concerned to attach ourselves to say, as an anthropologist, one small camp, which might be five, six people, and from that obtain all that information about society which might encompass anything up to three, four hundred people. It may be even more. So, consequently we see the units as being units of a much larger coherent organized society and very much interacting, interdependent, mutually dependent on interaction with other units within the society.
>
> We can certainly recognize what we called bands, even though units of the bands might be small camps of twenty, thirty people. But, the band is an aggregation of these camps which forms a definite sense of community. This is one of the defining characteristics of a band. The people there, for a number of reasons-- common language, dialect, having a common ideology or value system, having commonality in terms of the land they use and a degree of interaction which would be more frequent with people within their bands than people outside of their bands-- this all constitutes a very coherent society which anthropologists have no problem in identifying any more than the people have a problem knowing where the boundaries are.

---

* Transcript, Vol. X, p. 1454 ff.

At this point the objection was taken. What ensued was not as promised. It was instead a persuasive explanation of the bases for Dr. Freeman's conclusion that Inuit society was a band level society composed of units, the bands, larger than its constituent small camps. Those encampments of two or three families were the units described by the Inuit witnesses, encountered by Inspector Dent in the mid-1950's, by Norton in 1762, and discovered to have existed in the Thule period. In my view, nothing in the affidavit filed pursuant to Rule 482 would reasonably have led an opposing party to anticipate that evidence as to a band level society would be adduced in explanation or demonstration of the affidavit. None of the Defendant's counsel cross-examined Dr. Freeman on that aspect of his evidence in chief. In support of the objection they argued that they had had no opportunity to prepare to cross-examine him on it. They were right.

Delivering a unanimous decision of the Federal Court of Appeal, the then Chief Justice recently said:[12]

> I wish to add that a perusal of some of the affidavits of experts filed in this case leads me to believe that Rule 482 is being followed by some counsel, if at all, in the letter rather than the spirit. Indeed, in my view, the result is much less satisfactory than in the old days of voluntary exchange of valuation reports. I strongly suggest that, when an expert's affidavit does not contain a sufficiently detailed statement of the expert's reasoning so that the Court could, in the absence of attack, adopt that reasoning as its own and decide the question that is the subject of his evidence on the basis of it, the party should not be allowed to supplement it by verbal testimony until a supplementary affidavit is filed containing such reasoning and the other side and the Court have had an opportunity to consider it. (If that involves adjournments, costs thrown away should be assessed against the party at fault).

---

[12] *Karam v N.C.C.* [1978] 1 F.C. 404 at 406 ff.

I had had occasion the previous day, when that passage from the Karam case was cited to me, to indicate my intention to follow that course of action if the Plaintiffs' counsel persisted in efforts to adduce similarly undisclosed evidence in chief through Dr. Harp.* I must assume that the Defendants' counsel had that ruling in mind when the objection was again taken with respect to Dr. Freeman's evidence in chief. Perhaps that evidence did not turn out to be as crucial as they had anticipated it might be but, whatever the reason, no adjournment was requested to permit preparation of cross-examination and/or rebuttal evidence. If it had, it would have been granted and, since it was not, I can only conclude that the objection was waived.

Dr. Peter Usher is a "Socio-Economic Consultant". His academic qualification at the post-graduate level is geography. He received his doctorate in 1970. Geography, according to *The Shorter Oxford Dictionary*, is:

> The science that describes the earth's surface, its form and physical features, its natural and political divisions, its climates, productions, etc.

His work experience relative to the north and its inhabitants includes part time jobs and research in the summers of 1962 to 1967, inclusive. His first full time job was as a researcher for the Defendant Minister between October, 1967 and January, 1973. He was retained as a consultant at Inuvik, N.W.T., by the Plaintiff, Inuit Taparsit of Canada, from February, 1973 to August, 1974, and by the Committee for Original Peoples Entitlement from September, 1974 to November, 1976. Dr. Usher's evidence had more the ring of a convinced advocate than a dispassionate professional. There was a lot of prognosis.

---

* Transcript, Vol. IX, pp. 980-990.

Objections were taken to the admissibility of a good deal of Dr. Usher's evidence in chief and rulings were reserved. I have come to the conclusion that most of them were well taken. Neither his formal training as a geographer nor his experience in and with the Arctic and Inuit qualify him to form opinions on political, sociological, behavioural, psychological and nutritional matters admissible as expert evidence in a court of law. I do accept his competence as a geographer and to reach economic conclusions based on that competence.

Paragraphs 1, 2 and 18 of his affidavit are *pro forma*, containing no material conclusions. Paragraph 17 is pure argument and not evidence at all. Paragraphs 4, 5, 10, 11, 13, 14, 15 and 16 are not admissible. Paragraphs 6, 7, 8, 9 and 12 do set forth conclusions within Dr. Usher's competence as an expert. I did not find it necessary to make particular reference to those conclusions since they were essentially corroborative of the evidence of the Inuit witnesses and Dr. Freeman on the subject of the Inuit's exploitation of the barren lands and their resources.

William Noah, mayor of Baker Lake, prepared a list of the Plaintiff's places of origin which was tendered as an exhibit. Except as the information pertained to himself, close relatives and others originating in the Back River country, it was largely hearsay. It was objected to as such. Some of the other Inuit who testified confirmed the information insofar as their families were concerned. Manifestly it would have been outrageously costly to maintain the Court in Baker Lake long enough to hear all the Inuit necessary to confirm the list fully or to bring them south from Baker Lake for the same purpose. I am satisfied that an adequate sample of its contents was verified by admissible evidence. While they are not all the resident Inuit, the Plaintiffs are sufficiently numerous and their progeny, I am sure, even more so, to give the list some considerable validity as indicating the places of origin of the entire local Inuit population.

Exhibits marked for identification as "B" to "H" were tendered by the Plaintiffs as counsel was in the process of closing their case in chief. Exhibit "B" is a three volume reprint of a 1912 publication by the King's Printer for Canada entitled "Indian Treaties and Surrenders". It contains 483 treaties with Indians dated from May 12, 1781 to March 7, 1902. Exhibit "C" is a bundle of six Queen's Printer's reprints of treaties not included in Exhibit "B". Exhibits "B" and "C" are said to comprise copies of all the treaties ever concluded between the aboriginal inhabitants of Canada and its sovereign. Exhibits "D", "E" and "F" are photocopies of pages from three volumes of a publication by the Dominion Archivist entitled "Documents relating to The Constitutional History of Canada". Exhibit "G" is an official publication of the Government of Quebec entitled "The James Bay and Northern Quebec Agreement". No objection was taken to these documents on the basis of their being copies; however, the Defendants objected to their production except to the extent that they represented documents of which the court determined it could take judicial notice.

Exhibit "H", a photocopy of the *James Bay and Northern Quebec Native Claims Settlement Act*[13] ought not to have been marked. The court is required, by section 18 of the *Canada Evidence Act*[14] to take judicial notice of it. I am of the view that I can take judicial notice of all of the others.

Many of the treaties comprised in Exhibits "B" and "C" deal with lands that once were part of Rupert's Land. Treaties No. 124 in Exhibit "B" and 8 and 11 in "C" are of particular interest. The former adopted, in 1871, the Selkirk Treaty of 1817 which, so far as I am aware, is the only treaty whereby aborigines ceded land in Rupert's Land

---

[13] S.C. 1976-77, c.32.

[14] R.S.C. 1970, c. E-10.

for settlement while it was under the administration of the Hudson's Bay Company; Nos. 8 and 11 are the treaties dealing with lands that are today within the Northwest Territories. The evidence supports the proposition that the policies of the Hudson's Bay Company and the Canadian government have been consistently to conclude agreements with the aborigines before dealing with the land in a manner necessarily inconsistent with their aboriginal title. The documents comprised in Exhibits "D", "E" and "F" articulate that policy insofar as successive pre-Confederation governments were concerned and the federal position reflected in the James Bay Agreement establishes that this was, at least until very recently, still Canadian government policy. The court is, of course, able to give effect to policy only to the extent that it is reflected in law.

The evidence as to some disputed questions of fact is extremely meagre, so meagre that, in other circumstances, I should feel that the burden of proof had not been discharged. The meagreness of the evidence is, however, inherent in its subject matter. The barren lands are vast and their inhabitants few and, until the present generation, widely scattered and constantly on the move. Their history, beyond living memory, is unrecorded except by the handful of whites who, largely by accident, encountered them. Their resources did not interest early traders; their nomadic ways and tiny camps did not arouse the enthusiasm of missionaries. Snow houses leave no ruins and, until the proto-historic period, most of their tools and weapons were made of local materials which, like themselves, their dogs and tents, were organic and, hence, biodegradable. Even today the mineral exploration is carried on over large areas where, except near major water crossings close to the community, even the Inuit hunters are quite unlikely to come across them. Two or three witnessed incidents may well reflect a reality of countless unwitnessed incidents.

THE SOURCE OF INUIT ABORIGINAL TITLE

While *The Royal Proclamation* of 1763, various statutes and almost all the decided cases refer to Indians and do not mention Inuit or Eskimos, the term "Indians", in Canadian constitutional law, includes the Inuit.[15] In the absence of their exclusion from that term, either expressly or by compelling inference, decisions relevant to the aboriginal rights of Indians in Canada apply to the Inuit. In light of the Sigeareak decision,[16] *The Royal Proclamation* must be dismissed as a source of aboriginal title in Rupert's Land. However, the Proclamation is not the only source of aboriginal title in Canada.

In *Calder v Attorney-General of British Columbia*,[17] the six members of the Supreme Court who found it necessary to consider the substantive issues, which dealt with territory outside the geographic limits of the Proclamation, all held that an aboriginal title recognized at common law had existed. Judson, J., with Martland and Ritchie, JJ., concurring, put it, at page 328, as follows:

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

The emphasis is mine. In the result, he held that "Indian title" to have been extinguished. The dissenting judgment, which held

---

15 Reference as to whether the term "Indian" in section 91(24) of the *B.N.A. Act*, 1867, includes Eskimo inhabitants of Quebec. [1939] S.C.R. 104.

16 [1966] S.C.R. 645.

17 [1973] S.C.R. 313.

the aboriginal title, with certain exceptions, not to have been extinguished, was delivered by Hall, J., with Spence and Laskin, JJ., concurring. Pigeon, J., disposed of the matter exclusively on the procedural ground that the plaintiffs had not obtained the required *fiat* to sue the Crown in right of British Columbia, a conclusion concurred in by Judson, Martland and Ritchie, JJ. While it appears that the judgment of Pigeon, J., embodies the *ratio decidendi* of the Supreme Court, the clear agreement of the other six judges on the point is solid authority for the general proposition that the law of Canada recognizes the existence of an aboriginal title independant of *The Royal Proclamation* or any other prerogative act or legislation. It arises at common law. Its recognition by the Supreme Court of Canada may well be based upon an acceptance of the reasoning of Chief Justice Marshall in *Worcester v Georgia*,[18] a decision referred to in both their judgments by Judson and Hall, JJ.

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, *having institutions of their own, and governing themselves by their own laws*. It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors.

The emphasis was included in the passage when it was quoted by Mr. Justice Hall at page 383.

The decision of the Supreme Court of the Northern Territory of Australia in *Milirrpum v Nabalco*[19] is most useful in its exhaustive compilation and analysis of pertinent authorities from numerous common law jurisdictions. It is, however, clear in that portion of the judgment dealing with Australian authorities, pages 242 to 252, that Blackburn, J.,

---

[18] (1832) 6 Peters 515 at 542 ff.

[19] (1970) 17 F.L.R. 141.

found himself bound to conclude that the doctrine of communal native title had never, from Australia's inception, formed part of its law. If I am correct in my appreciation of the authority of the Calder decision, that is not the law of Canada. The Calder decision renders untenable, insofar as Canada is concerned, the Defendants' arguments that no aboriginal title exists in a settled, as distinguished from a conquered or ceded, colony and that there is no aboriginal title unless it has been recognized by statute or prerogative act of the Crown or by treaty having statutory effect.

PROOF OF ABORIGINAL TITLE

The elements which the Plaintiffs must prove to establish an aboriginal title cognizable at common law are:

1. That they and their ancestors were members of an organized society.

2. That the organized society occupied the specific territory over which they assert the aboriginal title.

3. That the occupation was to the exclusion of other organized societies.

4. That the occupation was an established fact at the time sovereignty was asserted by England.

Decisions supporting these propositions include those of the Supreme Court of Canada in *Kruger and Manuel v The Queen*[20] and the Calder case and those of the United States Supreme Court in *Johnson v M'Intosh*,[21] *Worcester v Georgia* and *U.S. v Santa Fe*.[22]

---

[20] [1978] 1 S.C.R. 104.

[21] (1823) 8 Wheaton 543.

[22] (1941) 314 U.S. 339.

Proof that the Plaintiffs and their ancestors were members of an organized society is required by the authorities. In quoting Mr. Justice Judson's Calder judgment, I emphasized the phrase "organized in societies" and I repeated the emphasis Mr. Justice Hall had included in quoting the passage from *Worcester v Georgia*: "having institutions of their own, and governing themselves by their own laws". The rationale of the requirement is to be found in the following *dicta* of the Privy Council in *Re Southern Rhodesia*:[23]

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor "richer than all his tribe". On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforcable than rights arising under English law. Between the two there is a wide tract of much ethnological interest, but the position of the natives of Southern Rhodesia within it is very uncertain; clearly they approximate rather to the lower than to the higher limit.

Their Lordships did not find it necessary to pursue the question further since they found that the aboriginal rights, if any, that might once have existed had been expressly extinguished by the Crown.

It is apparent that the relative sophistication of the organization of any society will be a function of the needs of its members, the demands they make of it. While the existence of an organized society is a prerequisite to the existence of an aboriginal title, there appears no valid reason to demand proof of the existence of a society more

---

[23] [1919] A.C. 211 at 233 ff.

elaborately structured than is necessary to demonstrate that there existed among the aborigines a recognition of the claimed rights, sufficiently defined to permit their recognition by the common law upon its advent in the territory. The thrust of all the authorities is not that the common law necessarily deprives aborigines of their enjoyment of the land in any particular but, rather, that it can give effect only to those incidents of that enjoyment that were, themselves, given effect by the regime that prevailed before.[24]

The fact is that the aboriginal Inuit had an organized society. It was not a society with very elaborate institutions but it was a society organized to exploit the resources available on the barrens and essential to sustain human life there. That was about all they could do: hunt and fish and survive. The aboriginal title asserted here encompasses only the right to hunt and fish as their ancestors did.

The organized society of the Caribou Eskimos, such as it was, and it was sufficient to serve them, did not change significantly from well before England's assertion of sovereignty over the barren lands until their settlement. For the most part, the ancestors of the individual Plaintiffs were members of that society; many of them were themselves members of it. That their society has materially changed in recent years is of no relevance.

The specificity of the territory over which aboriginal title has heretofor been claimed in the reported cases appears not to have been a disputed issue of fact. In the Calder case, the subject territory was agreed between the parties. In the Kruger case, the court did not find it necessary to deal with the questions of aboriginal title and extinguishment and disposed of the appeal on other grounds to which I will return. It did, however, give a clear signal

---

[24] *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2 A.C. 399.

as to what its approach would be in the future. Mr. Justice Dickson, for the court, at page 108 ff., said:

> ...Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis...

There were obviously great differences between the aboriginal societies of the Indians and the Inuit and decisions expressed in the context of Indian societies must be applied to the Inuit with those differences in mind. The absence of political structures like tribes was an inevitable consequence of the *modus vivendi* dictated by the Inuit's physical environment. Similarly the Inuit appear to have occupied the barren lands without competition except in the vicinity of the tree line. That, too, was a function of their physical environment. The pressures of other peoples, except from the fringes of the boreal forest, were non-existent and, thus, the Inuit were not confined in their occupation of the barrens in the same way Indian tribes may have confined each other elsewhere on the continent. Furthermore, the exigencies of survival dictated the sparse, but wide ranging, nature of their occupation.

In *Mitchel v U.S.*,[25] Mr. Justice Baldwin, delivering the opinion of the Court, said:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. ...
>
> The merits of this case do not make it necessary to inquire whether the Indians within the United States had any other rights of soil or jurisdiction; it is enough to consider it as a settled principle that their right of occupancy is considered as sacred as the fee-simple of the whites. ...

---

25 (1835) 9 Peters 711 at 746.

The value of early American decisions to a determination of the common law of Canada as it pertains to aboriginal rights is so well established in Canadian courts, at all levels, as not now to require rationalization. With respect, the American decisions seem considerably more apposite than those Privy Council authorities which deal with aboriginal societies in Africa and Asia at the upper end of the scale suggested in *Re Southern Rhodesia*. American decisions as to the existence of aboriginal title, rendered since creation of the Indian Claims Commission,[26] must be approached with considerable caution. The Commission, whose decisions are the subject of most recent American jurisprudence, is authorized, *inter alia*, to determine "claims based upon fair and honorable dealings that are not recognized by any rule of law or equity", a jurisdiction well beyond any Parliament has yet delegated to any Canadian tribunal.

The nature, extent or degree of the aborigines' physical presence on the land they occupied, required by the law as an essential element of their aboriginal title is to be determined in each case by a subjective test. To the extent human beings were capable of surviving on the barren lands, the Inuit were there; to the extent the barrens lent themselves to human occupation, the Inuit occupied them.

The occupation of the territory must have been to the exclusion of other organized societies. In the Santa Fe case, at page 345, Mr. Justice Douglas, giving the opinion of the court, held:

> Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had "Indian title" which, unless extinguished, survived the railroad grant of 1866.

---

[26] Public Law 79-959, August 13, 1946.

In the early historic period, it was the Chipewyan, not the Inuit, who wandered over the southwesterly portion of the Baker Lake Area. During the prehistoric period Indians occupied the Dubaunt valley and both Indians and Inuit occupied portions of the Thelon valley. The historic fact of their hostility supports the inference that their occupations of the same sites were successive rather than simultaneous. The evidence suggests that, in prehistoric times, the southwest portion of the Area was a transitional zone with primarily Indian occupation toward the boreal forest and primarily Inuit occupation toward Baker Lake. The only reason for either being there was the seasonal availability of caribou, so I cannot see that small camps of Inuit were likely, deliberately, to have wandered into land seasonally exploited by relatively large bands of Indians.

This is the only area where the weight of the evidence does not confirm the admission by the government Defendants that the Inuit had occupied and used the Baker Lake Area since time immemorial. The law is clear that where the evidence and an admission by counsel cannot stand together, it is the duty of the court to have regard to the real facts as established in evidence.[27] I take it that, in this context, "time immemorial" runs back from the date of assertion of English sovereignty over the territory which was probably no earlier than 1610 and certainly no later than May 2, 1670.

On the evidence, I cannot find that the entire Baker Lake Area was exclusively occupied by the Inuit on the advent of English sovereignty. The archaeological and historical evidence leads to the conclusion that probably, at that

---

[27] *Sinclair v Blue Top Brewing* [1947] 4 D.L.R. 561. (S.C.C.).

date, the boundary between Inuit and Indian land traversed the southwesterly portion of the Baker Lake Area. I have concluded, admittedly on the basis of very meagre evidence and recognizing a large element of arbitrariness as necessary to a definition of the boundary of exclusive Inuit occupation, that the territory to the south and west of a line drawn from the east end of Aberdeen Lake to the confluence of the Kazan and Kunyak Rivers was not Inuit territory.

At this point, it must be recalled that the lands over which the Plaintiffs assert their aboriginal title are not just the Baker Lake Area but an undefined area that includes it. The Baker Lake Area is where they say they are presently suffering a violation of their rights under their aboriginal title and in respect of which they seek injunctive and other relief but, again, their assertion of aboriginal title is not confined to the Baker Lake Area. The evidence as to Inuit occupation does not extend beyond the R.C.M.P. detachment area; it does, however, lead to the conclusion that Inuit occupation of the detachment area did not change materially between prehistoric times and their settlement.

In the result, I find, on a balance of probabilities on the evidence before me, that, at the time England asserted sovereignty over the barren lands west of Hudson Bay, the Inuit were the exclusive occupants of the portion of barren lands extending from the vicinity of Baker Lake north and east toward the Arctic and Hudson Bay to the boundaries of the Baker Lake R.C.M.P. detachment area as they were in 1954 including, specifically, that portion of the detachment area lying north and east of a line drawn from its boundary downstream along the Thelon River to its outlet from Aberdeen Lake, thence southeasterly to the confluence of the Kazan and Kunwak Rivers and thence upstream along the Kazan to the boundary of the area. An aboriginal title to that territory, carrying with it the right freely to move about and hunt and fish over it, vested at common law in the Inuit.

EXTINGUISHMENT BEFORE 1870

The Defendants say that the Inuit's aboriginal title in Rupert's Land was extinguished by the Royal Charter of May 2, 1670, granting Rupert's Land to the Hudson's Bay Company or, if not by that, by the admission of Rupert's Land to Canada in 1870. The limits of Rupert's Land are not in issue here nor does anything turn on the formal name of the grantee which will simply be referred to as "the company".

The Royal Charter granted the company "the sole Trade and Commerce of" Rupert's Land. It constituted Rupert's Land "one of our Plantacions or Colonyes in America" and went on:

> ...And further WEE DOE by these presentes for us our heires and successors make create and constitute the said Governor and Company for the tyme being and theire successors the true and absolute Lordes and Proprietors of the same Territory lymittes and places aforesaid And of all other the premisses SAVING ALWAYS the faith Allegiance and Soveraigne Dominion due to us our heires and successors for the same TO HAVE HOLD possesse and enjoy the said Territory lymittes and places and all and singular other the premisses hereby granted as aforesaid with theire and every of their Rightes Members Jurisdiccions Prerogatives Royaltyes and Appurtenances whatsoever to them the said Governor and Company and theire Successors for ever TO BEE HOLDEN of us our heires and successors as of our Mannor of East Greenwich in our County of Kent in free and common Soccage and not in Capite or by Knightes Service YEILDING AND PAYING yearely to us our heires and Successors for the same two Elkes and two Black beavers whensoever and as often as Wee our heires and successors shall happen to enter into the said Countryes Territoryes and Regions hereby granted...

The company's legislative authority in the colony was limited to the making of reasonable laws, not repugnant to the laws of England, with their application explicitly restricted to the company itself, its officers and servants. The company's judicial jurisdiction was limited to the application of English civil and criminal law to persons "belonging to"

or "that shall live under" the company. That the draftsman of the Charter did not contemplate Rupert's Land as totally devoid of aboriginal inhabitants is evident. The company was empowered to make "peace or Warre with any Prince or People whatsoever that are not Christians" in Rupert's Land "and alsoe to right and recompense themselves upon the Goodes Estates or people of those partes".

The presence in Rupert's Land of aboriginal inhabitants with aboriginal property rights was contemplated. The Charter did not purport to supercede with English law, the laws by which the aborigines governed themselves, nor did it authorize the company to legislate in respect of aborigines nor to adjudicate in respect of them or their laws. The extinguishment of aboriginal title by the Charter depends entirely upon the grant of title recited above.

This charter was by no means the only nor the first Royal Charter that established a proprietary colony in North America and granted title to the lands comprised in the colony to its proprietors. In fact, it was the last. The proprietors of those other colonies, before as well as after May 2, 1670, generally, if not invariably, effected the extinguishment of aboriginal rights by cession or sword. They did not rely on the incidents of a title peculiar to English law as displacing whatever rights the aborigines enjoyed under their own laws.*

It seems to me that the grant of title to the company was intended solely to define its ownership of the land in relation to the Crown, not to extinguish the aboriginal title. That conclusion is consistent with what had already happened in other North American colonies where, unlike Rupert's Land, settlement had made necessary the extinguishment of aboriginal title. It is consistent with the policy

---

* A very useful analysis of available historical material relevant to the conclusions reached in this and the next paragraph is to be found in Chapter 6 of *The Land Rights of Indiginous Canadian Peoples*, a thesis submitted for the degree of Doctor of Philosophy in the University of Oxford, Trinity term, 1979, by Brian Slattery, presently of the Faculty of Law, University of Saskatchewan, Saskatoon.

of the company itself, expressed as early as 1683, with respect to lands required for trading posts. It is consistent with what the company in fact did, through its surrogate Lord Selkirk, the only time it was required to make provision for a settlement. It is consistent with what the Canadian government has done since the admission of Rupert's Land to Canada.

The coexistence of an aboriginal title with the estate of the ordinary private land holder is readily recognized as an absurdity. The communal right of aborigines to occupy it cannot be reconciled with the right of a private owner to peaceful enjoyment of his land. However, its coexistence with the radical title of the Crown to land is characteristic of aboriginal title and the company, in its ownership of Rupert's Land, aside from its trading posts, was very much in the position of the Crown. Its occupation of the territory in issue was, at most, notional.

I therefor find that the Royal Charter of May 2, 1670, did not extinguish aboriginal title in Rupert's Land. Nothing in the 1690 Act of Parliament that confirmed the Charter had any bearing on this question.[28] Likewise, I find nothing in the Imperial Order in Council[29] of June 23, 1870, whereby Rupert's Land was admitted to Canada that had any effect on aboriginal title.

In the latter respect, the Plaintiffs urged that paragraph 14 of the Order in Council is a term which must be fulfilled before the Parliament of Canada will have the legislative jurisdiction to extinguish aboriginal title in Rupert's Land.

> 14. Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them.

---

[28] 2 W.& M., c.23.

[29] R.S.C. 1970, Appendices, Appendix I, No. 9.

I disagree. The provision neither created nor extinguished rights or obligations *vis à vis* the aborigines, nor did it, through section 146 of the *British North America Act, 1867*,[30] limit the legislative competence of Parliament. It merely transferred existing obligations from the company to Canada.

The aboriginal title, vested at common law in the Inuit, had not been extinguished prior to the admission of Rupert's Land to Canada. That title was not extinguished by or in the process of admission. It subsisted when Rupert's Land became part of Canada.

EXTINGUISHMENT SINCE 1870

The Inuit's aboriginal title has not been extinguished by surrender. Since the admission of Rupert's Land to Canada, it has been within the legislative competence of the Parliament of Canada to extinguish it. Parliament has not enacted legislation expressly extinguishing that title.

The Plaintiffs argue that any such extinguishment must be effected expressly. They find support for that proposition in the judgment of Mr. Justice Hall in the Calder case. The Defendants argue that extinguishment may be the necessary result of legislation even though the intention is not expressed. They find support for their position in the judgment of Mr. Justice Judson in the Calder case.

At page 402, Mr. Justice Hall, referring to the "Indian title" in issue, said:

> It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, *and then only by specific legislation.*

The emphasis is mine. After citing a number of authorities, he concluded his discussion of the particular point, at page 404, as follows:

> It would, accordingly, appear to be beyond question that the onus of proving that the

---

[30] R.S.C. 1970, Appendices, Appendix I, No. 5.

> Sovereign intended to extinguish the Indian title lies on the Respondent and that *the intention must be "clear and plain".*

Again, the emphasis is mine. If I understand the Plaintiffs well, they argue that, to extinguish aboriginal title, legislation must state expressly that such extinguishment is its object.

I have perused the authorities cited by Mr. Justice Hall and the one upon which he appears to have relied for the qualification embraced in the phrases I have emphasized is the following passage from the opinion of Davis, J., for the United States Court of Claims, in *Lipan Apache Tribe v U.S.*[31]

> The correct inquiry is, not whether the Republic of Texas accorded or granted the Indians any rights, but whether that sovereign extinguished their pre-existing occupancy rights. Extinguishment can take several forms; it can be effected "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise...". *United States v Santa Fe Pac. R.R., supra,* 314 U.S. at 347. While the selection of a means is a governmental prerogative, the actual act (or acts) of extinguishment must be plain and unambiguous. *In the absence of a "clear and plain indication" in the public records that the sovereign "intended to extinguish all of the[claimants'] rights" in their property, Indian title continues. Id.* at 353.

The emphasis was added by Mr. Justice Hall.

It is apparent that the phrase "clear and plain intention" has its origin in the Santa Fe decision. The issue, which gave rise to the phrase, was whether a band's acceptance of a reservation in 1881 had effected an extinguishment, by voluntary cession, of their aboriginal title to lands which were subject to the Act of Congress of July 27, 1866 which had granted those lands to the railway. The Act provided, in part, that:

> 2. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and required in the donation to the road named in the act.

---

[31] (1967) 180 Ct. Cl. 487 at 492.

That is clearly the expression of avowed solicitude Mr. Justice Douglas had in mind when he said, at pages 353 and 354:

> We search the public records in vain for any clear and plain indication that Congress in creating the Colorado River reservation was doing more than making an offer to the Indians, including the Walapais, which it was hoped would be accepted as a compromise of a troublesome question. We find no indication that Congress by creating that reservation intended to extinguish all of the rights which the Walapais had in their ancestral home. That Congress could have effected such an extinguishment is not doubted. But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards.

No Canadian legislation requiring that legislative extinguishment of aboriginal titles be effected in a particular way, has been brought to my attention. There are numerous Canadian authorities which have held that the aboriginal right to hunt, even when confirmed by treaty, is subject to regulation by competent legislation. The decision in *Sikyea v The Queen*,[32] delivered by Mr. Justice Hall for the Court, is an example. The right freely to hunt, as one's ancestors did, over particular land, has been an important incident of most, if not all, aboriginal titles yet asserted in Canada. It is the right proved here. It is, nonetheless, a right that has been abridged by legislation of general application making no express mention of any intention to deal with aboriginal title in any way.

I cannot accept the Plaintiffs' argument that Parliament's intention to extinguish an aboriginal title must be set forth explicitly in the pertinent legislation. I do not agree that Mr. Justice Hall went that far. Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it.

---

[32] [1964] S.C.R. 642.

That is as true of an aboriginal title as of any other common law right. Section 1(a) of the *Canadian Bill of Rights*[33] does not make the aboriginal title in issue here an exception to the general rule.

The legislation in the Calder case consisted of thirteen separate items: nine proclamations by the Governor of the Colony of British Columbia and four ordinances of its Legislative Council, none of which expressly provided that it was intended to extinguish aboriginal title. Their pertinent provisions are set out in the trial judgment.[34] After summarizing them, Mr. Justice Judson, at page 333, said:

> The result of these proclamations and ordinances was stated by Gould J. at the trial in the following terms. I accept his statement, as did the Court of Appeal:
>
> > The various pieces of legislation referred to above are connected, and in many instances contain references *inter se*, especially XIII. They extend back well prior to November 19, 1866, the date by which, as a certainty, the delineated lands were all within the boundaries of the Colony of British Columbia, and thus embraced in the land legislation of the Colony, where the words were appropriate. All thirteen reveal a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to "aboriginal title, otherwise known as the Indian title", to quote the statement of claim. The legislation prior to November 19, 1866, is included to show the intention of the successor and connected legislation after that date, which latter legislation certainly included the delineated lands.

He concluded, at page 344:

> In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.

---

[33] R.S.C. 1970, Appendices, Appendix III.

[34] (1969) 8 D.L.R. (3rd) 59 at 75 ff.

To say that the necessary result of legislation is adverse to any right of aboriginal occupancy is tantamount to saying that the legislator has expressed a clear and plain intention to extinguish that right of occupancy. Justices Hall and Judson were, I think, in agreement on the law, if not its application in the particular circumstances.

I now turn to the legislation said to have effected the extinguishment of the aboriginal title in issue. All apply to the District of Keewatin. No real doubt as to the validity of any has been suggested, or suggests itself, to me.

The first *Dominion Lands Act*[35] provided:

> 42. None of the provisions of this Act respecting the settlement of Agricultural lands, or the lease of Timber lands, or the purchase and sale of Mineral lands, shall be held to apply to territory the Indian title to which shall not at the time have been extinguished.

That provision was carried forward, *verbatim*, in the *Dominion Land Act*, 1879[39] which was repealed by the *Dominion Lands Act*, 1883,[37] which, in turn, provided:

> 8. None of the provisions of this Act shall be held to apply to territory the Indian title to which shall not, at the time, have been extinguished

That provision continued in effect until enactment of *The Dominion Lands Act*[38] of 1908.

The 1908 Act contained no provision exempting from its operation territory to which the Indian title had not been extinguished. It did provide:

> 76. The Governor in Council may—
>
> (a) withdraw from the operation of this Act, subject to existing rights as defined or created thereunder, such lands as have been or may be reserved for Indians;
>
> (b) grant lands in satisfaction of claims of half-breeds arising out of the extinguishment of the Indian title;
>
> (c) upon the extinguishment of the Indian title in any territory or tract of land,

---

35 S.C. 1872, c.23.

36 S.C. 1879, c.31

37 S.C. 1883, c.17.

38 S.C. 1908, c.20.

> make to persons satisfactorily establishing undisturbed occupation of any lands within the said territory or tract at the date of such extinguishment, by their own residence or that of their servants, tenants or agents, in actual peaceable possession thereof, free grants of the said lands, provided that an area not more than equal to a quarter-section shall be so granted to any one person unless there has been cultivation of more than that area;

Apart from periodic consolidations, the 1908 Act remained in force, without pertinent amendment, until replaced by the *Territorial Lands Act*[39] in 1950, which continues in force today.[40]

Until 1950, Parliament had not, by general legislation, extinguished aboriginal title in the Northwest Territories. Indeed, it expressly contemplated extinguishment as a future event.

The *Territorial Lands Act* makes no exemption of lands subject to unextinguished aboriginal title and, unlike its predecessor, it does not expressly contemplate the future "extinguishment of Indian title". The authority heretofore reserved to the Governor in Council by paragraph 76(a) is included in the authority delegated by paragraph 19(d) of the present Act:

> 19. The Governor in Council may
>
> ...
>
> (d) set apart and appropriate such areas or lands as may be necessary to enable the Government of Canada to fulfil its obligations under treaties with the Indians and to make free grants or leases for such purposes, and for any other purpose that he may consider to be conducive to the welfare of the Indians;

That is the only reference in the Act to any aboriginal inhabitants. In view of the fact that the lands ceded by the Indians under Treaties 8 and 11, concluded in 1899 and 1922 respectively, comprised all of the mainland of the Northwest Territories west of the Coppermine and Lockhart Rivers,

---

39 S.C. 1959, c.22.

40 R.S.C. 1970, c.T-6.

it is understandable that the authorities of the Governor in Council under paragraphs 76(b) and 76(c) of the 1908 Act were considered obsolete by 1950. The demand, by half-breeds or anyone else, for the opportunity to settle east of those rivers or in the Arctic Islands must have been slight between 1922 and 1950.

The Defendants argue that the removal by Parliament of the earlier express recognition of unextinguished "Indian title" is to be seen as an expression of its intention to extinguish aboriginal title. As part of my historical research, I referred to Parliamentary Reports pertinent to the enactment of the *Territorial Lands Act*.[41] The House of Commons dealt with the bill on May 10, 1950, at a session that began at 3:00 p.m. and adjourned at 5:50 p.m. In addition to oral questions and other routine proceedings, the House dealt with five bills that afternoon. Three, including the subject, were dealt with by second reading, Committee of the Whole and third reading. The Committee of the Whole finished dealing with the fourth and it passed third reading. The fifth passed second reading. The entire consideration of the subject bill, second reading, Committee of the Whole, and third reading, occupies about six and one-quarter pages of the Report commencing at page 2364. The word "Indian" appears only where the sponsoring Minister stated that the bill did not apply to lands "under the *Indian Act*". The word "Indian" does not otherwise appear in the report and the words "Eskimo", "Inuit" or "aborigine" do not appear at all. Debate in the Senate was considerably less extensive.* While I cannot have regard to anything said in either House in interpretting the statute, it is, I think,

---

[41] *The Senate of Canada, Official Report of Debates*, 2nd Session, 21st Parliament, Vol I.

