

**INDIANS, LAW AND LAND CLAIMS:  
PROBLEMS AND POSTULATES REGARDING JURIDICAL SELF-DETERMINATION FOR  
THE DENE NATION**

by

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B. A., Simon Fraser University, 1984

THESIS SUBMITTED IN PARTIAL FULFILLMENT OF  
THE REQUIREMENTS FOR THE DEGREE OF  
MASTER OF ARTS (CRIMINOLOGY)

in the School

of

Criminology

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SIMON FRASER UNIVERSITY

July 1987

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Indians, Law and Land Claims: Problems and Postulates

Regarding Juridical Self-Determination for the

Dene Nation

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## ABSTRACT

Once considered primarily a matter of real estate, the land claims of a number of Canadian indigenous groups reveal that these claims are now viewed as the best possible route to reasserting native control over native lives. After a brief explication of the social and historical processes resulting in this transformation, the thesis concentrates on the claim of the Dene Nation of the Northwest Territories. Through their claim the Dene aspire to the creation of an Indian nation-state that would be administered through a system of public government. This government would assume control over a variety of basic constitutional powers, including the administration of justice.

Focusing upon the Denes' aspiration to control over justice services, some of the problems which could come into play against this initiative will be examined. At their most basic, these include the difficulties implicit in translating this group's aboriginal social control mechanisms into a form which is compatible with, and workable in, the larger, intensely bureaucratic Canadian legal system. One of the most problematic issues to be addressed in this regard concerns how the oral tradition characteristic of pre-contact Dene society influenced those mechanisms and whether that influence is sufficient to endanger the resurrection of "Dene Law" in the modern context of the Nation of Denendeh.

The significance of the orality/literacy dichotomy is examined in detail for the role it could play in the revitalization of Dene law. Moving beyond the purely literate task of defining what might qualify as law among Dene legal traditions, the thesis asserts that arguments concerning the presence or absence of "law" in this context become increasingly redundant the more one appreciates the differences in world view between predominantly oral and literate societies. The argument is made that to enlist inherently literate definitions of law as a measuring rod for determining the presence or quality of law among pre-literate peoples comprises little more than a classic "apples versus oranges" comparison. From this,

the thesis concludes that focusing upon questions of the differences between the Denes' traditional controls and modern Canadian law serves only to diminish the more significant issue of how those differences might be accommodated in resurrecting "Dene Law".

## DEDICATION

For My Parents

*To my Mother for teaching me to appreciate history and my Father for teaching me to go out and make it.*

## ACKNOWLEDGEMENTS

*"Oh Merlyn," cried the Wart. "Please come too."  
"Just for this once," said a large and solemn tench beside his ear, "I will come.  
But in the future you will have to go by yourself. Education is experience, and  
the essence of experience is self-reliance."*

T.H. White, The Sword in the Stone.

Many thanks to my Committee for their willingness to support my ideas and guide them to their fruition in this work. To Simon, who, from the beginning, received both the student and the study with honesty and integrity and whose professionalism will remain a defining standard from this point forward. My gratitude also to Bob, who somehow always manages to find a 25th hour in his day to give to his students, and to Colin, whose quiet confidence in my work will be remembered and appreciated always. To Rob, who kept me going throughout the process with his wit and sincerity; and to Paul, whose contribution to my career ranges far beyond this work and who, in very many ways, must be credited with starting it all.

My gratitude also to Berenice, who with patience and gentleness bravely read what no one had read before, and to Kevin, whose constant support personified *amor vincit omnia*.

And last, but not least, to Veitchy, who put the text in proper form.

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## I. PREFACE

The question of aboriginal entitlement to lands traditionally used and occupied has been a recurring one in the history of colonization and nation-building. As early as the 15th century, debates raged as to the rights of indigenes in possession of discovered continents and, as a necessary corollary to this, how those rights might be dealt with in the higher interests of kings and colonies. In the context of colonial Canada, the approach to native rights was quite simple: Aboriginals were "savages" and thus unadorned with the rights and privileges of so-called civilized peoples. In the short term, this perspective proved highly expedient in facilitating the colonization process, as it allowed the colonizing power to evade much of the democratic details characteristic of transactions between equals. Its long-term effects of territorial dispossession and demoralization of Canadian indigenes are only now being fully realized.

It is the aim of this thesis to elucidate one of the most potentially influential of those effects, namely, the proposed creation of indigenous nation-states through the ratification of land claims agreements. Recognizing that not all readers will be equally versed in the historical and political underpinnings of the claims, the first three chapters are directed to providing the layperson with sufficient background information to permit a critical reading of the concluding portions of the text. As such, they are not intended to furnish a highly detailed canvass of their respective contents; each aims to acquaint the reader with the fundamental themes in the area, cumulating in a basic appreciation of Canadian native land claims past, present, and future.

To this end, the first chapter of the thesis chronicles a history of Indian-government interactions from the time of initial contact up to and including the present state of controversy regarding land claims and self-determination. This discussion provides the backdrop for the second chapter, which reveals how many of the early Canadian administrations' policies eroded aboriginal rights and traditions and how this contributed to current native activism. Taken together, these policies cumulate neatly into a situation of *internal colonialism* for Canadian indigenous peoples, a reality which is shown to possess profound implications for natives' own appraisals of their place and future in the larger polity. This colonialization will be shown to play a large role in native perceptions of the the range of potential outcomes of land claims campaigns. In its assessment of colonialism, this chapter necessarily touches upon the inhibition of natives' rights created by their relegation to internal colonies. Case law and legal definitions pertinent to questions of native rights and entitlement are discussed, albeit in a highly specific and truncated fashion. The sheer magnitude of legal determinations and considerations of indigenous rights is such that any discussion of this here is, of necessity, limited to the most important decisions on these matters. Again, it must be qualified that this portion of the text is intended only to offer a basic appreciation of the legal status of those indigenous rights pertinent to land claims and self-government.

It is in the third chapter that the thesis begins to narrow its focus to the subject of land claims and self-government. Drawing upon the research of Boldt<sup>1</sup>, a continuum of self-government goals is presented, ranging from assimilation on behalf of those believed most negatively affected by their internal colonization, to the political autonomy and/or independence promoted by those indigenous groups best able to overcome colonialism. In assessing the viability of these various ends, discussion turns to the federal government policies concerning land claims, both specific and comprehensive. Analysis is directed most

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<sup>1</sup>Menno Boldt. "Intellectual Orientations and Nationalism Among Leaders in an Internal Colony: A Theoretical and Comparative Perspective". 33(4) The British Journal of Modern Sociology 1982:484-510.

closely to the latter policy, especially the recommendations of the recent Commission on Comprehensive Claims Policy and their potential impact on the current negotiation processes.

The fourth chapter shifts discussion to the recipients of those policies, concentrating upon the comprehensive claim of the Dene Nation of the Northwest Territories. Through their land claim, this group, in conjunction with the Metis Association of the N.W.T., seek the creation of the Indian nation-state of Denendeh on those lands traditionally used and occupied by the Dene people. The Denes' claim was selected for study on a number of grounds, including its longevity and relatively high degree of elaboration. Elucidation of the incidents of their claim is preceded by an account of their original social organization and subsistence, and how these were affected by the movement of non-natives into the Denes' traditional lands. The concluding portion of the fourth chapter draws upon the earlier discussions to explore some of the potential impediments to resurrection of traditional Dene institutions in the modern setting of Denendeh. Focusing on the Denes' aspiration to juridical independence, this chapter introduces the main object of the thesis: A contemplation of the problems and postulates associated with translating aboriginal Dene social control<sup>2</sup> mechanisms

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<sup>2</sup>There are, unquestionably, certain liabilities incurred when one attempts to utilize concepts constructed in one context to tap apparently parallel concepts in a different environment. To the extent that the term "social control" was devised by contemporary scholars to designate neoteric social control mechanisms, it may be of limited generalizability outside the immediate frame of reference. Whether it is possible for the concept to reflect *accurately* the nature of social control in earlier societies, which lack the more structured control devices of the present tense, is uncertain. Yet for ease of explication, it is beneficial to enlist terms with which the reader is probably already familiar; scholarly reading is often difficult enough without requiring the reader to become versed in an entirely new terminology from text to text.

Thus, with a few careful qualifications, the term "social control" will be enlisted throughout this thesis to refer to such controls as existed in aboriginal Dene society. As will be seen later in the body of this manuscript, Dene society lacked a clearly defined hierarchy of authority with which a structure of social control might be identified. In the absence of this, and of the state which it would define, social control was not a matter of *coercive control* in the sense of a monopoly of control devices that could be used to reinforce the position of the state. Rather, social control might be better understood as social regulation. The mediation of everyday behaviors was largely a function of each individual's appreciation of the importance of the group and the maintenance of its pacific state to his/her ongoing survival. Where disputes arose between members of that group, their resolution was normally left to the persons involved rather than to a supposedly objective outsider. The latter

into the contemporary juridical context of Denendeh. One of the problems which must be addressed before such a translation is even considered concerns the presence, absence, or quality of law germane to Dene aboriginal society. This is necessary since, should it be discovered that the aboriginal Dene lacked law, questions of how that law might be generalized to the present tense become patently redundant.

Since it is impossible to speak of law without establishing the basic parameters of what the term is held to include, the fifth chapter outlines the definitions of law proposed by a variety of theorists. The thought of these individuals represents but one small corner of a vast body of research on the concept of law; to undertake a comprehensive sweep of the literature is well beyond the scope of this thesis and probably beyond the needs of the discussion it contains. It would require little effort to challenge the validity of the choice of one theorist over another; in any work there necessarily remain streams of thought left untapped. As is made apparent in the opening paragraphs of the chapter, the theories contained therein were selected on grounds equally as compelling as those which might have underpinned a different selection. However, it is believed that the selection serves the

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<sup>2</sup>(cont'd) intervened only in those disagreements which became public, that is, which the immediate parties could not resolve and which thus threatened to affect any number of previously uninvolved interests. (see: Dario Melossi, "The Law and the State as Practical Rhetorics of Motive: The Case of *Decarceration 1*", in Lowman et al, *in Transcarceration: Essays in the Sociology of Social Control*, Aldershot, England: Gower Publishing Company Ltd, (1986):56.) Even then, the supposedly objective outsider was in most cases a common, older relative of the disputants, rather than a formal judge (as she/he would be know today) formerly unacquainted with either the parties or their disagreement.

Despite such distinctions, the term social control may be seen as apposite terminology in discussions of Dene social control. This is especially true in the construction of the term offered by Stanley Cohen, who envisages social control as encompassing those "organized ways in which [a] society responds to behavior and people it regards as deviant, problematic, worrying, threatening, troublesome or undesirable in some way or another". This definition, taken from Cohen's Visions of Social Control. Crime, Punishment and Classification [Cambridge: Polity Press, (1985):1-3], is used here as it is easily generalized beyond the institutional constraints of modern legal systems. Since it does not make absolute distinctions between *proactive* and *reactive* controls, nor the forms assumed by these in different social contexts, Cohen's construction is well-suited to the more informal types of control germane to aboriginal Dene society. On these grounds, whenever the term surfaces in discussion throughout the thesis, it should be understood in the manner outlined by Cohen.

purposes for which it was made.

The sixth chapter of the thesis marks an end to the ascension implicit in the chapters which anticipate it, for it is in this chapter that the essence of the work is reached. Applying the constructions of law presented in the fifth chapter to the realities of traditional Dene social control outlined in the fourth, the thesis argues for the inadequacy of these definitions as measuring rods for gauging the legal climate of aboriginal Dene society. The lack of fit between these constructions and "Dene Law" is viewed as resulting in large part from the perceptual dissonance characterizing the primarily oral, aboriginal Dene and the firmly entrenched literacy of the authors of those constructions. It is proposed that this incongruity renders comparisons between oral and literate constructions fruitless; literate measurements cannot quantify oral concepts as these two lack a common scale by which the dimensions might be understood. It should not be surprising, then, that attempts to make such comparisons are often unproductive. The orality/literacy dichotomy is further extended as a possible explanation for the unproductive nature of much contemporary Indian-government interactions.

As its final task, the thesis offers a short chapter summarizing the main points of the discussions antecedent to it. This concluding statement considers the potential impact of these points upon the articulation of Dene juridical traditions, as well as the forms which those traditions might assume for modern purposes. It is apparent from this latter discussion that a good deal of research remains to be done to clear the pathway for Dene juridical independence — it is hoped that this thesis will move its readers to pursue some of those questions.

## II. AN INTRODUCTION TO THE EVENTS CULMINATING IN CONTEMPORARY NATIVE ACTIVISM

The evolution of a nation is not unlike the development of a child. Both experience a number of stages, each of which may leave its mark cumulating in the finished product. Canada is no different in this respect, and it too has sustained a variety of growing pains in achieving her present status. Some of these, like the Riel Rebellion or the battles with the French, were sufficiently spectacular to ensure them a place in its national history and character. Others, less thrilling due to their lack of a comparably dramatic conclusion, have no such place. Whether this is due to the reality that they do not qualify as history in the sense of finished business, or that their persistence has become an embarrassing thorn in this country's side, they do remain — stubborn blemishes on Canada's adolescent complexion which refuse to heal or be hidden.

Most significant in Canada's list of unfinished business is the fulfillment of duties owed her indigenous peoples through treaties and legislative commitments. Owing to their unsettled status, these documents, which constitute the sole evidence of governmental responsibility to indigenes, have left Canadian aboriginals in a form of legislated limbo with regard to lands, rights and duties. Recently, however, Native people across the nation have become increasingly active in campaigns to see their claims addressed.<sup>1</sup> United by a common end, indigenous groups are lobbying for the settlement of their land claims and treaties as a route to reasserting control over their future.

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<sup>1</sup>Although this thesis concentrates upon the claim of the Dene Nation, it should be noted that many Native groups have maintained an on-going struggle for recognition of the rights originating from their status as original users and occupants of this land. The Nishga of the Northwest Coast of British Columbia are especially notable in this regard; this group has sustained their campaign for rights recognition for nearly a century with little or no diminution in strength or intensity.

Bolstered by the support of both national and international authorities, Native activists are articulating a variety of strategies for removing their fate from the hands of the government. Adding an interesting dimension to these strategies is the response of the heavily entrenched non-native bureaucracy to the potential threat to their power reserves. The legacy of Indian-government relations has revealed that rarely has the Dominion acted without an ulterior, invariably self-serving, end when meting out policy for its indigenous charges. As a consequence of this, the Indian-government relationship has become one of the ultimate ironies of Canadian history and a tribute to the self-interested capabilities of government agencies.

### [1] A Clashing of Histories: Canada versus Kanata

*"Let us have Christianity and civilization to leaven the masses of heathenism and paganism among the Indian Tribes; let us have a wise and paternal government faithfully carrying out the provisions of our treaties...They (native people) are wards of Canada, let us do our duty by them..." Alexander Morris, 1880.<sup>2</sup>*

Despite Canada's official coming of age in 1867, its history began long before this date. Depending upon whose version is preferred in the telling of historical tales, the starting point for discussions of Canada's early years can vary widely. If one chooses to concentrate on the documentations of archaeologists and anthropologists as these create an Indian history of Canada, the origins of the first nation(s) of this country would begin between ten and 100 thousand years prior to the date cited above.<sup>3</sup> This would chronicle the origins of

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<sup>2</sup>James S. Frideres, Canada's Indians, Contemporary Conflicts. (Prentice-Hall: Ontario, 1974), p.xiv.

<sup>3</sup>Hugh Brody, Maps and Dreams. (Douglas and McIntyre: Vancouver/Toronto, 1981). p.15



*Kanata*, the *place or village where people live*, and it would offer a picture of our origins arguably much different from that projected by European commentaries.<sup>4</sup> The Indian history would begin with the migration of peoples from the continent of Asia, who are believed to have crossed into North America on a land bridge formed by what is now the Bering Strait.<sup>5</sup> This migration is believed to have occurred during the recession of the Wisconsin glacier, the last and largest glacier covering the upper portion of this continent, placing the arrival of the *first Canadians* at roughly 14,000 B.C.<sup>6</sup> Tales of the forefathers of the Northwest Coast culture would extend back as far as 4000 B.C., with the first traces of the ancestors of the eastern provinces finding their origins shortly thereafter.<sup>7</sup>

An evolutionary description of *Kanata* would first be set apart by the rich and powerful oral tradition which was the primary medium of its indigenous cultures.<sup>8</sup> Conveyed not only by oratory but by song and dance as well, this chronicle would be one of a cultural mosaic encompassing a number of relatively distinct societies, each manifesting social and political norms and customs of their own. Quite apart from any written record, this history would acknowledge the well-established and often highly sophisticated nature of many of these societies, and their unique systems of administering the needs of their numbers so foreign to the European concept of government and social management. Similarly divergent

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<sup>4</sup>George F. G. Stanley, "As long as the Sun Shines and Water Flows: An Historical Comment", in As Long as the Sun Shines and Water Flows, Getty et al (eds.) (U.B.C. Press: Vancouver, 1983) p.20.

<sup>5</sup>For further elaboration of this migration, see: Brody, note 3, *supra*; Diamond Jenness, Indians of Canada, (7th ed.), (University of Toronto Press: Toronto 1977); Jay Myers, The Fitzhenry and Whiteside Canadian Book of Facts and Dates, (Fitzhenry and Whiteside: Ontario, 1986).

<sup>6</sup>Jay Myers, note 5, *supra*, p.1.; also: Alan Lyle Bryan, "The Prehistory of the Canadian Indians," in Native People, The Canadian Experience, R. Bruce Morrison and C. Roderick Wilson (eds.), (McClelland and Stewart Ltd.: Toronto. 1986) pp.45-52.

<sup>7</sup>Jay Myers, *ibid*.

<sup>8</sup>See Diamond Jenness, note 5, *supra*; Hugh Brody, note 3, *supra*; George F. G. Stanley, note 4, *supra*.

from that record would be the estimated time of first contact with the white strangers and the subsequent impact of their arrival. This history would draw on the remembrances of eastern coastal groups such as the Micmac of Nova Scotia, who boast of interactions with European fishermen and explorers as early as the 1400's.<sup>9</sup> The most poignant discussions of the early impact of these strangers would be second hand at best, as the most compelling authorities on this matter, the Beothuks of present-day Newfoundland, were driven into extinction by the strangers shortly after first contact.<sup>10</sup>

The European history of "Canada" would interconnect with the Native version around 1497 and would begin with the voyages of John Cabot.<sup>11</sup> Cabot sailed in search of the New World a total of three times, perishing at sea on the third. What Cabot sought was stumbled upon three years later by the Portuguese, Gaspar Cote-Real, when he was forced from his intended destination of Greenland by ice. He came upon Terra Labrador and a group of Nasquapee Indians, claimed both in the name of Portugal, and attempted to transport fifty Nasquapee back to Lisbon with him. All were lost at sea before reaching their journey's end.<sup>12</sup> Within fifteen years, fishing boats of the British, Spanish, Portuguese and French were harvesting the Grand Banks of Newfoundland. By 1520, a group of ambitious Portuguese, ever anxious to establish the presence of their sovereign in the New World, attempted settlement on an island just off the southern tip of Nova Scotia and failed.

Despite this activity, the next official contact between the Europeans and Natives of this area did not occur until 1534 with the arrival of Jacques Cartier.<sup>13</sup> When he and his crew were forced by the elements to winter in the country, Cartier made use of the

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<sup>9</sup>Diamond Jenness, *ibid.*, p.266.

<sup>10</sup>*Ibid.*

<sup>11</sup>Jay Myers, note 6, *supra*, p.18.

<sup>12</sup>*Ibid.*

<sup>13</sup>See George F. G. Stanley, note 4, *supra*; Jay Myers, *ibid.*

unanticipated time to contact the Indians at Hochelaga and claim possession of their territories in the name of Francis I. The next few years saw the evolution of a very special relationship between the French and their indigenous hosts. The former, neophytes in the ways of the wilderness, were initially almost totally dependent upon the knowledge and expertise of the Natives; their survival, as well as that of the fledgling fur trade, was contingent upon the maintenance of a peaceful and productive association with the Indians. The Indians, in turn, did not perceive themselves as having a great deal to lose by offering their hospitality to the white strangers. As aptly framed by George Stanley, "French culture, French men, French trade goods — none of them could be totally ignored by the Natives; the only thing they ignored was the French claim that the region was the property of ... the king [who] could dispose of the lands as he willed".<sup>14</sup>

It was a contention not difficult to disregard, given the outnumbering of Whites by Natives and the vast expanse of the lands surrounding them both. Indeed, the realities of maritime life at this time were such that theoretical claims to lands were really rather meaningless. The French, more concerned with fostering the fur trade than with the establishment of permanent agrarian settlements, did not see the need to demand the formal surrender of Indian lands to the King.<sup>15</sup> Therefore, without bothering with theories of land tenure, the Indians accepted French presents and muskets and helped the French fight their enemies, both elemental and otherwise. And in the meantime, Acadian settlers acquired Indian lands and Indian wives.<sup>16</sup>

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<sup>14</sup>Ian A. L. Getty and Antoine S. Lussier, (eds.), "Preface", in As Long As the Grass Grows and the River Flows: A Reader in Canadian Native Studies, (U.B.C. Press: Vancouver, 1983), p.4.

<sup>15</sup>See J. Rick Ponting and Roger Gibbins, Out of Irrelevance: A Socio-political Introduction to Indian Affairs in Canada, (Butterworths: Toronto, 1980), pp.3-31.

<sup>16</sup>George F. G. Stanley, note 4, *supra*, p.4.

In 1578, Queen Elizabeth I appointed Sir Humphrey Gilbert to discover new lands and found a colony in North America.<sup>17</sup> His first voyage failed, largely due to his crew, which consisted primarily of reformed pirates who found the calling of their first vocation too powerful to ignore once at sea. His sailing rights withdrawn for a time, Gilbert did not set to sea again until 1583, whereupon he reached North America and claimed Newfoundland in the name of Elizabeth. Thus were the first affronts to French supremacy in the young Canada effected by the British. With subtlety at first, Elizabeth was determined to test the potential battle waters before launching a deliberate attack on Acadia. After thirty years of such testing, in July of 1613, she commanded Samuel Argall to execute the first official attack on the French posts. So began a new era for both the French and her indigenous allies; their rights equally affronted, they fought side by side to repel their British enemies.

In the fighting between the French and British that would occupy the next century, the French came off less than second best. In 1713, the Treaty of Utrecht brought to a close the shuffling of allegiances and territories which had characterized the Franco-English war in the New World. By this treaty, France gave up to Britain all forts and territories in Hudson Bay, Newfoundland, and Acadia; but retained the islands of St. Pierre and Miquelon off Newfoundland, Ile Royale (Cape Breton Island), and Ile Saint-Jean (Prince Edward Island). The boundaries of Rupert's Land and Acadia, which had been virtually undefined during the French occupation, remained without clear definition. The French were allowed to continue fishing off the coast of Newfoundland, as they had done for almost two centuries, but this was the limit of their spoils.

As far as the British lawyers were concerned, this ended the matter. To the Acadians and their Native allies, it was not so simple. The former embarked on a campaign of subterfuge, refusing to take oaths of allegiance to the British Crown and thwarting British

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<sup>17</sup>Jay Myers, note 5, *supra*, p.23.

attempts to establish trade routes and settlements.<sup>18</sup> To the Indians, who were unused to paper peace, determination of an appropriate response was somewhat slower in coming. This concept of negotiating was strange; even more strange was the demand that "...they should make their submission to the British King, give undertakings to trade only with the people approved by the new Government, agree that disputes between the Indians and Whites should be settled according to Her Majesty's laws, and share their lands with the whites who were expected to flock into the newly acquired colony."<sup>19</sup> These newcomers were men who resembled the French only in flesh, not in favor — the French had never imposed conditions such as these.

Sensing the rift that existed between the two white nations, the Natives initially adopted a strategy of playing off the two against each other, with the advantage regularly falling to the French. When, in 1744, the War of the Austrian Succession emerged in its colonial counterpart as King William's War in British North America, the chance to reassert French authority did not go unhindered by the Indians.<sup>20</sup> The Micmac, among others, came out clearly on the side of the French. Within one year of the French declaration of war they had lost the settlement at Louisbourg as well as that at Trois-Rivieres. Even their attempts to retreat were doomed; when the remaining men of the last French fleet attempted to return to France, some 2,400 men were lost at sea, not one in battle.<sup>21</sup> Subsequent French campaigns, manned primarily by Canadians, were either anticipated by the British and taken by surprise, or beaten in battle. By 1748 the French were exhausted. They signed the

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<sup>18</sup>See Ian A.L. Getty and Antoine S. Lussier, note 14, *supra*; J. Rick Ponting and Roger Gibbins, note 15, *supra*.

<sup>19</sup>George F. G. Stanley, note 4, *supra*, p.5.

<sup>20</sup>King William's War was named in recognition of William IV (1711–51), who ruled the Netherlands as Prince of Orange at the incipience of the War of the Austrian Succession. See The Encyclopaedia Britannica, vol. 23, p.539.

<sup>21</sup>Jay Myers, note 5, *supra*, p.61.

Treaty of Aix-la-Chapelle with the British, thereby ending the War of the Austrian Succession and reverting title to the Prince Edward and Cape Breton Islands and Louisbourg back to France.<sup>22</sup> This compact was no more successful than the Treaty of Utrecht in changing the Indian populations' impression of the British. The Indians continued to battle British title, thwarting attempts to increase settlement and usurp French trade efforts.

The tentative peace established with the 1748 agreement was short lived, even by colonial standards. A clash between George Washington and a small band of French loyalists in 1754 resulted in the surrender of the American holdings and the beginning of the French and Indian War. This latest conflict differed from previous ones in that its causes were primarily territorial; it not only was the first clash which was not imported from European soil, it also had as its primary focus the definition of French and British holdings in the New World.<sup>23</sup> The Indian presence was more keenly felt here than ever before. Not only was their allegiance to the French openly acknowledged in the title awarded the war; but it may also be ventured that such recognition implicitly placed the battling Natives in the context of *nations* capable of aligning themselves with others for the protection of a land mass. That the British would enlist this definition to their advantage in the future interactions with the Indians would prove fateful for both.

The British pulled out all the stops in this war. Tiring of the seemingly endless struggle with the French and their indigenous allies, they imported the colonial feud to the European mainland and declared war on France in 1756. Lasting seven years, hence its title the Seven Year's War, this contest saw the French driven out of the Maritimes by 1758 and 3500 loyalists deported to France.<sup>24</sup> The year 1779 saw the defeat of the French in the single most decisive campaign in Canadian history — constituting only ten minutes of her

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<sup>22</sup>See Stanley, note 4, *supra*; and Jay Myers, *ibid.*, p.61.

<sup>23</sup>Jay Myers, *ibid.*, p.64.

<sup>24</sup>*Ibid.*, p.66.

history, the Battle of the Plains of Abraham was the last major stand taken by the French in the Seven Year's War; it was also their last major fall. By the time of the signing of the Treaty of Paris in 1763, the once strong French presence in Canada was greatly weakened. France had lost virtually all her North American possessions — a reality which was mirrored in the treaty whereby she ceded to Britain all her Canadian possessions except the islands of St. Pierre and Miquelon off Newfoundland.<sup>25</sup> The French reign in the New World was at an end, as was the unique Indian-White relationship which had characterized it.

As had been the case with the previous treaties, the distinction between the oral tradition of the Indians and the literacy characterizing white society resulted in the former's failure to accept fully the terms of the written document. Having failed to negotiate the terms of the peace with the Indians, but rather with their French allies, the Indian population did not perceive the matter as concluded. Within two months of the signing of the treaty drawing to an end the Seven Year's War, Pontiac led the western tribes in rebellion against the British, capturing all Imperial posts west of Niagara. Clearly the "savages" were a force to be reckoned with. When allied with the French they had been contained somewhat by the European influence; independent of such guidance, their tenacity in battle achieved new heights.

It had been the hope of the Imperial government that the Seven Year's War would be the last battle it would have to fight to secure its place in the new world. The tenacity and hostility of the Natives raised questions in British minds regarding the proportion costs to benefits in colonizing the Americas. Notwithstanding the potential economic benefits implicit in exploitation of the colony's substantial staple wealth, the resistance of the Indigenes to accept British tutelage added a rather troublesome angle to that exploitation. However, when the traitorous United States threatened to expand their borders beyond the 49th parallel, the

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<sup>25</sup> *Ibid.*, p.68.

fighting spirit of the Indians came to be redefined as a potential asset. If the Natives could be won over, they would constitute a valuable ally in the fight against the American colonies. This desire to redirect Indian energies was salient among the intentions which led to the creation of the first official Imperial policy in regard to Canadian indigenes.

The Royal Proclamation was the first step taken in the British campaign to win over their indigenous charges.<sup>26</sup> Handed down within a year of the last treaty with France, this document charged the Imperial Indian Department with the duty to ensure that neither the Indians nor their lands be "molested or disturbed in the possession of such parts of [the] Dominions...[which]...not having been ceded...or purchased [were] reserved for them."<sup>27</sup> Intended to protect the unsophisticated indigene from the wiles of the less scrupulous white settlers, this document established the British Crown as the only authority entitled to negotiate or secure transactions of land. In doing so, it also implicitly defined the manner in which the Imperial government would relate to Indians from this point onward.<sup>28</sup>

In terms of winning over the Natives to the Imperial cause, the document had little success; of greater impact in this regard was the regular distribution of presents to key tribes.<sup>29</sup> The importance of the Proclamation became more apparent after 1815 when the threat of United States invasion became increasingly less immediate and intimidating. Once the need for the Indians as allies diminished, they came to be redefined as little more than an impediment to the renewed Imperial drive for colonization and settlement. Seen in this light

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<sup>26</sup>It might be useful to add that, as a prominent piece of colonial legislation, the Proclamation was clearly also directed to ends beyond those pertinent to indigenes. Among those other goals, for example, was the hope that the Proclamation would prevent future border wars with the United States, thereby enabling the British Crown to avoid the often exorbitant monetary expenditures associated with such interactions. (See: The Royal Proclamation, 1763)

<sup>27</sup>*Ibid.*

<sup>28</sup>Michael Asch, Home and Native Land: Aboriginal Rights and the Canadian Constitution, (Methuen Press Ltd.: Toronto, 1984).

<sup>29</sup>James S. Frideres, note 2, *supra*.



they were something to be ignored; when this became unfeasible due to the increasing push of settlers into western territories, they underwent yet another redefinition.

To remove the Indian forcefully from their lands was impractical not only in terms of the manpower and monetary expenditure, but was of uncertain ethics given the tenets of the Royal Proclamation. To evade these impediments, the British relied on Hamilité rationalizations of their duty to civilize the "savages" and turned their energies to the "christianization, education and assimilation" of the Indian.<sup>30</sup> Toward these ends the Colonial government in 1830 implemented a reserve system which was to serve as a social laboratory where the Indians could be prepared for their imminent inclusion in the white society.<sup>31</sup> The Indians would be afforded the tools of the trade of civilized European living by the ever-increasing population of white settlers. Upon the successful completion of their resocialization, they would be released to take their rightful place in the Canadian mainstream. Whether they were in fact amenable to this inclusion was not considered important by the young state; the inherent superiority of the European way of life was believed to be such that as soon as the Indians realized its value they would gladly shed their savage past. It was the duty of the Crown to so enlighten the ignorant Native.

The magnitude of the margin of error and misunderstanding characterizing this latest definition of the Indian was made evident by the apparent failure of the reserve system as early as 1850. The degree of social disintegration and culture shock typifying reserves was not taken as indicative of an initial misdirection; rather, such evidence was enlisted as further proof of the inherent savagery of the Indian and as justifying the taking of additional measures to impress upon indigenes the advantages of a "civilized" lifestyle. Of substantial

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<sup>30</sup>James S. Frideres, *ibid.*; Getty and Lussier, note 14, *supra*; Ponting and Gibbins, note 15, *supra*.