Official Report of Debates, House of Commons, 2nd Session, 21st Parliament, Vol III.

* Records of the proceedings of Parliamentary committees were not routinely published in 1950. The consideration of the bill by the Senate Committee on Banking and Commerce would appear not to have been an exception. Nothing in its report to the Senate suggests that extinguishment of aboriginal title was considered by the Committee.

fair to remark the irony implicit in the idea that such a basic right, particularly vested in certain people, then helpless to look after their own interests, over whom Parliament had exclusive legislative competence, was, in 1950, so casually extinguished. Without regard to what was intended or achieved, it is an historic fact, of which I am entitled to take judicial notice, that, in enacting the *Territorial Lands Act*, Parliament did not expressly direct its attention to the extinguishment of aboriginal title.

The legislation which the Defendants say amounts to the exercise by Parliament of "a sovereignty inconsistent with any conflicting interest, including one to aboriginal title", to adopt the terminology accepted by Mr. Justice Judson in the Calder decision includes certain provisions of the *Territorial Lands Act*, the *Public Lands Grants Act*[42] and the *Northwest Territories Act*.[43] The key provision is section 4 of the *Territorial Lands Act*:

> 4. Subject to this Act, the Governor in Council may authorize the sale, lease or other disposition of territorial lands and may make regulations authorizing the Minister to sell, lease or otherwise dispose of territorial lands subject to such limitations and conditions as the Governor in Council may prescribe.

"Territorial lands" are defined to include all interests in land in the Northwest Territories, including mines and minerals, vested in Her Majesty in right of Canada or of which the federal government has power to dispose. If there is any gap in the above authority of the Governor in Council to dispose of interests in land in the Northwest Territories, it is apparently filled by section 4 of the *Public Lands Grants Act*

---

[42] R.S.C. 1970, c.P-29.

[43] R.S.C. 1970, c.N-22.

which authorizes the sale, lease or other disposition of public lands and the prescription of limitations and conditions in respect of such disposition.

It is sufficient to summarize the other provisions of the *Territorial Lands Act* relied on. Sections 3.1 and 3.2 empower the Governor in Council to appropriate territorial lands as a land management zone and to make regulations and issue permits governing and allowing surface use in a zone. Section 8 authorizes the making of regulations for the leasing of mining rights in, on and under territorial lands. Section 14(a) authorizes regulations respecting permits to cut timber. Section 19 authorizes the Governor in Council to withdraw lands from disposition under the Act and to set apart and appropriate territorial lands for numerous purposes, in addition to those set forth in paragraph 19(d) recited above, including public buildings, facilities and other purposes, ranging from burial grounds to bird sanctuaries and gaols to town-sites, and to authorize private acquisition of land for railways, power and pipe lines. Under section 13 of the *Northwest Territories Act*, the Commissioner in Council has been delegated authority to make ordinances in respect, *inter alia*, of property and civil rights, the preservation of game and to open roads on public lands.

I will merely note, at this point, that the Governor in Council and the Commissioner in Council have acted on their statutory authority in many areas. That fact and the purport of those regulations and ordinances are not material to the question of the complete extinguishment of aboriginal title. Such extinguishment must be effected by Parliament itself enacting legislation inconsistent with the continued existence of an aboriginal title; it cannot depend on the exercise of authority delegated by that legislation. That is not to say that the rights comprised in an aboriginal title cannot be abridged by legislation, delegated or otherwise, without the title being completely extinguished.

The other statutory provisions summarized do not add anything significant to section 4 of the *Territorial Land Act*. The land management zones referred to in sections 3.1 and 3.2 are a new concept introduced in 1970.[44] They may be invoked when the Governor in Council "deems it necessary for the protection of the ecological balance or physical characteristics of any area". It is difficult to see how the type of occupation implicit in the Inuit's aboriginal title would be inconsistent with those objectives. The 1908 Act expressly envisaged the future extinguishment of "Indian title". That necessarily implied a recognition of the existence of an unextinguished "Indian title". Sections 8, 14(a) and 19 of the present Act had their counterparts in sections 37, 59 and 76 of the 1908 Act. They were not fatal to a subsisting aboriginal title. The provisions of the *Northwest Territories Act* do not contribute to the extinguishment of aboriginal title. It turns entirely on section 4 of the *Territorial Lands Act* and, to the extent it adds anything, section 4 of the *Public Lands Grants Act*.

There are significant differences between the situation that prevailed in northwestern British Columbia in the 1860's and those in the barren lands in 1950. The exchange of dispatches between the Colonial Office and Governor Douglas between July 31, 1858 and October 19, 1861, quoted by Mr. Justice Judson at pages 329 ff. of his Calder judgment, make clear that extinguishment of the "Indian title" was very much in mind when the proclamations issued and the ordinances were made. The legislation is explicit in its purpose to open up the territory to settlement. Although there were no treaties, particular lands had been set aside for Indians and these were excluded from the lands made available for settlement while, on the other hand, the Indians were expressly excluded from the right to take up the land that was made available. The conclusion of Mr.

---

[44] R.S.C. 1970, (1st Supp.), c.48.

Justice Judson, at page 344, merits repetition:

> In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.

In the case of the Inuit on the barren lands, the extinguishment of their aboriginal title was plainly not in Parliament's mind in 1950. The barren lands were not, for obvious reasons, being opened for settlement and so there was no reason to extinguish the aboriginal title. While section 4 of the Act is broad enough to permit dispositions of land for settlement purposes, one would have to be blind to the reality of the barrens to think a significant demand for settlement a practical prospect. In repealing the 1908 Act, Parliament repealed, and did not replace, its comprehensive scheme to permit, indeed encourage, settlement of unoccupied Crown lands by way of homestead entry, pre-emption and purchase. Those provisions, sections 8 to 28 inclusive, stood in the same statute with paragraphs 76(b) and (c) which expressly contemplated extinguishment of Indian title as a future event.

Section 4 of the *Territorial Lands Act* is a competent exercise by Parliament of the right to dispose of the lands in question. However, dispositions of the sort and for the purposes that Parliament might reasonably have contemplated in the barren lands are not necessarily adverse to the Inuit's aboriginal right of occupancy. Those which might prove adverse cannot reasonably be expected to involve any but an insignificant fraction of the entire territory. Extinguishment of the Inuit's aboriginal title is not a necessary result of legislation enacted since 1870. The aboriginal title in issue has not been extinguished.

THE MINING LAWS

No real doubt as to the validity of the mining laws has been raised in my mind. I do not, therefore, intend to recite them, except to the extent necessary to deal with the questions of whether, by virtue of their aboriginal title,

the Inuit have "rights previously acquired" within the meaning of subsection 29(11) of the Canada Mining Regulations[45] and are "holders of surface rights" within the meaning of section 8 of the *Territorial Lands Act*.

With the exception of a number of parcels in the hamlet itself, I am entirely satisfied that the entire territory in issue remains "territorial lands" within the meaning of the *Territorial Lands Act* and "public lands" within the meaning of the *Public Lands Grants Act*. They are subject to the Canada Mining Regulations. To the extent that their aboriginal rights are diminished by those laws, the Inuit may or may not be entitled to compensation. That is not sought in this action. There can, however, be no doubt as to the effect of competent legislation and that, to the extent it does diminish the rights comprised in an aboriginal title, it prevails. That point was succinctly made by Laskin, C.J.C., for the Court, in *The Queen v Derriksan*.[46]

> On the assumption that Mr. Sanders is correct in his submission (which is one which the Crown does not accept) that there is an aboriginal right to fish in the particular area arising out of Indian occupation and that this right has had subsequent reinforcement (and we express no opinion on the correctness of this submission), we are all of the view that the *Fisheries Act*, R.S.C. 1970, c.F-14, and the Regulations thereunder which, so far as relevant here, were validly enacted, have the effect of subjecting the alleged right to controls imposed by the Act and Regulations.

It was reiterated in *Kruger and Manuel v The Queen*.[47]

The Canada Mining Regulations provide:

> (11) The granting of a permit in respect of any prospecting permit area is subject to any rights previously acquired or applied for by any person in the area to which the permit applies.

Read in the context of the Regulations as a whole and the power of the Governor in Council to make them, the proper construction to be placed on the phrase "rights previously

---

[45] C.R.C. 1978, c.1516.

[46] (1976) 71 D.L.R. (3rd) 159 at 160.

[47] [1978] 1 S.C.R. 104

acquired" in subsection 29(1) is that it refers only to rights acquired pursuant to the Regulations.

Section 8 of the *Territorial Lands Act* provides:

> 8. The Governor in Council may make regulations for the leasing of mining rights in, under or upon territorial lands and the payment of royalties therefor, but such regulations shall provide for the protection of and compensation to the holders of surface rights.

Canadian courts have, to date, successfully avoided the necessity of defining just what an aboriginal title is. It is, however, clear that the aboriginal title that arises from *The Royal Proclamation* is not a proprietary right.[48] If the aboriginal title that arose in Rupert's Land independent of *The Royal Proclamation* were a proprietary right then it would necessarily have been extinguished by The Royal Charter of May 2, 1670, which granted the Hudson's Bay Company ownership of the entire colony. Their aboriginal title does not make the Inuit "holders of surface rights" for purposes of the section.

OTHER MATTERS

(a) *LOCUS STANDI*

All the Defendants, in argument, challenged the status of the corporate Plaintiffs to maintain the action. This was not raised in the pleadings and I do not, therefore, propose to dispose of it.

If the Defendants had been serious, they would, no doubt, have raised the issue by way of a preliminary objection. Had they done so, the status of the Inuit Taparisit of Canada to seek the declaratory relief in a representative capacity and the like status of the Baker Lake Hunters and Trappers Association to seek the injunctive relief might well have been established and appropriate amendment of the pleadings allowed. The Hamlet of Baker Lake might have been

---

[48] *St. Catherines Milling and Lumber Company v The Queen in right of Ontario* (1888) XIV App. Cas. 46 at 54 ff.

in a different position. Be all that as it may, it would be unfair to give effect to the challenge at this stage, whatever the result might have been had it been raised at an appropriate stage of the proceedings.

(b) Counterclaims

The Defendants, Cominco Ltd. and Pan Ocean Oil Ltd., seek by counterclaim certain declarations involving the status of the lands in issue as "territorial" and "public" lands and the Inuit as persons having "rights previously acquired" and being "holders of surface rights" under the mining laws. The Plaintiffs say that the Defendant mining companies are not entitled to claim relief by way of counterclaim by reason of the order of March 29, 1979, by which they were joined as parties defendant.

That order reflected the express undertakings made by the Defendant mining companies whereupon the Plaintiffs and the government Defendants were induced not to oppose their application. It is to be noted that the action had, well before that date, been set down for trial and that their first application to be joined had been refused because of their unwillingness to accede to a time-table that would have permitted the trial to proceed on schedule. The order was silent as to counterclaims.

In the circumstances, it was incumbent upon the mining companies to disclose their intentions fully in advance of obtaining the Plaintiffs' acquiescence in their joinder. It is entirely proper for the Plaintiffs to insist on a strict interpretation of the order to the effect that anything not expressly authorized is not authorized.

(c) Jurisdiction

The Defendant mining companies, other than Essex Minerals Company Limited, pleaded that this Court has no jurisdiction to grant the injunctive relief sought against them. That challenge, of course, arises out of the Quebec North Shore[49] and McNamara Construction[50] decisions of the

---

[49] [1977] 2 S.C.R. 1054.

[50] [1977] 2 S.C.R. 654.

Supreme Court of Canada. In the circumstances, it is unnecessary for me to add to an already too lengthy judgment and to the ~~extensive~~ jurisprudence already generated by those decisions.

(d) Interim Injunction

The interim injunction issued herein April 24, 1978, will be dissolved.

(e) Costs

I should be entirely prepared to entertain any motions the Plaintiffs or government Defendants may wish to make in respect of costs in light of the decision. Entry of judgment will be delayed until December 17, 1979, to permit such motions to be brought.

Costs, as they affect the Defendant mining companies, were anticipated in the order of March 29, 1979. I cannot see that there were any costs incidental to the counterclaims.

CONCLUSION

The Plaintiffs are entitled to a declaration that the lands comprised in District E2, the Baker Lake R.C.M.P. detachment area in 1954, excluding that portion, which has previously been more particularly described, lying south and west of the Thelon and Kazan Rivers, are subject to the aboriginal right and title of the Inuit to hunt and fish thereon. The action will otherwise be dismissed. The counterclaims of the Defendants, Cominco Ltd. and Pan Ocean Oil Ltd., will be dismissed without costs.

J.F.C.C.

Ottawa, Canada

November 15, 1979.

SCHEDULE 'A'

In the Northwest Territories; in the Districk of Keewatin, all that tract of land being more particularly described as follows:

Commencing at a point on the right bank of the Dubaunt River at approximate latitude 63°50'30" and longitude 100°00'; thence due south to latitude 63°30'; thence due east to longitude 97°30'; thence due south to latitude 62°45'; thence due east to longitude 95°00'; thence due north to latitude 63°00'; thence due east to longitude 94°00'; thence due north to latitude 64°00'; thence due east to longitude 92°30'; thence due north to latitude 64°30'; thence due west to longitude 95°00'; thence due north to latitude 65°00; thence due west to longitude 97°00'; thence due north to latitude 65°30'; thence due west to longitude 99°30'; thence due south to latitude 64°45'; thence due west to longitude 100°30'; thence due south to latitude 64°00'; thence due east to longitude 100°00'; thence due south to the point of commencement.

SCHEDULE 'B'

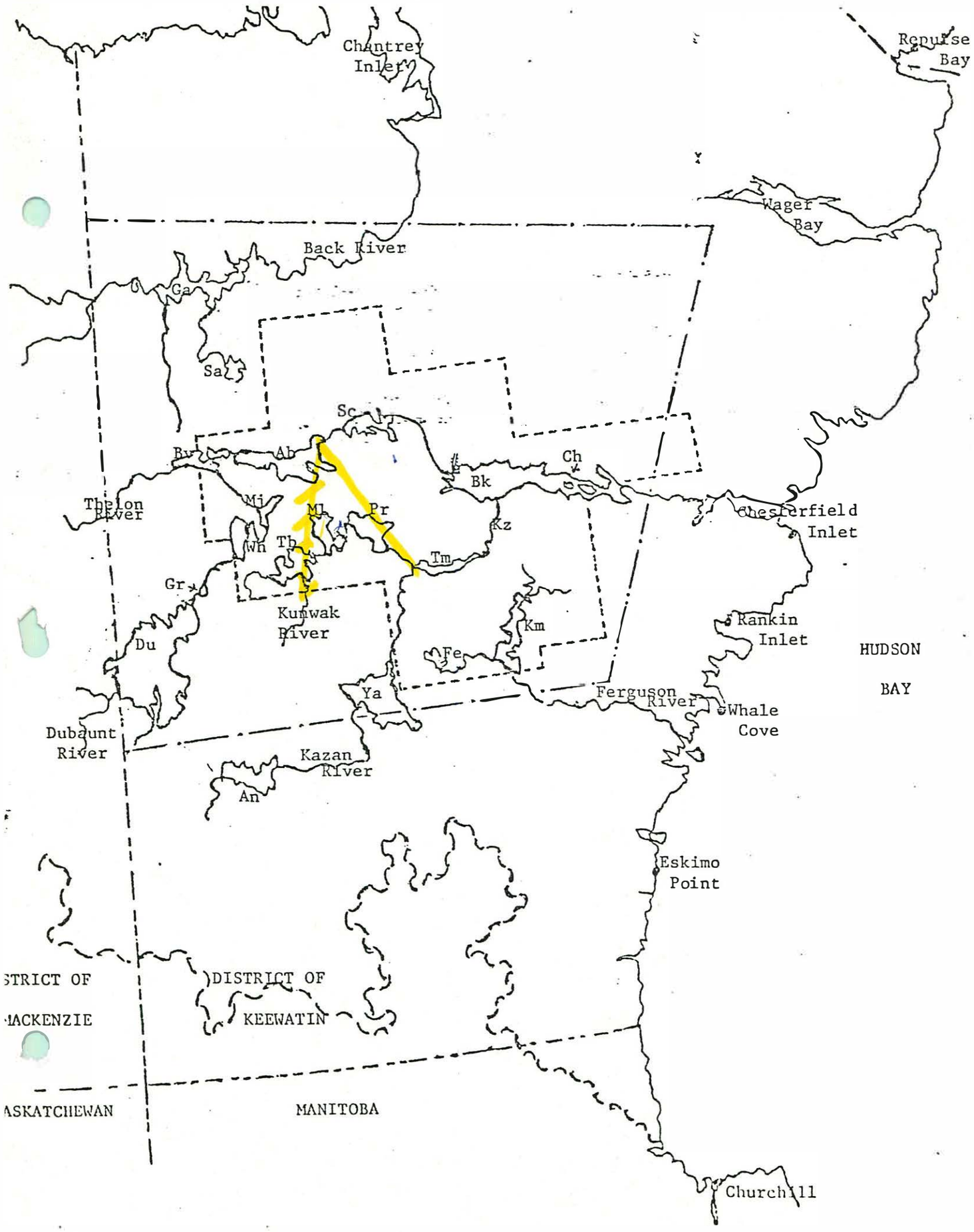
SCHEDULE 'C'

LEGEND

KEEWATIN DISTRICT BOUNDARY — - - — —
BAKER LAKE AREA - - - - - - - - - - - - - -
R.C.M.P. DETACHMENT AREA —·—·—
TREE LINE ~~~~~~~~~~

Aberdeen Lake - Ab	Ferguson Lake - Fe	Sand Lake - Sa
Anjikuni Lake - An	Garry Lake - Ga	Schultz Lake - Sc
Baker Lake - Bk	Grant Lake - Gr	Tebesjuak Lake - Tb
Beverly Lake - Bv	Kaminuriak L. - Km	Thirty Mile L. - Tm
Christopher Island - Ch	Kazan Falls - Kz	Wharton Lake - Wh
Dubaunt Lake - Du	Mallery Lake - Ml	Yathkyed Lake - Ya
	Marjorie Lake - Mj	
	Pr. Mary Lake - Pr	

Hamlet of Baker Lake - #
Other Communities - o



COURT NO. T-1628-76

IN THE FEDERAL COURT OF CANADA

(TRIAL DIVISION)

BETWEEN:

THE HAMLET OF BAKER LAKE, BAKER LAKE HUNTERS AND TRAPPERS ASSOCIATION, INUIT TAPIRISAT OF CANADA, MATTHEW KUNUNGNAT, SIMON TOOKOOME, HAROLD QARLITSAQ, PAUL UTA'NAAQ, ELIZABETH ALOOQ, TITUS ALLUQ, JONAH AMITNAK, FRANCIS KALURAQ, JOHN KILLULARK, MARTHA TICKIE, EDWIN EVE, NORMAN ATTUNGALA, WILLIAM NOAH, MARION PATTUNGUYAQ, SILAS KENALOGAK, GIDEON KUUK, OVID KINNOWATNER, STEVEN NIEGO, MATTHEW INNAKATSIK, ALEX IGLOOKYOUAK, TITUS NIEGO, DEBRA NIEGO, STEPHEN KAKIMAT, THOMAS ANIRNGNIQ, MARGARET AMAROOK, JAMES UKPAQAQ, JIMMY TAIPANAK, MICHAEL AMAROOK, ANGELA KRASHUDLUAQ, MARGARET NARKJANERK, JOHN NARKJANERK, ELIZABETH TUNNUQ, MARJORIE TARRAQ, HANNA KILLULARK, WILLIAM K. SCOTTIE, EDWIN NIEGO, MARTHA TALEROOK, MARY IKSIKTAARYUK, BARNABAS OOSUAQ, NANCY SEVOQA, JANET IKUUTAQ, MARJORIE TUTTANNUAQ, LUKE TUNGNAQ, JAMES KINGAQ, MADGE KINGAQ, LUCY TUNGUAQ, HATTIE AMITNAK, MAGDALENE UKPATIKY, WILLIAM UKPATIKU, PAUL OOKOWT, LOUIS OKLAGA, H. AVATITUUQ, LUK ARNGNA'NAAQ, MARY KAKIMAT, SAMSON ARNAUYOK, EFFIE ARNALUAK, THOMAS KAKIMAT, MATHEW NANAUQ, JOHN NUKIK, BILL MARTEE, MARTHA NUKIK, SILAS PUTURIRAQTUQ, DAVID MANNIK, THOMAS IKSIRAQ, ROBERT INUKPAK, JOEDEE JOEDEE, JOHN AUAALA, HUGH TULURIALIK, THOMAS N. MANNIK, SILAS QIYNK, BARNABUS PERYOUAR, BETTY PERYOUAR, JOAN SCOTTIE, OLIVE INNAKATSIK, SARAH AMITNAK, ALEX AMITNAK, VERA AUAALA, GEORGE TATANIQ, MARY TAGOONA, JAMES TERIQANIAK, JOHN IQSAKITUQ, SILAS KALLUK, HANNAH KUUK, HUGH UNGUNGAI, CELINA UTA'NAAQ, MOSES NAGYUGALIK, MARY IQAAT, LOUIS TAPATAI, HAROLD ETEGOYOK, SALLY IGLOOKYOUAK, MARJORIE AQIGAAQ, MATTHEW AQIGAAQ, MONA QIYUARYUK, WINNIE OWINGAYAK, SAMSON QUINANGNAQ, ELIZABETH QUINANGNAQ, HATTIE ATTUTUVAA, PAUL ATTUTUVAA, MARION ANGUHALLUQ, LUK ANGUHALLUQ, RUTH TULURIALIK, IRENE KALURAQ, CHARLIE TOOLOOKTOOK, THOMAS TAPATAI, ELIZABETH TAPATAI, B. SCOTTIE, MARY KUTTICQ, JACOB MARRIQ, LUCY KOWNAK, A. TAGOONA, CHARLES TARRAQ, VIVIEN JOEDEE

Plaintiffs

- and -

THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, THE ENGINEER DESIGNATED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT PURSUANT TO SECTION 4 OF THE TERRITORIAL LAND USE REGULATIONS, SOR/77-210, AS AMENDED, THE DIRECTOR, NORTHERN NON-RENEWABLE RESOURCES BRANCH OF THE DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, THE MINING RECORDER AND THE DEPUTY MINING RECORDER FOR THE ARCTIC AND HUDSON BAY MINING DISTRICT, AND THE ATTORNEY GENERAL OF CANADA, URANGESELLSCHAFT CANADA LIMITED, NORANDA EXPLORATION COMPANY LIMITED (NO PERSONAL LIABILITY), PAN OCEAN OIL LTD., COMINCO LTD., WESTERN MINES LIMITED, AND ESSEX MINERALS COMPANY LIMITED,

Defendants

MEMORANDUM OF FACT AND LAW SUBMITTED ON BEHALF OF THE DEFENDANTS NORANDA MINES EXPLORATION LIMITED (NO PERSONAL LIABILITY) AND URANGESELLSCHAFT CANADA LIMITED

1. This memorandum addresses itself to the following three issues raised in this action:

(a) USE AND OCCUPANCY

Does the evidence establish that the ancestors of the plaintiffs used and occupied the lands claimed by the plaintiffs since time immemorial? If so, was the character of that use and occupation such as to entitle the plaintiffs to "aboriginal rights"? It is submitted that the answer to these questions is no.

(b) EXTINGUISHMENT

In the alternative, if the evidence establishes the necessary existence and character of use and occupancy of the subject lands by the plaintiffs and their ancestors, such as would otherwise entitle them to "aboriginal rights", has such a right been extinguished? It is submitted that the answer to this question is yes.

(c) REMEDY

In the further alternative, if the plaintiffs hold aboriginal rights in respect of the lands claimed by them, are they entitled to more than declaratory relief in respect thereof, and in particular are they entitled to assert injunctive relief against the Crown or the

other defendants? It is submitted that the answer to this question is no.

USE AND OCCUPANCY

2. It is submitted that, in order for the plaintiffs to establish aboriginal rights to the subject lands, the plaintiffs must prove at least the following elements:

(i) The plaintiffs and their ancestors constitute an organized native community;

(ii) The plaintiffs and their ancestors:

(a) occupied;
(b) to the exclusion of other tribes;
(c) a specific territory;
(d) for a period commencing in the indefinite past prior to the exercise of dominion over that territory by a European power;

(iii) The people living on the subject lands at the time of the exercise of dominion over those lands were the ancestors of the plaintiffs.

Reference: Johnson v. McIntosh (1823) 8 Wheaton 543: 21 U.S. 240.
Worcester v. State of Georgia (1832) 6 Peters 515: 31 U.S. 530.
Milirrpum et al v. Nabalco Pty. Ltd. (1971) 17 F.L.R. 141.
Calder v. Attorney General of British Columbia (1973) 34 D.L.R. (3d) 145 (S.C.C.).

Kruger and Manuel v. The Queen (1977) 75 D.L.R. (3d) 434 at 437.

3. It is submitted that in order for the plaintiffs to establish that they and their ancestors constitute an organized native community, they must demonstrate that they and their ancestors constitute a defined or recognized group, each member bearing some stable relationship to the other members and the members bearing some stable relationship to the land in question.

4. In most cases dealing with claims based upon aboriginal rights, this issue was not a factual problem. Distinctive tribes or groups of Indians such as the Nishgas, Walapais, etc., claim geographical areas used only by that tribe. That the existence of an organized native community is essential to a claim for aboriginal rights is demonstrated, it is submitted, by the following:

(i) The origins of the notion of aboriginal rights are to be found in such cases as Johnson v. McIntosh and Worcester v. The State of Georgia, supra, wherein Indian tribes were viewed as formerly sovereign nations entitled to continued possession of the lands theretofore occupied by them;

(ii) Indian treaties, which are considered to be good evidence of the legality of aboriginal rights, were always made with specific Indian tribes, and not with Indians generally;

(iii) There is an absence of claims by Indians generally, or treaties with Indians

generally, unconnected with specific tribes.

5. In the present case, the 112 individual plaintiffs come from at least 10 different geographical locations and are derived from various dialect groups, as demonstrated by Exhibit P1 and the evidence of the individual plaintiffs who testified, which can be summarized as follows:

(i) About one-third of the residents of Baker Lake come from the Back River area, outside the Baker Lake study area ("the Study Area"), and the ancestors of these people in turn largely appear to have come from the northern coastal area;

(ii) Other plaintiffs come from the Gary Lake area, Chesterfield Inlet area, Cambridge Bay, Repulse Bay, coastal area, the Padlei area and numerous other areas;

(iii) The plaintiffs and their ancestors and the other residents in Baker Lake are derived from various tribal groups identifiable by dialect and clothing, including at least the following:

Ukkasiksalingmiut, Haininaayormiut, Padlermiut, Harvaqtormiut, Illinlingmiut, Qaernermiut, Ahearmiut, Aivilimiut, Hanneqtormiut and Tareumiut.

(iv) Of the plaintiffs who testified only Messrs. Peryouar and Amarook appear to have been born and to have immediate ancestors who were in the Study Area, and in the case of

Mr. Amarook, his grandfather came from Chesterfield Inlet.

6. The only common element among the plaintiffs is that they are of the Inuit or Eskimo cultural or ethnic race. That fact, however, does not constitute the basis for a claim to aboriginal rights to any specific area, such as the Study Area. If it were otherwise, Inuit from Baffin Island, Greenland and the Coppermine would all have an equal claim to the same area. It is submitted, only some group smaller than Eskimos in general can assert a claim to the specific area occupied by that particular group. As above stated, the evidence indicates that Inuit groups are distinguishable by dialect and clothing and formerly lived in certain areas. At least ten such groups have been identified in evidence. No claim has been asserted in this action by or on behalf of such a group and accordingly, this court is not called upon to determine whether any such group would be entitled to assert such a claim.

Rather, the plaintiffs, who come from many Inuit groups and many geographical locations, assert in this action claims to aboriginal rights to the Study Area without regard to any pre-historic or historic relationship between any such particular group to those lands, and the claim, even though brought personally and not in a representative capacity, is purportedly asserted in the prayer for relief on behalf of Inuit generally. It is respectfully submitted that, because such claim is not brought by or on behalf of a particular organized native community, it is a claim unknown to law.

7. The second factual criteria, it is submitted, which the plaintiffs must establish is occupancy by the plaintiffs and their ancestors. The occupancy must be:

(i) For a period commencing in the indefinite past prior to the assertion of dominion over the lands by England;

(ii) To the exclusion of other groups or tribes;

(iii) Of a specific territory.

8. The first of these criteria requires the Court to consider at what point in time occupancy by the plaintiffs' ancestors must be found to have existed. It is respectfully submitted that such point in time is at the point of exercise of legal dominion over the lands by England, not at the point when some European enters the particular area in question, as submitted by the plaintiffs. If the latter was a necessary criteria, then there might well be large areas in Canada where, until relatively recently and even today, Europeans have not been and therefore native groups might commence or have commenced to acquire aboriginal rights.

9. It is submitted that the plaintiffs' claim to aboriginal rights depends for its origin upon the law of England that existed until Rupert's Land became part of Canada. If aboriginal rights did not exist in 1670 at the time of conveyance of Rupert's Land to The Hudsons Bay Company or 1611 when Henry Hudson "discovered" Hudson's Bay, it is submitted that the law of England did not create rights thereafter which could have affected or burdened the title of the Crown and its grantee, The Hudsons Bay Company. Therefore, it is submitted that the relevant time at which to examine the nature of Eskimo occupation of the Study Area, which could give rise to aboriginal rights, is before 1670 or 1611.

10. It is further submitted that, if the Inuit occupation immediately prior to 1670 or 1611 were found to be fleeting or

insubstantial, then such occupation would be insufficient to establish aboriginal rights. The authorities have used such words as "from time immemorial" or "before the memory of man" to describe the longevity of such occupation, all of which, it is submitted, means that aboriginal rights must have existed into the indefinite past prior to the exercise, according to English law, of dominion by England over the subject lands.

Reference: Worcester v. The State of Georgia, supra Calder v. Attorney General of British Columbia, supra.

11. It is submitted that the evidence in this action establishes the following facts with respect to the occupation of the Baker Lake Study Area, which facts these defendants request this Court to find:

(i) From about 7000 B.C. to 1250 B.C. the lands were used by the Northern Plano and Shield Archaic Indian people;

(ii) From about 1200 B.C. to 700 B.C. the lands were used by peoples of the Arctic small tools tradition;

(iii) From about 500 B.C. to 1700 A.D., the lands were used by the Plano-Taltheilei Indian peoples;

(iv) From about 1000 A.D. to 1200 - 1400 A.D., the eastern portion of the lands were used by peoples of the Thule cultural tradition. There is no evidence of use by the Thule people of the western portion of the area;

(v) After the ascendancy of the Thule people, who migrated from Alaska to Greenland and down the western coast of Hudson's Bay, between 1000 - 1200 A.D., those people retreated northward into the high Arctic;

(vi) From about 1200 A.D. to the late 1700's, the southern and western portion of the Study Area was used by peoples of the Taltheilei tradition (historically represented by the Chipewyan Indian) on a seasonal basis;

(vii) By the latter part of the 1700's, the Study Area was used by Eskimo peoples on a year-round basis;

(viii) The use by the Indian peoples and their forebears was for the purpose of hunting caribou;

(ix) Samuel Hearne observed Indians north of Dubawnt Lake during the year 1772 and observed Indians coming from the north;

(x) The Indians sighted by Samuel Hearne and established archaeologically to have been occupying the western and southern portion of the Study Area, used the water crossings on the Thelon River watershed where camp-sites, utilized by one succession of people after another, have been found;

(xi) The strength of the evidence of Indian occupation of the Thelon River base up to

the late 1700's on a seasonal basis is strongest in the western portion, where it is virtually conclusive at Aberdeen Lake, and in the southern portion; evidence of Indian use of river crossings further east into Chesterfield Inlet is inferential from earlier pre-historic use and evidence that they followed the herd and hunted in the same way as the Inuit did at a later time. Conversely, evidence of the earlier Thule occupation is strongest in the eastern portion, principally around Baker Lake, and is absent in the western portion around Aberdeen Lake and the southern portion;

(xii) In Dr. Harp's 1961 paper, The Archaeology of the Lower Thelon, there is no division of occupancy in the late Indian, early Eskimo occupation of these lands. Dr. Harp hypothesised a replacement of one people by the other, not a division of the watershed among peoples;

(xiii) Dr. Wright's view is that there is a possible division of occupancy between Indians and Eskimos in the Thelon River watershed, such division probably occurring about Shultz Lake, with no clear evidence of prehistoric Thule Inuit occupation west of Baker Lake and no clear evidence of Indian occupation east of Aberdeen Lake; Dr. Wright postulated

a buffer zone in the Schultz Lake area;

(xiv) Dr. Irving's findings indicate that, south of the Thelon River and Baker Lake area, including Ennendai Lake and up to 100 miles to the north thereof, the Indians occupied the land on a seasonal basis until historic time, and Inuit occupation of this area commenced in the 1800's;

(xv) During the Indian occupation, it is unlikely that Eskimos would have been in the same vicinity, due to the antipathy between the two races and the fact that both would have been hunting the same herd of caribou;

(xvi) Prior to the historic occupation of these lands by the inland-dwelling Eskimo (sometimes called the Caribou Eskimo), these lands had not been occupied for any lengthy period of time by any tribes or groups; due to the hostility of the environment, death due to starvation and other factors, or a retreat to the more hospitable environment of the coast or treeline, ended such occupation;

(xvii) Archaeological opinion is unanimous that the ancestors of the inland-dwelling Eskimos, who presently reside in the Study Area, did not come from that inland area. There are hypotheses as to the origin of the inland-dwellers. Two current hypotheses are that these people came from either the northern

Arctic coast or the Hudson's Bay coast, between the late 1700's and early 1800's. Linguistic evidence would tend to corroborate the theory that the inland-dwelling Eskimos are descendants of peoples living in the Coppermine area on the northern Arctic coast.

Reference: Evidence of Dr. Elmer Harp, pages 1009 - 1012, 1034, 1049 - 1053, 1073 - 1086, 1077, 1080 & 1083, 1096 - 1097, 1111 - 1114, 1131, 1137 - 1138, 1161 & 1164, 1177, 1195.

Evidence of Dr. James Wright, pages 2471 & 2473, 2482, 2493, 2494 - 2496, 2508, 2511.

Exhibits I - 6
I - 7
I - 8
I - 9
I - 12

12. On the basis of these facts, it is submitted that the following conclusions must be drawn:

(i) So far as the western side of the Baker Lake Study Area, including the migratory area of the Beverley Herd and in particular encompassing an area including Yathkyed, Dubawnt, Aberdeen and perhaps Shultz Lakes, and also the southern portions of the Baker Lake Study Area, there is positive evidence that Eskimos did not

occupy this area up to and including the late 1700's;

(ii) There is no evidence to support Eskimo use of any portion of the Baker Lake Study Area between 1400 A.D. and 1762 A.D.;

(iii) The evidence establishes that year-round use by Eskimos of the Study Area did not commence until late 1700's or early 1800's.

13. On the basis of these conclusions, it is submitted that Inuit aboriginal rights cannot be established in respect of the western or southern regions of the Study Area. So far as the rest of the area, it is submitted that the plaintiffs have failed to prove on the balance of probabilities Eskimo use and occupancy as of 1611 or 1670 sufficient to establish aboriginal rights.

14. It is submitted that there are two further criteria in relation to the nature of Inuit occupancy of the Study Area in order to establish aboriginal rights:

(i) The use and occupancy of the area must be exclusive;

(ii) The area must have definable limits.

Reference: Corpus Juris Secundum, Vol. 42, para. 28, page 688.
U.S. v. Sante Fe Pacific Railroad Company (1941) 341, U.S. 339.
Calder v. The Attorney General of British Columbia, supra.

15. Accordingly, even if there exists an area of over-lapping occupation by the Indians and the Eskimos in the area

between Aberdeen Lake and Baker Lake, it is submitted that such occupation would not be sufficient to create Inuit aboriginal rights.

16. As between Inuit groups themselves, it is submitted that the evidence demonstrates that there were no definable territories occupied by one Inuit group or groups to the exclusion of others. Rather, various groups of Inuit, usually defined by dialect and clothing differences, roamed various areas for relatively short periods of time and then moved on in search of food or furs. No group excluded any other from using any area. No actions, of any description, are found in the evidence which would indicate any sense of dominion or control over the subject lands or any part thereof by any of the plaintiffs. Nor has the required ingredient of possession or occupancy been proven with reference to the plaintiffs' habits or mode of life, and the evidence is quite to the contrary.

Reference: Evidence of Individual Plaintiffs:

Noah - 86 - 88

Avaala - 230

Ungungai - 323

Peryouar - 397

Tookoome - 607

Mitchel v. U.S. (1835) 34 U.S. 711.

17. Finally, the plaintiffs must establish that they are in fact descendants of those persons who occupied the Study Area since time immemorial. In view of the harshness of the environment resulting in death and starvation, the intermittent nature of occupancy of the area by any pre-historic group, the far flung geographic origin of the plaintiffs, the absence of evidence of Inuit occupancy of

the area between 1400 A.D. and the eighteenth century and the acknowledged ocmmencement of year-round occupancy of the Study Area by Eskimos only commencing in the eighteenth or nineteenth century, it is submitted that it is improbable in the extreme that any of the plaintiffs are the direct descendants of the Thule people who located in the Baker Lake area in the period from 1200 to 1400 A.D. Without proof of such direct ancestral linkage, and without the probability of such a link based upon circumstantial evidence, it is submitted that the plaintiffs are not entitled to assert aboriginal rights to the subject lands.

18. In conclusion, it is submitted that as the plaintiffs have failed to establish all of the above-mentioned criteria, their claim to aboriginal rights in respect of the Study Area must fail.

EXTINGUISHMENT

19. If this Court should conclude that at the time of exercise of sovereignty over Rupert's Land and prior to the granting of The Hudsons Bay Company's charter in 1670, the plaintiffs' ancestors occupied the Study Area in a manner which would otherwise entitle the plaintiffs to claim aboriginal rights, it is submitted that; the Crown has extinguished, or failed to create, any such rights by virtue of:

(i) The charter itself and the legislation confirming it;

(ii) or, in the alternative Federal legislation in respect of the Study Area operates as a diminution of those affected rights or a partial extinguishment thereof.

20. The legal authorities relating to aboriginal rights expressly recognize that the Crown can extinguish such rights. Compensation may or may not be payable at the time of extinguishment, but the Crown's ability to extinguish those rights in whole or in part cannot be doubted.

Reference: Johnson v. McIntosh, supra
Worcester v. State of Georgia, supra
U.S. v. Sante Fe Pacific Railroad, supra
R. v. Sikyea (1964) 43 D.L.R. (2d) 150; 50 D.L.R. (2d) 80.
R. v. White and Bob (1964) 50 D.L.R. (2d) 613; 52 D.L.R. (2d) 481.
Sigeareak v. The Queen [1966] S.C.R. 645.
Regina v. George (1966) 55 D.L.R. 386
Calder v. The Attorney General of British Columbia, supra
Regina v. Derrikson (1976) 60 D.L.R. (3d) 140; (1977) 71 D.L.R. (3d) 158.
Kruger and Manuel v. The Queen (1977) 75 D.L.R. (3d) 434.

21. In Calder all of the justices expressly accepted the proposition that the Crown could extinguish Indian title. Mr. Justice Hall stated that Indian title could only be extinguished by "surrender to the Crown or by competent legislative authority and then only by specific legislation", which he held in that case had not occurred; whereas Mr. Justice Judson held that extinguishment had occurred by virtue of the legislative history prior to British Columbia entering Canada.

22. In Sigeareak, Sikyea and George, The Supreme Court again held that aboriginal rights could be abrogated by Federal

legislation whether such rights arose from treaty, the Royal Proclamation of 1763 or from user from time immemorial.

23. It is submitted that The Hudsons Bay Charter (Exhibit D-7) is a clear grant to that company of all lands within Rupert's Land, with no reservation of rights in favour of Indians or Eskimos. It is further submitted that the detailed nature of the grant to The Hudsons Bay Company is inconsistent with the continued entitlement of Indians or Eskimos to use and occupy those lands. Therefore, it is submitted that title vests in The Hudsons Bay Company unencumbered by Indian title which was either not recognized or in the alternative was extinguished.

24. Unlike what occurred with other Crown grants, the charter to The Hudsons Bay Company was specifically confirmed by statute.

Reference: An act for confirming to the Governor and Company trading into Hudsons Bay their Privileges and Trade;
2W. & N., c. 23 (1690)

25. That Indian title did not exist in Rupert's Land is, it is submitted, recognized in the Royal Proclamation of 1763, which is in large measure the source or affirmation of existing Indian rights in Canada. If those Indian rights had been intended to be a burden upon the title held by The Hudsons Bay Company in the same fashion as, and as if it were still, Crown land, there would have been no need to exclude the operation of the Proclamation from the company's lands. Such exclusion is consistent only with aboriginal rights not being a burden upon those lands.

26. Therefore, it is submitted that at the time of the transference of Rupert's Land to Canada, no aboriginal rights

existed in the Study Area, which was part of Rupert's Land, and accordingly no aboriginal rights exist in those lands today.

27. In the alternative, if aboriginal rights in respect of the Study Area existed as of the date that Rupert's Land became part of Canada, then it is submitted that such rights, as is the case with all rights in Canada, are subservient to valid Federal legislation and in this respect, these defendants adopt the arguments of the Attorney General for Canada. That Indian rights arising from any source may be so extinguished has not been in doubt since the Supreme Court of Canada decisions of Sikyea, Sigeareak and George previously referred to.

28. Once a statute is determined to have been validly enacted by Parliament, in accordance with the distribution of powers found in sections 91 and 92 of the B.N.A. Act, that statute cannot thereby become invalid by virtue of the existence of aboriginal rights; if the reverse were true, aboriginal rights could not be extinguished and, as above indicated in paragraph 20, the ability of the Crown to extinguish aboriginal rights has never been questioned. There can be no more valid extinguishment of rights and title, aboriginal or otherwise, than by statute.

29. If the necessary effect of the statute is extinguishment, in whole or in part, of aboriginal rights, then effect will be given to that statute. This is the ratio decidendi of Sigeareak which is binding upon this Court.

30. The exclusive legislative authority over "Indians and lands reserved for Indians" conferred by section 91, subsection 24 of the B.N.A. Act carries with it the necessary implication that Parliament can interfere with aboriginal rights.

Reference: St. Catharines Milling & Lumber Company v. The Queen (1886) 13 S.C.R. 577; (1888) 14 A.C. 46

31. Nothing in section 146 of the B.N.A. Act or the terms and conditions whereby Rupert's Land became part of Canada, can be held to interfere with the paramount jurisdiction of Parliament. Under the B.N.A. Act, Parliament and the provincial legislatures are paramount within their respective legislative jurisdictions.

32. Even in the United States of America, which, like Canada, does have a constitution the effect of which might invalidate statutes passed within the legislative jurisdiction of the federal congress or stage legislatures, it has been held that there is no constitutional limitation upon the authority of Government to extinguish native rights and that the authority to do so is absolute.

Reference: U.S. v. Alcea Band of Tillamooks (1951) 341 U.S. 48
Tee-Hit-Ton Indians v. U.S. (1955) 348 U.S. 272

33. It is submitted that the purpose of the Order in Council made at the time of the admission of Rupert's Land of Canada was to protect The Hudsons Bay Company with respect to outstanding claims, if any, in respect of aboriginal rights. It has been submitted above that no aboriginal rights existed in Rupert's Land, but one can well imagine that The Hudsons Bay Company wished to be protected against any claim which might be asserted against it concerning native rights. There is no evidence that any such claim has ever been asserted against The Hudsons Bay Company.

34. If the afore-mentioned Order in Council has any wider effect, the effect is limited, on its very wording, to a claim for compensation. It does not expressly or impliedly create or preserve aboriginal rights.

35. It is accordingly submitted that whatever aboriginal rights the plaintiffs may have are diminished by the federal legislation affecting those rights. The plaintiffs may or may not have a claim for compensation, which is not asserted in this action and with respect to which these defendants make no submissions, but the validity and effect of the legislation cannot be doubted.

Reference: Calder v. Attorney General of British Columbia, supra
Kruger and Manuel v. The Queen, supra

REMEDY

36. If the plaintiffs are entitled to assert any claim in this action in respect of the Study Area, it is submitted that the extent of such claim is a declaration with respect to their rights, and that they are not entitled, either as against the Crown or the individual defendants to the injunctive relief claimed by them.

37. Injunctive relief cannot be granted against the Crown to restrain the exercise of powers and duties conferred under valid legislation and regulations. If the legislation and regulations entitle the plaintiffs to compensation, that fact cannot render the legislation and regulations nugatory.

This position was expressly recognized in Calder, in which Mr. Justice Hall stated:

> "This is not a claim to title in fee but is in the nature of an equitable title or interest (See Cherokee Nation v. State of

> Georgia (1831), 5 Peters 1, 30 U.S. 1), a usufructuary right and right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams which does not in any way deny the Crown's paramount title as it is recognized by the law of nations. Nor does the Nishga claim challenge the federal Crown's right to extinguish that title. Their position is that they possess a right of occupation against the world except the Crown and that the Crown has not to date lawfully extinguished that right. The essence of the action is that such rights as the Nishgas possessed in 1858 continues to this date. Accordingly, the declaratory judgment asked for implies that the status quo continues and this means that if the right is to be extinguished it must be done by specific legislation in accordance with the law ...
>
> The Nishgas do not claim to be able to sell or alienate their right to possession except to the Crown. They claim the right to remain in possession themselves and to enjoy the fruits of that possession. They do not deny the right of the Crown to dispossess them but say the Crown has not done so. There is no claim for compensation in this action. The action is for a declaration without a claim for consequential relief as contemplated by British Columbia O. 25, r. 5 (M.R. 285) quoted later. However, it must be recognized that if the Nishgas succeed in establishing a right to possession, the question of compensation would remain for future determination as and when proceedings to dispose them should be taken."
>
> Reference: Calder v. The Attorney General, supra, at p. 174.

38. In Calder, the plaintiff Indians did assert that the provincial legislature had no authority to extinguish native title; a provincial statute purporting to effect this result would be invalid because the legislative authority with respect to Indians is vested in the federal Parliament. However, Calder expressly recognized the authority of the federal Crown and the federal Parliament to limit or extinguish native title.

39. If federal legislation has effected a diminution or extinguishment of aboriginal rights, the plaintiffs may be entitled to a declaration to that effect, but they are not, as submitted, entitled to injunctive relief which would interfere with the operation of that legislation.

40. In any event, it is submitted that the plaintiffs are not entitled to injunctive relief against the corporate defendants as this Court has no jurisdiction to grant such relief.

Reference: Quebec North Shore Paper Company and Quebec and Ontario Transportation Company Limited v. Canadian Pacific Limited and Inean Shop Limited, [1977] 2 S.C.R. 1054

McNamara Construction (Western) Limited and Fedelity Insurance Company of Canada v. The Queen, [1977] 2 S.C.R. 654

Dome Petroleum Limited v. Hunt, [1978] 1 F.C. 11 (F.C.T.D.)

Blanchette et al v. Canadian National Railway Company, [1977] 2 F.C. 431

Canadian Pacific Limited v. United Transportation Limited, [1977] 2 F.C. 712

Attridge v. The Queen et al (1978) 86 D.L.R. (3d) 543.

41. These Defendants therefore respectfully submit that this action be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY

T.G. Heintzman

T.G. Heintzman

M.M. Koenigsberg

of Counsel for the Defendants
Noranda Exploration Company Limited
(No Personal Liability) and
Urangesellschaft Canada Limited

AUTHORITIES

1. U.S. v. Alcea Band of Tillamooks (1951) 341 U.S. 48

2. Corpus Juris Secundum Vol. 42, para. 28, 688

3. Milirrpum et. al. v. Nabalco Pty. Ltd. (1971) 17 F.L.R. 141

4. A.G. of Canada v. George (1964), 45 D.L.R. (2d) 709 (Ont. C.A.); affd. [1966] S.C.R. 267

5. Regina v. Derriksan (1975), 60 D.L.R. (3d) 140, (B.C.C.A.); affd. (1976), 71 D.L.R. (3d) 150 (S.C.C.)

6. Regina v. White and Bob (1964), 50 D.L.R. (2d) 613; 52 W.W.R. 193 (B.C.C.A.)

7. St. Catharine's Milling and Lumber Company v. The Queen (1888), 14 App. Cas. 46 (P.C.)

8. The St. Catherines Milling And Lumber Company v. The Queen (1886), 13 S.C.R. 577

9. Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313; 34 D.L.R. (3d) 145; [1973] 4 W.W.R. 1

10. Calder et al. v. Attorney-General of British Columbia (1970), 13 D.L.R. (3d) 64; 74 W.W.R. 481 (B.C.C.A.)

11. Calder et al. v. Attorney-General of British Columbia (1969), 8 D.L.R. (3d) 59; 71 W.W.R. 81 (B.C.S.C.)

12. Mitchel et al. v. United States 34 U.S. (9 Pet. 711) 464 (1835)(U.S.S.C.)

13. Sigeareak E1-53 v. The Queen, [1966] S.C.R. 645; 57 D.L.R. (2d) 536

14. Sikyea v. The Queen, [1964] S.C.R. 642; 50 D.L.R. (2d) 80; 49 W.W.R. 306

15. Regina v. Sikyea (1964), 43 D.L.R. (2d) 150; 46 W.W.R. 65; [1964] 2 C.C.C. 325 (N.W.T.C.A.)

16. Johnson and Graham's Lessee v. McIntosh 21 U.S. (8 Wheat. 543) 240 (1823) (U.S.S.C.)

17. Worcester v. State of Georgia 31 U.S. (6 Pet. 515) 350 (1832) (U.S.S.C.)

18. Tee-Hit-Ton Indians v. The United States (1955),348 U.S. 272 (U.S.S.C.)

19. United States v. Santa Fe Pacific Railroad Company (1941), 314 U.S. 339 (U.S.S.C.)

20. Quebec North Shore Paper Company and Quebec and Ontario Transportation Company Limited v. Canadian Pacific Limited and Inean Shop Limited, [1977] 2 S.C.R. 1054

21. McNamara Construction (Western) Limited and Fedelity Insurance Company of Canada v. The Queen, [1977] 2 S.C.R. 654

22. Dome Petroleum Limited v. Hunt, [1978] 1 F.C. 11 (F.C.T.D.)

23. Blanchette et al v. Canadian National Railway Company, [1977] 2 F.C. 431

24. Canadian Pacific Limited v. United Transportation Limited, [1977] 2. F.C. 712

25. Attridge v. The Queen et al (1978) 86 D.L.R. (3d) 543.

IN THE FEDERAL COURT OF CANADA

(TRIAL DIVISION)

B E T W E E N :

THE HAMLET OF BAKER LAKE, BAKER LAKE HUNTERS AND TRAPPERS ASSOCIATION, et al.

Plaintiffs

- and -

THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, THE ENGINEER DESIGNATED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT PURSUANT TO SECTION 4 OF THE TERRITORIAL LAND USE REGULATIONS, SOR/77-210, AS AMENDED,

Defendants

PLAINTIFFS' MEMORANDUM OF LEGAL ARGUMENT

GOLDEN, LEVINSON,
Suite 1908,
101 Richmond St. W.,
Toronto, Ontario.

- and -

DAVID ESTRIN,
Eden Mills, Ontario.

Solicitors for the Plaintiffs.

T-1628-78

IN THE FEDERAL COURT OF CANADA

(TRIAL DIVISION)

BETWEEN:

THE HAMLET OF BAKER LAKE,
et al

Plaintiffs

- and -

THE MINISTER OF INDIAN
AFFAIRS AND NORTHERN
DEVELOPMENT, et al

Defendants

MEMORANDUM OF ARGUMENT
SUBMITTED ON BEHALF OF THE
DEFENDANTS PAN OCEAN OIL LTD.,
COMINCO LTD., and WESTERN
MINES LIMITED

1. It is respectfully submitted that the pleadings delivered and the evidence at trial disclose the following issues which the Court must determine:

(A) Whether the Plaintiffs have established aboriginal title to lands they claim in the Baker Lake area;

(B) If so, whether such title has been extinguished;

(C) If such title does exist and has not been extinguished, whether there has been any interference by the Defendants with the rights of the Plaintiffs incidental to such title; and

(D) Whether the Plaintiffs are entitled to the relief which they claim.

The facts and law in respect of each of these issues is examined in this memorandum.

(A) ABORIGINAL TITLE

(i) THE LAW

2. The rights of identifiable tribes and clans of native or aboriginal peoples in respect of the lands that they and their ancestors have occupied and used since time immemorial are recognized in law under the rubric of "aboriginal title". The incidents of such title are as follows:

(1) Any right that exists is a personal and usufructuary right, dependent upon the goodwill of the sovereign. The nature of the use to be protected is a question of fact in any given case. Usually it is a right to hunt and fish.

(2) There is vested in the Crown a proprietary estate underlying the aboriginal title, which becomes plenum dominium whenever that title is surrendered or otherwise extinguished.

(3) The right of the Crown to extinguish aboriginal title has never been doubted. Whether it be done by treaty, by sword, by purchase, by an exercise of sovereignty adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the Courts.

St. Catharines Milling and Lumber Company v. The Queen, (1888) 14 A.C. 46 (P.C.) Affirming (1886) 13 S.C.R. 577

U.S. v. Santa Fe Railway Co., (1941) 314 U.S. 339, at 345

Tee-Hit-Ton Indians v. The United States (1954), 348 U.S. 272

Calder et al. v. Attorney-General of British Columbia, (1973) 34 D.L.R. (3d) 145 (S.C.C.)

3. It is a question of fact to be proved on the evidence whether aboriginal title exists in any case where it is claimed.

U.S. v. Santa Fe Railway Co., supra.

Milirrpum v. Nabalco Property Co. Ltd. (1971) 17 F.L.R. 141, at 198 (N.T. Sup. Ct.)

4. To establish aboriginal title to the lands they claim, the Plaintiffs must prove the following essential facts:

(a) That they constitute a clan or tribe of Indians or Eskimos; aboriginal title to lands has never been legally recognized as a general right of native peoples, Indian or Estimo, but rather a right of members of clans or tribes of native peoples having the same links to the same areas of land as their ancestors;

(b) That the lands they claim constitute a specific territory defined and recognized as the territory of that tribe or clan;

(c) That the territory is used and occupied by the Plaintiffs and was used and occupied by their ancestors since "time immemorial", the proof of which must be established at least to the date at which sovereignty was exercised over the territory by England; and

(d) That the said territory is and was occupied exclusively by that tribe or clan as distinguished from being wandered over by many tribes or clans.

Johnson and Graham's Lessee v. McIntosh, (1823) 8 Wheaton 543: 21 U.S. 240

Worcester v. State of Georgia (1832) 6 Peters 515: 31 U.S. 530

U.S. v. Santa Fe Railway Co., supra.

Milirrupum v. Nabalco Property Co. Ltd., supra.

Calder et al. v. Attorney-General of British Columbia, supra.

(ii) THE EVIDENCE

5. If the Plaintiffs fail to prove any one of the essential factual elements forming the basis of aboriginal title, their claim must fail. It is respectfully submitted that the Plaintiffs have failed to prove all of the factual elements essential to their claim.

(a) (i) There is no basis in law for the claim for aboriginal title asserted by the Plaintiffs the Hamlet of Baker Lake, the Baker Lake Hunters and Trappers Association, and the Inuit Tapirisat of Canada. These Plaintiffs are corporate entities which recently came into existence. They neither hunt nor fish nor can they show that they are successors to any persons who have hunted and fished in the area claimed such as to satisfy the requirements for aboriginal title as herein-before set out.

(ii) In respect of the individual Plaintiffs, it is respectfully submitted that the evidence

demonstrates that they do not constitute a clan or other recognized group of Inuit, but rather are tied together by their being members of the same municipal community created in the Baker Lake area in the 1950's by the Federal Government. They are a community of different groups of Inuit whose immediate ancestors in nearly every case came from outside the Baker Lake area.

(b) (i) There is no evidence that the Plaintiffs who testified or their ancestors considered the area claimed to be a territory defined and recognized as their territory. They do not appear to have had a concept of territory and, indeed, there is no evidence that linked the ancestors of these Plaintiffs with the territory they now claim.

(ii) Insofar as the Plaintiffs who did not testify are concerned, there is no way of knowing where their ancestors carried out activities which might give rise to an aboriginal title. Their assertion of aboriginal title has not been established.

(c) There is no archaeological or historical evidence of the presence in the Baker Lake area in 1670 of any group which might be said to be predecessors of the Plaintiffs.

(d) The Plaintiffs failed to establish an exclusive occupation and use of the territory by any Inuit clan or group. The archaeological evidence demonstrates that the Baker Lake area was occupied

and used by other aboriginal peoples known to be hostile to the Inuit.

Evidence of Harp-in-Chief - Vol. XXIX

p. 1024, l. 15 to
p. 1025, l. 23

Cross-Examination, p. 1171, l. 20 to
p. 1172, l. 23

6. The within Defendants adopt and rely upon the submissions as to use and occupancy contained in the Memorandum of Argument filed on behalf of the Defendants Noranda Exploration Company Limited and Urangesellschaft Canada Limited.

(B) EXTINGUISHMENT

7. Any aboriginal title which the Inuit may have had in the area claimed has been extinguished, either

(a) by the Crown by virtue of the Royal Charter granted to the Hudson's Bay Company in 1670, or

(b) by legislation of the Federal Government subsequent to 1870 which legislation is inconsistent with the rights asserted by the Plaintiffs and constitutes a clear and plain indication of the government's intention to extinguish such title.

(a) The Hudson's Bay Grant of 1670

8. It is common to all parties that the area claimed by the Plaintiffs is included within lands granted to the Hudson's Bay Company by the Royal Charter of 1670.

That Charter provided, inter alia, as follows:

> "And by these presentes for us our heires and successors DOE give grant and confirme unto the said Governor and Company and theire successors the sole Trade and Commerce of all those Seas Streightes Bayes Rivers Lakes Creekes and Soundes in whatsoever Latitude they shall bee that lie within the entrance of the Streightes commonly called Hudsons Streightes together with all the Landes and Territoryes upon the Countryes Coastes and contynes of the Seas Bayes Lakes Rivers Creeks and Soundes aforesaid that are not already actually possessed by or granted to any of our Subjectes or possessed by the Subjectes of any other Christian Prince or State with the Fishing of all Sortes of Fish Whales Sturgions and all other Royall Fishes in the Seas Bayes Isletes and Rivers within the premisses and the Fish therein taken together with the Royalty of the Sea upon the Coastes within the Lymittes aforesaid and all Mynes Royall aswell discovered as not discovered of Gold Silver Gemms and pretious Stones to bee found or discovered within the Territoryes Lymittes and Places aforesaid And that the said Land bee from henceforth reckoned and reputed as one of our Plantacions or Colonyes in America called Ruperts Land AND further WEE DOE by these presents for us our heires and successors make create and constitute the said Governor and Company for the tyme being and theire successors the true and absolute Lordes and Proprietors of the same Territory Lymittes and places aforesaid And of all other the premisses. . ."

Exhibit D-7, pp. 11 - 12

9. The terms of the grant are worthy of some comment. Firstly, there is the grant to the Hudson's Bay Company of all fish contained within the area of the grant, including "Royall Fishes" which traditionally were reserved to the Crown. Secondly, the grant specifically gives, grants and confirms unto the Company "all the Landes and Territoryes upon the Countryes Coastes and contynes of the Seas Bayes Lakes Rivers Creekes and Soundes aforesaid that are not already actually possessed by or granted to any of our Subjectes or possessed by the Subjectes of any other Christian Prince or State. . ." together with ". . .all Mynes Royall aswell discovered as not discovered of Gold Silver Gemms and pretious Stones to bee found or discovered within the Territoryes Lymittes and Places

aforesaid. . ." and constitutes the Company as ". . .the true and absolute Lordes and Proprietors of the same Territory Lymittes and places aforesaid And of all other the premisses . . .".

10. The terms of the grant were thus a grant in fee simple to all the lands comprised in Ruperts Land. Such a grant in 1670 normally included a grant of all minerals contained within the land, except the minerals royal which by common law were reserved to the Crown unless expressly granted. This is the reason for the specific reference to those minerals contained in the terms of the Charter.

Halsbury's Laws of England, 3d Ed., Vol. 26, p. 325

Case of Mines (1567), 1 Plowd 310, at 336

Cheshire, Modern Law of Real Property, 12th Ed. at 153

11. The question as to whether the Plaintiffs have had continuously since time immemorial a right to hunt and fish unobstructed within the said lands then may be illustrated by asking the following question: If the Hudson's Bay Company during the period from 1670 to 1870 had conducted mining activities in lands over which the Plaintiffs purport that their predecessors hunted, would an English Court have granted an injunction to restrain such activities? If not, it cannot be said that the Plaintiffs or their predecessors have had a continuous claim for aboriginal title to the subject lands.

12. It is respectfully submitted that the answer to any such request would have been that the Hudson's Bay Company's grant in fee simple to the lands, together with its absolute

right and sovereignty over the lands with power to legislate in respect thereof and grant justice therein, enabled them to deal with these lands without the fetters of any legal restrictions which would arise by virtue of "an aboriginal claim".

13. It is respectfully submitted that this grant to the Hudson's Bay Company of the lands in fee simple, together with the right to administer such lands, was thus the first act of the sovereign in extinguishing any prior existing aboriginal title, if any had existed, in that such title would clearly be inconsistent with this grant.

14. As stated by the Plaintiffs in their Memorandum (p. 55), "extinguishment can take several forms; it can be affected by treaty, by sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise. . .", citing Davis, J. in Lipan Apache Tribe v. The United States (1967), 180 Ct. Cl. 487, at 492, relying on the authority of The United States v. Santa Fe Railway Co., supra. at 347.

15. Even if one accepts the notion of "plain and clear" extinguishment as set out in the passage of Corpus Juris Secundum cited by the Plaintiffs in their Memorandum, paragraph 7, page 55, nothing could be more plain and unambiguous than the extinguishment by the sovereign of all competing claims to the absolute title granted to the Hudson's Bay Company by virtue of its Charter.

16. It is for this reason that the Royal Proclamation of 1763 (the terms of which are found in tab 14 in the Legislative Brief filed by the Plaintiffs) does not and never did apply to the area granted to the Hudson's Bay Company by the 1670 Charter.

Per Hall, J., Sigeareak v. The Queen,
[1966] S.C.R. 645, at 650

17. It is clear from a reading of the Royal Proclamation that the purpose of that Proclamation was to set up the four governments therein referred to and to give instructions to three of those governments, inter alia, as to the way in which they should carry out their dealings with the Indians within those areas of the new governments which had recently been set up.

18. In addition, the Proclamation deals with those lands which lie outside of the areas of the four new governments created and in respect of those lands, persons are restricted from making any purchases or settlements whatever or taking possession of any of the lands above reserved "without our special leave and license for that purpose first obtained".

19. This prohibition does not extend to the three new governments created (reference to Grenada excepted for obvious reasons) nor "within the limits of the territory granted to the Hudson's Bay Company". It is submitted that the clear reason for this exception is found in the Charter granted to the Hudson's Bay Company: it had been granted the fee simple as well as the right to govern such territories. The concern for "great frauds and abuses in respect of the purchase of the lands of the Indians to the great prejudice of the King's interest and the great dissatisfaction of the said Indians" as referred to in the Proclamation could not apply to these lands as they had more than one hundred years earlier been granted directly to the Hudson's Bay Company. For this reason, the provisions of the Royal Proclamation could not and were not made applicable to that territory as the drafters thereof were aware that any rights of native peoples in that territory had already been extinguished by the grant to the Hudson's Bay Company. The Proclamation is thus a clear recognition of that earlier extinguishment.

20. For the above reason, the Sovereign did not reserve "under our sovereignty, protection and dominion for the use of the said Indians" the lands comprised in the Hudson's Bay grant. The distinction made between the recognition of aboriginal title as existing in those areas which by the terms of the Proclamation were reserved for the use of the Indians by the Crown and the express reservation therefrom of Ruperts Land was a direct recognition that such aboriginal title did not exist and could not exist in those lands previously granted to the Hudson's Bay Company.

21. It is submitted that the reading of the Proclamation of 1763, together with the terms of the Hudson's Bay grant of 1670, make it clear that there had been a plain and unambiguous extinguishment of such aboriginal title as might exist to the lands granted to the Hudson's Bay Company by virtue of its Charter of 1670. Even the highest test of extinguishment of "clear intention" set out in the Plaintiffs' Memorandum at pages 54 and 55 has been satisfied.

(b) Federal Legislation Subsequent to 1870

22. In the event the Court is of the view that the Hudson's Bay Charter did not extinguish any aboriginal title that the Plaintiffs might have had, then it is respectfully submitted that legislative acts by the Parliament of Canada and the exercise of delegated legislative powers subsequent to the admission of Ruperts Land into Confederation in 1870 did extinguish completely any aboriginal rights inconsistent with such legislation.

23. Such legislative extinguishment has taken the form

either of Acts of Parliament directed towards the granting of property rights inconsistent with the rights claimed by the Plaintiffs or in the nature of game regulations and other laws of general application which directly restrict such rights. This part of the memorandum addresses itself to:

(i) such laws generally;

(ii) game laws in particular.

(i) General Legislation

24. Acts of Parliament or acts of government enacted under authority delegated by Parliament and which "reveal a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands. . ., a sovereignty inconsistent with any conflicting interest, including one to aboriginal title" (per Judson, J., Calder at page 82) include, inter alia (the list is illustrative, not exhaustive):

(a) The Territorial Lands Act, R.S.C. 1970, c. 263, which contains, inter alia, the following provisions inconsistent with such a title:

(i) The Governor in Council may set apart and appropriate any territorial lands as land management zones and may make regulations for the issuance of permits for the use of the surface of land in such zones and for the terms and conditions of such permits (ss. 3.1, 3.2);

(ii) The Governor in Council may authorize the sale, lease or other disposition of territorial lands and may make regulations authorizing the Minister of Indian Affairs and Northern

Development to sell, lease or otherwise dispose of territorial lands (s. 4);

(iii) The Governor in Council may make regulations for the leasing of mining rights in, under or upon territorial lands (s. 8);

(iv) The Governor in Council may make regulations respecting the issue of permits to cut timber (s. 14(a)); and

(v) The Governor in Council may also set apart and appropriate territorial lands for the sites of places of public ownership and public uses such as schools, market places, public parks, hospitals, airports, etc. (s. 19(b)), set apart and appropriate territorial lands for game preserves, game sanctuaries, bird sanctuaries, or other similar public purposes (s. 19(e)), authorize the acquisition by any railway, power company or pipe line company of a right of way for a road bed, transmission lines or pipe lines through territorial lands (s. 19(f)).

(b) The Public Lands Grants Act, R.S.C. 1970, c. 224, by virtue of which the Governor in Council may, inter alia, authorize the sale, lease or other disposition of any public lands that are not required for public purposes. . .(s. 4(1)(a)).

(c) The Northwest Territories Act, R.S.C. 1970, c. 331, by virtue of which the Commissioner in Council is empowered to make ordinances in relation to inter alia:

(i) property and civil rights in the territories (s. 13(h));

(ii) the preservation of game in the territories (s. 13(g)); and

(iii) the closing up, varying, opening, establishing, building, management or control of any roads, streets, lanes or trails on public lands (s. 13(s)).

(d) The Territorial Land Use Regulations, SOR/77-210 provide for the regulation of certain activities requiring a permit.

(e) The Canada Mining Regulations, SOR/77 - 900 provide:

(i) for the granting of prospecting licences to any individual who is 18 years of age or older and any corporation that is registered with the Registrar of Companies which entitles the licensee to enter, prospect for minerals and locate claims on any lands, other than certain specified lands (s. 11(1));

(ii) for the location of claims (s. 12);

(iii) for the recording of claims (s. 24(1)(3)); and

(iv) that the holder of a recorded claim may apply for a lease of the claim, and subject to certain conditions, he shall be granted a lease of that claim by the Minister for 21 years (s. 58(1), (2), (10) and 59(1)).

25. The exercise of the powers granted to the Governor in Council or the Commissioner in Council under the aforementioned Acts would have the effect of interfering with

purported aboriginal rights in the greater part of the Northwest Territories.

26. It is respectfully submitted that Parliament could not have had the intention that such Statutes be restricted in their scope and application to only those geographic areas where there was no claim to a prior existing aboriginal title.

27. In addition to the Statutes and delegated legislation above referred to, acts have been done by servants of the Crown under the authority of such Statutes which indicate a clear intention that they are not subject to any such usufructuary right, including,

(a) the issuance of prospecting permits, licences and mining leases generally throughout the Northwest Territories and specifically to the mining company Defendants in this action in the Baker Lake area, which licences are validly issued under the terms of The Canada Mining Regulations;

Exhibit D-4

(b) the issuance of Land Use Permits under the authority of The Territorial Lands Act generally throughout the Northwest Territories and specifically to the mining company Defendants herein authorizing the carrying on of their activities in the Baker Lake area;

Exhibits D-2 and D-3

(c) the grant of lands in fee simple and by lease, in particular in the Baker Lake area.

Exhibit D-5

28. A review of the history of legislation leading up to

The Territorial Lands Act illustrates that Parliament made no recognition of an "Indian Title" to lands located in the Northwest Territories. The Dominion Lands Act, 1872, and its successor statute of 1883, which by virtue of s. 42 and s. 3, respectively, did not extend their operation to "territory the Indian Title to which shall not at the time have been extinguished". However, when The Dominion Lands Act was amended in 1908 to include the Northwest Territories, the only references to Indian lands were contained in that section (s. 76) giving the Governor in Council the power to withdraw certain lands as may have been reserved for Indians and to grant lands in satisfaction of claims of half-breeds arising out of the extinguishment of the Indian Title, and to grant lands upon the extinguishment of Indian Title in any territory or tract of land.

The Dominion Lands Act, S.C. 1872, c. 23, s. 42

The Dominion Lands Act, S.C. 1883, c. 17, s. 3

The Dominion Lands Act, S.C. 1908, c. 20, s. 76

29. The Dominion Lands Act, 1908, was repealed and replaced by The Territorial Lands Act, S.C. 1950, c. 22 (now R.S.C. 1970, c. 263) in which the only reference to Indian Lands or Indian Title may be found in s. 19:

> "19. The Governor in Council may:
>
> (d) set apart and appropriate such areas or lands as may be necessary to enable the Government of Canada to fulfil its obligations under treaties with the Indians and to make free grants or leases for such purposes, and for any other purpose that he may consider to be conductive to the welfare of the Indians."

The Territorial Lands Act, R.S.C. 1970, c. 263, s. 19(d)

30. The removal by Parliament of the earlier expressed limitation on the operation of the Act in respect of territories subject to unextinguished "Indian Title" must be seen as an indication that Parliament intended the provisions of its latest enactment to prevail in all of the area subject thereto and that rights obtained thereunder, including rights derived under The Canada Mining Regulations enacted pursuant thereto, should prevail regardless of any claim to "Indian Title". To interpret The Territorial Lands Act as argued by the Plaintiffs would be equivalent to retaining the original proviso contained in The Dominion Lands Act of 1872, contrary to the expressed will of Parliament and contrary to the accepted cannon of construction that an express change in language in an enactment must have been done with some intention by Parliament.