<sup>31</sup>John L. Tobias, "Protection, Civilization, Assimilation: An Outline of Canada's Indian Policy", in As Long as the Sun Shines and Water Flows. A Reader in Canadian Native Studies, Getty and Lussier, note 4, *supra*, p.40.

significance in this heightened campaign was the first of what would become a series of recurring panaceas for the "Indian Problem": "An Act to Encourage the Gradual Civilization of Indians...and to amend the laws respecting Indians."<sup>32</sup> This 1857 legislation was echoed in principle by another such Act, in 1869, for "the Gradual Enfranchisement of Indians" and yet another, in 1884, this latter one for "Conferring Certain Privileges on More Advanced Bands...With a View to Training Them for the Exercise of Municipal Affairs". Although these documents differed somewhat in form, their substance united them in the common intent of assimilating aboriginals, in the first two instances through enfranchisement<sup>33</sup> and, in the third, through the quasi-independence of municipal band status.<sup>34</sup>

The principle of enfranchisement introduced by the first act was one of the more interesting strategies developed to absorb the Indian identity. Technically, the franchise was not easy to achieve, being granted only those Natives who had proven themselves worthy. "Worthy" in this context required a proven proficiency in one or both of the official languages, freedom from debts, and the exhibition of a sound moral character.<sup>35</sup> That there were any number of "true" Canadians unable to meet these criteria was implicit in the need of the Colonial administration to protect Natives from the white settlers. This reality aside, however, since enfranchisement meant leaving the reserve and embarking on a life as just another Canadian, it also meant that the parcel of reserve land held by the new citizen would revert back to the government.<sup>36</sup> Couched in terms of the fair and equal participation

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<sup>32</sup>*Ibid.*, p.44.

<sup>33</sup>In the continuing government tradition of non-consultation with Native people in the drafting of legislation for them, there was at this time little consideration of whether or not Indian people actually wanted the vote. Desirability of "full participation" in the Canadian polity was simply assumed.

<sup>34</sup>Tobias, note 31, *supra*; see also Pontings and Gibbins, note 15, *supra*.

<sup>35</sup>Tobias, *ibid.*

<sup>36</sup>See Marie Smallface Marule, "The Canadian Government's Termination Policy: From 1969 to the Present Day", in One Century Later, Getty and Smith, (eds.), (U.B.C. Press: Vancouver, 1978).

of Natives in the Canadian mainstream, the "enfranchisement acts" were little more than elaborate real estate schemes.

Coinciding with this legislative push to assimilate the Indian was the progressive exploration and settlement of what had come to be known as the Upper and Lower Canadas. Much of the colony had been charted and, with the end of the War of 1812, a relatively solid boundary had been delineated between British North America and the United States. Parliaments of both Upper and Lower Canada had been meeting with increasing regularity and, given their similarity of interests, the question of uniting the two provinces was imminent. In the late 1830's, debate on the subject was interrupted briefly when the failure to consult with French Canadians was protested in the Upper Canadian Parliament.<sup>37</sup> Notwithstanding this contention and the reality that Native interests had not been considered much less consulted, the Act of Union<sup>38</sup> received royal assent in England in 1840.

By 1860 Canada had obtained a healthy degree of recognition as a quasi-independent colony of the Imperial government. The country now for the most part administered its own internal affairs, with British influence strongest in external affairs.<sup>39</sup> In this year control of Indian affairs was transferred to Canada, empowering the colonial government to negotiate treaties and cessions as well as legislate formal policy in regard to Natives. Some policies, such as the products of nearly a century of the British administration of Indian affairs, were of necessity inherited from the Imperial government, as were the obligations and benefits arising from treaties negotiated by them. In the matter of treaties, the inheritance was not a substantial one; there had only been three treaties, two negotiated by William Robinson in 1850 for lands on Lakes Huron and Superior, and an earlier one by Lord Selkirk with some

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<sup>37</sup>Jay Myers, note 5, *supra*, p.103.

<sup>38</sup>"An Act to Re-Unite the Provinces Of Upper and Lower Canada, and for the Government of Canada." [23d July 1849] Statutes of the Province of Canada 1840-66 v.p., annual.

<sup>39</sup>Jay Myers, note 5, *supra*, pp.121-122.

western bands.<sup>40</sup> These were now pretty much finished business. The latter assessment was equally attributable to lands ceded prior to 1860. In this category were large packages of land surrendered by the Chippewa, Ottawa, Pottawatamie, Huron, Mississaugua and Mohawk Indians totalling nearly three million acres.<sup>41</sup>

In February of 1867 a draft bill was tabled in the British Parliament the intent of which was to unite the Provinces of Canada (Eastern and Western as of 1860), New Brunswick and Nova Scotia into the Dominion of Canada. Passed in the first week of March of the same year, the British North America Act<sup>42</sup> laid the necessary ground work for the creation of the Dominion of Canada, granting the British colony independence on July first of 1867. This did not, however, constitute a complete cutting of ties with the Imperial government. Insofar as the British Parliament lost the power to disallow a Canadian Parliamentary initiative, it retained responsibility for external matters pertaining to other nations, immigration and the armed forces. Canada would not receive total parliamentary equality with its Imperial mentor until the passage of the Statute of Westminster in December of 1931.<sup>43</sup>

The independent Canada deviated little from Imperial policies regarding Natives. Continuing the assimilationist tradition, the Dominion handed down what would become the single most significant document in relation to Canadian indigenous groups. Presented as the cure-all for the "Indian Problem", the 1876 Indian Act left no aspect of Native life unattended, paving the way for an intensified erosion of Indian sovereignty. Acting within the very wide range of powers defined by the Act, the newly born (1879) federal Indian

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<sup>40</sup> *Ibid.*, p.112,90, respectively.

<sup>41</sup> *Ibid.*, pp.90-123.

<sup>42</sup> "An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith." [29th March 1867] Statutes of Canada 1867/68-1969/70. Ottawa, annual.

<sup>43</sup> Jay Myers, note 5, *supra*, p.180.

Department pursued a mandate to provide for "band councils and the management and protection of Indian land and monies, to define Indian rights...and to define entitlement to band membership and Indian status."<sup>44</sup> In effect, the Act conferred all the necessary powers to dissect the noble savage and reassemble him in the appropriate Anglo fashion, complete with Euro-Canadian ideas of morality, politics and private property.

A variety of strategies, new and old, were enlisted to achieve this end. Among the older, more effective approaches retained by the Dominion was the systematic erosion of an Indian land base. This tactic was aimed at two ends. Its first and most obvious intent was the removal of the geographical component intrinsic to the maintenance of a spirit of nationhood and cultural identity. It was especially effective in this regard when applied to Native societies, for most of which existed a special symbiosis with regard to the land — a relationship central to Indian culture.<sup>45</sup> The second goal (and the proposed justification for land seizures) was the replacement of Indian notions of communal or public property with western-liberal concepts of private ownership, a crucial step towards civilization and inclusion in the Canadian mainstream.<sup>46</sup>

Indian lands were not the only focal point of the assimilation assault; the full force of the Act was also brought to bear upon Indian social, political and personal institutions. Despite the resistance of a number of native groups, the original social structures of virtually all bands were disregarded and, in their place, the artificially created band status was applied across the board. In like fashion, customary forms of Indian government were officially prohibited and replaced with elected band councils which functioned as little more than agents of the Dominion, exercising a carefully limited range of delegated powers. Central to

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<sup>44</sup>Yasmin Jiwani, "As long as the Sun Shines, the Grass Grows and the River Flows", Unpublished paper, (Simon Fraser University, 1984).

<sup>45</sup>Hugh Brody, note 3, *supra*.

<sup>46</sup>See Ian A. L. Getty and Antoine S. Lussier, note 14, *supra*.

the preservation of Indian identity and therefore implicitly impeding assimilation, traditional forms of religion and worship were officially discouraged. Anglo missionaries were allotted the task of converting entire nations.<sup>47</sup> Language barriers were also eradicated as Indian department teachers were instructed to coerce the use of the English language by sanctioning those children found speaking their Native tongue.<sup>48</sup>

Initial Native response to this program of cultural genocide assumed a form of "passive resistance." Hoping to mitigate the impact of the new government structures, some bands elected to council only those individuals traditionally recognized as leaders. These leaders were in large part the elders of a given group, reflecting the respect accorded age and wisdom in many early societies. The government, not sharing the indigenous view of the elderly, declared these headsmen incompetent and inadequate, and hence was able to override the band's choices and ensure that councils were constituted of only those persons it could influence. Where bands were more adamant about preserving their political conventions, the leaders were denied official recognition and in some cases, such as that of the Haudenosaunee, jailed.<sup>49</sup> Perceiving the strength of their adversary, Natives turned to the preservation of less prominent cultural practices. When the Potlach was outlawed among west coast bands, the ceremony continued on a less grand scale without the usual trappings, most of which had been confiscated by the Dominion.<sup>50</sup> Although much of the power of this status-gaining ceremony was lost in the translation to the smaller model, the preservation of even the smallest aspect of it constituted an important act of defiance for these Natives.

With the passage of additional assimilationist policy the quiet revolutions of many of these new colonies became increasingly mute. Struggling to preserve Native cultures and

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<sup>47</sup> *Ibid.*

<sup>48</sup> Keith Penner, "The Penner Report", (Ottawa: 1982).

<sup>49</sup> *Ibid.*

<sup>50</sup> See J. Rick Ponting and Roger Gibbins, note 15, *supra*; also Yasmin Jiwani, note 44, *supra*.

dignity in the face of virtually complete government control was a strain on limited emotional resources and a task felt by some to be fruitless in the face of so powerful a foe. Thrust into a cultural vacuum, there was precious little fuel for the fires of rebellion. It appeared that to achieve its goal of *de-Indianizing* the Indian, the Dominion had only to wait and watch, not that there was much to attend to — Carefully tucked away on reservations, Native societies were not equipped to do much more than lick their social, cultural and political wounds.

Legislation was not the only means by which assimilation was forwarded; following guidelines set out in the Royal Proclamation of 1763, the Dominion government acted upon the powers afforded by the 1860 legislation and negotiated a limited number of treaties with selected bands. With a few relatively insignificant exceptions, the treaties followed the same basic pattern. All designated the area of land to be ceded and the conditions of its cession, such as monetary considerations in the form of annuities and interest to be paid to individual band members, areas to be reserved, allowances for maintenance of public works and services as well as, in most cases, a medicine chest.<sup>51</sup> The first of these agreements was concluded July 25, 1871 with the Swampy Creeš and the Chippewas by Manitoba Lieutenant-Governor Archibald.<sup>52</sup> The Chippewas were also involved in the second treaty made in August of the same year, as well as the fourth and fifth treaties concluded on September 15, 1874 and September 24, 1875, respectively. The third agreement focussed on Ojibway lands, the sixth and seventh pacts involved the Plains and Wood Creeš and the Blackfoot Nation. In terms of territories surrendered, these treaties handed over to the Dominion of Canada the whole area west of Thunder Bay to the Rocky Mountains.<sup>53</sup> Subsequent treaties, numbered eight through eleven, were concluded between 1899 and 1921. These last agreements

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<sup>51</sup>George F. G. Stanley, note 4, *supra*.

<sup>52</sup>Jay Myers, note 5, *supra*, p.131.

<sup>53</sup>George F. G. Stanley, note 4, *supra*, p.11; Jay Myers, *ibid.*, p.136.

were concerned with the cession of northern portions of Ontario, Saskatchewan, and Alberta as well as the Mackenzie River Valley in the Northwest Territories.<sup>54</sup> As will be established in subsequent chapters, the status of these agreements and, implicitly, the rights and duties which stem from them, grew increasingly uncertain with the passage of time. When pressed to define exactly what was intended by the Dominion at the time it entered into the treaties, government officials have been less than conclusive in their response.

The wounding of the Indian and their culture caused by the program of assimilation was debilitating. Less than fifty years after the handing down of the "state-of-the-art" Indian Act of 1876, Native societies were in a state of disarray unparalleled in any other Canadian groups. It appeared that the reservation system had achieved only minimal success<sup>55</sup>; the equally questionable results of the "Assimilation Acts" suggested the frailties of policies based on concepts of coerced equality. Faced on every front with evidence of their own misdirection, the Federal government clung with an almost desperate tenacity to their assertion that the disarray of aboriginal cultures was not a consequence of inappropriate policy, but rather a confirmation of the lack of civilization amongst the Indian population. The wretched conditions of on-reserve life were not taken as indicative of a fundamentally flawed philosophy or praxis, but as grounds that additional measures were required to achieve the desired end.

By the 1970's those "additional measures" had served only to reduce aboriginal societies to an even greater state of disintegration. Notwithstanding the noble intentions of the original seeds of Indian policy sowed by the Royal Proclamation, subsequent initiatives have had few positive effects on Native life. The reserves which were originally intended to wean natives from their traditions and effect a gentle transition to civilized life have become their prisons.

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<sup>54</sup>George F. G. Stanley, note 4, *supra*.

<sup>55</sup>This depends, of course, upon those ends which one perceives the reservations were directed to achieve; it may be argued that, in gathering Native people together, the reserves actually contributed to stabilizing the Indian population.



Although the option to flee the cage is freely granted, securing an exit is not. Inside, nearly one-quarter of all babies do not survive infancy. Of those who do outlive this dangerous time, the chances of a young and violent death is three times that for other Canadians; that such an end will be by their own hand is six times greater.<sup>56</sup>

It is arguable that this latter index may be attributed at least in part to the demoralizing lifestyle experienced by most Natives. A Native family living on a reserve is unlikely to experience the luxury of an adequately serviced home: reserve housing possesses only a 40 per cent chance of having running water, sewage disposal or in-door plumbing. The chances are increasingly slim that the meagre lodging is warm in winter or cool in summer, this climate intensified by the reality that most of these houses provide a base for at least two families.<sup>57</sup> For those who possess the strength to fight the paralyzing effects of poverty, rallying sufficiently to leave the reserve, the prognosis is no less bleak than that which faces those who remain. The harsh realities playing upon urban aboriginals are well documented and do not suggest any positive alternative to the lifestyle afforded on the average reserve.<sup>58</sup>

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<sup>56</sup>See Keith Penner, note 48, *supra*; see also Bradford W. Morse, Aboriginal Peoples and the Law, (Carleton: Ottawa, 1985), pp.7-12. As pointed out here by Morse, statistics are capable of conveying at best half the picture. Insofar as these can convey a sense of a situation, "*Statistics do not bleed or feel pain, frustration and hopelessness.*"

<sup>57</sup>Keith Penner, note 48, *supra*.

<sup>58</sup>For a complete picture of the lifestyle both off and on the reserve, consult the following sources: Keith Penner, "The Penner Report", note 48, *supra*; Simon N. Verdun-Jones and Gregory K. Muirhead, "The Native in the Criminal Justice System: Canadian Research", Crime et/and Justice, vol. 7/8, no. 1, (1979-80:3); Union of British Columbia Indian Chiefs *with* the Ministry of Human Resources, "Report: Social Problems of Indian People in British Columbia", Unpublished monograph, (Vancouver, 1978).

### [III] Reconciling Two Histories: The Best of Both Worlds?

Insofar as Canadian indigenous groups had endured the repeated efforts of the Dominion to secure their assimilation, they had at no time bent to the full extent of the government's will nor had they completely abandoned the battle as lost. Their tenacity aside, after nearly a century of increasing government interference in the lives of Native people, it required a sizeable blow to galvanize a renewed Native offensive. This blow arrived with a more than adequate report in the handing down of the Trudeau Government's "White Paper" in 1969. Presented as the product of a year's consultation with indigenous groups across the country, this document was a tribute to the self-serving tokenism that characterized its predecessors. Couched in the very alluring terms of fair and equal participation of Natives in the Canadian mainstream, it called for the termination of the special status afforded Natives through the elimination of the Indian Act as well as those agencies of the Department of Indian Affairs that administered them.<sup>59</sup> Whilst removal of the rights articulated by the Act were grounds for protest, these were not the most provocative of the Paper's recommendations. The White Committee also called for the invalidation of all treaties and hence the duties owed Natives as a consequence of those agreements.<sup>60</sup>

Extinguishment of treaties was unacceptable on two very significant grounds. Although the Royal Proclamation clearly articulated the rights of Indians as sovereign bodies, without the support of this statement contained in the treaties, the contemporary status of aboriginal rights would be highly uncertain. In addition, although the Dominion had never allotted any greater weight than that of a contractual agreement to the treaties, they nonetheless stood as a statement of duties owed and as such constituted a moral, if not legal, obligation to fulfill

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<sup>59</sup>J. Rick Pontings and Roger Gibbins, note 15, *supra*.