> Craies on Statute Law, 7th Ed. 142, at 143
>
> R. v. Price, (1871), L.R. 6 Q.B., 411, at 416

31. Comparison may be made with the provisions of the agreements with the provinces annexed to The British North America Act, 1930, whereby the ownership of natural resources was transferred to certain provinces and by the terms of which the Indians continue to have,

> "the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."
>
> R.S.C. 1970, Appendices at pp. 371, 380, 381, 388 and 389

32. Such right was restricted by the terms of these agreements to "unoccupied Crown Lands". It is respectfully submitted that if it is found that an aboriginal title exists

in respect of the land claimed in the Northwest Territories, then it too would be in respect only of unoccupied Crown lands, leaving aside such lands as have been occupied by others by rights granted under valid federal legislation.

R.S.C. 1970, Appendices at pp. 370 (Schedule 1(11)), 380 (Schedule 2(10)), 388 (Schedule 3(10))

(ii) Game Legislation

33. Any usufructuary right to hunt and fish freely by the Plaintiffs has been virtually eliminated by various laws enacted for the preservation and protection of game, which have had the effect of:

(a) requiring the Inuit to obtain a licence to hunt and report numbers of caribou killed;

(b) prohibiting hunting entirely in certain areas such as the Thelon Game Reserve or other areas designated under the Wildlife Ordinance;

(c) restricting fishing rights;

(d) prohibiting or restricting the hunting of certain species declared endangered species (musk oxen, polar bears);

(e) prohibiting the hunting of certain birds;

(f) regulating the type of firearms or fishing equipment which may be used in the pursuit of game or fish;

(g) regulating the use to which animals hunted by the Plaintiffs may be put.

Migratory Birds Convention Act, R.S.C. 1970, c. 179

Wildlife Ordinance, assented to October 27, 1978 and predecessor statutes

The Game Ordinance NWT 1960 (second sess.) c. 2

The Fisheries Act, R.S.C. 1970, c. 119 and regulations thereunder

34. Such laws and regulations enacted thereunder have been held to be valid prevailing legislation in cases in which it was sought to advance a prior existing native right to hunt and fish which would render them inapplicable to either Inuit or Indians. The legislation in question (federal) has been held to prevail even where the right alleged is to be found in the express terms of a treaty and the statute in question is a breach of the promise contained in such "treaty".

Sigeareak v. The Queen, [1966] S.C.R., 645

Sikyea v. The Queen, [1964], S.C.R., 642, affirming 43 D.L.R. (2d) 150 (N.W.T.C.A.)

R. v. Derrikson, (1977) 71 D.L.R. (3d) 159 (S.C.C.)

The Queen v. George, [1966] S.C.R. 267

35. It is respectfully submitted that the case of Prince v. The Queen, [1964], S.C.R. 81 (Plaintiffs' Memorandum, pp. 63 - 64) turned on the interpretation of two Manitoba statutes and is restricted to a determination of the meaning of the term "hunt" contained in s. 72(1) of The Game and Fisheries Act, R.S.M. 1954, c. 94, and The Manitoba Natural Resources Act, R.S.M. 1954, c. 180. The Court was of the view that the combined effect of these Acts enabled the Indians in question to hunt with lights for their own personal use in spite of other

provisions to the contrary contained in the former Act. As such, it is only authority for the interpretation of those Manitoba statutes and cannot be said to be authority for a proposition that general hunting and fishing rights of natives are superior to federal legislative enactments. That case merely resolved an ambiguity in a provincial statute in favour of the accused.

Prince v. The Queen, [1964] S.C.R. 81

R. v. Wesley, (1932), 58 C.C.C. 269

36. The evidence in this case demonstrates that the Plaintiffs who gave evidence herein were aware of the existence of these regulations and accepted their restrictions on the manner of their hunting and fishing as well as the species and geographical areas within which they were entitled to carry on such hunting and fishing.

Evidence, William Noah
Vol. II, p. 145, l. 4 to
p. 146, l. 27

p. 73, ll. 12 - 30

Evidence, Simon Tookoome
Vol. VI, p. 594, ll. 6 - 18

Evidence, Avaala
Vol. III, p.210, l. 21 to
p.211, l. 22

37. None of the "game laws" above referred to contained any express provision that they were to prevail over and extinguish any aboriginal right to hunt and fish. It is respectfully submitted that there is no difference in principle between restrictions on hunting and fishing rights arising as a result of game regulations and restrictions which might arise as a result of other legislative provisions, such as The Canada

Mining Regulations. If the Court is of the view that there exist usufructuary rights in the Plaintiffs in this case, then such rights must be restricted when in conflict with express statutory provisions, as was found in the cases above referred to.

38. In conclusion, it is respectfully submitted that the terms of the Royal Charter of 1670, or alternatively, the legislation of the Federal Government since 1870, satisfy the tests of extinguishment of aboriginal title. They demonstrate a clear and unambiguous intention to exercise a sovereignty inconsistent with a claim of aboriginal title. On the other test of extinguishment, any aboriginal title which might exist is extinguished by necessary implication insofar as it is inconsistent with the above-mentioned statutes.

> Calder et al. v. Attorney-General of British Columbia, supra., per Judson, J. at 344
>
> Milirrpum v. Australia, (1970), 17 F.L.R. 141, at 291 - 292

(c) Extinguishment and the Constitution

39. The Plaintiffs argue that the Imperial Order-in-Council of the 23rd of June, 1870, constitutes a constitutional restriction on the Federal Government's power to extinguish aboriginal title by appropriate legislation. That Order-in-Council provides:

> "It is hereby ordered and declared. . . [that] Ruperts Land shall from and after the [15th of July] be admitted into. . . the Dominion of Canada upon the following terms and conditions, being the terms and conditions still remaining to be performed . . .
>
> "14. Any claims of Indians to compensation

> "for lands required for purposes of settlement shall be disposed of by the Canadian Government. . .and the Company shall be relieved of all responsibility in respect of them."

40. The wording of this paragraph in the Order-in-Council is identical to that contained in the Deed of Surrender, Schedule C thereto, and is similar to the terms of the Memorandum of Understanding between the Company and the Government (attached to the 5th Resolution). It is submitted that the Order-in-Council was designed to give legislative force to that undertaking, just as other undertakings in the said Deed were provided for elsewhere in the Order-in-Council.

R.S.C. 1970, Appendices 257 - 277

41. It is respectfully submitted that the purpose of this section was directed towards relieving the Hudson's Bay Company of the liability for claims for compensation outstanding as of the date of transfer and did not contemplate such claims as might arise some 100 years thereafter. Furthermore, the claims to compensation referred to were those for "lands required for purposes of settlement". In the scheme of the Order-in-Council and the joint addresses, such lands were clearly of the types referred to. The Order-in-Council is directed towards the carving out of settlements, such as those that had already been established in the Red River Colony, or other settlements of an agricultural or urban nature and settlements contemplated by the schedule to the Deed of Surrender.

R.S.C. 1970, Appendices 274 - 277

42. Such settlements, it is submitted, would involve the transfer of real property rights to persons taking up living on the land for agricultural or other purposes in accordance with the scheme as set out in the Order-in-Council and the Deed of Surrender.

43. It is in this sense that the term "settlement" is also used in the Royal Proclamation of 1763, and is in conformity with its dictionary definition:

> "IV. An assemblage of persons settled in a locality. 1. A community of the subjects of a state settled in a new country; a tract of country so settled, a colony, esp. one in its earlier stages 1697. 2. In the outlying districts of America and the Colonies: A small village or collection of houses. Also, the huts forming the living quarters of the slaves on a plantation. 1827."
>
> The Shorter Oxford English Dictionary, Third Edition, (1944) Vol. II

44. To interpret, as do the Plaintiffs, the purpose of this paragraph in the Order-in-Council as being directed towards mining exploration activities of the type presently carried on by the mining company Defendants would be to clearly distort any notion of a settlement as referred to both in the Order-in-Council and the Deed of Surrender. Mining activities of the type carried on by the Defendants do not, it is submitted, constitute a "settlement".

45. Furthermore, if the Plaintiffs' position is to be accepted that aboriginal title cannot be extinguished or abrogated by Parliament, except in full compliance with the terms and conditions of the Order-in-Council passed pursuant to Section 146 (p. 63 of Plaintiffs' Memorandum), then all treaties with Indians subsequent to the 1870 Order-in-Council would have had to have been arranged "in communication with the Imperial Government" in order to be in conformity with the provisions of the paragraph and thus have constitutional validity. It is respectfully submitted that it has not been the practice of Canada in treaties entered into with Indians within the territory of Ruperts Land, subsequent to 1870, to submit such treaties for approval by the Imperial Government

or to discuss same with the Imperial Government as such would be clearly contrary to the notion of Canadian sovereignty over such lands.

46. It is respectfully submitted that if the Plaintiffs are correct that Section 14 of the Order-in-Council imposes on the government the obligation to compensate for lands presently subject to the Defendant mining companies' exploration activities, then such an obligation is one which can only give rise to a right of action by the Plaintiffs against the Federal Crown for damages. It cannot be interpreted as a condition precedent to the validity of legislation which otherwise properly falls within the legislative competence of Parliament.

47. It is submitted that the Court, in interpreting the Order-in-Council should do so, "in the light of the reasonableness of the consequences which follow from giving it a particular construction" and the grave consequences which would result from the interpretation urged by the Plaintiffs must be considered in arriving at that interpretation.

Per Ld. Reid in Gartside v. I.R.C., [1968] A.C. 533, at 612

Craies on Statute Law, supra., at 97

48. In view of the fact that those areas in which aboriginal rights may be asserted in the Northwest Territories are undefined and potentially vast, such grave consequences as might reasonably be expected to result are:

(a) the invalidity of previously existing legislation creating works of a public nature such as parks (Thelon Game Sanctuary), roads, railroads, harbour installations, the Dew Line, etc.;

(b) the invalidity of titles to land previously granted in the Territories; and

(c) The piecemeal application of laws otherwise of general application to only those areas which may be shown to be free of aboriginal title.

49. It is respectfully submitted that the interpretation that we suggest is in conformity with the nature of an aboriginal title, which has never been held by a Court to prevent settlement or invalidate otherwise valid legislation. It conforms with the interpretation given in R. v. Sikyea, supra., where Johnson, J.A., (whose reasons were approved by the S.C.C. on appeal) stated:

> "It is, I think, clear that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act and its Regulations."
>
> Regina v. Sikyea, [1964], 43 D.L.R. (2d) 150, at 158
>
> Sikyea v. The Queen, [1964], S.C.R. 642

50. If Parliament may by statute breach a treaty to the Indians, an obligation having some analogy to international law, may it not similarly abrogate common law rights, as it was so held in Sigeareak?

> Sigeareak v. The Queen, supra., at 650

51. Such an interpretation is in conformity with the United States cases and principles of American law cited by the Plaintiffs in their Memorandum. There has been no American case holding that legislation which would otherwise be validly enacted or rights acquired thereunder are not of full force and

effect because of the existence of such a title. Rather, the highest American cases relied on by the Plaintiffs may be said to hold that natives' right to compensation or to occupancy may not be extinguished without clear and unequivocal language to that effect, such right to compensation being specifically provided for by United States Statutes.

U.S. v. Santa Fe Railway Co., supra., at 539

Tee-Hit-Ton Indians v. The United States, (1955), 348 U.S., 272

Lipon Apache Tribe, (1967), 180 Ct. Cl. 487, 42 C.J.S. s. 28, pp. 688 - 690

52. In this case, if a claim for compensation exists, the Plaintiffs may pursue same against the Federal Crown; but there is no evidence that the Crown Defendants or the mining company Defendants have ever denied any right of access to or occupancy of Crown lands under prospecting permit or lease for the purposes of hunting or fishing by the Plaintiffs.

53. Mr. Justice Hall in his minority decision in the Calder case was dealing with the question of the right of the Plaintiffs therein to a declaration as to the continued existence of an aboriginal right. He did not deal with the question of compensation or the right of holders of fees, mineral and mining rights deriving their title from valid legislation to be present on such lands.

54. Parliament has legislative authority over Indians in addition to the other matters referred to in the previous section dealing with legislative extinguishment. A finding to the effect that, by virtue of Section 14 of the 1870 Order-in-Council, Parliament lacks the power to legislate in respect

of lands obtained from the Hudson's Bay Company unless the conditions of prior compensation and consultation with the Imperial Government have been adhered to would violate the established constitutional concept of the exhaustion of powers and the supremacy of Parliament and impose a hitherto unrecognized limitation on legislative power.

The B.N.A. Act, S. 91 (24)

Laskin, Canadian Constitutional Law, 4th Ed., 92 - 97

(C) THE DEFENDANT MINING COMPANIES' ACTIVITIES DO NOT CONSTITUTE AN INTERFERENCE WITH ANY ABORIGINAL RIGHT OF THE PLAINTIFFS

55. The right of the Plaintiffs in its highest form is a usufructuary right to hunt and fish. It is respectfully submitted that the Plaintiffs can have no complaint concerning the Defendant mining companies exercising the rights granted to them under valid legislation. Moreover, the Plaintiffs certainly have no complaint unless they can demonstrate that the activities of the Defendant mining companies are incompatible with the rights of the Plaintiffs.

56. The Defendant mining companies have never prevented the Plaintiffs or any of them from access to any Crown lands for the purposes of hunting or fishing.

57. There is no evidence in respect of any interference by the mining companies with fishing by the Plaintiffs in the Baker Lake area.

58. The majority of evidence called by the Plaintiffs was directed towards the absence of caribou from areas where

the Plaintiffs had, in previous years, carried out their hunting activities. In addition, a certain number of isolated incidents were alleged where on occasion it was stated by the Plaintiffs giving evidence that a helicopter scared away game which they were in the act of hunting. It is submitted that this does not constitute an interference with an aboriginal right to hunt in a given area, although it might consist of some inconvenience at that time.

Evidence, Quarliksau
Vol. V, p. 555, l. 5 to
p. 558, l. 10

59. The most serious allegation is that the activities of the mining company Defendants in this area, together with other activities unrelated to the mining company Defendants, are "harmful to wildlife", and in particular, caribou.

Statement of Claim, paras. 20, 23 and 25

60. The Mayor of Baker Lake testified that the problem is not that there are not enough caribou, but rather that caribou have not in recent years been found to be within easy reach of the community of Baker Lake where they had on occasion been found in the past. The reason for this complaint is in part because the Plaintiffs no longer live their traditional way of life on the land, moving their camps to hunt caribou, but rather work in Baker Lake during the week and therefore no longer have the time to hunt which they previously did.

Evidence, William Noah
Vol. I, p. 26, ll. 10 - 18
p. 30, ll. 1 - 8

Vol. II, p. 43, l. 1 to
p. 44, l. 19

Evidence, B. Peyrouar
Vol. IV, p. 414, l. 30 to
p. 415, l. 5

61. The evidence of several of the Plaintiffs was that caribou are extremely sensitive to noise and human activity, particularly at water crossings. This would vary at certain times of the year.

Evidence, B. Peyrouar
Vol. V, p. 424, ll. 6 - 21
p. 372, ll. 17 - 28

Evidence, Amarook
Vol. V, p. 501, ll. 25 - 30

62. If the Plaintiffs' evidence is to be accepted that noise of aircraft and other noise resulting from human activity would have the effect of driving caribou out of large areas, then it is hardly to be wondered, in view of the activities which take place in and around Baker Lake itself and which include the use of hundreds of skidoos, motorized vehicles of all kinds, sirens, etc., that the caribou do not frequent or come near the Baker Lake community as they may have done in the past.

Evidence, William Noah
Vol. I, p. 26, ll. 10 - 18

Evidence, B. Peyrouar
Vol. IV, p. 414, l. 19 to
p. 419, l. 9

Evidence, Simailak
Vol. VIII, p. 905, l. 11 to
p. 912, l. 3

63. Furthermore, if the evidence of the Plaintiffs concerning the sensitivity of caribou to noise and human activities is to be accepted, then it must also be accepted that their own activities in and around water crossings, particularly in the Kazan River area, consisting among other things of establishing camps, hunting and fishing with motor boats, are also responsible for the failure of caribou to use

those water crossings.

Evidence, Amarook
Vol. V, p. 508, l. 1 to
p. 509, l. 25

Evidence, Peyrouar
Vol. V, p. 425, ll. 5 - 22

64. However, it is submitted that the evidence demonstrates that caribou are not particularly bothered by noise or human activities and are not necessarily bothered by aircraft unless persistently harassed at low level altitudes during sensitive seasons of the year (calving or migration). Generally, they are curious and gregarious beasts. They have been seen in and close to mining camps while the normal aircraft and other activities associated with exploration activities are going on, pass undisturbed close to drilling operations, have come up close to aircraft to examine same shortly after landing, and are not necessarily unduly affected by noise or by the presence of humans. Indeed, in spite of the activity in the Baker Lake area above referred to, they have been hunted in large numbers in and around the community as recently as 1967 and 1968 when herds wintered in close proximity to the community.

Evidence, Peyrouar
Vol. V, p. 442, l. 18 to
p. 443, l. 16

Evidence, Scottie
Vol. V, p. 359, l. 3 to
p. 360, l. 1

Evidence, Miller

Evidence, Geist
Vol. X, p. 1307, ll. 19 - 30
p. 1365, l. 10 to
p. 1370, l. 29

Evidence, Calef
Vol. XV, p. 2375, l. 17 to
p. 2376, l. 24
p. 2428, l. 13 to
p. 2429, l. 1

Evidence, Miodaszewska
Vol. XV, p. 2523, l. 2 to
p. 2532, l. 22

Evidence, Griffith
Vol. XVI, p. 2540, l. 5 to
p. 2546, l. 11

Evidence, Rota
Vol. XVI, p. 2551, l. 8 to
p. 2557, l. 22

Exhibits I-13 and I-14

65. Insofar as water crossings are concerned, even if caribou do not make use of a given water crossing, this will not deter them from crossing bodies of water. The evidence is that they will cross over at other locations and that their use of water crossings varies from year to year.

Evidence, Tookome
Vol. VI, p. 600, ll. 5 - 19

Evidence, Calef
Vol. XV, p. 2346, l. 18 to
p. 2348, l. 28

66. The only evidence of an expert nature called by the Plaintiffs concerning possible disturbances of caribou by mining activities amounted to a plea that further information be obtained by further experimentation which experimentation would require the implantation of electronic objects in caribou for the purposes of measuring their physiological reactions to external stimuli not observable by normal observation. Such reactions would not, the Court was told, differ from reactions to any other normal and natural external stimuli. The observations of this witness, Dr. Geist, were the result of experiments which he or others had conducted, largely on domestic animals or animals in captivity, and not from any knowledge of the Kaminuriak or Beverly herds with which he had

had no experience.

Evidence, Geist
Vol. X, p. 1350, ll. 7 - 19
p. 1330
p. 1303, ll. 25 - 26
p. 1304, l. 24 to
p. 1305, l. 4
p. 1355, ll. 12 - 27
p. 1343

67. It is respectfully submitted that the evidence of Dr. Miller and Dr. Calef, both fully qualified biologists familiar with barren ground caribou, is to be preferred. It is clear from their evidence that activities of the types carried on by the mining company Defendants under the present regulations enacted by the Government are not harmful to wildlife and do not constitute a harassment of the caribou herds. It is clear that the government has the authority and has so exercised it to ensure that the environment in the Northwest Territories is protected.

Evidence, Miller
Vol. XIII, p. 2079, ll. 13 - 22
Vol. XIV, p. 2252, ll. 11 - 20
p. 2276, ll. 11 - 21

Evidence, Calef
Vol. XV, p. 2324, ll. 15 - 26
p. 2331, l. 16 to
p. 2332, l. 30
p. 2349, l. 8 to
p. 2353, l. 6
p. 2367, ll. 1 - 16
p. 2460, ll. 12 - 18

Evidence, Hornal
Vol. XIII, pp. 1917 - 1926

68. It is submitted that if there is an absence of caribou in and around the Baker Lake area as urged by the Plaintiffs, and in particular, if the Kaminuriak herd is no longer to be found in areas where it previously has been hunted by them, the reason is not because of the activities of the mining company Defendants but rather because of the diminution in the

size of that herd as a result of natural causes and over-hunting. Both of the biologists called by the Government, Miller and Calef, were of the view that the reason why the herd was no longer to be found north of the Kazan River was because its size had been reduced from some 150,000 animals in the 1950's to approximately 33,000 animals or thereabouts today, which reduction in the size of the herd meant that it was no longer occupying the vast areas which it previously had done. Dr. Geist conceded that such an explanation was consistent with the reason why the herd may no longer be found in its previous areas.

Evidence, Miller
Vol. XIII, p. 2077, ll. 12 - 28
p. 2079, ll. 7 - 22

Evidence, Calef
Vol. XV, p. 2331, l. 15 to
p. 2332, l. 30
p. 2448, l. 15 to
p. 2449, l. 14

Evidence, Geist
Vol. X, p. 1324, l. 19 to
p. 1325, l. 1
p. 1375, l. 26 to
p. 1377, l. 21

Exhibit I-10

69. On these facts, it is submitted that the Plaintiffs failed to demonstrate that the activities of the Defendant mining companies have interfered with them in the exercise of any aboriginal title which they might possess and certainly cannot be held to be responsible for the diminution of the numbers of caribou hunted by them.

70. In any event, it is submitted that "aboriginal title" in Canada is restricted to access to unoccupied Crown lands. The Plaintiffs have full access to the subject lands, even

those on which the Defendant mining companies are carrying out their activities. The Crown is not the guarantor of the presence of game on its lands. The Plaintiffs in this case are asserting that they have not only the right to hunt on Crown lands, but also the right to find game in and around the community of Baker Lake in places where it was on occasion found in the past. The right to hunt game does not include necessarily the right always to find game: this latter "right" is one that Nature with its years of plenty or scarcity never guaranteed to the Inuit in the past, and cannot be guaranteed as an incident of aboriginal title by the Court. In any event, all of the evidence at trial would indicate that scarcity of caribou as there is results from overkill by Inuit hunters. This must be considered in the context of fast growing populations, concentrations of people in modern communities, use of the same hunting areas by many hunters, advanced technology for travel and hunting, and departure from a traditional lifestyle of living off the land in small disparate groups that followed the migration of the herds that were hunted.

Evidence, William Noah
Vol. I, p. 30, ll. 1 - 7
Vol. II, pp. 60 - 61

Evidence, Supt. Dent
Vol. XIII, pp. 1974 - 1975

(D) ENTITLEMENT TO THE RELIEF CLAIMED

71. It is respectfully submitted that the claim of the Plaintiffs must fail by reason of:

(a) The failure of the Plaintiffs to prove aboriginal title to the lands claimed;

(b) In the alternative, the extinguishment of any aboriginal title that may be found to have existed; or

(c) In the alternative, the failure of the Plaintiffs to prove that the activities of the Defendants are incompatible and a necessary interference with such aboriginal title.

72. Even if the Plaintiffs were found by the Court to have proved the essential elements of aboriginal title, the failure of the Government to extinguish that title, and an incompatability of that title with the activities of the Defendants, their claim for injunctive relief cannot succeed on jurisdictional grounds:

(a) The Court has no jurisdiction to grant injunctive relief against the Crown or its officers and agents to restrain them from carrying out statutory duties and obligations committed to them by the Sovereign.

Attorney-General for Ontario v. Toronto Junction Recreation Club, (1904), 8 O.L.R., 440 (H.Ct.J.)

Attorney-General for British Columbia v. Brooks-Bidlake & Whittall, Limited, (1922), 63 S.C.R., 466

Amalgamated Builders' Council v. McGregor, (1929), 36 O.W.N., 344 (H.Ct.J.)

(b) Moreover, this Honourable Court has no jurisdiction to grant the relief sought against the Defendant mining companies.

Quebec North Shore Paper v. C.P. Ltd., [1977] 2 S.C.R., 1054

McNamara Construction v. The Queen, [1977], 2 S.C.R., 654

73. It is respectfully submitted that this action must be dismissed for the reasons hereinbefore set out, and that the interlocutory injunction issued by this Honourable Court on April 24th, 1978, be dissolved.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

.....
W. C. Graham

.....
R. W. Cosman

of Counsel for the Defendants
PAN OCEAN OIL LTD.
COMINCO LTD.
WESTERN MINES LIMITED

IN THE FEDERAL COURT OF CANADA

(TRIAL DIVISION)

BETWEEN:

THE HAMLET OF BAKER LAKE, BAKER LAKE HUNTERS AND TRAPPERS ASSOCIATION, INUIT TAPIRISAT OF CANADA, MATTHEW KUNUNGNAT, SIMON TOOKOOME, HAROLD QARLITSAQ, PAUL UTA'NAAQ, ELIZABETH ALOOQ, TITUS ALLUQ, JONAH AMITNAK, FRANCIS KALURAQ, JOHN KILLULARK, MARTHA TICKIE, EDWIN EVE, NORMAN ATTUNGALA, WILLIAM NOAH, MARION PATTUNGUYAQ, SILAS KENALOGAK, GIDEON KUUK, OVID KINNOWATNER, STEVEN NIEGO, MATTHEW INNAKATSIK, ALEX IGLOOKYOUAK, TITUS NIEGO, DEBRA NIEGO, STEPHEN KAKIMAT, THOMAS ANIRNGNIQ, MARGARET AMAROOK, JAMES UKPAQAQ, JIMMY TAIPANAK, MICHAEL AMAROOK, ANGELA KRASHUDLUAQ, MARGARET NARKJANERK, JOHN NARKJANERK, ELIZABETH TUNNUQ, MARJORIE TARRAQ, HANNA KILLULARK, WILLIAM K. SCOTTIE, EDWIN NIEGO, MARTHA TALEROOK, MARY IKSIKTAARYUK, BARNABAS OOSUAQ, NANCY SEVOQA, JANET IKUUTAQ, MARJORIE TUTTANNUAQ, LUKE TUNGNAQ, JAMES KINGAQ, MADGE KINGAQ, LUCY TUNGUAQ, HATTIE AMITNAK, MAGDALENE UKPATIKY, WILLIAM UKPATIKU, PAUL OOKOWT, LOUIS OKLAGA, H. AVATITUUQ, LUK ARNGNA'NAAQ, MARY KAKIMAT, SAMSON ARNAUYOK, EFFIE ARNALUAK, THOMAS KAKIMAT, MATHEW NANAUQ, JOHN NUKIK, BILL MARTEE, MARTHA NUKIK, SILAS PUTURIRAQTUQ, DAVID MANNIK, THOMAS IKSIRAQ, ROBERT INUKPAK, JOEDEE JOEDEE, JOHN AUAALA, HUGH TULURIALIK, THOMAS N. MANNIK, SILAS QIYNK, BARNABUS PERYOUAR, BETTY PERYOUAR, JOAN SCOTTIE, OLIVE INNAKATSIK, SARAH AMITNAK, ALEX AMITNAK, VERA AUAALA, GEORGE TATANIQ, MARY TAGOONA, JAMES TERIQANIAK, JOHN IQSAKITUQ, SILAS KALLUK, HANNAH KUUK, HUGH UNGUNGAI, CELINA UTA'NAAQ, MOSES NAGYUGALIK, MARY IQAAT, LOUIS TAPATAI, HAROLD ETEGOYOK, SALLY IGLOOKYOUAK, MARJORIE AQIGAAQ, MATTHEW AQIGAAQ, MONA QIYUARYUK, WINNIE OWINGAYAK, SAMSON QUINANGNAQ, ELIZABETH QUINANGNAQ, HATTIE ATTUTUVAA, PAUL ATTUTUVAA, MARION ANGUHALLUQ, LUK ANGUHALLUQ, RUTH TULURIALIK, IRENE KALURAQ, CHARLIE TOOLOOKTOOK, THOMAS TAPATAI, ELIZABETH TAPATAI, B. SCOTTIE, MARY KUTTICQ, JACOB MARRIQ, LUCY KOWNAK, A. TAGOONA, CHARLES TARRAQ, VIVIEN JOEDEE

Plaintiffs

- and -

THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, THE ENGINEER DESIGNATED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT PURSUANT TO SECTION 4 OF THE TERRITORIAL LAND USE REGULATIONS, SOR/77-210, AS AMENDED, THE DIRECTOR, NORTHERN NON-RENEWABLE RESOURCES BRANCH OF THE DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, THE MINING RECORDER AND THE DEPUTY MINING RECORDER FOR THE ARCTIC AND HUDSON BAY MINING DISTRICT, AND THE ATTORNEY GENERAL OF CANADA, URANGESELLSCHAFT CANADA LIMITED, NORANDA EXPLORATION COMPANY LIMITED (NO PERSONAL LIABILITY), PAN OCEAN OIL LTD., COMINCO LTD., WESTERN MINES LIMITED, AND ESSEX MINERALS COMPANY LIMITED,

Defendants

INDEX

MEMORANDUM OF ARGUMENT OF THE DEFENDANT
ESSEX MINERALS COMPANY

I FACTS

1. Essex Minerals Company is the holder of approximately 386 recorded mineral claims in the Baker Lake area. The company has been carrying on mineral exploration activity in the area in issue since 1976. During the period 1976 to the present, the company has held prospecting permits granted to it pursuant to the provisions of the Canada Mining Regulations, SOR 177/900 as amended, and has applied for and obtained land use permits pursuant to the Territorial Land Use Regulations, SOR/77-210, as amended.

Exhibits P-36, P-70, P-76

Evidence, Volume XI, p. 160, l. 17 - 21

2. In 1979, three Land Use Permits were issued to the company. Permit number N79X989 was issued for the purpose of establishment of a fuel storage area near the Baker Lake airport. Permits numbered N79C972 and N79N973 were issued for the purpose of enabling prospecting and exploration activity to take place. Each permit is subject to a number of conditions imposed by the Engineer pursuant to section 31 of the Territorial Land Use Regulations. Among the conditions attached to permits numbered N79C972 and N79C973 are a number of conditions imposed upon the company in order to protect the caribou pursuant to the discretion granted to the Engineer under section 31(1)(m) of the Regulations. In addition, each Land Use Permit is explicitly subject to the Order of this Court dated April 24, 1978.

Exhibit D-3, tabs P, Q and U

3. The area is issue in this action appears to be within latitude 62 degrees, 30 minutes North, and 66 degrees North, and longitude 92 degrees West, and 101 degrees West. The area is

entirely within the lands granted to the Hudson's Bay Company by Charles II.

Evidence, Volume XIII, pages 1896 - 1897

Exhibit D-7

4. The use of the lands in the Baker Lake area is regulated in accordance with applicable legislation and government policy, by officials of the Ministry of Indian Affairs and Northern Development. The Inuit of Baker Lake have no control over implementation of the legislation, or the use of the lands.

Evidence, Volume III, pp. 1901 - 1926, p. 1955, ll. 18 - 26

5. Pursuant to such legislation, in addition to recording the mining claims of this defendant and others, the federal Crown has granted surface and mineral leases of lands in the Baker Lake area, and has made grants of estates in fee simple in lands in the area, without any reservations except as contained in The Territorial Lands Act.

Exhibits D-4 and D-5

II LEGISLATION

A. The Admission of Rupert's Land into Canada

1. The lands in question in this action were among the lands granted to the Hudson's Bay Company in 1670, and were part of Rupert's Land at the time that area became part of Canada.

Reference re "Indians", [1939] S.C.R. 104, at 105 - 106

2. The first legislative instrument dealing with the lands in issue was The Rupert's Land Act, (1868) 31 & 32 Vict. c. 105 (Imp.). That Act, which defined "Rupert's Land" as the whole of the territories "held or claimed to be held" by the

Hudson's Bay Company (s. 2), merely provided a mechanism for the British Parliament to accept a surrender of the lands of the Company.

Essex Minerals Company Brief of Legislation ("Brief")
Tab 1

That surrender was made by deed in 1869 (R.S.C. 1970, App. No. 9, Schedule C). Clauses 10 and 14 of the Deed were incorporated into the 1870 Order-in-Council which officially admitted Rupert's Land into the Dominion. They read as follows:

> 10. All titles to land up to the eighth day of March, one thousand eight hundred and sixty-nine, conferred by the Company are to be confirmed.
>
> 14. Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them.

Brief, Tab 2

3. It is respectfully submitted that the Order-in-Council, when read as a whole, evidences the intention of the Crown to exercise complete sovereignty over all of Rupert's Land and nowhere does it recognize the existence of any "aboriginal rights" therein.

4. The Order-in-Council incorporated a number of the terms of the Deed of Surrender as part of the "terms and conditions" upon which Rupert's Land was being admitted into the Dominion. In doing so, it elevated the agreement between the Queen and the Company to the level of a statutory instrument.

The Deed itself treats the Company as surrendering, for valuable consideration, the whole of the vast lands referred to therein. There is no suggestion in the Deed or in the Order-in-Council that the Company had no power to surrender the lands, or that the lands were encumbered with "Indian title". In any event,

there is no suggestion that the titles confirmed in Clause 10 of the Deed and Order-in-Council are subject to any claims of "Indian title".

The Deed and Order-in-Council grant the Company the right to select blocks of land adjoining its posts (Clauses 2, 3 and 4 of the Deed and Order-in-Council). There is no suggestion that the Indians who might be living on such lands (a total of up to 50,000 acres) had any interest therein, or that there was to be any consultation with the natives prior to the selection of the blocks by the Company.

In Clause 11, the Company was granted the right to carry on its trade "without hindrance". There is no suggestion that the power to carry on business is subordinate to any native hunting or fishing rights.

By Clauses 8 and 9, the Crown is entitled to take certain lands reserved to the Company without compensation, but must pay fair value for other lands. There is no similar agreement or legislative enactment giving any rights to compensation to the natives. The contrast between Clauses 8 and 14 is striking. The Company is treated as an owner of lands, to whom compensation must be paid unless otherwise specially agreed. The Indians, on the other hand, may have "claims" to compensation which are to be "disposed of". This language is far from a recognition of any "rights". Rather, the language would seem to imply an unfettered discretion in the Crown to make, or not to make, an ex gratia payment, calling to mind the words of Mr. Justice Reed in respect of the American position:

> "The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability."
>
> Tee-Hit-Ton Indians v. The United States, 348 U.S. 313 (1955) at p. 318

The generosity of the Crown, however, extended only so far as to entertain "claims" with respect to lands "required for purposes of settlement" (Clause 14 above). Other lands such as lands already granted, lands required for public purposes, or lands acquired by the Hudson's Bay Company under other Clauses of the Deed and Order-in-Council may not even be the subject of "claims".

5. It is respectfully submitted that there is no trace in the legislation above referred to of any rights in the nature of property or occupational rights remaining in the native peoples inhabiting Rupert's Land. It is submitted that, if any such rights existed prior to 1868, they were extinguished by the Order-in-Council referred to above, in 1870.

B. LATER LEGISLATION

(a) THE NORTHWEST TERRITORIES ACTS

1. The Order-in Council of 1870 granted to the Parliament of Canada

> "full power and authority to legislate for the future welfare and good government of [Rupert's Land]."

Brief, Tab 2, at p. 26

2. The Northwest Territories Act (1875) 38 Vict. c. 49, provided in section 1 thereof that the Northwest Territoties were to be those portions of Rupert's Land not included in Manitoba.

Brief, Tab 3

3. The District of Keewatin Act (1876) 39 Vict. c. 21 repealed previous Acts dealing with the area. By section 11 of that Act, all federal Acts respecting public lands applied to the District.

Brief, Tab 4

4. The Northwest Territories Act, R.S.C. 1906, c. 62 repealed both The District of Keewatin Act and the earlier North-West Territories Act. By section 14, all federal laws are made applicable to the Territories, unless specifically exempted.

Brief, Tab 5

5. The various territorial Acts mentioned above had for their purpose the setting up of the local government in the Territories. None of them mentioned aboriginal rights, nor was there any mention of the natives in the 1952 revision of the Northwest Territories Act, (R.S.C. 1952, c. 331).

Brief, Tab 6

6. In 1960, for the first time, the NorthWest Territories Act contained provisions dealing with natives (S.C. 1960, c. 20). It provided in section 1 (amending section 14 of the 1952 Act) that game ordinances are applicable to Indians and Eskimos, but that Indians and Eskimos may not be restricted by Ordinance from hunting for food on unoccupied lands, unless the game be in danger of extinction.

The purpose of the amendment was to give the territorial government power to regulate game beyond that exercisable by the provincial legislatures in that, except as provided in section 1(3) of the 1960 Act, the Commissioner in Council has power to make such Ordinances "applicable to and in respect of" Indians and Eskimos.

The 1960 Act also contained a clause making laws of general application in the territory applicable to Indians and Eskimos (section 2 of the 1960 Act).

Brief, Tab 7

7. The current Act is the Northwest Territories Act, R.S.C. 1970, c. N-22. That Act continues the provisions respecting game ordinances referred to above. The territorial government is restricted in respect of other matters to the powers exercisable by provincial legislatures (section 14).

Brief, Tab 8

Section 47 of the Act provides that the Governor in Council shall have power to make regulations

> "for the control, management, administration and protection of reindeer in the Territories, whether they are the property of Her Majesty or otherwise"

The Commissioner in Council has enacted "An Ordinance Respecting the Preservation of Game", 1960 (2nd), c. 2, D.1, pursuant to the powers granted in section 14 of the Northwest Territories Act. Except as provided in section 14(3) of the Act, that Ordinance comprehensively regulates hunting of game as therein defined and is applicable to Indians and Eskimos throughout the Territories.

Brief, Tab 9

Sigareak El-53 v. The Queen, [1966] S.C.R. 645

The Governor in Council has exercised his power under section 47 of the Northwest Territories Act in the Northwest Territories Reindeer Regulations, P.C. 1954-1921.

Brief, Tab 10

It is submitted that the above legislation completely regulates hunting in the Northwest Territories. The powers contained in the Northwest Territories Act evidence the intention to exercise complete dominion over hunting adverse to the continuation of any aboriginal right to hunt free of governmental restriction.

8. Section 14(3) of the Northwest Territories Act is said by the plaintiffs to be recognition and continuation of their aboriginal hunting rights (page 62 of the Plaintiffs' Memorandum). It is submitted that, on the contrary, that section supports the inference that the federal power is unrestricted, since it is inserted by way of exception to the comprehensive power granted in section 14(2).

9. It is submitted that, if the Inuit ever had unrestricted hunting rights in the Northwest Territories as an incident of their alleged aboriginal rights, such rights no longer exist.

(b) THE DOMINION LANDS ACTS

1. It is suggested by the plaintiffs at page 24 of their Memorandum that the exemption from the operation of the 1872 Dominion Lands Act of lands, "Indian title" to which has not been extinguished, amounts to a recognition of the continued existence of aboriginal rights in (at least) the Baker Lake area.

Brief, Tab 11

This suggestion presupposes that (1) Indian title exists, and (2) it has not been extinguished. If the argument made above in pages one to five be accepted, then aboriginal rights in all of Rupert's Land (with the exception of the lands governed by the Manitoba Act, 1880, 33, Vict. c. 3) were extinguished in 1870, assuming any such rights existed prior to 1870.

In addition, since the 1872 Act in terms applies to "the Lands included in Manitoba and the Northwest Territories" (section 1), and the phrase "Indian title" is not defined, it could be said that the exemption section was inserted to prevent the portions of the Act referred to in section 42 thereof from applying even to unsurrendered reserve lands.

Section 105 of the 1872 Act gives the Governor in Council power to, inter alia, withdraw from the operation of the Act lands that "have been reserved" to the Indians. The implication is that without these two sections, all Indian lands would be subject to disposal and sale under this Act, including reserve lands.

2. In the alternative, if the exemption from the operation of the Act of unextinguished "Indian title" indeed amounts to a recognition and continuation of aboriginal title in (at least) the Baker Lake area, then when that section was dropped from the Act in 1908, aboriginal rights were thereby deliberately extinguished. (The legislation is summarized at pages 24 - 25 of the Plaintiffs' Memorandum).

There has been no mention of "Indian title" in the Territorial Lands Act since 1950. If the presence of such words created or maintained aboriginal rights, the omission of these words implies that Parliament deliberately chose to legislate as if such rights to not exist, and has thereby extinguished them.

(c) THE TERRITORIAL LANDS ACT AND REGULATIONS THEREUNDER

1. The Territorial Lands Act, R.S.C. 1970, c. T-6 and the Regulations enacted thereunder establish a comprehensive scheme for the administration and management of Crown lands that are under the control and management of the Minister of Indian Affairs and Northern Development.

Brief, Tab 12

"Land" is defined in the Act as follows:

> includes mines, minerals, easements, servitudes and all other interests in real property

"Territorial lands" are defined as:

> lands in the Northwest Territories or in the Yukon Territory that are vested in the Crown or of which the Government of Canada has power to dispose

Section 4 provides:

> "Subject to this Act, the Governor in Council may authorize the sale, lease or other disposition of territorial lands and may make regulations authorizing the Minister to sell, lease or otherwise dispose of territorial lands subject to such limitations and conditions as the Governor in Council may prescribe."

Section 8 provides:

> "The Governor in Council may make regulations for the leasing of mining rights in, under or upon territorial lands and the payment of royalties therefor, but such regulations shall provide for the protection of and compensation to the holders of surface rights."

Sections 6 to 12 provide certain limits on the power to grant lands, including an automatic reservation to the Crown of the mineral rights in all granted lands.

Section 19 gives the Governor in Council power to, inter alia:

> "(d) set apart and appropriate such areas or lands as may be necessary to enable the Government of Canada to fulfil its obligations under treaties with the Indians and to make free grants or leases for such purposes, and for any other purpose that he may consider to be conducive to the welfare of the Indians;
>
> (e) set apart and appropriate territorial lands for use as forest experimental areas, national forests, game preserves, game sanctuaries, bird sanctuaries, public shooting grounds, public resorts or for any other similar public purpose;
>
> (h) make regulations or orders with respect to any question affecting territorial lands under which persons designated in the regulations or orders may inquire into a question affecting territorial lands and may, for the purposes of such inquiry, summon and bring before them any person whose attendance they consider necessary to the inquiry, examine such person under oath, compel the production of documents and do all things necessary to provide a full and proper inquiry;
>
> (k) make such orders and regulations as are deemed necessary to carry out the purposes and provisions of this Act, R.S., c. 263, s. 18: 1967-68, c. 32, s.4."

Sections 3.1 and 3.2 of the Act, new by R.S.C. 1970, c. 48, (1st Supp.), empower the Governor-in Council to set apart

and appropriate "any territorial lands" as a land management zone and to make regulations for the "protection, control and use of the surface of land" in a land management zone."

2. The Territorial Land Use Regulations, SOR/77-210 were passed pursuant to sections 3.1, 3.2 and 19 of the Territorial Lands Act.

Brief, Tab 13

They prohibit the carrying on, without a permit, of the activities mentioned in sections 8 and 9 of the Regulations, in the whole of the territorial lands within the Northwest Territories. Section 21 sets out the conditions required for eligibility for a permit. Section 22 details the information required to be submitted in an application for a permit. Section 23 gives the Engineer responsible for issuance of permits the right to obtain information and obtain an inspection of the lands proposed to be used. If the application for a Class A Permit is made in accordance with the Regulations, the Engineer must within 10 days either issue the Permit or give reasons for requiring further time or refusing to issue the Permit, as the case may be (section 25). In the case of a Class B Permit, the Engineer cannot require further time, but must either issue the Permit or give reasons for his refusal to do so.

When a Permit is issued, it may contain terms and conditions as set out in section 31. The discretion to impose conditions upon the permitted use of land is very broad, including controls on

"31(a) the location and the area of territorial lands that may be used;

(b) the times at which any work or undertaking may be carried on;

(c) the type and size of equipment that may be used in the land use operation;

(d) the methods and techniques to be employed by the permittee in carrying out the land use operations;

(e) the type, location, capacity and operation of all facilities to be used by the permittee in the land use operations;

(h) the protection of wildlife and fisheries habitat;

(i) the protection of objects and places of recreational scenic and ecological value; and

(m) such other matters not inconsistent with these Regulations as the Engineer thinks necessary for the protection of the biological or physical characteristics of the land management zone."

If a permittee does not comply with the conditions of his permit, it may be suspended or cancelled (sections 41 and 42). Assignment of a Land Use Permit requires the approval of the Engineer (section 44). There is a right of appeal to the Minister from a decision of the Engineer (section 45).

There are exemptions from the requirement to obtain a permit contained in section 6 of the Regulations, but they effectively allow only normal hunting activities or minimal exploratory activities to be carried on without the extensive restrictions imposed by the Regulations.

3. It is clear that the use of, and activities taking place upon, lands within the purview of these Regulations is limited in accordance with the terms of the Regulations. The Inuit are not exempted from the operation of the Regulations except insofar as, as residents of the Northwest Territories, they conduct normal hunting activities upon the land. The structure of the Regulations and the discretion granted to the Engineer thereunder, indicate that Parliament desired that protection of the environment be accomplished by means of flexible but limited controls imposed upon all persons proposing to use Crown lands. There is no suggestion that the Inuit have possessory rights which may entitle them to control the use of lands, and any consultation with the Inuit would be as a result of the exercise of discretion by the Engineer, as a matter of policy, not as a matter of legal obligation.

4. The Canada Mining Regulations, SOR/77-900, as amended, were passed pursuant to the Public Lands Grants Act and sections 4 and 8 the Territorial Lands Act.

Brief, Tab 14 and 15

The Regulations provide a scheme for the orderly development of mining claims, from prospecting, to staking claims, to the eventual issuance, if all property steps have been taken, of a mining lease.

There is no discretion in any official charged with duties under the Regulations, if the Regulations have been complied with, to refuse to grant the rights provided under the Regulations, or to impose conditions thereon. For example, the Mining Recorder "shall" record the claim in accordance with the application of the locator of the claim, if the Regulations have been complied with (section 24(3)). Further, the holder of a recorded claim "shall" be granted a lease if he has complied with section 58, (as amended). (See also in this regard section 59(2)).

The rights granted to persons under the Canada Mining Regulations are rights in the nature of property rights, in that they import the right to exclude others from the lands to which the rights relate. This is obviously true of a mining lease, but it is also true of the holder of a recorded claim, who has the "exclusive right to prospect for minerals and develop any mine on the land enclosed within the boundaries of the claim" (section 27(1)). Furthermore, it is only the holder of a claim who is entitled to call for a lease under section 58.

The Canada Mining Regulations are expressly subject to the Territorial Land Use Regulations (section 3(2)), and therefore control over the ecological balance of the lands is maintained by the federal government, even after a mine has begun operating.

There is no suggestion in the Canada Mining Regulations that the rights granted thereunder are subject to any aboriginal rights, or that any claim of Inuit occupation can exclude the holder of a recorded claim or of a mining lease from conducting the permitted activities upon the lands comprised therein.

5. It is submitted that the Territorial Lands Act, the Public Lands Grant Act, the Territorial Land Use Regulations and the Canada Mining Regulations comprise a comprehensive scheme for the use and disposition of lands within the Baker Lake area, adverse to the continuance of any occupational rights in the Inuit.

6. It is submitted that the combined effect of the legislation mentioned herein is to extinguish the aboriginal usufructuary or occupational rights in the Inuit of Baker Lake, if any such rights existed, or at the very least, to supersede such rights to the extent necessary to give effect to the legislation.

III CASE LAW

A. Extinguishment

1. Whatever the nature and extent of aboriginal rights, it is submitted that there is an unfettered discretion in the Crown to wholly extinguish these rights, without consultation and without payment of compensation. This is so at common law because the Crown is the owner of the ultimate fee in all the lands conquered or discovered by His or Her subjects. Occupation of an area under new sovereignty continues only at the sufferance of the ruler.

In the United States, it is Congress that has the supreme power to extinguish Indian title - and the justice of such extinguishment is not open to enquiry, whether such extinguishment be done

> "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the rights of occupancy, or otherwise ..."

U.S. v. Santa Fe Pacific Railway Co. 314 U.S. 339 (194) at p. 347

In Canada the above proposition has not been questioned since St. Catherine Milling & Lumber Company v. The Queen (1888) 14 App. Cas. 46 P.C. in which Lord Watson stated the following at page 55:

> "...there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenun dominium whenever that title was surrendered or otherwise extinguished."

2. With the exception of Pigeon, J., who did not deal with the issue of aboriginal rights, the Supreme Court of Canada was unanimous in the view that the Crown and Parliament have the power to extinguish native title. The disagreement between Hall J. and Judson, J. in Calder v. The Attorney-General of British Columbia, referred to in the Plaintiffs' Memorandum at pages 48 to 52, was as to the method by which extinguishment could be accomplished.

Hall, J. was of the view that extinguishment required express language. He said:

> "[Indian title] being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only be specific legislation."
>
> Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313; 34 D.L.R. (3d) 145 at p. 208 (references are to page numbers in the D.L.R. Report)

Hall J. appears to agree with the appellants' contention in the Calder case that legislation, to effect an extinguishment, must specifically purport to do so. (See his comments at page 209 and 210 of the report). This appears to be the position relied upon by the plaintiffs in their memorandum at pages 48 to 59.

3. If the above is indeed the ratio decidendi of Hall, J.'s decision, the learned judge went further than necessary on the facts before him, and indeed went further than any of the authorities relied upon by him in his judgment.

4. The learned judge (at page 210) cites the requirement laid down by certain American authorities that extinguishment of Indian title requires a "clear and plain intention" on the part of the legislative authority. The origin of that phrase appears to be the case of U.S. v. Santa Fe Pacific Railway Company, 314 U.S. 339, at p. 353 (1941). However, the decision in that case depended upon the application of an Act of Congress of July 27, 1866. Section 2 of the Act provided:

> "The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this Act..."
>
> Supra, at p. 344

A major issue in the case was whether the creation of a reservation in 1865 and attempted forcible removal of the tribe to that reservation in 1874 effected extinguishment as contemplated by the Act referred to above. The Court held that there was "no indication" of an intention to extinguish and that the creation of the reservation was a mere offer by Congress. Mr. Justice Douglas stated at page 354:

> "...an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards."

The above passage makes it quite clear that, even when "Indian title" is protected by express legislation relating to the land in issue, extinguishment can occur by implication, without express words to that effect. In the Santa Fe case itself, Indian title was extinguished by implication from the conduct of the claimant tribe in accepting a reservation created at their request.

5. Other American cases which have used the terminology mentioned by Hall, J. turn in large part on their own facts.

Most such decisions arise as a result of the passage by Congress of the Indian Claims Commission Act (60 Stat. 1049) which grants specific rights.

> (see, for example, United States v. Shoshone Tribe of Indians 304 U.S. 111 (1938);
>
> Lipan Apache Tribe v. The United States 180 Ct. Cl. 487 (1967), and
>
> United States v. Northern Pauite Nation, 393 F. 2d 786 (1968))

6. Where there is no specific Congressional recognition of "Indian title", the interest of the Indians, whatever it may be, can be "taken" without consent and without compensation.

In Tee-Hit-Ton Indians v. United States 75 S. Ct. 313 (1904), the Indian tribe claimed compensation for the taking of timber from land over which they claimed a "full proprietory ownership" or at least a recognized right to unrestricted possession, occupation and use. The Supreme Court held that the tribe was not entitled to compensation:

> "This is true, not because an Indian or an Indian tribe has no standing to sue or because the United States has not consented to be sued for the taking of original Indian title, but because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law."
>
> Tee-Hit-Ton Indians, supra, at p. 320

7. Hall, J. also referred in support of his decision to the cases of Amodu Tijani v. The Secretary, Southern Nigeria (at page 208) and The Queen v. Symonds (at p. 209). Both of these cases are inapplicable to the situation found in the present case, and the broad statements made in them, justified by the facts of the cases, conflict with decisions of the Privy Council arising out of differing circumstances.

The former case was concerned with the interpretation of paragraph 6 of a Public Land Ordinance of 1903, which provided that where lands required for public purposes are the

property of a native community in Nigeria, the Head Chief of such community may sell the lands. The Privy Council held that the Chief could receive Compensation under the Ordinance on behalf of the community for the community usufructuary title. In that case, the Judicial Committee was of the view that when the lands in question were ceded to the Crown, the cession was made on the footing that the rights of property of the inhabitants were to be fully protected. This fact, and the existence of a specific statutory compensatory scheme, makes this case inapplicable to the situation facing Hall, J. in the Calder case.

Amodu Tijani v. The Secretary, Southern Nigeria [1921] 2 A.C. 399 at p. 405, 407

In the latter case, the issue was a contest between claimants to a parcel of land, one claiming under a Crown grant, and the other claiming under a purchase from the Maoris. It was hald that the claimant holding under Crown grant had the better title. The decision in the case rested upon the now well-accepted proposition that native title can be surrendered only to the Crown, and that subjects cannot acquire lands from natives on their own behalf, but only on behalf of the Crown. The case also upheld the exclusive right of the Crown to extinguish native title.

The Queen v. Symonds, (S.C. Auckland) (1847) N.Z. P.C.C. 387

8. In a decision in which the facts were closer to those in the present case, the question before the Privy Council was as to the ownership of unalienated lands as between the British South Africa Company, the Crown, and the native inhabitants. The Court held that the native contention could only succeed if

> " ... the rights, whatever they exactly were, belonged to the category of rights of private property, such that upon a conquest it is to be

> presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them."
>
> In Re Southern Rhodesia, [1919] A.C. 211, Lord Sumner at p. 233

Lord Sumner did not decide the issue of what the nature of property ownership among the natives might have been. He did not find it necessary because he held that in any event, their rights were extinguished by the actions of the Crown in granting land, allowing settlement and establishing reserves elsewhere in the territory. He said at page 235:

> "By the will of the Crown and in the exercise of its rights the old state of things, whatever its exact nature, as it was before 1893, has passed away and another and, as their Lordships to not doubt, a better has been established in lieu of it. Whoever now owns the unalienated lands, the natives do not."

9. The reasoning of Gould, J., at trial in the Calder case on the issue of extinguishment was adopted by Judson, J., in his opinion for three members of the Supreme Court:

> "The various pieces of legislation referred to above are connected ... All thirteen reveal a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to "aboriginal title, otherwise known as the Indian title", to quote the Statement of Claim."
>
> Calder, supra, at p. 160

Judson, J., goes on to refer to "alienations" inconsistent with the existence of an aboriginal title (at p. 162). These "alienations" included fee simple grants, petroleum and natural gas leases, mineral claims and tree farm licences. Judson, J. stated further at p. 167:

> "In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had,

> when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation."

10. It is submitted that the views of Judson, J., are in accord with the general line of authority on the issue of extinguishment of native rights. It is submitted that the intention to extinguish such rights will be implied from the conduct of the Crown or from applicable legislation where the facts show that the legislation or actions are inconsistent with an exclusive right of occupancy such as that claimed by the plaintiffs in this action.

B. Validity of Legislation - Power to Dispose

1. It is a fundamental principle of English common law that the Crown is the source of all title to land. No subject can own land allodially, but only an interest or an estate in it which is derived from the Crown. The moment, therefore, when the Crown acquired sovereignty over the lands in issue, every square inch of the territory became the property of the Crown, to be dealt with as policy might dictate.

Milirrpum et al v. Nabalco Pty and the Commonwealth of Australia, [1971] 17 F.L.R. 141 (Australia)

2. In the St. Catherines Milling case (supra) it was held that the substantial and paramount estate is vested in the Crown, and upon extinguishment of Indian title, that estate became a plenum dominium. At page 58 of the Privy Council decision, Lord Watson states:

> "The Crown has all along had a present estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown ..."

3. The "burden" of Indian title remains "dependant upon the goodwill of the Sovereign", and does not in any way interfere

with the Crown's right to dispose of or otherwise deal with its land. If that were not the case, a Crown grant could be impugned by Indians claiming that the grant is subject to unextinguished Indian title. However, when the courts have been faced with a contest between a claim under a Crown grant, as against "Indian title", the Crown grant has uniformly been upheld.

Corinthe et al v. Seminary of St. Sulpice (1912) 5 D.L.R. 263 (P.C.)

Point v. Dibblee Construction Co. et al [1934] 2 D.L.R. 785

Warman v. Francis et al [1958] 20 D.L.R. (2d) 627

4. Indeed it has been held, even with respect to lands specifically set apart by treaty for the use of Indians as reserve lands, that the lands remain the property of the Crown, and the interest of the Indians therein is "personal and usufructuary" and not sufficient to found an action for trespass or ejectment.

Point v. Dibblee Construction Co. et al, (supra) at page 795

5. It is submitted, therefore, that when Parliament, in the exercise of its powers pursuant to the 1870 Order-in-Council referred to above, and the British North America Act, passed legislation purporting to deal with lands "vested" in the Crown, such legislation was and is valid to govern all ungranted Crown lands, including lands occupied by the Inuit.

6. The Territorial Lands Act, the Public Lands Grants Act and the Regulations passed thereunder purport to deal comprehensively with Crown lands as if no occupational or other aboriginal rights exist therein. This alone is sufficient to extinguish any "aboriginal rights". In the alternative, the legislation and Regulations mentioned above are independently

valid, and the Inuit, like all other Canadians, are bound by their provisions. To the extent, therefore, that the legislation regulates the use of land or grants interests therein, any Inuit rights of occupancy, hunting or fishing are superseded

7. The claims of Indians or Eskimos to be entitled to exercise "aboriginal rights" on lands governed by valid legislation have come before the courts on a number of occasions. In each instance, it has been held that no such right can be exercised in contravention of applicable legislation or regulation. Even hunting rights specifically guaranteed to Indians by treaty cannot supersede the provisions of federal legislation, (or provincial legislation by reason of section 88 of the Indian Act R.S.C. 1970, c. 1-6, as amended). In R. v. Francis, for example, the proposition is put this way:

> "There can be no doubt that ... legislation of the Parliament of Canada and Regulations made thereunder, properly within section 91 of the British North America Act 1867, are not qualified or in any way unenforceable because of the existence of rights acquired by Indians pursuant to treaty."
>
> R. v. Francis (1969), 10 D.L.R. (3d) 159, at 195,

Other cases that have upheld legislation as against "aboriginal rights" are:

> Sikyea v. The Queen, [1964] S.C.R. 642, affirming (1964) 46 W.W.R. 65
>
> R. v. George, [1966] S.C.R. 267
>
> Sigeareak E1-53 v. The Queen, [1966] S.C.R. 645
>
> Millirrpum et al v. Nabalco Ptv et al (supra) at pages 290 - 292 (Australia)
>
> Derriksan v. The Queen, [1976] 6 W.W.R. 480 (S.C.C.), affirming [1975] 4 W.W.R. 761; and
>
> Kruger et al v. The Queen, [1978] 1 S.C.R. 104

9. It is submitted that as stated above, "aboriginal rights" are not in the nature of property rights. It is for that reason that they can be extinguished by the Sovereign at will and without compensation. Accordingly, there is no "property right" to which the protection of the Canadian Bill of Rights can attach, and The Bill of Rights can therefore not affect the administration by the federal government of the legislation mentioned above.

IV RELIEF REQUESTED

1. This defendant submits that this action be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY

Claude R. Thomson

Leah Price

of Counsel for the Defendant
Essex Minerals Company Limited

ESSEX MINERALS COMPANY BRIEF OF LEGISLATION

TAB

1. Rupert's Land Act, 1869, 32-33 Victoria, c. 3 (Canada)

2. Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the Union, 1870

3. Northwest Territories Act (1874), 38 Vict. c. 49

4. District of Keewatin Act (1876), 39 Vict. c. 21

5. Northwest Territories Act, R.S.C. 1906, c. 62

6. Northwest Territories Act, R.S.C. 1952, c. 195

7. Northwest Territories Act, R.S.C. 1960, c.

8. Northwest Territories Act, R.S.C. 1970, c. N-22, and amendment to Northwest Territories Act, supra, taken from the Canada Statute Citator

9. Ordinance Respecting the Preservation of Game, 1960 (2nd) c. 2, D.1

10. Northwest Territories Reindeer Regulations, P.C. 1954-1921

11. Dominion Lands Act, S.C. 1872, c.23

12. Territorial Lands Act, R.S.C. 1970, c. T-6, and amendment to Territorial Lands Act, supra, taken from the Canada Statute Citator

13. Territorial Land Use Regulations, SOR/77-21

14. Public Lands Grants Act, R.S.C. 1970, c. P-29

15. Canada Mining Regulations, SOR/77-770

    Amendment, SOR/78-813
    Amendment, SOR/79-234

APPENDIX "B"

LIST OF AUTHORITIES

1. Reference re "Indians", [1939] S.C.R. 104, at 105 - 106

2. Tee-Hit-Ton Indians v. The United States, 348 U.S. 313 (1955) at p. 318

3. Sigareak E1-53 v. The Queen, [1966] S.C.R. 645

4. U. S. v. Santa Fe Pacific Railway Co. 314 U.S. 339 (1941) at p. 347

5. St. Catherine Milling & Lumber Company v. The Queen, (1888) 14 App. Cas. 46 P.C.

6. Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313; 34 D.L.R. (3d) 145 at p. 208

7. United States v. Shoshone Tribe of Indians 304 U.S. 111 (1938)

8. Lipan Apache Tribe v. The United States 180 Ct. Cl. 487 (1967)

9. United States v. Northern Pauite Nation, 393 F. 2d 786 (1968)

10. Amodu Tijani v. The Secretary, Southern Nigeria [1921] 2 A.C. 399 at p. 405, 407

11. The Queen v. Symonds, (S.C. Auckland) (1847) N.Z. P.C.C. 387

12. In Re Southern Rhodesia, [1919] A.C. 211

13. Milirrpum et al v. Nabalco Pty and the Commonwealth of Australia, [1971] 17 F.L.R. 141

14. Corinthe et al v. Seminary of St. Sulpice (1912) 5 D.L.R. 263 (P.C.)

15. Point v. Dibblee Construction Co. et al, [1934] 2 D.L.R. 785

16. Warman v. Francis et al (1958), 20 D.L.R. (2d) 627

17. R. v. Francis (1969) 10 D.L.R. (3d) 189

18. Sikyea v. The Queen, [1964] S.C.R. 642, affirming (1964) 46 W.W.R. 65

19. R. v. George, [1966] S.C.R. 267

20. Derriksan v. The Queen, [1976] 6 W.W.R. 480, affirming [1975] 4 W.W.R. 761

21. Kruger et al v. The Queen, [1978] 1 S.C.R. 104

T-1628-78

IN THE FEDERAL COURT OF CANADA

(TRIAL DIVISION)

BETWEEN:

THE HAMLET OF BAKER LAKE,
et al

Plaintiffs

- and -

THE MINISTER OF INDIAN
AFFAIRS AND NORTHERN
DEVELOPMENT, et al

Defendants

MEMORANDUM OF ARGUMENT
~~SUBMITTED ON BEHALF OF~~ THE
DEFENDANTS PAN OCEAN OIL
LTD., COMINCO LTD., and
WESTERN MINES LIMITED

FASKEN & CALVIN
Box 30
Toronto-Dominion Centre
Toronto, Ontario M5K 1C1

Solicitors for the Defendants
Pan Ocean Oil Ltd.
Cominco Ltd., and
Western Mines Limited

Canada

ELIZABETH THE SECOND, by the Grace of God of the United Kingdom, Canada and Her other Realms and Territories QUEEN, Head of the Commonwealth, Defender of the Faith.

ACTING DEPUTY ATTORNEY GENERAL

TO ALL TO WHOM these Presents shall come or whom the same may in anywise concern,

GREETING:

A PROCLAMATION

WHEREAS Her Majesty Queen Victoria in Council at the Court at Osborne House, Isle of Wight, did, on the 31st day of July, 1880, order and declare, by and with the advice of Her Most Honourable Privy Council, that "from and after the first day of September 1880, all British Territories and Possessions in North America, not already included within the Dominion of Canada, and all Islands adjacent to any of such Territories or Possessions, shall (with the exception of the Colony of Newfoundland and its dependencies) become and be annexed to and form part of the said Dominion of Canada; and become and be subject to the laws for the time being in force in the said Dominion, in so far as such laws may be applicable thereto."

AND WHEREAS certain of these Islands and waters of the Arctic Archipelago have been frequented for centuries by Canadian Inuit who, as full citizens and participants in the national fabric, have contributed to making this region a vital, integral part of Canada.

AND WHEREAS, on the first day of July, 1909, Captain Joseph Elzéar Bernier, Commander of the Canadian Government Steamer Arctic landed on Melville

Companion of Our Order of Canada, Chancellor and Commander of Our Order of Military Merit upon whom We have conferred Our Canadian Forces' Decoration, Governor General and Commander-in-Chief of Canada.

AT OUR GOVERNMENT HOUSE, in Our City of Ottawa, this twenty-fifth day of July in the year of Our Lord one thousand nine hundred and eighty and in the twenty-ninth year of Our Reign.

BY COMMAND,

DEPUTY REGISTRAR GENERAL OF CANADA

IN THE FEDERAL COURT OF CANADA

(TRIAL DIVISION)

B E T W E E N:

THE HAMLET OF BAKER LAKE, BAKER LAKE HUNTERS AND TRAPPERS ASSOCIATION, INUIT TAPIRISAT OF CANADA, MATTHEW KUNUNGNAT, SIMON TOOKOOME, HAROLD QARLITSAQ, PAUL UTA'NAAQ, ELIZABETH ALOOQ, TITUS ALLUQ, JONAH AMITNAK, FRANCIS KALURAQ, JOHN KILLULARK, MARTHA TICKIE, EDWIN EVE, NORMAN ATTUNGALA, WILLIAM NOAH, MARION PATTUNGUYAQ, SILAS KENALOGAK, GIDEON KUUK, OVID KINNOWATNER, STEVEN NIEGO, MATTHEW INNAKATSIK, ALEX IGLOOKYOUAK, TITUS NIEGO, DEBRA NIEGO, STEPHEN KAKIMAT, THOMAS ANIRNGNIQ, MARGARET AMAROOK, JAMES UKPAQAQ, JIMMY TAIPANAAK, MICHAEL AMAROOK, ANGELA KRASHUDLUAQ, MARGARET NARKJANERK, JOHN NARKJANERK, ELIZABETH TUNNUQ, MARJORIE TARRAQ, HANNA KILLULLARK, WILLIAM K. SCOTTIE, EDWIN NIEGO, MARTHA TALEROOK, MARY IKSIKTAARYUK, BARNABAS OOSUAQ, NANCY SEVOQA, JANET IKUUTAQ, MARJORIE TUITANNUAQ, LUKE TUNGAO, JAMES KINGAQ, MADGE KINGAQ, LUCY TUNGUAQ, HATTIE AMITNAK, MAGDALENE UKKPATIKY, WILLIAM UKPATIKU, PAUL OOKOWT, LOUIS OKLAGA, H. AVATITUUO, LUKE ARNGNA'NAAQ, MARY KAKIMAT, SAMSON ARNAUYOK, EFFIE ARNALUAK, THOMAS KAKIMAT, MATHEW NANAUQ, JOHN NUKIK, BILL MARTEL, MARTHA NUKIK, SILAS PUTURIRAQTUQ, DAVID MANNIK, THOMAS IKSIRAQ, ROBERT INUKPAK, JOEDEE JOEDEE, JOHN AVAALA, HUGH TULURIALIK, THOMAS N. MANNIK, SILAS QIYNK, BARNABUS PERYOUAR, BETTY PERYOUAR, JOAN SCOTTIE, OLIVE INNAKATSIK, SARAH AMITNAK, ALEC AMITNAK, VERA AUAALA, GEORGE TATANIQ, MARY TAGOONA, JAMES TERIQANIAK, JOHN IOSAKITUQ, SILAS KALLUK, HANNAH KUUK, HUGH UNGUNGAL, CELINA UTA'NAAQ, MOSES NAGYUGALIK, MARY IOAAT, LOUIS TAPATAI, HAROLD ETEGOYOK, SALLY IGLOOKYOUAK, MARJORIE AQIGAAQ, MATTHEW AQIGAAQ, MONA QIYUARYUK, WINNIE OWINGAYAK, SAMSON QUINANGNAQ, ELIZABETH QUINANGNAQ, HATTIE ATTUTUVAA, PAUL ATTUTUVAA, MARION ANGUHALLUQ, LUKE ANGUHALLUQ, RUTH TULURIALIK, IRENE KALURAQ, CHARLIE TOOLOOKTOOK, THOMAS TAPATAI, ELIZABETH TAPATAI, B. SCOTTIE, MARY KUTTICQ, JACOB MARRIQ, LUCY KOWNAK, A. TAGOONA, CHARLES TARRAQ, VIVIEN JOEDEE

- Plaintiffs

- and -

THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, THE ENGINEER DESIGNATED BY THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT PURSUANT TO SECTION 4 OF THE TERRITORIAL LAND USE REGULATIONS, SOR/77-210, AS AMENDED, THE DIRECTOR, NORTHERN NON-RENEWABLE RESOURCES BRANCH OF THE DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, THE MINING RECORDER AND THE DEPUTY MINING RECORDER FOR THE ARTIC AND HUDSON BAY MINING DISTRICT, THE ATIORNEY GENERAL OF CANADA, URANGESELLSCHAFT CANADA LIMITED, NORANDA EXPLORATION COMPANY LIMITED (NO PERSONAL LIABILITY), PAN OCEAN OIL LTD., COMINCO LTD., WESTERN MINES LTD., AND ESSEX MINERALS COMPANY LTD.

- Defendants

PLAINTIFFS' MEMORANDUM OF LEGAL ARGUMENT

GOLDEN, LEVINSON,
Suite 1908,
101 Richmond St. W.,
Toronto, Ontario.

and

Mr. David Estrin,
Eden Mills, Ontario.

Solicitors for the Plaintiffs

McCARTHY & McCARTHY,
Suite 4800,
Toronto-Dominion Centre,
Toronto, Ontario.

Solicitors for the Defendants,
Urangesellschaft Canada Ltd., and
Noranda Exploration Co. Ltd.,
(No Personal Liability)

CAMPBELL, GODFREY & LEWTAS,
Suite 3600,
Toronto-Dominion Centre,
Toronto, Ontario.

Solicitors for the Defendant,
Essex Minerals Co. Ltd.

MINISTRY OF JUSTICE
Ottawa, Ontario.

FASKEN & CALVIN,
Suite 3000,
Toronto-Dominion Centre,
Toronto, Ontario.

Solicitors for the Defendants,
Pan Ocean Oil Ltd., Cominco
Ltd., and Western Mines Ltd.

PART I

INTRODUCTION

The following memorandum is in four parts; the first, this introduction; the second, a brief statement of those facts supporting the submission of law; the third, a collection of historic references in support of aboriginal title and the fourth, a statement and analysis of the relevant law in support of the Plaintiffs' claim.

The facts do not take into account the complete range of facts put into evidence, some of which reinforce a particular area of the Plaintiffs' case and some of whichwere led to create or answer issues of fact which may be matters of defense. The sole purpose was to illustrate the assumptions which are made in support of the legal argument. It is noted that these factual allegations may not be the minimum required to bring the relevant law into play and to avoid that suggestion, a preliminary statement is made.