<sup>60</sup>*Ibid.*

those duties.<sup>61</sup> To extinguish the treaties would be disastrous for Native people. Even though indigenes were anxious to reassume some degree of independence and self-supervision, most Native leaders agreed that after nearly a century of paternalism, such an abrupt weaning would be highly problematic for their people. Baptism by fire is no way to test a people's readiness for autonomy. Furthermore, considering the havoc wreaked by the Dominion in seeing the satisfaction of benefits accruing them by treaty, Natives rightfully believed they were owed something for their troubles. Determined to collect their due and see the government held to their promises, Natives came together to fight the assimilationist intentions of the White Paper.

It was not to be an easy battle, however, for insofar as the tenets of the Paper constituted an implicit confession of the failings of previous policy approaches, it also encompassed a monetary aspect of central interest to the government. Through dissolution of the treaties, lands reserved under them would be transformed into municipalities under Native control. In this way not only would reserve funding be cut, but so could many of the government's past losses since a band would be opened to all the taxation normally levied from municipalities. Likewise, by extinguishing special status and the Department of Indian Affairs, the costs of administering the relevant portions of the Act would be removed. Hundreds of civil service positions would have to be shuffled, and some lost, but when measured against the potential gains the votes of a few irate civil servants seemed a small price to pay. The attitude seemed one of an entrepreneur exiting from a bad deal; the Indian business had gone sour and the government was now intent upon cutting its losses and getting out of the picture.

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<sup>61</sup>See especially: Peter A. Cummings and Neil H. Mickenberg, Native Rights in Canada, 2nd. ed. (General Publishing Co. Ltd.: Toronto, 1972); Maureen Davies, "Aspects of Aboriginal Rights in International Law" in Aboriginal Peoples and the Law, Morse, (ed.), note 56, *supra*; 1985). David W. Elliot, "Aboriginal Title", in Morse, (ed.), *ibid*; Harold Cardinal, "The Unjust Society", in Out of Irrelevance, Ponting and Gibbins (eds.), (Butterworths: Toronto, 1980).

Denying the magnitude of the impediments before them, Native people rallied to fight the proposed changes in a fashion and number unprecedented in the history of Indian-government relations. Minimizing cultural distinctions in the interests of a common end, aboriginals joined together to fight City Hall and they won. The White Paper slipped out of existence only weeks after it had first reared its ugly head.<sup>62</sup>

Strengthened by their initial victory, Native peoples began cautiously to reassess their position. Inasmuch as nearly a century of domination and manipulation had dissolved much of their spirit and neutered their effectiveness, their power as a united group had been proven by the White Paper experience. Out of their tattered ranks emerged an enlightened indigenous leadership aware of the extent of the inequalities characterizing their peoples. Where they had found the resources to speak up was uncertain but largely unquestioned; the central question in the minds of Natives across the country at this point was simply where they might go from here.

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<sup>62</sup>J. Rick Ponting and Roger Gibbins, note 15, *supra*.

### III. THE ESSENCE OF THE ACTIVISM: LAND CLAIMS AND SELF-DETERMINATION

The flaws which ultimately led to the downfall of the White Paper<sup>1</sup> were really no different from those which had doomed policy initiatives on both sides of Confederation. The more patent errors of application and implementation tainting previous programs had hinted at an underlying philosophical misperception which was made clearly evident in the 1969 initiative. The failure of Indian agents and reservations, of christianization and assimilation, all sprung from the same ill-founded premise that the western-liberal tradition which underpinned British institutions was an easy, if not automatic, alternative to the "pagan traditions" of Canadian indigenous groups.<sup>2</sup>

In this western-liberal tradition, society was conceived of not as an entity in and of itself, but rather as the by-product of the cumulation of a number of individuals for the controlled promotion of self-interests. The state formed in this context was an entirely artificial creation without foundation in the natural order of things: a human-made common authority overseeing the competition of individual ends. In the classic European conception of the state, as described by such scholars as Hobbes<sup>3</sup>, this institution was reducible to

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<sup>1</sup>For a complete discussion of this document, consult pages 19-21 in the preceding chapter.

<sup>2</sup>Menno Boldt and Anthony Long, "Tribal Philosophies and the Charter of Rights and Freedoms", in The Quest for Justice, Aboriginal Peoples and Aboriginal Rights, Menno Boldt and Anthony Long, (eds.), (University of Toronto Press: Toronto, 1985), p.166.

<sup>3</sup>For Hobbes, human beings were moved by three principal passions: 1) a desire for gain; 2) a desire for safety; and 3) a desire for reputation. Without the guidance of a "superior power" in the form of a state, these passions led inevitably to a "war of every man against every man", in which the regulation of each of these wars fell upon the parties involved. With the evolution of a "proper" state, the "brutish and anarchic" condition of original man was elevated to an orderly functioning body wherein the responsibility for administering the fulfillment—or non-fulfillment—of individual passions fell upon the institutionalized authority of the state. See Huntingdon Cairns, Legal Philosophy from Plato to Hegel, (Johns

individual wills in possession of certain natural and inalienable rights.<sup>4</sup> In this sense, there was little middle ground between the individual and the state; the whole was equal to the sum of its parts. Little of this original conception was lost in the translation to pragmatic legislation, which in both Canadian and American polities focused on protection of individual prerogatives from infringement by group interests. Later, in the Canadian Charter of Rights and Freedoms<sup>5</sup>, virtually all statements of license are prefaced as applying to "every citizen" or "individual".<sup>6</sup>

In North American indigenous societies, a very different conception of social life prevailed. To the antithesis of British traditions, societies here were defined in cosmocentric as opposed to homocentric terms; rights and responsibilities emerged from the observance of duties to the whole, not to the self. Robert Vachon states that this view of society was an outgrowth of the Indian appreciation of the interrelatedness of all things and the need for harmony among them. The whole, and implicitly its parts, can survive only if each aspect fulfills its given role:

In the cosmocentric perspective animals, plants, and objects were regarded as having souls or spirits and were dealt with as *persons* (sic) who had human qualities of thinking, feeling, and understanding, and who had volitional capacities as well. Social interaction occurred between human beings and other-than-human *persons* (sic) involving reciprocal relations and mutual obligations<sup>7</sup>.

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<sup>3</sup>(cont'd) Hopkins Press, U.S.A., 1959), pp.249-271.

<sup>4</sup>*Ibid.*, p.166.

<sup>5</sup>Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, R.S.C. 1982, amended by the Constitutional Amendment Proclamation 1983, effective June 1984.

<sup>6</sup>For an expansion of this statement, see James Youngblood Henderson, "Aboriginal Rights in Western Legal Tradition", in The Quest for Justice, Aboriginal Peoples and Aboriginal Rights, Menno Boldt and Anthony Long, (eds.), (University of Toronto: Toronto, 1985), p.186; Daniel J. Gormley, "Aboriginal Rights as Natural Rights" in The Canadian Journal of Native Studies, vol. IV, 1(1984), pp. 29-49. In his "Report of the Mackenzie Valley Pipeline Inquiry", (J. Lorimer and Co.: Toronto, 1977), Mr. Justice Thomas R. Berger provides a good degree of evidence corroborating assertions of the fundamental gaps between Native and Western European philosophies of life.

<sup>7</sup>Robert Vachon, "Traditional Legal Ways of Native Peoples and the Struggle for Native Rights", [15 *Inter-Culture*, (1982) 1-18] in Boldt and Long, The Quest for Justice, note 2,

When viewed in the terms outlined above, it is little wonder that the policies of colonial Canada not only failed, but were disastrous for Native people. At the insistence of the Indian people, policy orientation in the aftermath of the White Paper would undergo a massive rethinking. Whether the products of that thought would be translated into action remained to be seen.

[I] Contemporary Indian Politics: Aboriginal Rights through Anglo Eyes.

Among the first products of that rethinking<sup>8</sup> was the report of Keith Penner's Parliamentary task force on Indian self-government.<sup>9</sup> The task force solicited the views of Native people across the country and, unlike its predecessor the White Paper, actively incorporated those views into its final report. The Penner Report articulated Native perceptions of an Indian Department that was both "stultifying and wasteful", and of "self-government as an aboriginal right" whose denial would simply perpetuate all the problems already associated with the Department.<sup>10</sup> These assertions translated into 58 recommendations, the most sweeping of which carried one step further the Indian assessment that self-government should be recognized, stating that this right should be "explicitly stated and recognized in the

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<sup>8</sup>(cont'd) *supra*, p.116.

<sup>9</sup>This is not to imply that the period punctuating the release of the White Paper and the publication of Penner's report was an inactive one. That epoch saw the appearance of Berger's Report of the Mackenzie Valley Pipeline Inquiry, a number of position papers composed by a variety of Native groups in both the provinces and the Territories (as will be seen later, the Dene Declaration was among these papers), as well as the settlement of the James Bay Agreement (also discussed later in this thesis).

<sup>9</sup>Paul Tennant, "Indian Self-Government: Progress or Stalemate", in Paul Tennant, Sally M. Weaver, Roger Gibbins and J. Rick Ponting, "The Report of the House of Commons Special Committee on Indian Self-Government: Three Comments", Canadian Public Policy, X:2, pp.211-215.

<sup>10</sup>*Ibid.*, p.213.

Constitution of Canada".<sup>11</sup> Through entrenchment, Indian Nations were to be accorded *true autonomy* in the sense that their powers to govern would not be artificial creations of legislatures. Similarly, the Constitutional provisions would not constitute the right itself, but rather would serve to *acknowledge* in law a *pre-existing* right of Indian sovereignty.<sup>12</sup> Thus Indian Nations would form a distinct "third order" of government in the Canadian polity.

Parliamentary response to the recommendations was voiced by (then) Minister of Indian Affairs John Munro, who adopted a largely noncommittal stance. Insofar as the official statement of response emphasized the need to "break the dependency cycle...[through] recognizing the importance of the cultural heritage and integrity of Indian peoples", it did not assert any willingness to seek permanent or fundamental change.<sup>13</sup> Rather, the federal government saw a restructured relationship enhancing the "special relationship between the Government and Indian peoples" as sufficient to answer the demands outlined by Penner.<sup>14</sup> This restructuring would be effected by "general framework legislation", the first of which followed within a few months of the statement of response.

Bill C-52, "An Act relating to self-government for Indian Nations", had its first reading on June 27, 1984. This was not the first of such proposals. Parliament had been investigating self-government options as early as 1979, a reality which raises questions as to the timeliness and purposes of Penner's committee. This latest bill revealed that any restructuring of the Indian-government relationship was to be on the latter's terms with minimal participation by the Indian Nations. Through this legislation, Indian communities could

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<sup>11</sup>Minutes of the Proceedings of the House of Commons Special Committee on Indian Self - Government, "The Penner Report." Issue No. 40, October, 1983.

<sup>12</sup>Paul Tennant, note 9, *supra*, pp.212-213.

<sup>13</sup>Department of Indian and Northern Affairs, "Response of the Government to the Report of the Special Committee on Indian Self-Government". Presented by John C. Munro, Minister of Indian Affairs and Northern Development. Ottawa, Ontario. March 5, 1984. p.1.

<sup>14</sup>*Ibid.*, p.1.



secure a carefully mediated quasi-independence through the drafting of a Charter "consistent with democratic principles" and protective of "individual rights".<sup>15</sup> That those guidelines were not consistent with traditional indigenous modes of government was not taken into account. Perusal of the bill further suggests that such democratic principles were not observed by the government itself in compiling the Act. Throughout the proposed legislation were conditions and corollaries to the granting of self-government which culminated in the power of the Minister to suspend at his discretion any Indian government "for cause".<sup>16</sup>

The proposed Bill had little impact for two reasons. In the first place, it clearly perpetuated the policy of assimilation of Indian people by requiring that the form of government they adopt be an essentially western-liberal one. Second, and perhaps more significantly, it sought to establish Indian governments as creatures of legislation and, therefore, implicitly creations of the Canadian polity. If Indian Nations could be persuaded to buy into such a plan, any future claims to an aboriginal right of self-government would be immediately discounted by the existence of those bands who had accepted the position of the federal government as architect of that right. Permitting the Canadian government to accept responsibility for the creation of those rights that most Natives believe to be gifts of the Creator would set a dangerous precedent for future claims negotiations. What the law giveth, the law may also taketh away.

Meanwhile, the Canadian Constitution had come into effect — yet another document replete with contradictions for Native people. Inasmuch as they had fought long and drawn-out battles with government in a variety of spheres for acknowledgement and entrenchment of aboriginal rights, the securing of those ends constituted a bittersweet victory. In the final product, aboriginal rights were included as section 35 of the Constitution Act 1982, whereby "existing aboriginal and treaty rights...are hereby recognized and affirmed" as

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<sup>15</sup>See section 6, Bill C-52, (1984).

<sup>16</sup>*Ibid*, s.26.

these pertain to "Indian, Inuit and Metis peoples". Section 25 of the Canadian Charter of Rights and Freedoms complemented this statement by establishing that the Charter "shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms which pertain to the aboriginal peoples of Canada".<sup>17</sup>

As they currently stand, these provisions are of dubious effect. This uncertainty is in large measure due to the imprecision of two terms which may ultimately determine the degree of weight held by the sections. Insofar as any rights are qualified by the term "existing", exactly what rights are recognized and affirmed by section 35 is open to a great deal of speculation. Given the lack of consistency characterizing previous governments' dealings with indigenous claims to rights, the question is raised as to whether there are, in fact, any "existing" aboriginal rights in certain areas of the country.<sup>18</sup> The immediate case of British Columbia is raised; aside from the coverage of the northeast corner of this province by treaty 8, the remainder of its territory is not subject to treaty rights or constraints. Notwithstanding the finding in *Calder et al v. Attorney-General of British Columbia*<sup>19</sup>,

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<sup>17</sup>Constitution Act, 1982, enacted by the Canada Act, 1982 (U.K.), c.11; amended by the Constitutional Amendment Proclamation, 1983, in force June 21, 1984.

<sup>18</sup>Thomas Flanagan, "From Indian Title to Aboriginal Rights" in Law and Justice in a New Land, Louis Knafla, (ed.), (Carswell: Vancouver, 1986), pp.81,99.

<sup>19</sup>*Calder et al v. Attorney-General of British Columbia*, [1973] S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145. In this case the plaintiff, a group of Nishga Indians of Northwestern British Columbia sought a declaration that they possessed an aboriginal title to their land which had not been extinguished. Their claim was based on their assertion that they and their ancestors had occupied the lands in question since *time immemorial*. Although the decision was ultimately determined on a technical issue not pertinent to the question of title, the remaining six opinions were evenly split on the issue of extinguishment. Judson J., spoke for those Justices denying the existence of the Nishgas' title, asserting that, if such title ever had existed, it had been extinguished by the sum course of action and legislation carried out by the government of British Columbia to date. The opposite holding was voiced by Hall J., and supported by Spence and Laskin, JJ. Hall, J. held that, without denying the unfettered prerogative of the Crown to extinguish such titles, the title presented by the Nishgas had survived both government action and the passage of time. This survival was attributable to the absence of a *clear and plain* legislative statement or surrender to the Crown, the right in question being a *legal right* the removal of which must be asserted in clear and specific terms. Although the technical consideration constituted the ultimate justification for denying the Nishga any declaratory relief, the case stands as an indication of the Courts' willingness to contemplate matters of aboriginal title. More importantly, the stand of the three Justices

indigenous interests in this province may find themselves either completely out in the cold as existing in a "rights vacuum" which renders section 35 irrelevant or, as expressed by Thomas Flanagan, "Canadians may be presented with a massive bill for [their] compensation."<sup>20</sup>

If, for the sense of argument, it is to be agreed that some aboriginal rights are both present and established (the criteria and possibility of which will be considered below), would only those rights considered to be in existence at the time of the entrenchment of the relevant constitutional provisions be acknowledged? Would subsequent extinguishment – or recognition – require formal Constitutional amendment? The impact of the term "existing" will ultimately be determined in one of two forums: the courts, or in the context of the First Ministers' Conferences provided for in section 37 of the Constitution.<sup>21</sup> Conferences held to date under the authority of section 37 have been of little practical effect, the most notable outcome being the agreement of all parties to the meetings that more meetings are required<sup>22</sup>.