Part III requires little explanation. Historic references are an essential part of any case such as this. We respectfully suggest that the source material which is all filed may reveal more of interest. An attempt was made to locate and identify what was pertinent and to indicate the source, whether that source was already filed material or articles in recognized journals.

Part IV, the submissions of law, are presented in support of the Plaintiffs' claim and in reasonable anticipation of major issues derived from the pleadings. It is anticipated that a verbal reply will become necessary on an examination of the Defendants' submissions of law.

PART II

THE FACTS

The following propositions of fact, while not exhaustive of the factual issues which this case may raise, form the basis of the legal submissions which follow.

1. Where the following statement alleges a larger factual base than is necessary to support the legal submission, a minimum factual statement required should be deemed to be included in the event that the Court does not find the larger factual statement justified by the evidence.

The historic references set forth in Part III of this memorandum form part of the factual basis of the legal submissions.

2. The Defendant mining companies, together with others permitted to engage in mining exploration in the Baker Lake area, have and will continue to disrupt and impair hunting and fishing activities of the individual Plaintiffs and the persons resident in the Baker Lake area whose interests are protected by the corporate Plaintiffs,(hereinafter collectively referred to as "the Plaintiffs").

3. In any event, the activity of mining exploration is in derogation of the use and enjoyment by the Plaintiffs of their right and title to possession, not only for the purposes of hunting and fishing, but also to travel, live and camp freely upon the lands.

4. The Defendants all carry out the functions pleaded against them in paragraphs 6, 7, 8, 9 and 11 of the Statement of Claim.

5. The Inuit from whom the Plaintiffs are descended have occupied and used the land in the Baker Lake Area since at least the 13th Century, A.D.

6. The Inuit rely upon the land for food and clothing, and the ability to live on and from the land is essential to their cultural survival and well being.

7. The Inuit of Baker Lake have not been conquered nor has the land upon which they lived.

8. No treaty or other act of cession affecting or ceding any aboriginal right or title of the Plaintiffs has ever been made or occurred.

9. The Plaintiffs have continuously opposed and protested against mining exploration activity in the Baker Lake area which was used and occupied by them and have never acquiesced in or agreed to such activity.

10. Controls imposed by the government Defendants do not protect hunting and fishing or other rights arising from aboriginal title. Their object is to conserve caribou and other wildlife. In any event, controls are inadequate and incapable of enforcement due to the size of the area and the complexity and fluctuating nature of the activity.

11. The damage to the Plaintiffs' interest is unique and incapable of redress in monetary terms.

PART III

HISTORICAL REFERENCES

A. ORIGINS OF THE CONCEPT OF ABORIGINAL TITLE

1. The Spanish theologian and legal jurist, Francisco de Victoria, acclaimed as the man who established the foundations of modern international law, wrote two famous lectures entitled De Indis and De Jure Belli dealing with basic questions of Indian rights. He argued that Indians were human beings and that their land titles should be respected. The conquistadores, in attempting to justify a wholesale seizure of Indian lands in the New World, urged that Indians were heretics, tainted with mortal sin. Victoria countered, with precedents, that even heretics and sinners were legally entitled to own property. To the argument that the Pope had given Indian lands to the Kings of Spain and Portugal, Victoria replied that the Pope had no temporal power over Indian aboriginies. Victoria disposed of the "title by discovery" argument summarily. Discovery gives little to lands not already possessed. But as the Indians were the true owners of their lands, both from the public and private standpoint, their discovery by the Spaniards had no more effect on their property than the discovery of the Spaniards by the Indians had on Spanish Property.

> Felix Cohen, "Original Indian Title" (1947-48), 32 Minn. L. Rev. 28, at 44-45.

2. Victoria's doctrines were given papal support in the Bull Sublimis Deus issued in 1537 by Pope Paul III.

It states in part:

> ".... Indians are truly men .... notwithstanding whatever may have been said or may be said to the contrary, the said Indians .... are by no means to be deprived of their liberty or the possession of their property .... and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property;.... should the contrary happen, it shall be null and of no effect."
>
> Cohen, "Original Indian Title", at 45.

3. The sentiments of the Papal Bull and Victoria were reflected in Spain's Law of the Indies. For example, one such law states:

> "We command that the farms and lands which may be granted to Spaniards be so granted without prejudice to the Indians; and that such as may have been granted to their prejudice and injury be restored to whoever they of right shall belong." (Law of June 11, 1594, Book 4, Title 12, Law 9)

Other provisions of the Laws of the Indies allowed Indians to establish mining claims in the same manner as Spaniards, and removed Spanish land holdings located in areas to the prejudice of the Indians. No laws placed the Indians in a legally inferior position to that of the Spaniards. Spanish ordinances stringently protected Indian lands against trespass; to protect Indians against the superior bargaining power of the Spaniards all transfers of Indian property were outlawed unless made before an appropriate judicial officer under conditions designed to bring the Indian an adequate return for what he sold. The historical oppression of the Indians by the Spaniards was in defiance of, rather than pursuant to, the laws of Spain.

> Felix Cohen, "The Spanish Origin of Indian Rights in the Law of the United States" (1942), 31 Geo. L.J. 1, esp. at 12-16.

B. THE ORIGIN AND RECOGNITION OF ABORIGINAL TITLE IN NORTH AMERICA UNTIL 1867

I THE AMERICAN COLONIES

1. The colonies established by the Dutch in the New World were all founded on lands purchased from Indians. Article 27 of the "New Project of Freedoms and Exemptions", 1629, stated:

> "The Patroons of New Netherland, shall be bound to purchase from the Lords Sachems [ie. Indians] in New Netherlands, the soil where they propose to plant their colonies, and shall acquire such rights thereunto as they will agree for with the said Sachems."

Most of the other colonies in the New World were quick to adopt laws in the same vein.

Cohen, "Original Indian Title", at 40.

2. The first letter of instruction to Captain John Endicott from the Massachusetts Bay Company in 1629 states:

> "Above all, we pray you to be careful that there be none in our precincts permitted to do any injury in the least kind to the heathen people; and if any offend in that way, they themselves receive due correction .... if any of the savages pretend right of inheritance to all or any part of the lands granted in our patent we pray you endeavour to purchase their title, that we may avoid the least scruple of intrusion."
>
> Peter Cumming and Neil Mickenburg (eds.), Native Rights in Canada, (The Indian-Eskimo Association of Canada, Toronto: 1972), at 15.

3. A 1633 statute of the Colony of Massachusetts provided that:

> "What land any of the Indians in this jurisdiction have possessed and improved, by subduing the same they have a just right unto".
>
> Cumming and Mickenburg, Native Rights in Canada, at 15.

4. The national policy of the American Government concerning Indian title after 1776 was firmly declared by the first important act passed by Congress, the Northwest Ordinance of July 13, 1787, which declared in Article 3:

> "The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shallbe invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them".
>
> Cohen, "Original Indian Title", at 41.

5. Most of the lands acquired by the United States since 1776 were purchased from the Indian owners. Purchases from Britain, Spain, France, Mexico and Russia granted the United States Government sovereignty rights and government powers over the lands, and not the real estate in the land itself. For example, after paying Napolean $15 million for the cession of political authority over the Louisiana Territory, the United States proceeded to pay the Indian tribes in possession of that ceded territory more than 20 times that amount for lands they were willing to sell. Having originally paid Russia $7 million for the purchase of Alaska in 1867, the Government has now agreed to pay Alaskan natives $962 million over a period of time, as well as agreeing to, inter alia, substantial land allotments as outlined in the Alaska Native Claims Settlement Act, 1971, 43 U.S.C., S. 1601.

> Cohen, "Original Indian Title", 34-43;
>
> Ken Lysyk, "The Indian Title Question In Canada: An Appraisal In The Light of Calder", (1973), 51 Can. Bar. Rev. 450, at 468.

II BRITISH COLONIAL POLICY IN CANADA PRIOR TO 1867

1. British policy toward the Indians of Canada took on a sharp focus during the 1750's and '60's. To assuage Indian discontent due to westward expansion of settlements out of New England, the British developed a program designed to establish a uniform Indian policy throughout the colonies which had as its major component the respect for Indian lands. After the initial failure of the 1754 Albany Congress attended by representatives of the New England colonies, England appointed two officials with authority to exercise political control in Indian matters.

> Cumming and Mickenburg, Native Rights in Canada, at 23.

2. The developing attitude of the British with respect to the acquisition of Indian lands is revealed in a 1756 Report to Sir William Johnson, the officer in charge of the northern Indian tribes, from the Secretary of Indian Affairs. The Report said, in part:

> "That the Indians be remedied and satisfied with regard to their complaints about their Lands .... and that no Patents for Lands be hereafter Granted but for such as shall be bought in the presence of the superintendant at public meetings and the sale recorded by His Majesty's Secretary for Indian Affairs".
>
> Cumming and Mickenberg, Native Rights in Canada, at 24.

3. Article 40 of the 1760 Articles of Capitulation, Montreal, states:

> "The Savages or Indian allies of his most Christian Majesty, shall be maintained in the Lands they inhabit; if they chuse to remain there; they shall not be molested on any pretence whatsoever, for having carried arms, and served his most Christian Majesty; they shall have, as well as the French, liberty of religion, and shall keep their missionaires. The actual Vicars General, and the Bishop, when the Episcopal see shall be filled, shall have leave to send

> to them new Missionaries when they shall judge it necessary. ...."
>
> A. Shortt and A. Doughty (eds.) Documents Relating To The Constitutional History Of Canada 1759-1791, Part I , (King's Printer, Ottawa; 1918), at 33 (hereinafter cited as Constitutional Documents - Part I): Marked "D" for identification.

4. A proclamation issued by the Privy Council in December, 1761, strictly forbade the colonial governors from passing any grants on lands possessed by Indians. The governors were also instructed to, "publish a proclamation in Our Name strictly enjoining and requiring all persons whatever who may either willfully or inadvertently have seated themselves on any lands so reserved to or claimed by the said Indians without any lawful Authority for so doing forthwith to remove therefrom." The governors had to refer all future applications for Indian lands to England.

> Cumming and Mickenberg, "Native Rights in Canada" 24, and 285-88.

5. The circumstances and motivations leading up to the Royal Proclamation of 1763 are revealed in a lengthy series of correspondence preceding the issuance of that document. The correspondence reveals the British Government's long standing concern over white encroachment upon Indian lands, fraudulent purchases of Indian property by white settlers and the need to develop a method of obtaining Indian lands when future pressures from white settlement created such a need.

> This correspondence is detailed in Constitutional Documents - Part I , A few such examples are contained in documents marked "D" for identification, at 150-55.
>
> See also Cumming and Mickenberg, Native Rights in Canada , at 26-28.

6. The part of the Royal Proclamation of 7 October, 1763 relating to Indians and lands reserved for Indians reads:

> "And whereas it is just and reasonable, and essential to our Interest and the Security of our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida, or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also, that no Governor or Commander in Chief in any of Our other Colonies or Plantations in America, do presume, for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to, or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.
>
> And We do further declare it to be our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the Use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West, as aforesaid; and We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without Our especial Leave and Licence for that Purpose first obtained.
>
> And, We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described, or upon any other Lands, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

And whereas great Frauds and Abuses have been committed in the 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 that Purpose by the Governor or Commander in Chief of our Colonies 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 that Purpose; And We do, by the Advice of Our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever; provided that every Person, who may incline to trade with the said Indians, do take out a Licence for carrying on such Trade from the Governor or Commander in Chief of any of our Colonies respectively where such Person shall reside; and also give Security to observe such Regulations as We shall at any Time think fit, by ourselves or by our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade: And We do hereby authorize, enjoin, and require the Governors and Commanders in Chief of all our Colonies respectively, as well Those under our immediate Government as Those under the Government and Direction of Proprietaries, to grant such Licences without Fee or Reward, taking especial Care to insert therein a Condition, that such Licence shall be void, and the Security forfeited in case the Person to whom the same is granted shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as aforesaid.

And We do further expressly enjoin and require all Officers whatever, as well Military as those employed in the Management and Direction of Indian Affairs, within the Territories reserved as aforesaid for the use of the said Indians, to seize and apprehend all Persons whatever, who standing charge with Treason , Misprision of Treason, Murders, or other Felonies or Misdemeanors, shall fly from Justice, and take Refuge in the said Territory, and to send them under a proper Guard to the Colony where the Crime was committed

> of which they stand accused, in order to take their Trial for the same.
>
> Given at our Court at St. James's, the 7th Day of October, 1763, in the Third Year of our Reign.
>
> GOD SAVE THE KING. "

The entire Royal Proclamation of 1763 is reprinted in R.S.C. 1970, Appendices at 123-129. This excerpt is on p.127-29, and is reproduced in Tab 14 of the "Legislative Brief".

7. The instructions to James Murray, the Governor of Quebec stressed not only that the Proclamation of 1763 was to be strictly followed, but also that "You are upon no Account to molest or disturb them [ie. the Indians] in the Possession of such Parts of the said Province, as they at present occupy or possess".

> Constitutional Documents - Part I, at 199-200.
>
> Reproduced in document marked "D" for identification. See especially Articles 61, 62 and 63, at 199-200.

8. The instructions given to Governor Guy Carleton in 1768 and 1775 were almost identical to those given to Governor Murray a few years earlier.

> Constitutional Documents - Part I , at 319-320. See document marked "D" for identification, esp. Articles 59-61 for the 1768 instructions;
>
> For the 1775 instructions see A. Shortt and A. Doughty, Documents Relating To The Constitutional History of Canada 1759-1791 Part II, (King's Printer, Ottawa: 1918) at 607, Art. 32, and 619, Art. 43. Reproduced in document marked "E" for identification.

9. Of the numerous treaties and surrenders made by the Indians (see generally the Cole's Treaty Series cited infra), the Robinson Superior Treaty and the Robinson Huron Treaty, both of 1850, can be viewed as the forerunners of the numbered treaties which were to follow. As a provincial commissioner William Robinson was instructed to extinguish

aboriginal title in the Lake Superior and Lake Huron areas. The two treaties were generally in conformity with the principles set out in the Royal Proclamation of 1763. The negotiations were held in open public meetings and the lands were only to be surrendered to the Crown rather than to private individuals. Annexed to each treaty was a schedule of reserves which were to be held and occupied by the Chiefs and their tribes in common for the purposes of residential cultivation. The Indians were denied all rights to dispose of any portion of the reservations without the consent of the Superintendant General of Indian Affairs, nor could they hinder the exploration for minerals in any part of the territory ceded to the Crown. The Indians were to be paid a yearly annuity and were to retain the:

> ".... full and free privilege to hunt over the territory now ceded by them and to fish in the waters thereof as they have heretofore been in the habit of doing, saving and excepting only such portions of the said territory as may from time to time be sold to individuals, and occupied by them with the consent of the Provincial Government. "

Canada, Indian Treaties And Surrenders (Kings Printer, Ottawa: 1912) in 3 Volumes. Reprinted in Coles Canadiana Collection, Toronto: 1971 (Hereinafter referred to as the Coles Treaty series). See Vol. 1, at 148.

C. THE RECOGNITION OF ABORIGINAL TITLE BY THE HUDSON'S BAY COMPANY

1. In 1670 Charles II granted a Charter to the Governor and Company of Adventurers Trading into Hudson Bay. The Charter granted the Company the right to "the sole Trade and Commerce of all those Seas Streightes Bayes Rivers Lakes Creakes and Soundes .... that lie within the .... Hudsons Streightes together with all the Landes and Territories" adjacent thereto. Generally, the Company had little occasion to concern itself with extinguishment

of aboriginal title. The principal object of obtaining surrenders from the native people would be to prepare the way for settlers, a policy diametrically opposed to the Company objectives of expanding the fur trade. Land use for the Company consisted almost exclusively of the establishment of trading posts. Nevertheless, from this conduct in concluding treaties with the Indians it may be implied that the Company recognized aboriginal title as a fetter upon their own title.

> Lysyk, "The Indian Title Question In Canada" , at 455-56;
>
> Cumming and Mickenberg, "Native Rights In Canada" at 138, 142.

2. The first "treaty" between the Hudson's Bay Company and the Indians was concluded in 1668 by Zachary Gillam, Captain of the expedition to James Bay, and the Indians around Rupert's River. For a number of years after 1670, the instructions to the expeditions included an order that treaties were to be made with the Indians. In January, 1683, upon request from Charles II to "account of their title and pretence to the said Bay and to the lands and Territories thereabout" a memorial was written by Sir James Hayes, a barrister-at-law and Deputy Governor,(and one of the original members)of the Hudson's Bay Company. The memorial states, inter alia:

> "That above 15 yearessince some Members of this Company did adventure to make further Discoveryes with in the said Bay, And by the good conduct of one Zachary Gillam in the Nonsuch Ketch, they Discovered a river in the bottome of the sd. Bay upon the East Mayne, where he met withthe Native Indians & haveing made a league of Friendship wth. the Capt. of the said River & firmely purchased both the river it selfe & the Lands there aboute, he gave it the Name of Rupert River (his Highness Prince Rupert being principally concerned in that expedition) and built a Fort, which in honour of your Majesty was called Charles Fort, & tooke possession of the said River & all the Land & Territory there aboute in the name of your Majesty & then & there entered into a Trade & Commerce wth. the Natives which hath bin ever since maintained without any Interruption either from the French or others.
>
> That there upon your Majesty was gratiously pleased by the Royall letters Pattents under the great Seale of England to Incorporate the said Adventurers & so grant them & their

> Successors for ever All the said Bay & the straits leading thereunto called Hudsons Straits with all the Lands and Territories Rivers & Islands in and aboute the said Bay and the sole Trade and commerce there.
>
> That the above mentioned agreemt. made by Zachary Gillam with the Indians was afterwards repeated and confirmed wth. one Charles Baily who was sent as Governour of the affaires of the Company with in the said Bay with whome Mons. Frontenac who was then Governour of Canada by his letters beareing Date 8th Octob. 1673 did concilliate a good Intelligence & amity without complaineing of any Injury done by the Company in building Forts & Makeing Settlements & commerce there or without makeing any pretence to the Land thereabout as Mons. dla Barre his successor hath now Done.
>
> That since that time we have erected other Forts upon the coast of the said Bay, in places more remote from Canada than Charles Forte is, still makeing solemne compacts and Agreements wth the Natives for their Rivers & Territories, where we have wth. great expence discovered and maintained a Trade & commerce which we hope will in tyme turne to our benefitt & also produce a considerable emolument to your Majesty & the nation."
>
> Ken Narvey, "The Royal Proclamation of 7 October 1763, The Common Law, And Native Rights To Land Within The Territory Granted To the Hudson's Bay Company", (1974) 38 Sask. L.R. 123, at 178-80;
>
> Cumming and Mickenberg, Native Rights In Canada, at 142

3. In 1688, the Governor of Rupert's Land and the Governor, and second in command, of the Bottom of the Bay, were given a Royal Commission, by James II, to make treaties with the Indians, in addition to their instructions from the Hudson's Bay Company. However, since the Company was not interested in settlement, one would expect to find only a few treaties.

> Cumming and Mickenberg, Native Rights In Canada, at 142.

4. By 1763 the only non-native settlements within the Rupert's Land territory as granted to the Hudson's Bay Company were those of the Company at Churchill, York Fort,

Severn House, Albany Fort, Moose Fort, and Eastmain House (six), all on the shores of Hudson and James Bays, with Severn and Eastmain being merely outposts of York and Albany respectively. (Churchill and York are now in Manitoba, Severn, Albany and Moose are now in Ontario and Eastmain is now in Quebec). Essentially, the whole of the rest of the territory was in the possession of various tribes of Indians or Inuit as their hunting grounds. By 1683 treaties for the purchase of the land in the immediate vicinity of two of the forts that had then been established were entered into, excluding the area of Captain Gillam's purchase.

Narvey, "Royal Proclamation of 1763", at 178, 180-82.

5. By an indenture of 12 June, 1811, the Hudson's Bay Company transferred to the Earl of Selkirk the right to purchase land from the Indians in an area later known as Assiniboia (now in southern Manitoba). Lord Selkirk's negotiations with the Indians to extinguish their title resulted in the Selkirk Treaty of July 18th, 1817.

The Selkirk Treaty is reproduced in the Cole's Treaty Series, Vol. 1, at 285.

For a thorough examination of the events leading up to the treaty, including the sale of the land by the Hudson's Bay Company see Narvey, "Royal Proclamations of 1763", at 184-208.

6. So far as is known the Hudson's Bay Company never made any other attempt to establish agricultural settlements within Rupert's Land, and never made any grant of land whatsoever in that part of Rupert's Land not included in Assiniboia.

Narvey, "Royal Proclamation of 1763", at 200.

7. By a Royal Grant of January, 1849 conveying Vancouver Island to the Hudson's Bay Company it was contemplated that the Governor, Factors and officials of the Hudson's Bay Company should exercise on behalf of the Company all of the powers necessary to make treaties with the Indians to further the objectives of the Company. To this end 14 treaties were signed, (10 by Governor Blanshard from August 29, 1850 to February 8, 1851, and 4 by Governor Douglas from February 6, 1852 to December 23, 1854) with members of various Tribes of Indians on Vancouver Island surrendering the lands occupied by them. Each of the treaties contained the following clause:

> "The condition of, or understanding of this sale, is this, that our village sites and enclosed fields, are to be kept for our own use, for the use of our children, and for those who may follow after us, and the lands shall be properly surveyed hereafter; it is understood however, that the land itself with these small exceptions, becomes the entire property of the white people forever, it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly."
>
> Regina v. White and Bob (1964), 50 D.L.R. (2d) 613, (B.C.C.A.) esp. at 615, 648-63.

D. THE RECOGNITION OF ABORIGINAL TITLE IN THE TRANSFER OF RUPERT'S LAND TO CANADA

1. Section 146 of the British North America Act, 1867, (hereafter the B.N.A. Act) states:

> "It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or

> either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland."
>
> The British North America Act, 1867, 30 & 31 Victoria, c. 3 (U.K.). Reprinted in R.S.C. 1970, Appendices, at 191-238. S.146 is reproduced at Tab 15 of the "Legislative Brief"

2. In order to effect such a transfer the Rupert's Land Act, 1868 was passed whereby the Imperial Government granted Her Majesty the right to accept a surrender, upon terms, of the lands, privileges and rights of the Hudson's Bay Company territory. Section 5 gives the British Crown the power to declare, by means of an Order-in-Council, that Rupert's Land be admitted as a part of the Dominion of Canada. (Note that S.146 of the B.N.A. Act states that such an Order-in-Council has the same effect as if enacted by the Parliament of the United Kingdom.)

> Rupert's Land Act, 1868, 31-32 Victoria, c. 105 (U.K.). Reprinted in R.S.C. 1970, Appendices, at 239-41. See also Tab 16 of the "Legislative Brief".

3. On 19 November, 1869 the Hudson's Bay Company surrendered, by deed, to the Government of Canada, all land and rights granted by the Charter of 1670 (with some exceptions not relevant to the issue of aboriginal title). Article 14 of the Deed of Surrender states:

> "Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them."
>
> Deed of Surrender reprinted in R.S.C. 1970, Appendix 271, attached as Schedule (C) to the Order-in-Council of 1870. Article 14 is found at 274.

4. On 23 June, 1870 an Imperial Order-in-Council was issued stating that Rupert's Land was to become part of Canada on 15 July, 1870. Note that the Preamble to the Order-in-Council states that Rupert's Land is admitted into the Union in accordance with the conditions outlined in S.146 of the B.N.A. Act; two Addresses from the Houses of Parliament along with Resolutions attached to those Addresses are also to be included as terms of entry. The Order then specifically states that "It is hereby ordered and declared .... [that] Rupert's Land shall from and after the [15th of July] be admitted into .... the Dominion of Canada upon the following terms and conditions, being the terms and conditions still remaining to be performed ....

> "14. Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government, and the Company shall be relieved of all responsibility in respect of them."
>
> Order of Her Majesty in Council Admitting Rupert's Land And The North-Western Territory Into The Union, 23rd June, 1870. Reprinted in R.S.C. 1970, Appendices, at 257-277. See also Tab 18 of the Legislative Brief.

5. There were two Addresses and a series of Resolutions presented to the Crown from the Canadian Parliament which were incorporated into the 1870 Order-in-Council. The first Address, entitled an "Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada" dated December 17, 1867 states that:

> ".... upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines."
>
> This first Address is attached as Schedule (A) to the 1870 Order-in-Council and is found in R.S.C. 1970, Appendices, at 264-65.

6. Following the first Address the Senate and the House of Commons passed a series of Resolutions, dated 28 May, 1869, which were also incorporated into the 1870 Order-in-Council. The 8th Resolution states:

> "That upon the transference of the territories in question to the Canadian Government, it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer."

The 8th Article of a Memorandum entitled "Details of Agreement between the Delegates of the Government of the Dominion and the Directors of the Hudson's Bay Company" attached to the 5th Resolution, states:

> "8. It is understood that any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government, in communication with the Imperial Government, and that the Company shall be relieved of all responsibility in respect of them."
>
> The Resolutions are attached as the first part of Schedule (B) to the 1870 Order-in-Council, and are found at R.S.C. 1970, Appendices, at 265-68. Resolution 8 is found at 268. Article 8 of Resolution 5 is found at 267.

7. The Second Address of the Senate and House of Commons to Her Majesty sought the transfer of the territories according to the terms and conditions stated therein, including the terms of the Resolutions, as outlined in para. 6, supra.

> The Second Address is attached as the second part of Schedule (B) to the 1870 Order-in-Council, reprinted in R.S.C. 1970, Appendices, at 269-70.

8. Note that the 14th term of the 1870 Order-in-Council (para. 4) is identical to the 14th term of the Deed of Surrender between the Hudson's Bay Company and the Government of Canada (para. 3), which is, in turn, essentially identical to the wording of the 8th term of the Memorandum attached to the 5th Resolution (para. 6).

9. The B.N.A. Act, S. 146 and the 1870 Order-in-Council also provide for the admittance of the North-Western Territory into Canada on essentially the same terms and conditons as outlined for Rupert's Land in para. 1-8 supra.

E. RECOGNITION OF ABORIGINAL TITLE BY THE GOVERNMENT OF CANADA AFTER 1867 (EXCLUDING THOSE INCIDENTS OUTLINED IN SECTION D SUPRA)

1. The Canadian Government embarked upon its treaty-making policy immediately following the admission of Rupert's Land and the North-Western Territory into the Union, in accordance with the terms and conditions of the 1870 Order-in-Council. The lands incorporated in the 11 "Numbered Treaties" -- from Treaty No. 1 concluded on August 3rd, 1871, to Treaty No. 11, concluded on 27 June, 1921 -- included all of the lands of the present three Prairie provinces and large areas of north-western Ontario, north-eastern British Columbia and western Northwest Territories. It is not possible to present even a brief outline of the numbered Treaties in order to do them justice. Regard should be had to the documents themselves, as reprinted in the Cole's Treaty Series, marked "B" for identification and the Treaties, marked "C" for identification. Native Rights in Canada, Chap. 14, entitled "The Prairie Provinces -- The 'Numbered' Treaties", at 119-31, deals extensively with the topic. K. Lysyk, "The Indian Title Question in Canada" (1973), 51 Can. Bar Rev. 450, at 459-61 makes the following comments:

> "The treaty-making policy of the federal government is well known and may be treated summarily. It constituted a continuation of the policy that had been followed prior to Confederation .... [i.e. the Robinson-Huron, and Superior Treaties of 1850]...."
>
> The essence of the treaties is unmistakable from their terms. In each case the Crown made

> certain promises in return for the Indians' surrender of the lands defined in the treaty. The standard phraseology employed was that the named tribes of Indians did "hereby cede, release, surrender and yield up to Her Majesty the Queen and successors forever all the lands included within the following limits, that is to say .... ", and this was followed by a description in precise terms of the land in question. The treaties in other words purported to be a purchase of whatever proprietary rights the Indians had in the land. In his reasons in the Calder case, Hall, J. put it this way:
>
> Surely the Canadian treaties, made with much solemnity on behalf of the Crown, were intended to extinguish the Indian title. What other purpose did they serve? If they were not intended to extinguish the Indian right, they were a gross fraud, and that is not to be assumed."

2. In anticipation of the acquisition of the new territories which it was to obtain later that year the Canadian Parliament passed the Manitoba Act, 1870 33 Victoria, c.3 (Canada); reprinted in R.S.C. 1970, Appendices at 247-56. This enactment was subsequently confirmed by The British North America Act, 1871, 34-35 Victoria, c.28 (U.K.); reprinted in R.S.C. 1970, Appendices at 289-90. Sections 30, 31 and 32, in part, of the Manitoba Act read as follows:

> "30. All ungranted or waste lands in the Province shall be, from and after the date of the said transfer, vested in the Crown, and administered by the Government of Canada for the purposes of the Dominion, subject to, and except and so far as the same may be affected by, the conditions and stipulations contained in the agreement for the surrender of Rupert's Land by the Hudson's Bay Company to Her Majesty.
>
> 31. And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall

> select such lost or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid,and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.
>
> 32. For the quieting of titles, and assuring to the settlers in the Province the peaceable possession of the lands now held by them, it is enacted as follows:-
>
> ...
>
> (3) All titles by occupancy with the sanction and under the license and authority of the Hudson's Bay Company up to the eighth day of March aforesaid, of land in that part of the Province in which the Indian Title has been extinguished, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.
>
> (4) All persons in peaceable possession of tracts of land at the time of the transfer to Canada, in those parts of the Province in which the Indian Title has not been extinguished, shall have the right of pre-emption of the same, on such terms and conditions as may be determined by the Governor in Council."

3. The first general enactment dealing with the administration and management of lands in Manitoba and the Northwest Territories was the Dominion Lands Act, S.C. 1872, c.23 ; by S.42 Indian lands were exempted from its operation:

> "42. None of the provisions of this Act respecting the settlement of Agricultural lands, on the lease of Timber lands, or the purchase and sale of Mineral lands, shall be held to apply to territory the Indian title to which shall not at the time have been extinguished."

This provision was continued in the Act until 1908.

> Lysyk, "The Indian Title Question in Canada", at 457-58. Note that footnote 19 at 457-58 provides a detailed historical analysis of the development of the Dominion Lands Act from 1872 until 1950.

4. From 1908 until 1950 when the Dominion Lands Act was repealed, the Act contained the following provision, with one modification in 1927:

> "76. The Governor in Council may--
>
> (a) withdraw from the operation of this Act, subject to existing rights as defined or created thereunder, such lands as have been or may be reserved for Indians;
> (b) grant lands in satisfaction of claims of half-breeds arising out of the extinguishment of the Indian title;
> (c) upon the extinguishment of Indian title in any territory or tract of land, make to persons satisfactorily establishing undisturbed occupation of any lands within the said territory or tract at the date of such extinguishment .... free grants of the said lands...."

In 1927 the wording in subsection (b) was altered to substitute cash payments for land grants.

> Lysyk, "The Indian Title Question in Canada", at 458, footnote 19.

5. In 1950 the Dominion Lands Act was repealed and the Territorial Lands Act, S.C. 1950, c.22 was enacted. (See now R.S.C. 1970, c. T-6). "territorial lands" are defined as meaning "lands in the Northwest Territories or in the Yukon Territory that are vested in the Crown or of which the Government of Canada has power to dispose." Section 19 of the Act (R.S.C. 1970) dealing with the powers of the Governor in Council, reads as follows:

> "19. The Governor in Council may
>
> ...
>
> (d) set apart and appropriate such areas or lands as may be necessary to enable the Government of Canada to fulfill its obligations under treaties with the Indians and to make free grants or leases for such purposes, and for any other purpose that he may consider to be conducive to the welfare of the Indians."

> Territorial Lands Act, R.S.C. 1970, c. T-6.
> See Tab 4 of the "Legislative Brief".

6. In 1874 the British Columbia legislature passed "An Act to amend and Consolidate the laws affecting Crown Lands in British Columbia" (S.B.C. 1873-74, No. 2) which failed to recognize any rights of Indians to public lands. In an early instance where the Federal Government exercised the extraordinary power of disallowance over provincial legislation the B.C. Crown Lands Act was declared null and void in March, 1875. The Federal Justice Minister found that because the Act did not provide for Indian reserves of land, nor did it grant any other rights or privileges to the Indians in respect of land, it was contrary to the historical development of relations with the Indians in Canada.

Cumming and Mickenburg, Native Rights In Canada, at 185-86.

7. In 1883 the Northwest Territorial Council passed "An Ordinance for the Protection of Game" providing for, inter alia, closed seasons on certain species of birds, game and fur-bearing animals. Section 19 of the Ordinanace provided that the entire Ordinance "shall not apply to Indians in any part if the Territories, with regard to any game actually killed for their use only, and not for purposes of sale or traffic." In 1889 an amendment was passed to the Game Ordinance repealing the exemption in respect to Indians. The response of the Dominion Government was to disallow this amendment (see S.C. 1891, p. lxi)

Cumming and Mickenberg, Native Rights In Canada, at 277.

8. In 1912, joint federal and provincial legislation extended the northern boundaries of Quebec and Ontario to their present positions on the shores of Hudson Bay. The enacting statutes contain identical provisions concerning the obligation on the part of the two provinces to negotiate

treaties of surrender with the Indians in the newly acquired territories. The land in question was formerly held by the Hudson's Bay Company as part of Rupert's Land. In each of the two federal enactments, the boundaries extension is stated to be made "upon the following terms and conditions and subject to the following provision" (in part):

> "That the province of Quebec [Ontario] will recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof, and the said province shall bear and satisfy all charges and expenditure in connection with or arising out of such surrenders;
>
> That no such surrender shall be made or obtained except with the approval of the Governor in Council;
>
> That the trusteeship of the Indians in the said territory, and the management of any lands now or hereafter reserved for their use, shall remain in the Government of Canada subject to the control of Parliament."
>
> Quebec Boundaries Extention Act, 1912, S.C. 1912, c.45, S.2(c), (d), and (e); Ontario Boundaries Extention Act, 1912, S.C. 1912, c.40, S.2 (a), (b) and (c); An Act respecting the extention of the Province of Quebec by the annexation of Ungava, S.Q. 1912, c.7; An Act to express the Consent of the Legislative Assembly of the Province of Ontario to an Extension of the Limits of the Province, S.O. 1912, c.3. See Lysyk, "The Indian Title Question in Canada", at 458-459.

9. The passage of the Quebec Boundaries Extention Act, 1912, S.C. 1912, c.45 was preceeded by Order-in-Council No. 2626, dated 17 January 1910, stating that the Province of Quebec must recognize Indian title in the area of land in question. Order-in-Council, No. 811, dated 2 May 1910 recites the fact that Quebec has agreed to recognize Indian rights.

10. All of the provinces except Alberta, Saskatchewan and Manitoba entered confederation with the ownership of

the natural resources. Thus, the 1929 Natural Resources Transfer Agreements conveyed the ownership of the natural resources from the federal government to the Prairie provinces. The Agreements were incorporated into the British North America Act, 1930, 20-21 George V, c.26 (U.K.); reprinted in R.S.C. 1970, Appendices, at 365-399. Each of the three agreements provide, in part, as follows:

> "In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."
>
> (See R.S.C. 1970, Appendices, Schedule (1) Manitoba, para. 13, at 371; Schedule (2) Alberta, para. 12, at 380-81; Schedule (3) Saskatchewan, para. 12, at 388-89)

The agreements were approved by the federal parliament and the three provincial legislatures. Section 1 of the B.N.A. Act, 1930 provides:

> "1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the British North America Act, 1867, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order-in-Council or terms or conditions of union made or approved under any such Act as aforesaid."

11. Section 6(3) of the National Parks Act, R.S.C. 1970, c. N-13 provides that:

> "The Governor-in-Council may authorize the Minister to purchase, expropriate or otherwise acquire any lands or interests therein, including the lands of Indians or of other persons, for the purposes of a park."

By amendment in 1974 subsection 6(3) now reads:

> "(3) The Governor in Council may authorize the Minister to purchase, expropriate or otherwise acquire any lands or interests therein for the purposes of a park."
>
> R.S. 1974, c.11, S. 2.1.

Section 11(1) of R.S. 1974, c.11 is also important to the concept of aboriginal title:

> "11.(1) Subject to subsection (2), the Governor in Council may, after consultation with the Council of the Yukon Territory or the Council of the Northwest Territories, as the case may be, by proclamation, set aside as a reserve for a National Park of Canada, pending a settlement in respect of any right, title or interest of the people of native origin therein, the lands described in Part I, II or III of Schedule V to this Act or any lands within the boundaries of the lands described in Part I, II or III of that Schedule, and upon the issue of a proclamation under this subsection, notwithstanding any other Act of the Parliament of Canada, and save for the exercise therein by the people of native origin of the Yukon Territory or Northwest Territories of traditional hunting, fishing and trapping activities, the National Parks Act applies to the reserve so set aside as it applies to a park as therein defined.
> ....
> (3) Following a settlement in respect of any right, title or interest of the people of native origin in lands set aside as a reserve by proclamation issued under subsection (1), the Governor in Council may, by further proclamation, set aside such lands, or any portion thereof, as a National Park of Canada, and upon the issue of a proclamation under this subsection, notwithstanding any other Act of the Parliament of Canada but subject to the terms of any such settlement, the National Parks Act applies to the National Park of Canada so set aside as it applies to a park as therein defined."

12. The Preamble to the James Bay and Northern Quebec Native Claims Settlement Act states, inter alia:

> "AND WHEREAS the Agreement further provides in consideration of the rights and benefits set forth therein for the surrender by the said Crees, the Inuit of Quebec and the Inuit of Port Burwell of all their native claims, rights, titles and interests, whatever they may be, in and to the land in the Territory and in Quebec;
>
> AND WHEREAS Parliament and the Government of Canada recognize and affirm a special

responsibility for the said Crees and Inuit..."

Section 3 of the Act continues:

> "3.(1) The Agreement is hereby approved, given effect and declared valid.
>
> (2) Upon the extinguishment of the native claims, rights, title and interest referred to in subsection (3), the beneficiaries under the Agreement shall have the rights, privileges and benefits set out in the Agreement.
>
> (3) All native claims, rights, title and interests, whatever they may be, in and to the Territory, of all Indians and all Inuit, wherever they may be, are hereby extinguished, but nothing in this Act prejudices the rights of such persons as Canadian citizens and they shall continue to be entitled to all of the rights and benefits of all other citizens as well as to those resulting from the Indian Act, where applicable, and from other legislation applicable to them from time to time."

By section 2, "Territory" means the "area of land comtemplated by the 1912 Quebec boundaries extention acts...".

James Bay and Northern Quebec Native Claims Settlement Act, S.C. 1976-77, c.32. Proclaimed in force 31 October, 1977. The James Bay and Northern Quebec Agreement has been marked "G" for identification.

PART IV

THE LAW

A. THE ORIGINS OF ABORIGINAL TITLE

1. Aboriginal title is a common law recognition of early colonial policy to respect the possession of native peoples of their lands and to require a surrender of their interest before settlement.

See generally Part III Paras. 4-6, 9-24.

2. St. Catharines Milling and Lumber Company v. The Queen (1888),14 App. Cas. 46 (P.C., affirming (1886) 13 S.C.R. 577, which affirmed (1885) 13 O.A.R. 148 (Ont. C.A.), which affirmed (1885),10 O.R. 196 (Chancery), involved a dispute between the Province of Ontario and the Government of Canada as to the ownership of certain lands ceded by a tribe of Indians in an 1873 treaty with the Dominion. The lumber company cut timber on the land in question, which was Crown land, acting under a licence granted by the Dominion Government in 1883. The Ontario Government sued for an injunction and damages arguing that section 109 of the British North America Act, 1867 guaranteed provincial ownership of all lands lying within the boundaries of the respective provinces, subject to any trusts or other interests in those lands. The Dominion argued that by virtue of the Proclamation of 1763 the content of aboriginal title to lands reserved for Indians was that of fee simple (14 App. Cas. 46, at 54), and therefore the Dominion Government received complete title as a result of the 1873 treaty. Each Canadian court and the Privy Council held in favour of the Province. In order to deal with the

argument the courts had to determine the nature of the interests held by the three parties concerned: the federal government, the provincial government, and the Indians. The Privy Council held that as a result of the Royal Proclamation of 1763 the ownership of Indian lands was split, with the Crown holding the underlying legal fee - variously described as a "legal estate" (p.55), a "present proprietary estate" (p.58), and as "a substantial and paramount estate underlying the Indian title...." (p.55) - while the Indians possessed a right of occupancy, termed a "personal and usufructuary right" (p.54), "Indian title" (p.55), a "burden" on the title of the Crown (p.58), and as an "interest" other than that of the Province (p.58). Upon Confederation, the Crown, in right of the Province, became possessed of the proprietary estate which became a plenum dominium (defined as: "Full ownership: the property in a thing united with the usufruct." Black's Law Dictionary (4th ed., West Pub. Co., St. Paul: 1951 p.1314) when the Indian title was surrendered (p.55, 57). In St. Catharines Milling and Lumber Company v. The Queen, (1886) 13 S.C.R. 577, the majority held that the Crown in the right of the Province became the owner and Strong and Gwynne, JJ., held that the Dominion became the owner. However, on the point of Indian title there was no disagreement between the majority and minority views, Ritchie, C.J., for the majority agreeing substantially with Strong, J. in this respect.

3. In the Supreme Court of Canada decision in the St. Catharines Milling case Strong J., in dissent on another issue, quoted from a review of American authorities as follows:

> "The American authorities, to which reference has already been made, consist (amongst others) of passages in the commentaries of Chancellor

Kent (Kent's Commentaries 12 ed. by Holmes, vol. 3 p. 379 et seq. and in editor's notes), in which the whole doctrine of Indian titles is fully and elaborately considered, and of several decisions of the Supreme Court of the United States, from which three, Johnston v. McIntosh, (8 Wheaton 543), Worcester v. State of Georgia (6 Peters 515), and Mitchell v. United States (9 Peters 711), may be selected as leading cases. The value and importance of these authorities is not merely that they show that the same doctrine as that already propounded regarding the title of the Indians to unsurrendered lands prevails in the United States, but, what is of vastly greater importance, they without exception refer its origin to a date anterior to the revolution and recognise it as a continuance of the principles of law or policy as to Indian titles then established by the British government, and therefore identical with those which have also continued to be recognized and applied in British North America. Chancellor Kent, referring to the decision of the Supreme Court of the United States, in Cherokee Nation v. State of Georgia (5 Peters 1), says:-

'The court there held that the Indians were domestic, dependent nations and their relations to us resembled that of a ward to his guardian; and they had an unquestionable right to the lands they occupied until that right should be extinguished by a voluntary cession of our government (3 Kent Comms. 383).'

On the same page the learned commentator proceeds thus:-

'The Supreme Court in the case of Worcester reviewed the whole ground of controversy relative to the character and validity of Indian rights within the territorial dominions of the United States, and especially with reference to the Cherokee nation within the limits of Georgia. They declared that the right given by European discovery was the exclusive right to purchase, but this right was not founded on a denial of the Indian possessor to sell. Though the right of the soil was claimed to be in the European governments as a necessary consequence of the right of discovery and assumption of territorial jurisdiction, yet that right was only deemed such in reference to the whites; and in respect to the Indians it was always understood to amount only to the exclusive right of purchasing such lands as the natives were willing to sell. The royal grants and charters asserted a title to the country against Europeans only, and they were considered as blank paper so far as the rights of the natives were concerned. The English, the French and the Spaniards were equal competitors for the friendship and aid of the Indian nations. The Crown of England never attempted to interfere with the national

affairs of the Indians further than to keep out the agents of foreign powers who might seduce them into foreign alliances. The English Government purchased the alliance and dependence of the Indian Nations by subsidies, and purchased their lands when they were willing to sell at a price they were willing to take, but they never coerced a surrender of them. The English Government considered them as nations competent to maintain the relations of peace and war and of governing themselves under her protection. The United States, who succeeded to the rights of the British Crown in respect of the Indians, did the same and no more; and the protection stipulated to be afforded to the Indians and claimed by them was understood by all parties as only binding the Indians to the United States as dependent allies.'

Again the same learned writer says (p. 385),

'The original Indian Nations were regarded and dealt with as proprietors of the soil which they claimed and occupied, but without the power of alienation, except to the Governments which protected them and had thrown over them and beyond them their assumed patented domains. These Governments asserted and enforced the exclusive right to extinguish Indian titles to lands, enclosed within the exterior lines of their jurisdictions, by fair purchase, under the sanction of treaties; and they held all individual purchases from the Indians, whether made with them individually or collectively as tribes, to be absolutely null and void. The only power that could lawfully acquire the Indian title was the State, and a government grant was the only lawful source of title admitted in the Courts of Justice. The Colonial and State Governments and the government of the United States uniformly dealt upon these principles with the Indian Nations dwelling within their territorial limits.'

Further, Chancellor Kent, in summarising the decision of the Supreme Court in Mitchell v. United States, states the whole doctrine in a form still more applicable to the present case. He says (P.386, note (a)):

'The Supreme Court once more declared the same general doctrine, that lands in possession of friendly Indians were always, under the colonial governments, considered as being owned by the tribe or nation as their common property by a perpetual right of possession; but that the ultimate fee was in the crown or its grantees, subject to this right of possession, and could be granted by the crown upon that condition; that individuals could not purchase Indian lands without license, or under rules prescribed by law; that possession was considered with reference to Indian habits and modes of life, and the hunting grounds of the tribes were as much in their actual occupation as the cleared fields of the whites, and this was the tenure of Indian lands by the laws of all the colonies.'

> It thus appears, that in the Unites States a traditional policy, derived from colonial times, relative to the Indians and their lands has ripened into well established rules of law, and that the result is that the lands in the possession of the Indians are, until surrendered, treated as their rightful though inalienable property, so far as the possession and enjoyment are concerned; in other words, that the dominium utile is recognized as belonging to or reserved for the Indians, though the dominium directum is considered to be in the United States. Then, if this is so as regards Indian lands in the United States, which have been preserved to the Indians by the constant observance of a particular rule of policy acknowledged by the United States courts to have been originally enforced by the crown of Great Britain, how is it possible to suppose that the law can, or rather could have been, at the date of confederation, in a state any less favourable to the Indians whose lands were situated within the dominion of the British crown, the original author of this beneficent doctrine so carefully adhered to in the United States from the days of the colonial governments? Therefore, when we consider that with reference to Canada the uniform practice has always been to recognize the Indian title as one which could only be dealt with by surrender to the crown, I maintain that if there had been an entire absence of any written legislative act ordaining this rule as an express positive law, we ought, just as the United States courts have done, to hold that it nevertheless existed as a rule of the unwritten common law, which the courts were bound to enforce as such, and consequently, that the 24th sub-section of section 91, as well as the 109th section and the 5th sub-section of section 92 of the British North America Act, must all be read and construed upon the assumption that these territorial rights of the Indians were strictly legal rights which had to be taken into account and dealt with in that distribution of property and proprietary rights made upon confederation between the federal and provincial governments."
>
> St. Catharines Milling and Lumber Co. v. The Queen (1886), 13 S.C.R. 577, at 610-613.

4. In Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313; 34 D.L.R. (3d) 145; [1973] 4 W.W.R. 1; on appeal from (1970), 13 D.L.R. (3d) 64; 77 W.W.R. 481 (B.C.C.A.); which was on appeal from (1969), 8 D.L.R. (3d) 59; 71 W.W.R. 81 (B.C.S.C.), the plaintiffs, on their own behalf, and as representatives of various

Indian tribes in British Columbia sought a declaration against the Attorney General of British Columbia "that the aboriginal title, otherwise known as the Indian title of the plaintiffs to their ancient tribunal territory.... has never been lawfully extinguished" ((1969), 8 D.L.R. (3d) 59, at 60). It was an agreed fact at trial that "no treaty or contract with the Crown, the Hudson's Bay Company or any other of the historical parties to dealings with lands in Canada occupied by Indians since time immemorial, has ever been entered into....with respect to the lands in question, by anyone on behalf of the Nishga Nation" ((1969), 8 D.L.R. (3d) 59, at 63). The plaintiffs argued that the Nishgas acquired, and at the time of trial still held, rights over their lands on Vancouver Island pursuant to the guarantees outlined in the Royal Proclamation of 1763. Gould, J. following the opinions of Sheppard and Lord, JJ.A. over the opinion of Norris, J.A. in R. v. White and Bob (1964), 50 D.L.R. (2d) 613; 52 W.W.R. 193 (B.C.C.A.) held that the Royal Proclamation did not apply to Vancouver Island because in 1763 Vancouver Island and the lands of Indians thereon were unknown to the Crown ((1969), 8 D.L.R. (3d) 59, at 66-67). Gould, J. then held that even if the plaintiffs could show that they had title to land which existed independently of the Royal Proclamation, such rights were "firmly and totally extinguished by overt acts of the Crown Imperial by way of proclamation, ordinance and proclaimed statute", revealing "a unity of intention to exercise....absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to 'aboriginal title....'" ((1969), 8 D.L.R. (3d) 59, at 74, 82). Gould, J. then noted that because of his findings he did not have to determine what the term "aboriginal title" might mean

((1969), 8 D.L.R. (3d) 59, at 82).

The court in Calder et al. v. Attorney-General of British Columbia (1970), 13 D.L.R. (3d) 64 (B.C.C.A.) essentially agreed with the findings of Mr. Justice Gould. For the purposes of the appeal the respondent admitted that the appellants were the descendants of the Indians who inhabited the lands in question in a traditional manner since time immemorial ((1970), 13 D.L.R. (3d) 64, at 70). Tysoe, J.A. held that the court lacked authority to hear the plaintiffs because there is no aboriginal title capable of judicial recognition in municipal law unless it had been previously recognized by the Legislature or the Executive Branch of Government. Since the Royal Proclamation of 1763 did not apply to the lands in question, following the reasoning set out by Gould, J. at trial, the Nishgas had no basis upon which to argue their claim ((1970) 13 D.L.R. (3d) 64, at 70-77). Tysoe, J.A. goes on to state that if he is wrong on the foregoing issues he agrees with Gould, J. that the aboriginal title to the lands had been extinguished, adding:

> "It is true, as the appellants have submitted, that nowhere can one find express words extinguishing Indian title but 'actions speak louder than words' and in my opinion the policy of the Governor and the Executive Council of British Columbia and the execution of that policy was such that, if Indian title existed, extinguishment was effected by it."

((1970), 13 D.L.R. (3d) 64, at 94-95). Davey, C.J.B.C., and Maclean, J.A. are in essential agreement with the reasons of judgment delivered by Mr. Justice Tysoe.

In the Supreme Court of Canada the Calder case, [1973] S.C.R. 313, was ultimately decided on a very narrow procedural ground, Judson, Martland and Ritchie, JJ., concurring with Pigeon, J. that in the absence of a fiat of the Lieutenant-Governor of the Province, the court has no jurisdiction to grant a declaration impugning the title to land vested in the Crown in the right of the Province of British Columbia ([1973] S.C.R. 313, at 426-427, 345). The decision of Pigeon, J. did not touch upon the merits of the case. Judson, J. (Martland and Ritchie, JJ., concurring) and Hall, J. (Spence and Laskin, JJ., concurring) each wrote separate opinions dealing with the merits which conflicted on an important issue. Although Mr. Justice Judson held that the Royal Proclamation was not the exclusive source of aboriginal title, he agreed with the trial and the Court of Appeal decisions on the issue of extinguishment of title. ([1973] S.C.R. 322-323, 333). At p. 344 of the judgment, Judson, J. concludes:

> "In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation."

On this point Hall, J. states, after an exhaustive review of the authorities:

> "It would....appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be 'clear and plain'. There is no such proof in the case at bar; no legislation to that effect."

([1973] S.C.R. 313, at 404). Mr. Justice Hall then cited a long line of authority to refute the finding by the Court of Appeal that Indian title was incapable of judicial interpretation unless it was recognized by legislative or executive actions ([1973] S.C.R. 313, at 404 et seq.).

Finally, Mr. Justice Hall disagreed with Judson, J. by holding that the Royal Proclamation of 1763 did apply to Vancouver Island but, in any case, agreed with Judson, J. that the Proclamation was merely declaratory of aboriginal title.

5. As stated by Judson, J. in the Calder case:

> "Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal or usufructuary right'. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was 'dependent on the good-will of the Sovereign'."
>
> Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313, at 328.

6. The Inuit of Baker Lake and their ancestors have always lived as nomadic dwellers on the lands in question. Their use and occupancy of the land has remained unchanged to the present and extends back in time at least to the commencement of the Thule Period circa 1200 A.D. Even though many families who formerly lived in camps were settled within the Hamlet of Baker Lake in the late 1950's their use and occupancy of the lands for camping, hunting and fishing remains essentially unchanged.

The economics of the barren lands of the Eastern Canadian Arctic provide the shaping force for human organization in that area. The concepts of dispersal of population, at least while hunting, sharing and communal living, and co-operation in the use of the land are all rooted in the necessity for survival in an extremely demanding environment.

Professor J.C. Smith observed:

> "The origins of the concept of native or aboriginal title is not, however, to be found in international law, nor in the theory of aboriginal rights traceable to the Spanish theologian, Francisco de Vitoria. It goes much deeper than this. It lies in the institutions of property of all people which, although differing from culture to culture, nearly all give recognition to the principle that the land which a people have developed and used from time immemorial belongs to them. The basis of title as between a dominant and a servient system is, therefore, long-term use and occupation by the servient systems of the lands now under the sovereignty of the dominant system. It is a possessory title. The degree of occupation and use needed to constitute the property relation depends upon the economic potentials of the land.
>
> J.C. Smith, "The Concept of Native Title", (1974), 24 University of Toronto Law Journal 1, at 9.

The existence of a nomadic lifestyle, even in geographic locales where a sedentary existence would be possible, has not defeated aboriginal title.

In Mitchel v. The United States, Baldwin, J. delivering the opinion of the Supreme Court of the United States held that:

> "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way, and for their own purposes, were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals."
>
> Mitchel et al v. The United States, 34 U.S. (9 Pet. 711) 464 (1835), at 746:486.

The principle is further illustrated by a number of decisions of the United States' Court of Claims.

For example, in United States v. Seminole Indians, Collins, J. states:

> "Had the Seminoles chosen to live by food-raising alone, we would regard the 'village' evidence (stressed by the Government) as a persuasive consideration in limiting the Seminoles' 'title' to the land falling within the compass of their permanent homesites, i.e., the northern half of the peninsula [of Florida].

Cultures that stake their survival upon a close union with the soil, as is the case with primitive food-raising economies, would not demand the vast tracts of land required for a nomadic, hunting existence. But the Seminoles—as was the case with many other Indian groups—survived not simply through farming, but by food-gathering and hunting as well. In other words, Seminole land-use clearly encompassed more than the soil actually 'possessed.' Therefore, other aspects of the Seminole pattern of life demand consideration.

Not only did these Indians wander in search of food supplements but, as already indicated, the appearance of the English in Florida spurred a demand for hides that compelled the Seminoles to make extensive use of the southern peninsula. On this point, the record admits of no doubt. It is clear, from the Government's own evidence, that the Seminoles' 'hunting preserve' extended to the Florida Keys. Such extensive penetration of the peninsula could be accomplished only be resort to temporary encampments—a home away from home. This, too, the record confirms. Again, it is worth emphasizing that the Seminoles hunted not only for subsistence, but also to sustain the trade which the English had initiated and which the Spanish, after them, were obliged to continue. Under such circumstances, the Indians' use of the land would not be minimal; moreover, this trade could reasonably demand a use of the land ranging well beyond the immediate environs of the permanent village sites.

In addition, the Seminoles traveled the inland waterways by canoe—covering as many as 40 miles per day—and from other reliable evidence we gather that, as early as 1740, the Seminoles had taken canoe trips to Havana with the eastern shore of the southern peninsula serving as their departure point. Again, by reference to the Government's evidence, we are informed that, as early as 1771, Seminole travel accounts for their appearance along the shores of western Florida.

Given these facts—which are not in the slightest way disputed—we believe that the Commission, as the trier of fact, could reasonably have concluded that Seminole 'use and occupancy' was adequate to sustain a claim of original title to the Florida peninsula. The area acknowledged by the Commission as being within Seminole dominion constituted a definable territory occupied exclusively by the Seminoles. And since the 'use and occupancy' essential to the recognition of Indian title does not demand <u>actual</u> possession of the land, but may derive through intermittent contacts, <u>Spokane Tribe of Indians v. United States</u>, 163 Ct. Cl. 58, 66 (1963), which define some general boundaries of the occupied land, <u>Upper Chehalis Tribe v. United States</u>, 140 Ct. Cl. 192, 155 F. Supp. 226 (1957), the Commission's determination that the Seminoles occupied all of Florida may not be regarded as legally defective."

> The United States v. The Seminole Indians of the State of Florida And The Seminole Nation of Oklahoma (1967), 180 Ct. C l. 375, at 384-385.

In Confederated Tribes v. The United States, Durfee, J. held:

> "'Continuous' use does not limit recovery to areas where the tribe had permanent villages, but also includes seasonal or hunting areas over which the Indians had control even though those areas were used only intermittently. Spokane Tribe v. United States, 163 Ct. Cl. 58, 66 (1963); Delaware Tribe of Indians v. United States, 130 Ct. Cl. 782, 128 F. Supp. 391 (1955); Iowa Tribe v. United States, 6 Ind. Cl. Comm. 464 (1958)."
>
> The Confederated Tribes Of The Warm Springs Reservation of Oregon v. The United States (1966) 177 Ct. Cl. 184, at 194.

7. The words "from time immemorial" have not been judicially defined. It is respectfully submitted that, at the very most, these words would mean since before recorded history, that is, before a memorial or written record is available. If, as in this case, the evidence shows that the first explorers into Baker Lake encountered Inuit and further, that archaeological evidence establishing prior occupancy is considered, that is sufficient to meet the language of the cases.

8. It has been held that the Royal Proclamation of 1763 "does not and never did apply" to the area granted to the Hudson's Bay Company by the 1670 Charter.

> Sigeareak E 1-53 v. The Queen, [1966] S.C.R. 645, per Hall, J. at 650.

It is respectfully submitted that this statement is too broad and is not supported by the language of the Proclamation itself.

In the Preamble to the section of the Proclamation dealing with the Indians "lands reserved to the said Indians" are defined as follows:

> ".... that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds...."

The section of the Proclamation excluding the territory granted to the Hudson's Bay Company reads:

> "And We do further declare it to be our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the Use of the said Indians, all the Lands and Territories not included within the Limits of our said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West, as aforesaid;"

However, the Proclamation continues in a passage designed to protect Indians from fraud and abuses in the purchase of lands reserved to them within the colonies or within the limits of a proprietary government by requiring:

> "....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 that Purpose."
>
> Royal Proclamation of 1763, reprinted in the "Legislative Brief", Tab 14.

The Hudson's Bay Company was a proprietary government in accordance with its Charter, which reads in part:

> ".... AND FURTHER WEE DOE by these presentes for us our heires and successors make create and constitute the said Governor and Company for the tyme being and theire successors the true and absolute Lordes and Proprietors of the same Territory....aforesaid...."
>
> Hudson's Bay Company Charter, Exhibit D-7, at 11-12.

By 1763 Baker Lake had been discovered and the Hudson's Bay Company was aware of, and dealt with the Inuit.

> Journals of William Christopher and Moses Norton, Exhibits P-92 and P-93.

The effect of the Royal Proclamation in law is to provide some evidence of the recognition of aboriginal title in accordance with its terms. In addition, it has been held not to be the exclusive souce of aboriginal title by a number of courts including Judson, J. and Hall, J. in the Calder case, and Johnston, J.A. in Regina v. Sikyea, approved by a unanimous Supreme Court of Canada.

> Calder et al v. Attorney-General of British Columbia, [1973] S.C.R. 313, per Judson, J., at 322-323, per Hall, J., at 396-397.

> Regina v. Sikyea (1964), 43 D.L.R. (2d) 150 (N.W.T.C.A.), at 152; affirmed Sikyea v. The Queen, [1964] S.C.R. 642, per Hall, J., at 646.

Insofar as the applicable portion of the Royal Proclamation of 1763 recognizes that lands reserved to Indians (i.e. lands not ceded or purchased) are able to be sold, and controls to prevent fraud or abuse are imposed, it supports the basic concept of aboriginal title in like manner as the more often-quoted earlier portion. Thus, it is submitted that the Royal Proclamation of 1763 is supportive of aboriginal title in the Baker Lake area.

B. CHARACTERISTICS OF ABORIGINAL TITLE

THE ABORIGINAL INTEREST

1. "I am of the opinion, that all ungranted lands in the province of Ontario belong to the crown as part of the public domain, subject to the Indian right of occupancy in cases in which the same has not been lawfully extinguished, and when such right of occupancy has been lawfully extinguished absolutely to the crown, and as a consequence to the province of Ontario. I think the crown owns the soil of all the unpatented lands, the Indians possessing only the right of occupancy, and the crown possessing the legal title subject to that occupancy, with the absolute exclusive right to extinguish the Indian title either by conquest or by purchase; that, as was said by Mr. Justice Story (Story on the Constitution 4th Ed. ss. 687),

> 'It is to be deemed a right exclusively belonging to the Government in its sovereign capacity to extinguish the Indian title and to perfect its own dominion over the soil and dispose of it according to its own good pleasure. ....The crown has the right to grant the soil while yet in possession of the Indians, subject, however to their right of occupancy.' "

St. Catharines Milling and Lumber Co. v The Queen (1887), 13 S.C.R. 577, per Ritchie, C.J., at 599-600.

"..... the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be 'parts of Our dominions and territories;' and it is declared to be the will and pleasure of the sovereign that, 'for the present', they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished."

St. Catharines Milling and Lumber Company v. The Queen (1888), 14 App. Cas.46 (P.C.), per Lord Watson, at 54-55.

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

Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313, per Judson, J., at 328.

"The dominant and recurring proposition stated by Chief Justice Marshall in Johnson v. McIntosh is that on discovery or on conquest the aborigines of newly-found lands were conceded to be the rightful occupants of the soil with a legal as well as a just claim to retain possession of it and to use it according to their own discretion, but their rights to complete sovereignty as independent nations were necessarily diminished and their power to dispose of the soil on their own will to whomsoever they pleased was denied by the original fundamental principle that discovery or conquest gave exclusive title to those who made it."

Calder et al v. Attorney-General of British Columbia, [1973] S.C.R. 313, per Hall, J., at 383; See also Johnson and Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat. 543) 240 (1823); Worcester v State of Georgia 31 U.S. (6 Pet.515) 350 (1832).

II. DERIVATION OF THE ABORIGINAL INTEREST

1. Aboriginal title derives from the domestic law imported by the colonizing power. In the case of England, the principles of that law involved a recognition and acceptance of the former law of the colony. In this policy, the roots of recognition of land held by aborigines may be found.

Hall, J. in the Calder case quotes from the English case of Campbell v. Hall as follows:

"Chief Justice Marshall in his judgment in Johnson v. McIntosh referred to the English

case of Campbell v. Hall (1774), 1 Cowp. 204, 98 E.R. 1045 This case was an important and decisive one which has been regarded as authoritative throughout the Commonwealth and the United States. It involved the rights and status of residents of the Island of Grenada which had recently been taken by British arms in open war with France. The judgment was given by Chief Justice Mansfield. In his reasons he said at p.1047

> 'A great deal has been said, and many authorities cited relative to propositions, in which both sides seem to be perfectly agreed; and which, indeed are too clear to be controverted. The stating some of those propositions which we think quite clear, will lead us to see with greater perspicuity, what is the question upon the first point, and upon what hinge it turns. I will state the propositions at large, and the first is this:
>
> A country conquered by the British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, and Parliament of Great Britain.
>
> The 2d is, that the conquered inhabitants once received under the King's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens.
>
> The 3d, that the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning.
>
> The 4th, that the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives.
>
> The 5th, that the laws of a conquered country continue in force, until they are altered by the conqueror: the absurd exception as to pagans, mentioned in Calvin's case [(1608), 7 Co. Rep. 1a Moore (K.B.) 790 sub nom. Case del Union, del Realm, D'Escose, ove Angleterre, 72 E.R. 908], shews the universality and

> antiquity of the maxim. For that distinction could not exist before the Christian era; and in all probability arose from the mad enthusiasm of the Crusades. In the present case the capitulation expressly provides and agrees, that they shall continue to be governed by their own laws, until His Majesty's further pleasure be known.
>
> The 6th, and last proposition is, that if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put.'

A fortiori the same principles, particularly Nos. 5 and 6, must apply to lands which become subject to British sovereignty by discovery or by declaration."

Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313, at 387-89.

III EXTINGUISHMENT

1. In the Calder case the Supreme Court of Canada split evenly on the question of whether or not the aboriginal title of the Nishgas had been extinguished. Judson, J. held that the 13 Proclamations and Ordinances for the granting and sale of Crown lands declaring ownership of the fee by the Crown effectively extinguished aboriginal title. Judson, J. adopted the language of Gould, J. in the trial decision, where he said at (1969), 8 D.L.R. (3d) 59, at 82:

> " All thirteen reveal a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to 'aboriginal title, otherwise known as the Indian title', to quote the statement of claim."
>
> Calder et al v. Attorney-General of British Columbia, [1973] S.C.R. 313, at 333.

Hall, J. held that Indian title was a legal right which could not be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation. There was no surrender by the Nishgas and neither the Colony of British Columbia nor, after Confederation, the Province or the Federal Government enacted legislation specifically purporting to extinguish the Indian title.

> Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313, at 402.

2. In the Court of Appeal, Tysoe, J.A. applied what is known as the Act of State doctrine to the question of whether or not the Nishgas had a right of action enforceable in municipal courts. He states:

> "In the light of these authorities I think it is necessary to keep in mind the clear distinction between mere policy of a sovereign authority and rights of natives conferred or expressly recognized by statute of the sovereign authority or by treaty or agreement having statutory effect and the different legal results that follow. There is no such statute applicable to the Nishga Indians and they have no such treaty or agreement. In saying this, I do not overlook the Royal Proclamation of 1763 so strongly relied on by the appellants. In my view this Proclamation did not in 1763 and never did thereafter apply to the area of territory inhabited by the Nishga Indians or to those Indians. On this question I would respectfully apply the reasoning of Sheppard, J.A., in which Lord, J.A. concurred, in R. v. White and Bob (1964), 50 D.L.R. (2d) 613 at pp. 619-21, 52 W.W.R. 193 and with which Schultz, Co. Ct. J., agreed in R. v. Discon and Baker (1968), 67 D.L.R. (2d) 619 at p. 629, 63 W.W.R. 485, adapting it to the Nishga territory."
>
> Calder et al. v. Attorney-General of British Columbia (1970), 13 D.L.R. (3d) 64, at 73.

At p.76, Mr. Justice Tysoe concludes:

> "It is my opinion that the matter of the possession of Indian title by the Nishga Indians and of

> any rights thereunder and the claim of the appellants in this action is for Government, and not for the Courts of British Columbia. I think it is clear from the cases I have set out, supra, that whatever rights the Nishga Indians may think they have under Indian title are not enforceable in the Courts as they have not been recognized and incorporated in the municipal law. I think it necessarily follows from those cases that this Court is without authority to pass upon the question whether these appellants possess Indian title. The claim for relief of the appellants is in negative form but it imports an affirmative, i.e., that the appellants possess Indian title. To grant the declaration sought would be to do indirectly what the Courts cannot do directly."

Hall, J. held that Mr. Justice Tysoe had erroneously applied the Act of State doctrine:

> "The Court of Appeal also erred in holding that there 'is no Indian Title capable of judicial interpretation unless it has previously been recognized either by the Legislature or the Executive Branch of Government'. Relying on Cook v. Sprigg, ([1899] A.C. 572), and other cases, the Court of Appeal erroneously applied what is called the Act of State Doctrine. This doctrine denies a remedy to the citizens of an acquired territory for invasion of their rights which may occur during the change of sovereignty. English Courts have held that a municipal Court has no jurisdiction to review the manner in which the Sovereign acquires new territory. The Act of State is the activity of the Sovereign by which he acquires the property. Professor D.P. O'Connell in his work International Law, 2nd ed., 1970, at p. 378 says:
>
> > 'This doctrine, which has been affirmed in several cases arising out of the acquisition of territory in Africa and India, has been misinterpreted to the effect that the substantive rights themselves have not survived the change. In fact English courts have gone out of their way to repudiate the construction, and it is clear that the Act of State doctrine is no more than a procedural bar to municipal law action, and as such is irrelevant to the question whether in international law change of sovereignty affected acquired rights.'
>
> The Act of State doctrine has no application in the present appeal for the following reasons: (a) It has never been invoked in claims dependent on aboriginal title. An examination of its rationale indicates that it would be quite inappropriate for the Courts to extend the doctrine to such cases; (b) It is based on the premise that an Act of State is an exercise of the Sovereign power which a municipal Court has no power to review: see Salaman v. Secretary of State in Council of India, [1906] 1 K.B. 613 at pp.639-640; Cook v. Sprigg, supra, at p. 578.

> When the Sovereign, in dealings with another Sovereign (by treaty of cession or conquest) acquires land, then a municipal Court is without jurisdiction to the extent that any claimant asserts a proprietary right inconsistent with acquisition of property by the Sovereign -i.e. acquisition by Act of State. The ratio for the cases relied upon by the Court of Appeal was that a municipal Court could not review the Act of State if in so doing the Court would be enforcing a treaty between two Sovereign States: see Cook v. Sprigg, supra, at p. 578; Vajesingji Joravaisingji v. Secretary of State for India (1924), [L.R. 51 Ind. App. 357] at p. 360, Salaman, supra, at p. 639. In all the cases referred to by the Court of Appeal the origin of the claim being asserted was a grant to the claimant from the previous Sovereign. In each case the claimants were asking the Courts to give judicial recognition to that claim. In the present case the appellants are not claiming that the origin of their title was a grant from any previous Sovereign, nor are they asking this Court to enforce a treaty of cession between any previous Sovereign and the British Crown. The appellants are not challenging an Act of State -they are asking this Court to recognize that settlement of the north Pacific coast did not extinguish the aboriginal title of the Nishga people - a title which has its origin in antiquity - not in a grant from a previous Sovereign. In applying the Act of State doctrine, the Court of Appeal completely ignored the rationale of the doctrine which is no more than a recognition of the Sovereign prerogative to acquire territory in a way that cannot be later challenged in a municipal Court.
>
> Once it is apparent that the Act of State doctrine has no application, the whole argument of the respondent that there must be some form of 'recognition' of aboriginal rights falls to the ground."
>
> Calder, et al. v. Attorny-General of British Columbia, [1973] S.C.R. 313, at 404-406.