As if the complications created by the condition of existence were not enough, questions as to what is meant by the term "aboriginal rights" rose fast on the heels of its inclusion in the provisions. In a political context, the term is accorded what anthropologists refer to as a "multivalent" quality, meaning that the term has a number of different layers

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<sup>19</sup>(cont'd) upholding the possibility of an enduring title to lands has been seen as a potentially significant advancement of their interests. Inasmuch as that question is yet to be fully litigated in Canada's highest Court, Native people are wise not to embrace *Calder* too enthusiastically. For a more intimate examination of this case, see K. Lysk, "The Indian Title Question in Light of Calder", The Canadian Bar Review, 51, (1973), p.450.

<sup>20</sup>Thomas Flanagan, note 18, *supra*, p.99.

<sup>21</sup>Extensive consideration of the potential impact of the term is offered by David W. Elliott in "Aboriginal Title", in Aboriginal Peoples and the Law, Bradford Morse, (ed.), (Carleton University Press: Ottawa, 1985), pp.48-121. Postulations regarding the possibilities that only those rights deemed "existing" in 1982 and the potential for constitutional amendment for those not so deemed mentioned above are examined by Elliott and credit for these assertions is given here.

<sup>22</sup>Thomas Flanagan, note 18, *supra*, p.82.

of definitions depending not only on who is speaking, but also on the context of its use and the time at which it is evoked.<sup>23</sup> Because of the high degree of flexibility and generality inherent in such terms, they can serve as a unifying agent among those who are the driving force behind the campaign which they reflect.<sup>24</sup> Unfortunately, use of such terms may also offer some less than positive consequences when their contents are the object of active negotiations. Inasmuch as different aboriginal groups may assign different qualities to such rights, other parties to the negotiation of those rights may be less than receptive to what they perceive as inconsistency rather than flexibility. For the purposes of the Constitutional provisions pertaining to "aboriginal rights", the multivalent nature of this phraseology could prove highly problematic. There presently exist in Canada at least fifty-nine dialect groups across seven primary cultural areas, and it is arguable that the sole shared characteristic of these often widely disparate groups is their use of the term "aboriginal rights". What each holds to constitute that right may be – and frequently is – quite distinct and possibly conflicting. The Penner report, for example, responding to the desire of a number of groups for the removal of Indian Act policies in the day-to-day lives of Natives, includes as one of its recommendations that the Act and the Department be dissolved within five years of the implementation of self-government mechanisms. The Report also included as a recommendation that those Natives who had expressed a desire to the Committee to remain under the auspices of the Act be allowed to do so. What is to become of these individuals upon the eventual dissolution of this legislation and the services it provides?<sup>25</sup>

The term "aboriginal rights" becomes increasingly curious the further its use is removed from the Constitutional sphere. That indigenous peoples should choose to use it is even more

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<sup>23</sup>Sally Weaver, "Federal Difficulties with Aboriginal Rights" in Menno Boldt et al, note 2, *supra*, pp.140–141.

<sup>24</sup>*Ibid.*, p.141.

<sup>25</sup>Sally Weaver, "A Commentary on the Penner Report", in The Report of the House of Commons Special Committee on Indian Self-Government: Three Comments, note 9, *supra*, pp.216–221.

peculiar given its roots. The denotation of the word, derived from the latin *ab*, meaning "from" and *origio* denoting "origin", is simply *first inhabitants*; but according to Flanagan it also has connotations of backwardness.<sup>26</sup> As a technical term in the realm of international law, "aborigine" has been taken to refer to those "members of uncivilized tribes which inhabit a region at a time a sovereign state extends its sovereignty over the region and which have so inhabited from time immemorial; and also the descendants of such persons dwelling in the region"<sup>27</sup>. As noted by Flanagan, given the clear and unequivocal rejection of contemporary Native spokesmen of claims to the implicit lack of civility among their ancestors, it is rather odd that they would choose to adopt such a label to depict their traditional rights.

Beyond the problems posed by the tricky semantics of the Charter and Constitution lies the reality that any type of recognition – regardless of its substantive content – must be in accordance with the Charter's introductory qualifications to the Constitution. This presents two fundamental barriers to the activation of traditional government mechanisms. As established earlier, indigenous societies have traditionally been based on a collectivist philosophy quite unlike the individualist focus of British political schemes. Canada, as the product of a British mentor, actively incorporates her seniors' western-liberal orientation. Insofar as the Charter requires the recognition and promotion of individual rights and freedoms and acts as a qualifier on all other statements of rights, including those found in section 35 of the Constitution, what is the constitutionality of forms of aboriginal government which fundamentally conflict with the western-liberal traditions underpinning the Canadian Charter and Constitution?

Notwithstanding these potential conflicts of principle, the Constitution threatens to further complicate indigenous activism through its nationalist focus. Roger Gibbins postulates that the

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<sup>26</sup>Thomas Flanagan, note 18, *supra*, p.82.

<sup>27</sup>Alpheus Henry Snow, quoted by Flanagan, *ibid*, p.82.

nature of the document is such that claims negotiations may easily devolve into struggles between the largely domain-specific Indian affairs and larger environmental determinants.<sup>28</sup> The latter refer to "broader political constraints...which would include a governmental commitment to individual - as opposed to group - rights, fiscal constraints, public opinion, and competing demands from other policy domains, such as an interest in developing energy resources where there are unsettled land claims."<sup>29</sup> Despite initial optimism that the Constitution provided an important opportunity for Canadian indigenous groups, it may in fact have closed a number of previously open doors by strengthening the influence of environmental determinants. In bringing to bear upon indigenous campaigns a number of larger national concerns over which they have no control, "Indian control over those public policies which shape their very lives and futures may be further weakened."<sup>30</sup>

The preceding problems and postulates combined with the relative weaknesses of many Native bargaining units suggest that, although they have come a long way since 1969, indigenous activists are confronted by a number of impediments. Not the least persuasive of these blockades is a general perception on behalf of the non-native population that claims to aboriginal land and treaty rights are, at best, precarious.<sup>31</sup> This sentiment is often a factor in the formulation of official attitudes regarding Native claims; a shrewd politician - or at least one seeking re-election - is well-advised to mirror the opinions held by the majority of his or her constituents. Hence the response of then Prime Minister Trudeau to queries as to whether his government would acknowledge and negotiate aboriginal claims: "Our answer is

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<sup>28</sup>Roger Gibbins, "Canadian Indian Policy: The Constitutional Trap", The Canadian Journal of Native Studies IV, 1, (1984), pp.1-9.

<sup>29</sup>*Ibid.*, p.2.

<sup>30</sup>*Ibid.*

<sup>31</sup>For an elaboration of that perception and the part it could play in Native success (or nonsuccess) in promotion of their land claims, see: Noel Dyck, (ed.), Indigenous Peoples and the Nation-State. Fourth World Politics in Canada, Australia and Norway. (St. John's, Newfoundland: Institute of Social and Economic Research, Memorial University of Newfoundland, 1985).

no. We can't recognize aboriginal rights because no society can be built on historical *might have beens*."<sup>32</sup>

Inasmuch as there may be some borderline truth to such a statement, the writing of history has shown that those in the position to do the writing are largely responsible for what will be written. That significant aspects of Indian history have been consistently downplayed – if not ignored – necessarily leads one to question exactly how much of whose history federal policy actually reflects.

## [II] Aboriginal Rights and Colonialization: A History of Systematic Erosion.

The first formal debates in regard to aboriginal sovereignty and rights to land were aired in the 15th century at the request of Charles V of Spain. The return of his explorers from the New World had confirmed not only the existence of that world, but of civilizations inhabiting them as well. This latter reality prompted some unique legal and moral questions in the mind of the Spanish King, who directed a tribunal of theologians, judges and court officials to answer them. Primary among these questions was the determination as to how conquests, discoveries and settlements could be made to accord with principles of justice and reason.<sup>33</sup> The junta was asked to assess two views on the matter, presented by Juan Gines de Sepulveda and Bartolome de Las Casas. The former relied upon the doctrine espoused by Aristotle in his Politics which held that some races, by virtue of their innate superiority, were justified in subjugating others.<sup>34</sup> By this view, the taking of lands and obliteration of

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<sup>32</sup>Trudeau, as quoted by Jiwani in "As long as the Sun Shines, the Grass Grows and the River Flows. The Indian Question in Canada: Termination or Self-Determination", Unpublished paper, Simon Fraser University, 1984.

<sup>33</sup>Thomas R. Berger, "Native History, Native Claims, and Self-Determination" in Indians and the Law, (The Continuing Legal Education Society: Vancouver, 1982), p.1.

<sup>34</sup>*Ibid.*, p.1.

cultures was legitimated by the natural order analogous to the survival of the fittest. Las Casas chose to advance a theory of all men as endowed with certain natural rights, the case for violation of which could never be legitimated. He relied on the prior teachings of Francisus de Vitoria who asserted that "Lordship in jurisdiction does not go so far as to warrant the [discoverer] in converting provinces to his own use or in giving towns or even estates away at his pleasure. Discovery and papal donation gave no right to occupy the lands of the indigenous populations."<sup>35</sup> Las Casas concluded from this base that the indigenous peoples of the Americas were entitled to live as free men, under their own rulers and their own laws.<sup>36</sup>

The results of the debate are uncertain; after hearing the two sides for what appears to have been a considerable period of time, the junta adjourned to formulate a decision which evidence suggests never reached the King.<sup>37</sup> Common threads in policies handed down following the dialectic suggest Las Casas' Vitorian model was determined most appropriate.<sup>38</sup> By this model aboriginals were held to be "true owners, before the Spaniard came among them, both from public and private points of view".<sup>39</sup> In the absence of a *just war* to protect the aborigines' choice of religion, only the voluntary consent of the majority of the American nations could legitimate any annexation of their territory to the Spanish Crown.<sup>40</sup>

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<sup>35</sup>James Youngblood Henderson, "Aboriginal Rights in Western Legal Tradition", in The Quest for Justice, Aboriginal Peoples and Aboriginal Rights, note 6, *supra*, p.188.

<sup>36</sup>*Ibid.*, p.189; see also Thomas R. Berger, "Native History, Native Claims and Self-Determination", note 33, *supra*.

<sup>37</sup>James Youngblood Henderson, note 6, *supra*, p.188-190.

<sup>38</sup>*Ibid.*, p.189.

<sup>39</sup>*Ibid.*, p.188

<sup>40</sup>The concept of a *just war* arose from Papal roots and justified the taking by force of lands whose occupants were not of the Christian faith. This mode of conquest was outrightly rejected by Vitoria, who asserted that for a *just war* there must be *just cause*, and the indigenous peoples of the New World constituted no such cause..."Although the Christian faith may have been announced to the Indians with adequate demonstration and they have refused to receive it, yet this is not a reason which justifies making war on them and depriving



This position was reinforced by the Vatican, which declared that the Indians were "men rather than devils or beasts", and thus were governed by the standards of human contact: "Notwithstanding whatever may have been or may be said to the contrary, the said Indians and all other peoples who may be discovered by Christians, are by no means to be deprived of their property, even though they may be outside the faith of Jesus Christ.. nor should they be in anyway enslaved; should the contrary happen it shall be null and of no effect."<sup>41</sup>

The Vitorian model appears to have spilled over into other regions of Europe to become the principle mechanism for dealing with newly discovered indigenes.<sup>42</sup> Acceptance of the model rested upon Europe's acceptance of the primary principle of natural rights that, prior to all rules, were those rights which are inherent to men and which form the foundation of legitimate law. In Britain, and throughout the continent, the principles espoused by the Spanish savants evolved into three distinct, but interrelated, modes of assuming sovereignty. The first of these was the most popular and least tangible, asserting that in the expansion of empires a finder's fee of sorts was implicit in first arrival on a previously undiscovered continent. This fee amounted to a right of sovereignty by the discoverer which was variously qualified as acting upon all other European interests in the discovered lands, any prior inhabitants of the territories and even upon the soil itself. This "doctrine of discovery" was rejected by international jurists on a number of grounds. Primarily, it was held to contain one basic, fatal flaw: Any claim to discovery could act only against territories found to be *terra nullius*, or previously uninhabited. In its capacity as an uninhabited

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<sup>40</sup>(cont'd) them of their property." Henderson, note 6, *supra*, p.189-190.

<sup>41</sup>*Ibid.*, p.189.

<sup>42</sup>See James Youngblood Henderson, note 6, *supra*, pp.187-220; Menno Boldt and Anthony Long, "Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians", The Quest for Justice, Aboriginal Peoples and Aboriginal Rights Boldt et al, (eds.), (University of Toronto Press: Toronto, 1985), pp.333-346; Maureen Davies, "Aspects of Aboriginal Rights in International Law", in Aboriginal Peoples and the Law, Bradford Morse, (ed.), (Carleton University Press: Toronto, 1985), pp.16-47.

territory, the land was seen to constitute a "legal vacuum" where no prior institutions barred the way to the assumption of full title to the soil and the unqualified disposition of powers by the new sovereign.<sup>43</sup> Insofar as the guidelines created by the doctrine provided for any "original inhabitants", it implicitly discounted any possibility of the lands in question being *terra nullius*. Since the territories were in fact populated, their discovery could only logically be credited to those already living there!<sup>44</sup> In its landmark decision *Johnson v. McIntosh*,<sup>45</sup> the Supreme Court of the United States held that, at the time, the principle of discovery was acknowledged by all Europeans simply because it facilitated their respective interests to do so.<sup>46</sup> In this way, the doctrine could be seen as pertaining not to the lands themselves, but rather as conveying upon the first discoverer *prior* rights over other nations in attempting to establish title.<sup>47</sup> At the cost of this more plausible articulation of discovery, the Court went on to say that, by virtue of discovery, Native inhabitants could find their option to dispose of their lands as they chose drastically curtailed by the rights afforded the new sovereign by virtue of the doctrine. Thus the weight of the previous statements is necessarily imprecise. A more exact appraisal of the doctrine was presented in the *Island of Palmas Case* (1928)<sup>48</sup>, where the Permanent Court of Arbitration held that "...discovery alone, without

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<sup>43</sup>Brian Slattery, "Ancestral Lands, Alien Laws: Perspectives on Aboriginal Title", Studies of Aboriginal Rights, No.2, 1983.

<sup>44</sup>Maureen Davies, cites Vitoria in his De Indis as the initial detector of this inconsistency, although it is arguable that it follows naturally from any reading of the basic tenets of the doctrine of discovery, credit must be given to he who detected the flaw first. Whether this initial statement renders the thought the sole intellectual property of Vitoria is uncertain, as the author -like many others in her field- noted the flaw early on the flaw which was subsequently confirmed by Davies and Vitoria. Although a number of European states attempted to advance the doctrine to one granting *exclusive title* to the discovered lands, such claims have rarely, if ever, been recognized in either international or domestic courts: eg. see Maureen Davies, note 42, *supra*, pp.34-35; In this same volume, see David W. Elliott, "Aboriginal Title", pp.48-121.

<sup>45</sup>21 U.S., 8 Wheat, p.543.

<sup>46</sup>*Ibid.*

<sup>47</sup>See Maureen Davies, note 42, *supra*, p.35.

<sup>48</sup>Maureen Davies, note 42, *supra*, p.35.

any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas or Miangas."<sup>49</sup>

Where a colonizing power could support its claim to primary discovery by pointing to established settlements on the territories in question, the doctrine may have been somewhat more tenable. This is doubtful, however, as the occupation not only had to be uninterrupted and permanent, but it had to be upon lands previously *terra nullius*.<sup>50</sup> Obviously any claim contingent upon the proof of the latter was highly dubious. Insofar as early courts were sometimes willing to find as *terra nullius* lands not exploited in a "civilized fashion", especially those occupied by nomadic groups<sup>51</sup>, this finding does not appear to have survived the translation to present-day courts. International courts have held that use of the "concept of *terra nullius* ...to justify conquest and colonization, stands condemned."<sup>52</sup>

Where grounds for a *just war* could be established, the second formulation of Vitoria's model was effected. "Conquest" operated as a cause of sovereignty only where there was war between two states and, by reason of the defeat of one of them, sovereignty passed from the loser to the winner.<sup>53</sup> The common conception of rights afforded by conquest held by international jurists was distinct from that held by the British.<sup>54</sup> Notwithstanding William the Norman's definition of the term as describing a "forcible method of acquisition", the British adopted the term *conquest* as *conquisition*, the latter amounting to the consensual possession of land.<sup>55</sup> Thus all territories secured through consent of the colonized nations, save those

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<sup>49</sup>*Ibid.*

<sup>50</sup>*Ibid.*, p.36.