3. Judson, J. refrained from adopting this argument, confining his approval of the Tysoe judgment to the question of actual extinguishment with respect to which Tysoe, J.A. had adopted the language of Mr. Justice Gould at trial. Judson, J. stated:

> "The result of these Proclamations and Ordinances was stated by Gould, J. at the trial in the following terms [8 D.L.R. (3d) at pp. 81-2]. I accept his statement, as did the Court of Appeal:
>
> > 'The various pieces of legislation referred to above are connected, and

> in many instances contain references inter se, especially XIII. They extend back well prior to November 19, 1866, the date by which, as a certainty, the delineated lands were all within the boundaries of the Colony of British Columbia, and thus embraced in the land legislation of the Colony, where the words were appropriate. All thirteen reveal a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to 'aboriginal title, otherwise known as the Indian title', to quote the statement of claim. The legislation prior to November 19, 1866, is included to show the intention of the successor and connected legislation after that date, which latter legislation certainly included the delineated lands."
>
> Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313, at 333.

Thus both Judson, J. and Tysoe, J.A. were in agreement that the various proclamations and ordinances had the effect of extinguishing Indian title. This quotation from Gould, J. also appears in full, in the judgment of Tysoe, J.A., followed by the statement that:

> "It is true, as the appellants have submitted, that nowhere can one find express words extinguishing Indian title but 'actions speak louder than words' and in my opinion the policy of the Governor and the Executive Council of British Columbia and the execution of that policy was such that, if Indian title existed, extinguishment was effected by it."
>
> Calder et al. v. Attorney-General of British Columbia (1970), 13 D.L.R. (3d) 64, at 94-95.

4. Both Tysoe, J.A. and Judson, J. base their conclusion that aboriginal title could be extinguished by implication on the bare statement of the right of the sovereign to extinguish title as set forth in the American case law, citing in particular United States v. Santa Fe Pacific Railway Co. (1941), 314 U.S. 339; and Tee-Hit-Ton Indians v. The United States (1955), 348 U.S. 272 Judson, J. states, quoting from the Santa Fe case:

> "The terms used in this letter bring to mind what was said on the subject of extinguishment of Indian title in United States v. Santa Fe Pacific R. Co. (1941), 314 U.S. 339 at 347:

> 'Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the Cramer case, 'The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive.' 261 U.S. at 229.
>
> Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. Buttz v. Northern Pacific Railroad, [119 U.S. 55 at 66.] As stated by Chief Justice Marshall in Johnson v. M'Intosh, [8 Wheaton 543, at 586] 'the exclusive right of the United States to extinguish' Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. Beecher v. Wetherby, [95 U.S. 517, at 525]."
>
> Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313, at 334-335.

Note that when relying on the Santa Fe case Tysoe, J.A. only quotes the second paragraph of the passage as outlined in the decision of Mr. Justice Judson, and no mention is made of the first paragraph of the quoted passage of the Santa Fe case.

> See Calder et al. v. Attorney-General of British Columbia (1970), 13 D.L.R. (3d) 64, at 79.

Tysoe, J.A. also relied upon Tee-Hit-Ton Indians v. The United States (1955), 348 U.S. 272 (See the Calder case, 13 D.L.R. (3d) at 79). The Tee-Hit-Ton case held that recovery of compensation without specific legislation would not be allowed when there had been extinguishment not having been grounded on a taking under the Fifth Amendment. Mr. Justice Reed in delivering the opinion of the Court (Douglas, Warren, and Frankfurter, JJ., dissenting) stated on the extinguishment issue:

"In 1941 a unanimous Court wrote, concerning Indian title, the following:

> 'Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable issues.' United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 347, 62 S.Ct. 248, 252, 86 L.Ed. 260."

Tee-Hit-Ton Indians v. The United States (1955),348 U.S. 272, at 281.

5. However the United States v. Santa Fe Pacific Railroad Company (1941),314 U.S. 339 was unquestionably more comprehensive and meaningful than would appear from the above-cited judgments. The opinion of Douglas, J. delivering the opinion of a unanimous Court of Appeal must be read in its entirety. Mr. Justice Douglas states, at p. 353-354:

> "We search the public records in vain for any clear and plain indication that Congress in creating the Colorado River reservation was doing more than making an offer to the Indians, including the Walapais, which it was hoped would be accepted as a compromise of a troublesome question. We find no indication that Congress by creating that reservation intended to extinguish all of the rights which the Walapais had in their ancestral home.
>
> That Congress could have effected such an extinguishment is not doubted. But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in Choate v. Trapp, 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941, the rule of construction recognized without exception for over a century has been that 'doubtful expressions, instead of being resolved in favour of the United States, are to be resolved in favour of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.' And see Minnesota v. Hitchcock, 185 U.S. 373, 395, 396, 22 S.Ct. 650, 658, 659."

United States v. Santa Fe Pacific Railroad Company (1941),314 U.S. 339, at 353-354.

If anything, the Santa Fe case stands for the proposition that extinguishment can only be achieved by "clear and plain" actions, rather than by implication.

6. The approach that actions extinguishing aboriginal title must be clear and plain has been expressly followed in a number of American cases. For example, in Lipan Apache Tribe v. The United States (1967), 180 Ct. Cl. 487, at 492, Davis, J. stated:

> "The correct inquiry is, not whether the Republic of Texas accorded or granted the Indians any rights, but whether that sovereign extinguished their pre-existing occupancy rights. Extinguishment can take several forms; it can be effected 'by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise ***.' United States v. Santa Fe Pac. R.R., supra, 314 U.S. at 347. While the selection of a means is a governmental prerogative, the actual act (or acts) of extinguishment must be plain and unambiguous. In the absence of a 'clear and plain indication' in the public records that the sovereign 'intended to extinguish all of the [claimants'] rights' in their property, Indian title continues, Id. at 353."
>
> Lipan Apache Tribe, Etc., The Mescalero Apache Tribe, Etc., And The Apache Tribe Of The Mescalero Reservation, Etc. v. The United States (1967), 180 Ct. Cl. 487;

7. The principle of "plain and clear" extinguishment is well stated in Corpus Juris Secundum :

> "The possessory right of Indians to their tribal lands is regarded as sacred, something to be taken from the Indians only with their consent, and on such consideration as may be agreed on.... only the government holding the fee can extinguish or interfere with the right, and until the right is extinguished by some definite action it cannot be questioned. The right is extinguished only by plain and unambiguous action."
>
> 42 C.J.S., s. 28 at 688-689.

8. In the Calder case, Hall, J. deals specifically with the issue of implied extinguishment. He states:

> "The important question remains: were the rights either at common law or under the Proclamation extinguished? Tysoe, J.A., said in this regard at p.95 [13 D.L.R. (3d)] of his reasons: 'It is true, as the appellants have submitted, that nowhere can one find express words extinguishing Indian title....' (emphasis added).
>
> The parties here agree that if extinguishment was accomplished, it must have occurred between 1858 and when British Columbia joined Confederation in 1871. The respondent relies on what was done by Governor Douglas and by his successor, Frederick Seymour, who became Governor in 1864.
>
> Once aboriginal title is established, it is presumed to continue until the contrary is proven. This was stated to be the law by Viscount Haldane in Amodu Tijani[v. Secretary, Southern Nigeria, [1921] 2 A.C. 399]at pp. 409-10, as follows:
>
> > 'Their Lordships think that the learned Chief Justice in the judgment thus summarised, which virtually excludes the legal reality of the community usufruct, has failed to recognize the real character of the title to land, occupied by a native community. That title, as they have pointed out, is prima facie based, not on such individual ownership as English law has made familiar, but on a communal usufructuary occupation, which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference. In their opinion there is no evidence that this kind of usufructuary title of the community was disturbed in law, either when the Benin Kings conquered Lagos or when the cession to the British Crown took place in 1861. The general words used in the treaty of cession are not in themselves to be construed as extinguishing subject rights. The original native right was a communal right, and it must be presumed to have continued to exist unless the contrary is established by the context or circumstances. There is, in their Lordships' opinion, no evidence which points to its having been at any time seriously disturbed or even questioned. Under these conditions they are unable to take the view adopted by the Chief Justice and the full Court. (Emphasis added.)'
>
> The appellants rely on the presumption that the British Crown intended to respect native rights;

therefore, when the Nishga people came under British sovereignty (and that is subject to what I said about sovereignty over part of the lands not being determined until 1903) they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation. There was no surrender by the Nishgas and neither the Colony of British Columbia nor the Province, after Confederation, enacted legislation specifically purporting to extinguish the Indian title nor did Parliament at Ottawa. The following quotation from Lord Denning's judgment in Oyekan v Adele [[1957] 2 All E.R. 785]at p. 788, states the position clearly. He said:

> 'In order to ascertain what rights pass to the Crown or are retained by the inhabitants, the courts of law look, not to the treaty, but to the conduct of the British Crown. It has been laid down by their Lordships' Board that
>
> > 'Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of his predecessors avail him nothing.'

See Vajesingji Joravarsingji v. Secretary of State for India ((1924), L.R. 51 Ind. App. 357 to p. 360 per Lord Dunedin), Hoani Te Heuheu Tikino v. Aotea District Maori Land Board ([1941] 2 All E.R. 93 at p. 98). In inquiring, however, what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law: see Amodu Tijani v. Southern Nigeria (Secretary) ([1921] 2 A.C. 399); Sakariyawo Oshodi v. Moriamo Dakolo ([1930] A.C. 667).

(Emphasis added.) Reference should also be made to The Queen v. Symonds((1847), N.Z.P.C.C. 387) approved in Tamaki v. Baker ([1901] A.C. 561)at p. 579. In Symonds, Chapman, J. said at p. 390:

> 'The practice of extinguishing Native titles by fair purchases is certainly more than two centuries old. It has long been adopted by the Government in our American colonies, and by that of the United States. It is now part of the law of the land, and although the Courts of the United States, in suits between their own subjects, will not allow a grant to be impeached under pretext that the Native title has not been extinguished, yet they would certainly not hesitate to do so in a suit by one of the Native Indians. In the case of the Cherokee Nation v. State of Georgia (1831) 5 Peters 1, the Supreme Court threw its protective decision over the plaintiff-nation, against a gross attempt at spoliation; calling to its aid, throughout every portion of its judgment, the principles of the common law as applied and adopted from the earliest times by the colonial laws: Kent's Comm. Vol. ii, lecture 51. Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice any thing new and unsettled.'

and to the statement of Davis, J. in Lipan Apache previously quoted that:

> '...In the absence of a 'clear and plain indication' in the public records that the sovereign 'intended to extinguish all of the (claimants') rights' in their property, Indian title continues...'

It would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be 'clear and plain'. There is no such proof in the case at bar; no legislation to that effect."

Calder et al. v. Attorney-General of British Columbia, [1973] S.C.R. 313, at 401-404.

9. Only the Federal Government may extinguish aboriginal title or the incidents thereof.

St. Catharines Milling and Lumber Co. v The Queen (1888), 14 App. Cas. 46 (P.C.); (1886), 13 S.C.R. 577.

C. HUNTING AND FISHING RIGHTS

1. Hunting and fishing rights are an incident of aboriginal title. Johnson, J.A. in the Northwest Territories Court of Appeal, affirmed by a unanimous Supreme Court of Canada, stated:

> "The right of Indians to hunt and fish for food on unoccupied Crown lands has always been recognized in Canada - in the early days as an incident of their 'ownership' of the land, and later by the treaties by which the Indians gave up their ownership right in these lands...these rights had their origin in the Royal Proclamation.... [of 1763]....By that Proclamation it was declared that the Indians 'should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds.' The Indians inhabiting Hudson Bay Company lands were excluded from the benefit of the Proclamation....That fact is not important because the Government of Canada has treated all Indians across Canada, including those living on lands claimed by the Hudson Bay Company, as having an interest in the lands that required a treaty to effect its surrender."
>
> Regina v. Sikyea (1964), 43 D.L.R. (2d) 150 (N.W.T.C.A.), at 152;
> Affirmed in Sikyea v. The Queen, [1964] S.C.R. 642, per Hall, J. at 646.

2. In Rex v. Wesley McGillivray, J.A. stated at p. 781:

> "If the effect of the proviso [s.12 of the Alberta Natural Resources Act] is merely to give to the Indians the extra privilege of shooting for food 'out of season' and they are otherwise subject to the game laws of the Province, it follows that in any year they may be limited in the number of animals of a given kind that they may kill even though that number is not sufficient for their support and subsistence and even though no other kind of game is available to them. I cannot think that the language of the section supports the view that this was the intention of the law makers. I think the intention was that in hunting for sport or for commerce the Indian like the white man

> should be subject to laws which make for the preservation of game but in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who generally speaking does not hunt for food and was by the proviso to s. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial."

He continues, at p. 786-787:

> "It is thus clear that whether it be called a title, an interest, or a burden on the Crown's title, the Indians are conceded to have obtained definite rights under this proclamation in the territories therein mentioned which certainly included the right to hunt and fish at will all over those lands in which they held such interest.
>
> But it is to be noticed in a consideration of the Indian title under this proclamation of 1763 that excluded from the lands reserved for the use of Indians, is the territory granted to the Hudson's Bay Co. in 1670, which as before stated includes the land with which we are concerned in this case....
>
> Whatever the rights of the Stoney and other Indians were under the Hudson's Bay regime, it is clear that at the time of the making of the Treaty to which I shall next allude, the Indian inhabitants of these Western plains were deemed to have or at least treated by the Crown as having rights, titles and privileges of the same kind and character as those enjoyed by those Indians whose rights were considered in the St. Catherine's Milling case because it is a matter of common knowledge that the Dominion has made treaties with all of the Indian tribes of the North West within the fertile belt in each of which they have given recognition to and provided for the surrender and extinguishment of the Indian title."
>
> Rex v. Wesley, [1932] 4 D.L.R. 774 (Alta. C.A.) at 781, 786-787; Approved by Freedman, J.A. in dissent in R. v. Prince et al (1962),40 W.W.R. 234 (Man. C.A.), at 242, which judgment was approved on appeal by a unanimous court in Prince and Myron v. The Queen, [1964] S.C.R. 81, per Hall, J. at 84.

3. In the Nova Scotia Court of Appeal, MacKeigen, C.J.S.C. stated:

> "A 'usufructuary right' to land is, of course, merely a right to use that land and its 'fruit' or resources. It certainly must include the right to catch and use the fish and game and other products of the streams and forests of that land"

R. v. Isaac (1975), 13 N.S.R. (2d) 460 (N.S.C.A.), at 478.

4. The aboriginal right to hunt and fish was recognized and continued by the enactment of section 14(3) of the Northwest Territories Act, R.S.C. 1970, c. N-22. Section 14(3) reads:

> "(3) Nothing in subsection (2) shall be construed as authorizing the Commissioner in Council to make ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on unoccupied Crown lands, game other than game declared by the Governor in Council to be game in danger of becoming extinct."

D. ABORIGINAL TITLE AND SECTION 146 OF THE BRITISH NORTH AMERICAN ACT, 1867

1. The effect of Section 146 of the British North America Act, 1867, and the Order of Her Majesty in Council Admitting Rupert's Land and the North-Western Territory Into the Union dated the 23rd of June, 1870, is to:

(a) provide clear evidence of Executive and Legislative recognition by both the federal and British Governments that Inuit enjoy aboriginal title to lands in the Baker Lake Area being part of Rupert's Land;

(b) provide a written, constitutional guarantee that aboriginal title and rights flowing from it cannot be extinguished or abrogated by Parliament except in compliance with the terms and conditions of the Order-in-Council passed pursuant to Section 146.

2. The first judicial interpretation of Section 146 of the British North America Act was R. v. Wesley, [1932] 4 D.L.R. 774, (Alta. C.A.). In regard to the effect of Section 146, Mr. Justice McGillivray stated at page 786:

> "It is clear that....the Indian inhabitants of these Western plains were deemed to have or at least treated by the Crown as having rights, titles and privileges of the same kind and character as those enjoyed by those Indians whose rights were considered in the St. Catharine's Milling case because it is a matter of common knowledge that the Dominion has made treaties with all of the Indian tribes of the North West within the fertile belt in each of which they have given recognition to and provided for the surrender and extinguishment of the Indian title."

3. In a subsequent case, R. v. Prince et al. (1962) 40 W.W.R. 234 (Man. C.A.), Freedman, J.A. in dissent, stated that Regina v. Wesley was correctly decided

and that its reasoning should be applied to the matter then before that court. On appeal to the Supreme Court of Canada, Hall, J. in delivering the decision of a full, unanimous court stated (Prince and Myron v. The Queen, [1964] S.C.R. 81 at 84 that he agreed with the reasons of Freedman, J.A. in his dissenting judgment.

4. Section 146 of the British North America Act and the Order-in-Council appeared to have been next judicially considered in the case of R. v. Koonungnak (1963), 45 W.W.R. 282 (N.W.T.T.C.). In his judgment, Sissons, J. at pp. 302-304, held that Indian and Eskimo hunting rights are not dependant on Indian treaty or even on the Royal Proclamation of 1763. They are aboriginal rights, merely recognized by English or Canadian law and that the position of Eskimos in this regard is strenghtened by said Order-in-Council.

5. In Re Paulette et al. and Registrar of Titles (No. 2), 42 D.L.R. (3d) 8 (N.W.T.S.C.), Section 146 of the British North America Act 1867 and the Order-in-Council were again considered. Mr. Justice Morrow suggested that the Indians living in Rupert's Land enjoyed a unique constitutional status after the issue of the Order-in-Council. At page 29 he states:

> "It would seem to me from the above that the assurances made by the Canadian Government to pay compensation and the recognition of Indian claims in respects thereto did by virtue of section 146 above, become part of the Canadian Constitution and could not be removed or altered except by Imperial statute. To the extent, therefore, that the above assurances represent a recognition of Indian title or aboriginal rights, it may be that the Indians living within that part of Canada covered by the proposed caveat may have a constitutional guarantee that no other Canadian Indians have."

Morrow, J. went on to state that in the particular situation he was dealing with unless certain treaties subsequently entered into by Indians in the area he was

considering legally terminated or extinguished the Indian land rights or aboriginal rights "it would appear that there was a clear constitutional obligation to protect the legal rights of the indigenous people in the area covered by the proposed caveat, and a clear recognition of such rights."

6. In Calder v. The Attorney-General of British Columbia (1973) 34 D.L.R. (3d) 145, Mr. Justice Judson held that the Terms of Union under which British Columbia entered into Confederation with the Dominion of Canada, having been approved by an Imperial Order-in-Council, had, under section 146 of the British North America Act, "the force of an Imperial statute". (see page 161)

7. Finally in the most recent case of Jack, et al. v. The Queen, (unreported - July 19, 1979), section 146 of the British North America Act 1867 and Terms of Union between British Columbia and the Cominion of Canada were again considered by the Supreme Court of Canada. This case concerned an alleged violation of the Fisheries Act, R.S.C. 1970, c. F-14, by a number of individual Indians who had engaged in "food fishing" without a license. In defense to the charge, the Indian defendants relied on Article 13 of the Terms of Union of British Columbia and Canada, 1871 which was approved by an Imperial Order-in-Council in conformity with section 146 of the British North America Act. Article 13 provided that the policy towards Indians and Indian lands pursued by the Dominion government would be as liberal as that of the colonial government prior to the Union. It was argued that this "policy" included the right of Indians to fish unregulated by the government. On the merits of the case, this argument was rejected. Chief Justice Laskin (speaking for himself and seven other judges) held that "the alleged right rises no higher than expediency to leave the Indians

to unregulated fishing in the particular rivers or elsewhere." In short, there was no legal basis upon which these fishing rights arose. In respect of this holding, it is important to note that the defendants did not rely on any aboriginal title or on any aboriginal rights which distinguishes that case from the one at hand. Mr. Justice Dickson disagreed with this holding and ruled that Article 13 provided Indians with a minimal guarantee of fishing rights. However, on the facts of the case he ruled that that guarantee was not violated by the application of the Fisheries Act to the defendants.

There are three significant holdings upon which all justices agreed. First, the protection provided by Article 13 of the Terms of Union (as approved by the Imperial Order-in-Council) had constitutional status. It is respectfully submitted that the same is true of the Order-in-Council dated June 23, 1870 admitting Rupert's Land and the North-Western Territory into the Union. Secondly, the defendants had status to raise a defense based on Article 13 in that there was a constitutional base for their argument that the federal government lacked the legislative authority to interfere with their fishing rights. It is submitted that the plaintiffs in this case also have status to challenge the legislative authority of Parliament to interfere with their constitutional rights guaranteed by section 146 of the British North America Act. Finally, no judge questioned that section 146 of the British North America Act could limit the legislative power assigned to Parliament by other provisions of the constitution.

8. Section 146 provides that "on Address from the Houses of Parliament of Canada to admit Rupert's Land and the North Western Territory, or either of them, into the Union, on such Terms and Conditions in each case as are in the Addresses and as the Queen seem fit to approve, subject

to the provisions of this Act; and the Provisions of any Order-in-Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland."

The material part of the said Address provides:

> "And furthermore, that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines."

The material part of the said Order-in-Council provides:

> "14. Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them."

9. It is respectfully submitted that section 146 constitutionally guarantees any aboriginal title or rights which were held by Indians in the lands covered by the applicable Order-in-Council. It is further submitted that Parliament lacks the legislative authority to abrogate or interfere with these rights unless and until the terms and conditions of the Order-in-Council have been complied with. Not only does section 146 guarantee these aboriginal rights and title but it also provides the only mechanism by which such rights and title may be extinguished or altered. On the record there is no evidence whatsoever that this mechanism was utilized by the federal government. A fortiori the aboriginal title or rights which existed prior to the Union are still maintained. Any legislation which interferes with these rights is either ultra vires or does not constitutionally apply to those persons protected by section 146.

10. It is important to note that the caselaw referred to in the previous section on extinguishment of title

does not consider the constitutional argument herein presented. The question of whether the extinguishment of title is by implication or express means is of no moment to this argument. Section 146 has provided the only means by which such title may be extinguished. The sole question is whether those means have been adopted in the case at bar.

E. THE POWER TO DISPOSE

1. Section 2 of the Territorial Lands Act, R.S.C. 1970, c. T-6 provides, in part:

> "territorial lands" means lands in the Northwest Territories or in the Yukon Territory that are vested in the Crown or of which the Government of Canada has power to dispose;

Section 2 of the Territorial Land Use Regulations, SOR/77-210 defines "territorial lands" as:

> lands in the Yukon Territory or in the Northwest Territories
>
> (a) that are vested in the Crown or of which the Government of Canada has power to dispose, and
>
> (b) that are under the control, management and administration of the Minister.

Section 3 of the Canada Mining Regulations, SOR/77-900 provides:

> These Regulations apply to
>
> (a) lands in the Territories that are vested in Her Majesty in right of Canada or of which the Government of Canada has power to dispose; and
>
> (b) public lands within the meaning of the Public Lands Grants Act that are not within any province and for the sale, lease or other disposition of which there is no other provision in the law.

Section 2 of the Public Lands Grants Act, R.S.C. 1970, c. P-29 provides, in part:

> "public lands" means lands belonging to Her Majesty in right of Canada and includes lands of which the Government of Canada has power to dispose.

The above enactments are reprinted in the "Legislative Brief" at Tabs 4, 8, 11, and 3, respectively.

2. The lands in Rupert's Land following admission into Confederation were burdened with aboriginal title,

at least insofar as the Baker Lake area is concerned. In the language of the Privy Council in St. Catherines Milling and Lumber Co. v. The Queen, "...there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished."

The Province was said to be entitled under the B.N.A. Act, 1867 to a beneficial interest in these lands "...wherever the estate of the Crown is disencumbered of Indian title."

> St. Catharines Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46, per Lord Watson, at 55, 59.

The possessory right spoken of in the cases and attaching to the very interest which the Crown held is a qualification on the interest vested in the Crown and, in the absence of specific legislation granting to the Crown the power to dispose of it, there is no right to dispose within the meaning of the definitions set forth in paragraph 1 of this part.

3. As has been fully set out in PART IV, "D" of this memorandum dealing with Section 146, aboriginal rights were recognized specifically in the admission of Rupert's Land to Confederation and were held in place by the guarantees of the last portion of section 146. The definition sections set forth in paragraph 1 herein must be read subject to aboriginal title.

F. THE CANADIAN BILL OF RIGHTS

1. Section 1(a) of the Canadian Bill of Rights states:

> "1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
>
> Canadian Bill of Rights, R.S.C. 1970, Appendices, App. III, at 457-458.

The preamble to Section 2 declares that no law of Canada, unless expressly declared to the contrary, shall be construed and applied so as to "abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms" as recognized or declared, inter alia, in Section 1(a) as set out above.

> Canadian Bill of Rights, R.S.C. 1970, App. III, at 458.

2. The construction of relevant portions of federal statutes such as the Territorial Lands Act, the Territorial Land Use Regulations and the Canada Mining Regulations suggested by the Defendants would authorize the taking of the aboriginal title of the Plaintiffs.

The aboriginal title is clearly classified as "property" and the right to hunt and fish and to live upon

and use the land is an "enjoyment of property".

St. Catharines Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46 (P.C.), affirming (1886), 13 S.C.R. 577.

3. An appropriate interpretation of the language of statutes otherwise valid would be one consonant with the Canadian Bill of Rights. The protection of property from inferential taking without some clear and plain parliamentary language surely falls within the language above-cited. Speaking for the majority of the Supreme Court, Laskin J. (as he then was) noted that the protections of Section 1 were not limited to the procedural protections enumerated in Section 2.

In Curr v The Queen he said:

> "The English antecedents, specifically 28 Edw. III, c. 3 of 1355 ('no man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death without he be brought to answer by due process of law") as backed up by the earlier Magna Carta, c. 29, reissue of 1225 (famous for the phrase 'per legem terrae'), point to procedural considerations, although it has been contended that they go farther: see McIlwain: Due Process of Law in Magna Carta (1914), 14 Col. L. Rev. 27. It is evident from s.2 of the Canadian Bill of Rights that its specification of particular procedural protections is without limitation of any others that may have a source in s.1."

Curr v The Queen, [1972] S.C.R. 889, at 898

In that case the clause was held not to overrule or "sterilize" specific criminal legislation.

4. It is submitted that the protection of the clause extends to a taking of property in a civil way as well as to criminal matters provided the taking is in accordance with the exercise of a power within the legislative authority of the Parliament of Canada.

5. It is further submitted that where the recognized manner of dealing with such property right is by treaty and compensation, that becomes due process, at least in the absence of any specific statutory enactment to the contrary.

G. JURISDICTION OF THE FEDERAL COURT OF CANADA

1. It is respectfully submitted that the Federal Court of Canada is entitled to grant injunctive relief claimed by the Plaintiffs against the mining company Defendants by reason of section 17(2), 17(3)(b), 17(3)(c) and 17(4)(b) of the Federal Court Act, R.S.C. 1970, c.10 (2nd Supp.).

The provisions referred to are herein set out.

> "17.(2) Without restricting the generality of subsection (1), the Trial Division has exclusive original jurisdiction, except where otherwise provided, in all cases in which the land, goods or money of any person are in the possession of the Crown or in which the claim arises out of a contract entered into by or on behalf of the Crown, and in all cases in which there is a claim against the Crown for injurious affection.
>
> (3) The Trial Division has exclusive original jurisdiction to hear and determine the following matters: .....
>
> (b) any question of law, fact, or mixed law and fact that the Crown and any person have agreed in writing shall be determined by
>
> (i) the Federal Court,
>
> (ii) the Trial Division, or
>
> (iii) the Exchequer Court of Canada; and
>
> (c) proceedings to determine disputes where the Crown is or may be under an obligation, in respect of which there are or may be conflicting claims.
>
> (4) The Trial Division has concurrent original jurisdiction .....
>
> (b) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of his duties as an officer or servant of the Crown. "

2. The Defendant mining companies sought to be admitted as defendants in these proceedings. The relief claimed against them is integrally bound up in the relief

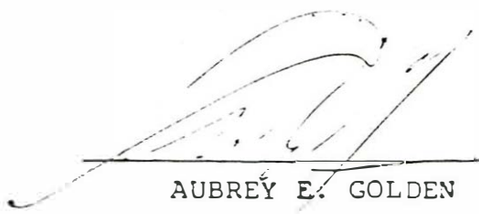
sought against the original Defendants and rests upon the disturbance of the same rights and interests. It is submitted that the ruling of Laskin, C.J.C. in the case of McNamara Construction (Western) Ltd. v. The Queen, [1977] 2 S.C.R. 654 is relevant to this issue.

In this particular case the Crown had sued McNamara Construction for an alleged breach of contract. The issue went to the Supreme Court of Canada on the point of whether or not the Federal Court could deal with this matter, and that turned on the proper interpretation of Section 17(4)(a) of the Federal Court Act. The result of the case was that Section 17(4)(a) was held to be too broad and ultra vires insofar as it purported to allow the Crown to sue on any contract whatsoever having reference to Section 101 of the B.N.A. Act. However, more importantly for our purposes, there were in fact two actions. One was a suit by the Crown against a construction company which was supposed to build a penitentiary. A second suit was brought by the Crown against a firm of architects and engineers. The two defendants gave notice pursuant to the Federal Court Rule 1730 of a claim over against another co-defendant alleging negligence on that defendant's part. One of the defendants, McNamara served a third party notice pursuant to Rule 1726 claiming a relief over by reason of alleged negligence or breach of contract by the third party. The Federal Court Trial Judge and the Federal Court of Appeal held that the notice served pursuant to Rule 1730 and the third party notice served pursuant to Rule 1726 should be set aside on the ground that the Federal Court had no jurisdiction to entertain the claim over by one defendant against the other defendant or the third party claim. That ruling by the

Trial Judge was sustained by the Federal Court of Appeal. In the Surpeme Court of Canada Laskin, C.J.C. dealt with this matter by way of obiter, having already ruled that the Crown could not in any event properly sue these companies in the Federal Court. But he went on to say:

> "In view of this conclusion, the consequential proceedings between the co-defendants and the third party proceedings must likewise fall, and it is unnecessary to deal with the issues raised as to their validity or propriety. I would, however, observe that if there had been jurisdiction in the Federal Court there could be some likelihood of proceedings for contribution or indemnity being similarly competent, at least between the parties, insofar as the supporting Federal Law embraced the issues arising therein."
>
> McNamara Construction (Western) Limited and Fidelity Insurance Company of Canada v. The Queen, [1977] 2 S.C.R. 654, at 664.

All of which is respectfully submitted by the undersigned counsel for the Plaintiffs on this 20th day of July, 1979.



AUBREY E. GOLDEN

DAVID ESTRIN

Counsel for the Plaintiffs.

LIST OF STATUTES

1. Manitoba Act, 1870
   33 Victoria, c.3 (Canada);
   reprinted in R.S.C. 1970,
   Appendices, at 247-56.

2. The British North America Act, 1871,
   34-35 Victoria, c.28 (U.K.);
   reprinted in R.S.C. 1970,
   Appendices, at 289-90.

3. The British North America Act, 1930,
   20-21 George V, c.26 (U.K.);
   reprinted in R.S.C. 1970,
   Appendices, at 365-399.

4. National Parks Act,
   R.S.C. 1970, c. N-13, as amended
   in R.S. 1974, c.11.

5. James Bay and Northern Quebec Native Claims Settlement Act,
   S.C. 1976-77, c.32.
   Proclaimed in force 31 October, 1977.

LIST OF CASELAW

6. Regina v. White and Bob
(1964), 50 D.L.R. (2d) 613;
52 W.W.R. 193 (B.C.C.A.)

7. St. Catharine's Milling and Lumber Company v. The Queen
(1888), 14 App. Cas. 46 (P.C.)

8. The St. Catherines Milling And Lumber Company v. The Queen
(1886), 13 S.C.R. 577

9. Calder et al. v. Attorney-General of British Columbia,
[1973] S.C.R. 313;
34 D.L.R. (3d) 145;
[1973] 4 W.W.R. 1

10. Calder et al. v. Attorney-General of British Columbia
(1970), 13 D.L.R. (3d) 64;
74 W.W.R. 481 (B.C.C.A.)

11. Calder et al. v. Attorney-General Of British Columbia
(1969), 8 D.L.R. (3d) 59;
71 W.W.R. 81 (B.C.S.C.)

12. Mitchel et al. v. United States
34 U.S. (9 Pet. 711) 464 (1835) (U.S.S.C.)

13. The United States v. The Seminole Indians Of the State of Florida And The Seminole Nation Of Oklahoma
(1967), 180 Ct.Cl. 375

14. The Confederated Tribes Of The Warm Springs Reservation Of Oregon v. The United States
(1966), 177 Ct.Cl. 184

15. Sieareak El-53 v. The Queen,
[1966] S.C.R. 645;
57 D.L.R. (2d) 536

16. Sikvea v. The Queen,
[1964] S.C.R. 642;
50 D.L.R. (2d) 80;
49 W.W.R. 306

17. Regina v. Sikyea
(1964), 43 D.L.R. (2d) 150;
46 W.W.R. 65;
[1964] 2 C.C.C. 325 (N.W.T.C.A.)

18. Johnson and Graham's Lessee v. McIntosh
21 U.S. (8 Wheat. 543) 240 (1823) (U.S.S.C.)

19. Worcester v. State of Georgia
31 U.S. (6 Pet. 515) 350 (1832) (U.S.S.C.)

20. Tee-Hit-Ton Indians v. The United States
(1955), 348 U.S. 272 (U.S.S.C.)

21. United States v. Santa Fe Pacific Railroad Company
(1941), 314 U.S. 339 (U.S.S.C.)

22. Lipan Apache Tribe, Etc., The Mescalero Apache Tribe, Etc., And The Apache Tribe Of The Mescalero Reservation, Etc. v. The United States
(1967), 180 Ct.Cl. 487

23. Rex v. Wesley,
[1932] 4 D.L.R. 774;
[1932] 2 W.W.R. 337 (Alta. C.A.)

24. Prince and Myron v. The Queen,
[1964] S.C.R. 81;
46 W.W.R. 121

25. Regina v. Prince et al.
(1962), 40 W.W.R. 234;
[1963] 1 C.C.C. 129 (Man. C.A.)

26. Regina v. Isaac
(1975), 13 N.S.R. (2d) 460 (N.S.C.A.)

27. Regina v. Koonungnak
(1963), 45 W.W.R. 282 (N.W.T.Ter. Ct.)
42 C.R. 143

28. Re Paulette et al. And Registrar of Titles (No. 2)
(1973), 42 D.L.R. (3d) 8 (N.W.T. S.C.)

29. Joseph Daniel Jack et al. v. The Queen
(unreported - July 18, 1979) (S.C.C.)

30. Curr v. The Queen,
[1972] S.C.R. 889;
26 D.L.R. (3d) 603;
18 C.R.N.S. 281

31. McNamara Construction (Western) Limited and Fidelity Insurance Company of Canada v. The Queen,
[1977] 2 S.C.R. 654;
75 D.L.R. (3d) 273;
13 N.R. 181

LEGAL JOURNALS

32. Felix Cohen, "Original Indian Title" (1947-48), 32 Minn. L. Rev. 28.

33. Felix Cohen, "The Spanish Origin of Indian Rights In The Law Of The United States" (1942), 31 Geo. L.J. 1.

34. Peter Cumming and Neil Mickenburg (eds.), Native Rights in Canada, (The Indian-Eskimo Association of Canada, Toronto: 1972), at 15, 23, 24, 26-28, 119-131, 138, 142, 185-186, 285-288.

35. Ken Lysyk, "The Indian Title Question In Canada: An Appraisal In The Light of Calder" (1973), 51 Can. Bar. Rev. 450.

36. Ken Narvey, "The Royal Proclamation of 7 October 1763, The Common Law, And Native Rights To Land Within The Territory Granted To the Hudson's Bay Company" (1974), 38 Sask. L.R. 123.

37. J.C. Smith, "The Concept of Native Title" (1974), 24 University of Toronto Law Journal 1.