<sup>51</sup>*Ibid.*

<sup>52</sup>See Western Sahara Case, (1975), Davies *in* Morse, note 42, *supra*.

<sup>53</sup>See Status of Greenland Case, 3 World Reports, p.151.

<sup>54</sup>James Youngblood Henderson, note 6, *supra*, p.192

<sup>55</sup>*Ibid.*

lands which were inherited, were lands held by virtue of conquest. Whether this form of conquest was subject to the conditions set upon it by Vitoria is not certain.<sup>56</sup> In an international realm, conquest seems to have encompassed the element of force absent in the British conception of the same term.

It is arguable that the British derivative of conquest emerged in response to the crumbling of claims based solely on discovery. Insofar as the British had as much of an interest in perpetuating the doctrine of discovery as other nations, they attempted to preserve its effects by defining a model which had more *prima facie* legitimacy – conquest – but did not necessarily deny the benefits afforded by discovery. By holding conquest as involving contractual purchase and/or securing of title by force, the British could fall back upon either route to securing sovereignty.

Strictly speaking, the third mode by which sovereignty could be secured involved the simple handing over of the newly discovered territories to the new sovereign. Notwithstanding the precise content of the term, *cession* in most cases involved an exchange of lands and/or rights for certain negotiated considerations on behalf of the Crown.<sup>57</sup> Given that claims to title advanced on the basis of either discovery or conquest involved (at a secondary level) the annexation of territories by negotiation with the original inhabitants,<sup>58</sup> this process came

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<sup>56</sup>Central to the making of a just and lawful contract was Vitoria's condition that all parties enter into the agreement freely, secure in their understanding of all its aspects; see Daniel J. Gormley, note 6, *supra*, pp.29-49.

<sup>57</sup>As in the case of treaties, which are often associated with acts of cession.

<sup>58</sup>In *De Jure Belli* (1588) Alberico Gentilis wrote that where sovereignty was claimed on the assertion of prior trading associations with the original occupants or on the albeit questionable grounds of discovery, no proprietary interest could be held in the lands in question until such was granted by the inhabitants. This philosophy was carried over into British sovereignty designs as it was from Gentilis that Elizabeth gleaned justifications for acts of usurping title. Vitoria held essentially the same view, but went one step further than Grotius, asserting that where the assumption of title is a negotiated process all parties must enter the negotiation freely, secure in their understanding of its aspects. Any consent given in other than such circumstances, as out of fear or ignorance, would not be upheld as valid, thereby negating the negotiated agreement. See James Youngblood Henderson, note 6, *supra*; Maureen Davies, note 42, *supra*; Daniel J. Gormley, note 6, *supra*.

to be closely associated with the coming to terms and signing of treaties. Although the inclusion of the concept of "exchange" necessarily inspires notions of purchase, treaties, especially in the contemporary context, are not necessarily analogous to the selling of land or rights.<sup>59</sup> It is notable that this form of securing title is documented in the 1763 Royal Proclamation where there appears an implicit separation of "purchase" and "cession": "...lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians".<sup>60</sup> Hence cession may not involve the negotiating of treaties, a practice which it has come to be associated with in retrospect. Further, cession appears to require an aspect of voluntarism; whether this element was in fact present at the signing of many treaties is highly uncertain.<sup>61</sup> A significant portion of contemporary claims talks is dedicated to determining if treaties were truly voluntary in the sense established by Vitoria. Furthermore, insofar as few Native lands have been left undisturbed either by the sovereign or the progression of time, there is a foundation in law for the assertion that acts of cession or conquest do not disturb the rights of private owners.<sup>62</sup> If the position of Francisus de Vitoria and Las Casas is upheld, whereby indigenous title to lands is said to exist in both the public and private realms then, according to the preceding statements, cession in no way equates to treaty exchanges.

The Royal Proclamation is significant far beyond the implications for concepts of cession and purchase noted above, especially as respects the qualifications placed upon the annexation

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<sup>59</sup>Insofar as the surrender of rights is concerned, there is authority at commonlaw which suggests that the assumption that rights have been so surrendered must be clearly evident, as the removal of fundamental rights is a strong and serious act and is not to be taken lightly. See: *United States v. Sante Fe Pacific Railroad Co.*, (314 US 339 1941); *Lipan Apache Tribe v. United States*, (180 Ct. Cl. 487 1967); *Milirrpum et al. v. Nabalco Pty. Ltd. and Commonwealth of Australia*, (17 FLR 141 1971); *R. v. White and Bob*, (50 DLR [2d] 648 1965).

<sup>60</sup>Royal Proclamation, October 7, 1763.

<sup>61</sup>Maureen Davies, note 42, *supra*, pp.40-43.

<sup>62</sup>*Ibid.* p.42.

of Indian lands in colonial Canada.<sup>63</sup> Insofar as the Proclamation constituted the maiden statement of policy dealing with aboriginal claims to lands in the colonies, it also marked the initial recognition of an aboriginal right.<sup>64</sup> In this aspect, the Proclamation has engendered a great deal of speculation in regard to the precise content of its statement of such rights. In *St. Catharine's Milling and Lumber Company v. The Queen*,<sup>65</sup> the Privy Council touched off an interesting debate by apparently asserting the Proclamation as an exclusive source of aboriginal rights in Canada.<sup>66</sup> Exclusivity aside, it was sufficient for purposes of this Court that the Proclamation was the controlling document in regard to lands. Although the Privy Council did not deal directly with the issue of exclusivity, the statements in the decision, holding that Indian possession of territories may in fact be at the pleasure of the Crown through the Proclamation, have been interpreted elsewhere to amount to a creation, as opposed to an affirmation, of aboriginal rights.<sup>67</sup> In their much-lauded volume of Aboriginal Rights in Canada,<sup>68</sup> Cummings and Mickenberg assert that if, in fact, the Royal Proclamation were confirmed as the exclusive origin of aboriginal rights in Canada, some interesting consequences emerge. Given that the Proclamation failed to specify a western boundary on its authority, it has been forwarded that the document has no bearing on either the western

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<sup>63</sup>Consult the first chapter of this work for discussion of the Proclamation in this context.

<sup>64</sup>Cummings and Mickenberg, Native Rights in Canada, (2nd. ed.), (General Publishing Co. Ltd.: Toronto, 1972), p.30.

<sup>65</sup>(1887), 13 S.C.R. 577.

<sup>66</sup>*Ibid.*, pp.30-31.; the root of the issue may be seen to arise from the statement in the decision to the effect that: "Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favor of all Indian tribes then living under the sovereignty and protection of the British Crown." Moving somewhat ahead of the discussion notated here, as the lands were held in this case to be within the geographic purview of the Royal Proclamation -an issue yet to be considered- then it was deemed to follow that the character of said lands must to some degree be determined by the Act.

<sup>67</sup>Cummings and Mickenberg, note 64, *supra*, p.31.

<sup>68</sup>*Ibid.*

provinces or the north.<sup>69</sup> Beyond a commonsensical reading that the document probably included all *potential* British claims in the west, advocates of the limited boundary theory assert that regardless of the paramount nature of the Act, no legislation can establish a boundary over lands unknown to the Crown at the time of its passage. The authors contend that "a strong case can be made that the law of aboriginal rights applies throughout Canada and that those areas not covered by the Proclamation of 1763, the original source of those rights is the law of nations, now incorporated into the commonlaw of Canada and confirmed by colonial and legislative policy."<sup>70</sup> Dismissing the issue as potentially irrelevant, Cummings and Mickenberg enounce that, regardless of whether indigenous rights find their origin in the Proclamation or the commonlaw, the incidents of Indian title do not change.<sup>71</sup>

For the native people of Canada, the nature of the origin of their basic rights is far from irrelevant. Notwithstanding the variance across claims and the strategies developed to promote them, a theme common to all assertions of rights is their spiritual basis.<sup>72</sup> This distinction, telling as it is of just how far removed legal dialectics are from indigenous contentions, is reflective of how easily essentially Native issues can be removed from a Native context. It is to this context that this chapter now turns.

### [III] Indian Rights through Indian Eyes: Finding the Middle Ground in a Sea of Edges.

From a purely practical standpoint, one can argue that if a discovering sovereign considered the culture and customs of an aboriginal group to be an integral part of that

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<sup>69</sup> *Ibid.*, pp.30-34.

<sup>70</sup> *Ibid.*, p.31.

<sup>71</sup> *Ibid.*

<sup>72</sup> See Menno Boldt and Anthony Long, note 2, *supra*, pp.18-68.

country's population, then those characteristics usually became integrated into the new order.<sup>73</sup> Such integration, however, does not appear to be the reality for indigenous groups in either the United States or Canada. Rather both these countries appear from the outset to have adopted a patently colonial attitude to the original inhabitants of the new world. It should not come as a surprise to most commentators that both of these polities emerged from a distinctly British heritage and hence under the tutelage of one of the consummate colonial powers of recent history.<sup>74</sup> Despite the often overzealous efforts by the United States to deny their British origins, their retention of practices of colonialism in an internal context are clear in their treatment of the Cherokees, and especially the Minominees, when these became inhibitive of westward expansion.<sup>75</sup> The Cherokees, who had repeatedly proven their resilience in adapting to colonial expansion and the "white man's ways", were ultimately defeated when, after gold was discovered on lands reserved for them, the Cherokees were forcibly removed from their homes, interned in make-shift camps, and then made to march 800 miles on foot to their new reserves. More than one-fourth of the tribe perished on the journey.<sup>76</sup> More recently, the Minominee, a comparatively wealthy group, were the focus of a piece of highly experimental legislation converting their reservation into a county. Once this change was

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<sup>73</sup>Marc Denhez, "Aboriginal Rights and the Sovereignty of Countries", Unpublished manuscript, (Inuit Tapirisat of Canada, 1982).

<sup>74</sup>Although some authorities, such as Luthy in his "Colonization and the Making of Mankind", Journal of Economic History, 21, (1961), pp.483-95., assert that virtually every civilization at every point in history enlisted colonization as a means to expanding their boundaries and authority, perusal of additional works on the subject suggest the British empire to be a forerunner in colonial endeavors.

<sup>75</sup>See Nancy Oestreich Lurie, "Minominee Termination: From Reservation to Colony", Human Organization, vol. 31, no. 3, (Fall 1972); Gary C. Anders, "The Reduction of a Self-Sufficient People to Poverty and Welfare Dependence: An Analysis of the Causes of Cherokee Indian Underdevelopment", The American Journal of Economics and Sociology, vol. 40, no. 3, (July 1981); C. Matthew Snipe, "The Changing Political and Economic Status if the American Indians: From Captive Nations to Internal Colonies", The American Journal of Economics and Sociology, vol. 45, no. 2, April (1986); Robert Gee and Ronald Gingerich, "Colonialism, Classes, and Ethnic Identity: Native Americans and the National Political Economy" Studies in Comparative International Development, 12, (1977), pp.70-93.

<sup>76</sup>Gary C. Anders, *ibid.*



effected, the Minominee became susceptible to all the costs and liabilities of county status. Inadequately prepared to deal with those costs and taxed well beyond their means, they soon found themselves without the resources to keep either Indian lands or jobs in Indian hands.<sup>77</sup>

In what way do the above incidents reflect the colonial mentality? It is perhaps best to state at the outset that colonialism, despite the abundance of scholarly attention it has received from a variety of social science disciplines<sup>78</sup>, has yet to be defined to the relative satisfaction of all concerned.<sup>79</sup> Inasmuch as this difficulty is endemic to the stuff of academia, it seems especially so in the realm of this concept. The academic establishment possesses no widely accepted theory of colonialism, nor does any substantial agreement exist upon what colonialism is.<sup>80</sup> In an attempt to counter this reality, Ronald J. Horvath conducted a survey of the literature on colonialism and found that certain characteristics are associated with the concept on a relatively consistent basis.<sup>81</sup>

For almost all concerned, classic colonialism involves an element of *domination* which is in most cases, if not all, generated by a more powerful group against a weaker population.<sup>82</sup> Domination, in this context, is defined as the control by individuals or groups over a territory and/or the behavior of other individuals or groups.<sup>83</sup> A relatively consistent aspect of

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<sup>77</sup>For an intimate portrayal of what happened to the Minominee and their County, see Nancy Oestreich Lurie, note 75, *supra*.

<sup>78</sup>Most notably Anthropology, but also Economics, History and Political Science.

<sup>79</sup>Ronald J. Horvath, "A Definition of Colonialism", Current Anthropology, 13, no.1, (1972), pp.45-51.

<sup>80</sup>*Ibid.*, p.45.

<sup>81</sup>*Ibid.*; see also, Beverly Gartrell, "Colonialism and the Fourth World", Culture, 6, no.1, (1986).

<sup>82</sup>Horvath, note 79, *supra*.

<sup>83</sup>*Ibid.*, p.50.

such domination is force, a factor which due to its chameleon-like quality, can be difficult to detect. Despite its many forms and qualities, however, some degree of force or violence is nonetheless at all times present in the colonial association. This is due to the fundamental reality that every such relationship, whether of domination, of exploitation, or oppression, is by definition violent, whether or not that violence is expressed by drastic means.<sup>84</sup> It was a more subtle form of violence that led to the first forms of colonial domination in Canada; the entrenchment of the Crown presence here was secured more through bureaucracy than open battle. The strategy was to convince the objects of the colonial process that colonialization was an inevitable fact of their future: that the loss of their sovereignty was imminent<sup>85</sup>, but could be mitigated by attachment to the higher power of the colonial regime. Once the leaders of the colonialized communities had been pulled into the colonial mentality, the colony was secured by the combined force of colonial power and a captive leadership.<sup>86</sup> So persuasive was this force that the objects of colonialization ultimately find themselves experiencing the classic *catch-22*, although what they possessed in the colonial scheme was at best a false sharing of power, any severing of ties promises even less than that.<sup>87</sup>

That settlement gives the appearance both of permanence and imminence is enhanced by the migration of settlers from the mother country who move about and expropriate the best lands with relative impunity. Usurpment and exploitation of the Natives' resources is fast and furious and the original inhabitants soon find themselves relegated to the lowest rung on the socio-economic ladder with little promise of upward mobility.<sup>88</sup> This is not a negotiated takeover; where contracts exist (perhaps in the form of treaties), they commonly state little

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<sup>84</sup>Paulo Freire, in Peter Puxley, "The Colonial Experience", in Mel Watkins (ed.), Dene Nation: The Colony Within, (University of Toronto Press: Toronto, 1977), pp.103-119.

<sup>85</sup>Peter Puxley, *ibid.*

<sup>86</sup>Nancy Oestreich Lurie, note 75, *supra*, pp.258-259.

<sup>87</sup>Peter Puxley, note 84, *supra*, pp.108-110.

<sup>88</sup>Ronald J. Horvath, note 79, *supra*, p.50; Nancy Oestreich Lurie, note 75, *supra*.

more than the terms under which one party effectively becomes the property of the other.<sup>89</sup> Whether these pacts are ultimately honored is highly speculative; tracing the history of colonized peoples suggests, however, that respect for the tenets of such agreements is not likely.

The definition outlined above is modified somewhat when applied to the internal relations playing between a sovereign and minority groups within a given nation. Whereas classic colonialism involves the target minority and an administrative network set up and manned by the colonializing power, when executed domestically, colonial policies enlist the active participation of the permanent settlers to fully effect the colonializing process.<sup>90</sup> Thus in an internal context, the objects of this process are subjected to a "double-barrelled" assault which combines the administrative arm of the Colonial power with the steady, piecemeal erosion of their sovereignty by the ever-increasing encroachment of settlers onto their lands. Often acting with complete disregard for the stated policies of the sovereign, settlers enter into personal compacts with the Natives for surrender of homesteading territories and facilitation of peaceful settlement. Ultimately, these contracts may come under the scrutiny of the sovereign with whom the final decision of their legitimacy will lie. Their recognition is usually dependent not upon the morality of keeping promises made, but rather upon whether the Crown sees a personal interest in the settler's lands which could override the homesteader's rights. Original title is not usually a consideration.

The historical discussion which occupied the first chapter of this work, reveals that this type of colonial relationship is precisely what existed across Native groups in both Canada and the United States.<sup>91</sup> In the Cherokee case outlined above, it was exhibited in the

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<sup>89</sup>Peter Puxley, note 84, *supra*, p.108.

<sup>90</sup>Ronald J. Horvath, note 79, *supra*, p.46.

<sup>91</sup>Notwithstanding this commonality, the similarities between the American and Canadian indigenous experiences should not be taken as being greater than the differences characterizing these groups' historical realities. Significant among these differences is the presence of the

number of times the United States government ignored treaties and used political and economic power to assert its will over the tribe.<sup>92</sup> In a Canadian context, the same tactics of usurpment of tribal sovereignty and disintegration of traditional social structures, were used to subjugate indigenous will and facilitate colonial domination. They persist today in the reality that Canadian indigenes must seek affirmation of their original rights in the Courts; the forum which is also called upon to clarify the treaties whose intentions have been so redefined over time by the government that no one is precisely certain what rights and obligations they represent.

This process of seeking redress for the pains inflicted by the colonialization process as a route to reasserting tribal sovereignty and self-determination has been appropriately termed *decolonialization*.<sup>93</sup> Inasmuch as many indigenous leaders and their sympathizers perceive a

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<sup>91</sup>(cont'd) Royal Proclamation in the Canadian context, which required that all land cessions be made directly to the Crown. In addition, in the United States' treating tradition, assumption of title by the government normally *preceded* the inception of an official relationship between the state and Native peoples, whereas the opposite was usually the case in Canada.

<sup>92</sup>Gary C. Anders, note 75, *supra*, pp.231-232.

<sup>93</sup>See: Peter Puxley, note 84, *supra*; Menno Boldt, "Intellectual Orientations and Nationalism Among Leaders in an Internal Colony: A Theoretical and Comparative Perspective", The British Journal of Sociology, vol. 33, no. 4, (December 1982); World Assembly of First Nations, "Tribal Political Status: Indigenous Peoples in the Family of Man", unpublished monograph, (July 1982); Herbert Luthy, "Colonization and the Making of Mankind", Journal of Economic History 21, (1961), pp.483-495. It has been suggested that the decolonialization movement is precipitated by a period of *neocolonialization*. See: Joseph G. Jorgensen. The Sun Dance Religion. Power for the Powerless. (University of Chicago Press: Chicago, 1972) pp.10-11; E. Palmer Patterson II. The Canadian Indian. A History Since 1500. (Collier MacMillan Canada Ltd.: Ontario. 1972). As a form of internal colonialization, neocolonialization emerges at the point where colonial subjugation of the target population is virtually complete. Its primary attributes may thus be seen to include internment on reservations and the special wardship status which accompanies this, the careful circumscription of indigenous leadership on those reserves with any potentially significant decision-making powers and responsibilities left to the primary colonializing agencies (in the Canadian indigenous context, the Department of Indian Affairs and Northern Development). The control of natives as a group is exceeded only by the extreme degree of administrative influence into the individual lives of native people. These broad categories of political and economic control cumulate in the unique relationship characteristic of colonializing powers and their internal colonies which, ultimately, cumulates in the drive toward decolonialization. See Jorgensen, *ibid.*, pp.11-12.

moral imperative implicit in this process, their critics contend not only the absence of such a component but the lack of need for it as well. Luthy, in his *Colonization and the Making of Mankind*,<sup>94</sup> asserts that, insofar as colonization was practiced by virtually all societies throughout history for the expansion of their cultural and geographical borders, it is not something to be apologized for. The historic "fact" that rarely did the colonizers "come up against political entities and social structures possessing an innate capacity to resist, against peoples who lived in the consciousness of a freedom or independence worth defending, or who cared much if their leadership changed" implicitly renders the colonized groups parties to their own fate.<sup>95</sup> Few powers, Luthy believes, intended the state of deprivation and underdevelopment imposed the colonial aspect of colonization to be permanent; colonization as the ruling of more or less "backward" people by foreign managers had to reach its end either by failure or by its very success, that is, by the growing acceptance by the dependent people of the techniques of their management.<sup>96</sup> In virtually every case of a colony throwing off the yoke of its colonialism, the emancipation was effected solely for the purpose of speeding up the process started by the colonizer. That is, for the achievement of a style and

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<sup>94</sup>Journal of Economic History, vol. 21, (1961), 483-495. Luthy does not distinguish between his concept of "colonization" and the relationship reflected in the term "colonialization", as this is used here. If colonization is intended to refer to the practice of transporting settlers from the colonial metropolis to the hinterland areas which comprise the focus of the colonial enterprise, then Luthy is most probably correct; most societies did, in fact, engage in some form of colonization. The concept of colonialism, however, refers to an arguably more intricate process; in the formulation of the term offered by Gunder Frank in his Dependent Accumulation and Underdevelopment (MacMillan Press Ltd.: U.S.A., 1978), colonialism reflects a scheme wherein a series of carefully orchestrated steps are taken, the cumulative effect of which is the erosion of the colonized peoples' indigenous economic arrangements and their replacement with a mode of production designed by and for the colonial power. This rearrangement ultimately leads to an overtly exploitive exchange of both natural and human resources which acts to the sole benefit of the colonial metropolis, leading to impoverishment and underdevelopment on behalf of the colonized region(s). Although it is possible to perceive these two as coincident events, colonization and colonialism *are not* identical processes — each reflects a unique aspect of this type of nation-building enterprise and thus must be understood as an individual concept. With the exception of the discussion pertinent to Luthy's article, this thesis views the term colonialization as apposite in analyses of the Indian-government relationship in the Canadian context.

<sup>95</sup>*Ibid.*, p.490.

<sup>96</sup>*Ibid.*

standard of life equivalent to that of the colonial metropolis.<sup>97</sup>

In the realm of indigenous decolonialization, however, Luthy would appear to have missed one significant point. Inasmuch as Canadian Natives aspire to a standard of living which is on a par with other Canadians, this is not to say that they desire the *same* style of life.<sup>98</sup> Notwithstanding the reality that Native Canadians have one of the lowest standards of living in the country the betterment of which would seem their right, the route(s) they have chosen to attain a superior lifestyle reflect distinctly Indian life philosophies and goals.

The first indication of the "Indianness" of the indigenous decolonialization process was alluded to above and reflects the spiritual underpinnings of Native ways of life. This spiritualism defies the ethnological and linguistic distinctions which characterize Canadian indigenous groups and prohibit generalizations, to constitute one of the few commonalities across emancipation drives. In this context assertions of right stress a symbiosis with the earth brought into being when the Creator gave to the first people *use*, not *ownership*, of the land, characterized by a sacred obligation to protect it and use its resources wisely.<sup>99</sup> It was

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<sup>97</sup> *Ibid.*, p.492-493.

<sup>98</sup>It is questionable, certainly, whether Luthy would perceive the Native situation in this country as a classically colonial one; nonetheless the preceding discussion demonstrates that the model fits.

<sup>99</sup>As articulated by the Assembly of First Nations in "The Logic and Justice of First Nations Self-Government", The Sun, (Wednesday, March 7, 1984); The Dene Nation in their numerous publications and pamphlets regarding the establishment of *Denendeh* eg., "Public Government for the People of the North", published by the Dene Nation and the Metis Association of the Northwest Territories, (January 1, 1982; Native Counselling Services of Alberta, "The Ways of my Ancestors", (Vancouver, August, 1983); the collective presentations of Oren Lyons, David Ahenakew, Fred Plain, Chief John Snow, Peter Ittinuar, Clem Chartier and Bill Wilson in "Political and Philosophical Perspectives on Aboriginal Rights by Indian, Inuit, and Metis Leaders" in The Quest for Justice, Aboriginal Peoples and Aboriginal Rights, (University of Toronto Press: Toronto, 1985); for a complete picture of the Indian way of life and relationship to the land, see Diamond Jenness, Indians of Canada, (7th ed.), (University of Toronto Press: Toronto, 1977); as well as E. Adamson Hoebel, The Cheyenne Way, (University of Oklahoma: U.S.A., 1941). Although somewhat dated, the latter two works remain of central significance in discussions of traditional ways. For a more recent commentary on this matter, consult Eric Schwimmer, "Symbolic Competition", Anthropologica, vol.14, no.2, (1972):117-155.

this distinction between ownership and use which facilitated the initial colonization of indigenous peoples and their lands. To the British, taking of lands used by the Indians was quite different from taking something they owned. Even the Natives admitted a lack of ownership and were quite willing, at least initially, to welcome others into the symbiosis they shared with the earth. As the implications of the colonial process became apparent, Native groups in a variety of contexts mobilized to preserve that symbiosis and the way of life which accompanied it. Protest at this stage, however, fell largely upon deaf ears; it is only in the last decade with the putative completion of the colonialization process, for better or for worse, that Native cries have been heard and acknowledged. Unfortunately remnants of the colonial mentality have persisted on both parts, with governments insisting upon a paternal role in the decolonialization process,<sup>100</sup> and some native groups believing total absorption into the Canadian polity to be their only option.<sup>101</sup>

This paternalism, according to Peter Puxley,<sup>102</sup> is a direct outgrowth of the colonial power's historical role as primary decision-maker and creator of the colonies' reality. Movements in the direction of autonomy by the colony undermine the nature of the power relationship of colonialism, and the reaction is defensive. Hoping to circumvent this response, Native activists have sought the affirmation and enforcement of their rights in the hopefully more objective arena of the courts. Of the battles fought in this arena, two have had significant impact on indigenous campaigns. The first, *Calder v. The Attorney General of British Columbia*<sup>103</sup>, involved a group of Nishga Indians seeking a declaration from the Court that aboriginal title to their traditional lands had not been extinguished. The Nishgas contended that having occupied and used the lands in question since *time immemorial*

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<sup>100</sup>Peter Puxley, note 84, *supra*, pp.116-117.

<sup>101</sup>Menno Boldt, "Intellectual Orientations", note 93, *supra*.

<sup>102</sup>Puxley, note 84, *supra*.

<sup>103</sup>1973 3 N.D.L.R. 3rd., p.445.

conveyed upon them an unextinguished right to continue to enjoy that occupancy and the lifestyle it supported. If it could be determined that the Nishga did possess such a right, the government could be liable for compensation for areas and actions taken which violated that license. Finding little positive response to their petition in the lower courts, the Nishga took their case to the Supreme Court of Canada for the final ruling. Although the decision was ultimately determined on a technical issue not pertinent to the question of title, the remaining six opinions were evenly split on the issue of extinguishment. Judson J. spoke for those Justices declining the existence of the Nishgas' title, asserting that if such title ever had existed it had been extinguished by the sum course of action and legislation carried out by the government of British Columbia to date. The opposite holding was voiced by Hall J., and supported by Spence and Laskin. Hall held that, without denying the unfettered prerogative of the Crown to extinguish such titles, the title presented by the Nishgas had survived both government action and the passage of time. This survival was attributable to the absence of a *clear and plain* legislative statement or surrender to the Crown, the right in question being a *legal right* the removal of which must be asserted in clear and specific terms. This has been taken to equate to a right which is alienable only to the Crown.<sup>104</sup>

*Calder* accomplished an additional task of note here. Since the first realization on behalf of the colonial power that Indians did not conceive of ownership as the British did, scholars had grappled with the nature of rights afforded by a *symbiotic* as opposed to *exploitative* relationship with the land. The first attempts to answer this question had occurred almost eighty years earlier with the Privy Council in deciding *St. Catharine's Milling and Lumber Company v. The Queen*.<sup>105</sup> This case provided the framework for the *Calder* decision by holding that the nature of Indian title as had been set out in the 1763 Royal

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<sup>104</sup>For a more intimate examination of this case, see K. Lysk, "The Indian Title Question in Light of Calder", The Canadian Bar Review, 51, (1973), p.450.

<sup>105</sup>(1889), 14 App. Cas. 46.



Proclamation was one of a *personal and usufructory nature*.<sup>106</sup> The definition offered here, albeit a limited one, specified the content of the personal usufruct as an "absolute use and enjoyment of their lands" which was at all times subject to the "good will of the sovereign".<sup>107</sup> A number of subsequent decisions dealing with this question chose simply to restate the assertions made in *St. Catharine's*.<sup>108</sup> However, in *Amodou Tijani v. The Secretary*<sup>109</sup>, the Privy Council elaborated on *St. Catharine's*, specifying the usufructory right as "a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the sovereign is a pure legal estate...[which] is qualified by a right of beneficial user which may not assume definite forms analogous to the estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence."<sup>110</sup> The Supreme Court in *Calder* went further than both of these statements, contending that a personal and usufructory right is "a right to occupy the land and to enjoy the fruits of the soil, the forests and of the rivers and of the streams."<sup>111</sup>

Inasmuch as this definition of a usufructory right may be regarded as reflecting with relative accuracy the nature of the association traditionally exhibited between Native people

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<sup>106</sup>The Concept of "usufruct" is not germane to the Common Law, but appears to be derived from the Roman laws of property. Under the Justinian Code, the notion was commonly, although not always, advanced as one of four "personal servitudes", the others being *usus*, *habitatio* and *operae servorum* [for a full elaboration of these, see Barry Nicholas, *An Introduction to Roman Law*, Clarendon Law Series, Oxford University Press: London, (1962):144-148]. Usufruct referred to "the right to use and take the fruits of another's property, movable or immovable, without fundamentally altering its character (*ibid.*, p.144); it did not, therefore, involve the incidents of full ownership as this is known in the Common Law.

<sup>107</sup>(1887), 13 S.C.R. 577 at p.608.

<sup>108</sup>See: Peter A. Cummings and Neil H. Mickenberg, note 64, *supra*.

<sup>109</sup>(1921) 2 App. Cas. 399.

<sup>110</sup>*Ibid.*, p.403.

<sup>111</sup>*Calder*, note 19, *supra*.

and the land, its accuracy is jeopardized on at least two grounds. Firstly, although this construction appears to hinge on *occupation* and *use* of lands, it does so only within a larger context of conveyance of ownership. By this meaning the land is split into layers: the top belonging for all practical purposes to the Natives while the rights to the soil and its resources fall to the sovereign. Notwithstanding the basic flaw that it acknowledges a relationship to the land which Natives traditionally do not, it is equally problematic when faced with the contemporary issue of resource development. The establishment of a scheme whereby subsurface rights accrue to the sovereign would arguably offer little protection to Native interests in the event of resource discovery by the government. Given that developers would have to violate surface rights in order to act upon subsurface rights, and the relatively consistent supremacy accorded nationalist concerns over domain-specific interests by the government, it stands to reason that indigenous surface rights would have to give way.<sup>112</sup> Furthermore, this issue threatens to be exacerbated as a free for all. Authority in the British North America Act<sup>113</sup> (s.109) guarantees provincial ownership of all lands lying within the boundaries of respective provinces, subject to any trusts or other interests in lands on the part of the federal government.<sup>114</sup> The express wording of the section refers to *mines and minerals*, suggesting that resource development would fall largely into the hands of the provinces. Given that "Indians and lands reserved for Indians"<sup>115</sup> fall under federal authority, resource issues threaten to be yet another aspect of Native rights entangled in federal and provincial government power struggles.

*The Hamlet of Baker Lake et al v. The Ministry of Indian Affairs and Northern*

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<sup>112</sup>Gurston Dacks, "Native Claims in Northern Canada" in The Quest for Justice: Aboriginal Peoples and Aboriginal Rights, note 2, *supra*, p.252-253.

<sup>113</sup>Now the Constitution Act, 1867.

<sup>114</sup>Peter C. Cummings and Neil H. Mickenberg, note 64, *supra*, p.33.

<sup>115</sup>Constitution Act, 1867, s.91(24).

*Development*<sup>116</sup> constitutes a more clear statement of aboriginal title. In this case, the Inuit of the Baker Lake area of the Northwest Territories were held to possess an occupancy-based aboriginal title, cognizable at common law, to their traditional homeland.<sup>117</sup> In line with the premise established in *Calder*, the Court in *Baker Lake* held that the Royal Proclamation was not the exclusive source of aboriginal rights; rather that the right accruing to the Inuit of Baker Lake arose at common law.<sup>118</sup> This assertion is in agreement with the United States Supreme Court finding in *Worcester v. The State of Georgia*,<sup>119</sup> where it was held that aboriginal rights do not require restatement in legislation or statute to be legitimate rights. The Court in *Baker Lake* also set a standard upon which to judge whether an aboriginal group possessed an occupancy-based title to lands. In order for such a right to be recognizable at common law, the group in question must establish the following: (1) that the claimants and their ancestors are part of an organized society; (2) that the organized society occupied the specific territory over which they are asserting aboriginal title; (3) that this occupancy was to the exclusion of other organized societies; and (4) that the occupation was an established fact at the time sovereignty was asserted by England.<sup>120</sup> Although this criterion supported the Inuit's aboriginal title, the Court held also that this form of common law recognition is subject to abrogation by laws of general application.<sup>121</sup>

If one focuses on a *strict precedent* interpretation of this decision, it may be argued that any finding which rests so heavily upon the dissenting opinion in *Calder* is, at best, of

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<sup>116</sup>107 D.L.R. (3d) 513, (1980).

<sup>117</sup>*Ibid.*; see also David W. Elliott, note 21, *supra*, pp.81-85.

<sup>118</sup>David W. Elliott, *Ibid.*, p.82.

<sup>119</sup>31 U.S., 6 Pet., (1980), p.415.

<sup>120</sup>*The Hamlet of Baker Lake et al v. The Ministry of Indian Affairs and Northern Development*, (1980), 107 D.L.R. (3d) 513 at pp.542-45.

<sup>121</sup>*Ibid.*

dubious import.<sup>122</sup> Notwithstanding this uncertain construction, *Baker Lake* may be based on crumbling footing insofar as both this decision and *Calder* predate the Constitution Act, 1982. This timing may be of some importance; for example, if section 35 of the latter document is not held as requiring formal amendment for all forms of extinguishment, how will it effect extinguishment, if at all?<sup>123</sup> Independent of such concerns, the decisions in both *Calder* and *Baker Lake* constitute an important recognition at common law of the potential for an enduring aboriginal title to land.

From decisions dealing with aboriginal title it would appear that Native conceptions of the nature and origin of this right have been, for the most part, disregarded. Beyond the very loose analogy of the *usufruct* as denoting the non-proprietary character of the association Indians established with the land, little more than lip service has been paid to indigenous traditions. In the majority of contexts, no reference is made to the spiritual component of such claims; a reality which, when coupled with the use of the colonizer's language in framing any recognition, reflects the degree to which the Canadian government has internalized its own colonial mentality.<sup>124</sup> It may be argued, however, that basing assertions of rights on grounds which are ultimately metaphysical, while stating a case to a profoundly pragmatic audience, is of questionable acumen. It is unlikely that the Canadian government will prove receptive to paying for something the very existence of which is, in their eyes, uncertain. It is perhaps for this reason that both parties to the decolonization process prefer to focus on the more tangible evidence of "occupancy and use" in determining the legitimacy of prior assertions of title. Or so the case would seem to be in Canadian Courts.

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<sup>122</sup>David W. Elliott, note 21, *supra*, p.84.

<sup>123</sup>*Ibid.*, p.116.

<sup>124</sup>Peter Puxley, note 84, *supra*, pp.116-117.

#### IV. INDIAN INITIATIVES AND GOVERNMENT POLICIES:

##### MAKING ENDS AND MEANS MEET

A modern commentator might suggest that indigenous peoples made a single, highly significant mistake at the outset of their association with the white man. They received the newcomers as visitors in their homes, making them welcome and providing them with the means to render their stay as free from peril as possible. Had the Natives realized at this point that the *visitors* intended to remain indefinitely at their cost, it is arguable that they would have dealt with them quite differently. After all, there is not now, nor was there ever, a duty acting upon a nation to admit visiting foreign peoples. As holders of territory, the Indians would have been well within their rights to consider not only the purpose and length of the visit, but the number of visitors as well.<sup>1</sup> Of course, given that the Indians did not perceive their relationship to the land in proprietary terms any more than they were likely to have viewed the white man as a permanent neighbor, the question of any such duty is largely irrelevant. To the degree that it may be relevant, it is of little more than illuminative value in retrospect.

An equally profound effect of this initial misstep was that the Indians, trusting in the tentative appearance of the whites, freely offered their knowledge and expertise for the newcomers' use. The latter were taught the necessary skills to survive in the new world and were quick to recognize the magnitude of the rewards facilitated by learning them well. It was only a matter of time before the apprentice began to overtake their mentor, removing the need for further tutelage. It was at this point that the power relationship began to

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<sup>1</sup>The lack of any prescription acting upon Indian nations to admit visitors was first articulated by Samuel Pufendorf; a more detailed discussion of his theory may be found in Maureen Davies, "Aspects of Aboriginal Rights in Aboriginal Law", in Aboriginal Peoples and the Law, Bradford W. Morse (ed.), (Carleton University Press: Toronto, 1985.)

reverse itself; whereas the white man was once dependent upon the Indian for survival, the opposite now held true. Having outlived his usefulness as a mentor, the fate of the Indian was simply to become irrelevant.<sup>2</sup>

Notwithstanding their supposed irrelevance and the policies this state facilitated, the Indian has survived. The implications of this persistence were uncertain until recently; but now these clearly appear to include a right to self-determination. Unable to beat the Indian, the Canadian polity seems finally willing to grant their entrance to the larger society. That altruism has any part in this willingness is questionable, especially given the reinforcement of the indigenes' right to self-determination by Canadian Courts. If this were not enough, the fundamental right of Canadian indigenes to determine their own life course has received recognition well beyond the realm of the domestic justice system. The United Nations as well as other lesser international tribunals have openly acknowledged the right of all colonized peoples to self-rule, free of either internal or external subjugation.<sup>3</sup> Inasmuch as the Canadian government has accepted the assertions of general rights espoused by the United Nations, it risks embarrassment of international proportions should actions be taken which openly contradict those assertions.

Unfortunately the history of Indian-government relations in this country is replete with contradictions — a chronicle of breach of promise and broken treaties which has left

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<sup>2</sup>Mel Watkins, ed., "From Development to Underdevelopment" in Dene Nation: The Colony Within, (University of Toronto Press: Toronto 1976).

<sup>3</sup>The United Nations in 1960-61 passed two significant resolutions, 1514-XV and 1654-XVI respectively, declaring the right of all peoples of the world to self-determination. Taken together as the "Declaration on the Granting of Self-Determination to Colonial Colonies", this position has been reinforced by the "Universal Declaration on Economic, Social and Cultural Rights" and its partner "Covenant on Civil and Political Rights". The specific rights of Canadian indigenes in this regard have been articulated by the IXth Russell Tribunal, a junta of internationally renowned jurists, who gathered in 1980 to consider the status in the realm of international law of the Natives' claims. The tribunal's conclusions are familiar; they explicitly proclaim a sovereign indigenous right to live as distinct groups, with a distinct land mass as well as the right to self-determination. The reader will recognize these assertions as those originally articulated by Las Casas in 15th century Spain.

Canadian indigenes reeling in its wake. In light of this history, asking the Indian to enter into government negotiations on land claims has about it something of "the aura of asking a condemned man to take up rope manufacturing".<sup>4</sup>

[I] Indigenous Routes to Decolonization: Ideally Speaking.

It is often suggested that a peoples' future is to some extent dependent upon their history. By implication then, those nations with an objectionable past might be expected to design their future differently than would a civilization based on a more admirable evolution. Where from the outset a nation was the master of its own fate, guiding its own fortunes and gathering strength, the continuation of that tradition is rarely doubted. Not only do the rich get richer, but the powerful grow more powerful with, as the analogy contends, the poor and powerless providing the stuff of the superordinate's gain. Such is the essence of the colonial association. The colonial powers, in a push to bolster their cause against other colonial powers, expand into new frontiers — often at the cost of lesser civilizations. The newly discovered peoples are overrun by the more powerful discoverer, changing the original inhabitants' history forever.

A central component of the colonized individuals' subjugation is the internalization of a *colonial mentality*.<sup>5</sup> This view of the world is profound and often permanent. It is characterized by acute feelings of powerlessness and anomie fostered by the dehumanization implicit in the colonialization process. When the question of decolonialization arises, either from external or internal origin, the answers it elicits will be strongly affected by the measure of colonial mentality held by a given people. Where a group has experienced an

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<sup>4</sup>Mel Watkins, note 2, *supra*.

<sup>5</sup>Peter Puxley, "The Colonial Experience", in Watkins, *ibid.*, pp. 103–119.

extreme of colonialization, coupled with a high measure of internalization of a colonial psychology, it would be expected that this group would articulate a less optimistic view of self-determination or independence. Conversely, a group less tainted by their colonial experience may be seen to manifest a much more positive opinion of the possibility and practicality of self-determination. In his survey of political attitudes among Indigenous leaders of Canadian Native groups, Menno Boldt<sup>6</sup> discovered that the degree of colonialization and internalization of a *colonial mentality* were indeed influential factors in these leaders' conceptions of self-determination and strategies for approaching that state.

It would seem to follow that those most debilitated by the colonial experience would be least likely to become involved in the decolonialization process. As was discussed in the preceding chapter, these indigenes have become so intertwined with the colonial bureaucracy that they cannot conceive of life independent of it. The perhaps questionable sense of security afforded by limited participation in the colonial power structure (through band councils and the like) is preferred to a potentially powerless existence in the Canadian mainstream. In Boldt's study, a full quarter of the leaders surveyed believed that the best possible alternative to their present status would be to *indigenize*,<sup>7</sup> those branches of the

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<sup>6</sup>A professor of sociology at the University of Lethbridge, Dr. Boldt is considered a specialist in minorities and has published widely on subjects of Indian leadership, politics and philosophy. Of particular interest to the thesis are his The Quest for Justice, Aboriginal Peoples and Aboriginal Rights, with Anthony Long, (University of Toronto Press: Toronto, 1985); and the work presently under discussion, "Intellectual orientations and nationalism among leaders in an internal colony: a theoretical and comparative perspective", The British Journal of Sociology, vol.33, no.4, (December, 1982). The survey which formed the basis of this article involved a total of 158 leaders; those chosen for interview were individuals identified by "positional" and "reputational" factors. These indicators were originally designed by Wendell Bell in his case-study of nationhood on the island of Jamaica during the final transition from colonial dependence to political independence. Bell's thesis has subsequently been expanded by Charles C. Moskos, who studied nationalism among the six West Indies Territories, and by Arvin W. Murch, who conducted an analysis similar to Muskos in the Caribbean colony of the French Antilles. The combined Bell-Moskos-Murch theses form the methodological base for Boldt's research. Of the 158 leaders selected under the scheme, a total of 83 were included in the study, of these fourteen were not interviewed—three refused and the others were unavailable for a variety of reasons. The submissions of these leaders are discussed in Boldt's article and form the basis of the conclusions offered here.

<sup>7</sup>The term *indigenization* is used by Paul Havemann in his article "The Indigenization of



colonial bureaucracy responsible for the administration of Native life.<sup>8</sup> By this logic, the flaws of the colonial system could be ameliorated simply by training Indians to replace the white bureaucrats. Indians, having a better understanding of matters pertaining to and of consequence to Natives, are felt to be better equipped to administer Indian lives.

Although there may be some *prima facie* truth to this position, deeper scrutiny reveals some potential problems. One such problem concerns the cultural diversity of the Canadian aboriginal population. Notwithstanding the evidence cited by some commentators of a recently emerging *pan-Indianism*<sup>9</sup>, rifts persist among differing cultural groups which could drastically affect the potential for smooth functioning of an already rocky bureaucratic process. It is questionable, on these grounds, whether a west coast Indian would be perceived by a Native of the central plains to understand his/her needs any better than the white bureaucrat. Even if the majority of the Native population should prove amenable to overlooking the cultural biases which could affect the indigenization process, this would not alter the fundamental

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<sup>7</sup>(cont'd) Social Control in Canada", Unpublished Monograph, (Vancouver, 1983), p.352. In his usage, the term involves the "process of co-optation of indigenous individuals and organizations to assist in the delivery and implementation of "imposed" programs, policies and laws, ie., those of the colonizer". This is the practical equivalent of Boldt's "Adapted Department", hence the terms are used interchangeably here.

<sup>8</sup>Menno Boldt, note 6, *supra*, p.493.

<sup>9</sup>As articulated by J. S. Frideres, there are several values and beliefs which override individual band differences, including the belief that decisions must be reached by consensus, not majority opinion; an emphasis on sharing and the absence of an emotional attachment to material goods; a fundamental belief in, and respect for, each individual's freedom to act as s/he chooses, as well as a tendency, rather than a value or belief, to withdraw from anxiety-producing situations. Advocates of this movement believe that by focusing on the commonalities between Native peoples, an identification with *Indianness* may be fostered which will in turn induce a sense of nationalism and identity for Indian people. Pan-Indianism manifests two main forms: *religious* and *reform*. Religious pan-Indianism is primarily a rural phenomenon, focusing on harmony with and respect for nature. Reform pan-Indianism originates in an urban setting and hence manifests more cosmopolitan characteristics. This form of the movement not only believes in the preservation and promotion of traditional Indian values, but is strongly supportive of indigenous involvement in the business and professional life of the larger society. The founders of this movement are, in a sense, marginal. They are largely "part-white", bilingual, have good educations and "typical" white occupations. See J. S. Frideres, Canada's Indians, Contemporary Conflicts, (Prentice-Hall: Ontario, 1974), pp.115-120.

reality that the indigenized mechanism is still a Western-European one. The various Indian Affairs offices and the mandates they affect are tainted by one unavoidable reality — they are institutions which were designed by non-Indians in a non-Indian fashion according to non-Indian needs. Simple indigenization could, in this light, achieve one of two ends. The first — and arguably the least likely under the circumstances — would involve the Native bureaucrats changing the system sufficiently to allow it to better fulfill Native needs. The second outcome of indigenization could be the co-optation of the Native bureaucrats' intentions to the needs of the bureaucracy and the ends it serves.

Although Weber saw the bureaucracy as indispensable for the rational attainment of the goals of any organization or industrial society, the rigidities of this mode of administration would seem to render it quite inappropriate for Native societies. Notwithstanding the reality that traditional indigenous societies were neither simple "organizations" nor "industrial societies", the bureaucratic characteristics of a clear hierarchy of authority and decision-making as well as the centrality of written documentation of all transactions, would seem to render the bureaucracy a completely inappropriate mechanism for meeting indigenous needs.<sup>10</sup> The criticism levied at Weber's model by Robert K. Merton would seem to hold especially true when that model is applied to Native societies; that is, the very characteristics which Weber held would make the Bureaucracy efficient are one and the same as those which would cause it to be inefficient.<sup>11</sup>

In light of the preceding discussion, indigenization would seem to offer little to alleviate the position in which Canadian Natives now find themselves. If taken one step further, this option equates to assimilation, the ultimate end of the colonial scheme.<sup>12</sup> As such, the term

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<sup>10</sup>See Max Weber, "The Theory of Social and Economic Organization", (1947); the concise, albeit limited, discussion of Weber's bureaucracy offered here is taken from G. Duncan Mitchell, A Dictionary of Sociology, (London Press: England 1968).

<sup>11</sup>*Ibid.*, p.21.

<sup>12</sup>Herbert Luthy, "Colonization and the Making of Mankind", Journal of Economic History, 21,

*assimilation* has acquired some highly negative connotations when enlisted in the context of Native land claims. For many indigenous groups, the term denotes little more than cultural genocide; yet the strength of these sentiments has not dissuaded some Canadian Native peoples from seeing assimilation as their only option. These individuals may be seen as those most seriously affected by colonialization; they have not only lost much of their cultural distinctiveness to the ravages of colonialism, but at the same time have lost the resources to preserve what may remain. So burdened, they believe their only option is to blend quietly into the Canadian mainstream. In his survey, Boldt encountered a "sizeable group" who supported complete integration of Natives into the larger polity.

Those leaders advocating indigenization and political integration represent one extreme of what may be termed the "decolonialization continuum". Assimilation, as one would expect, occupies one extreme with indigenization resting much nearer the middle ground. Past this middle point is encountered the more radical realm populated by those Native activists advocating *political autonomy*. The latter term is enlisted by Boldt to refer to those indigenous leaders who desire a fundamental change in political status from that which exists at present. Although no specification of statehood is involved in such a change, these individuals are actively seeking Indian control over those institutions that regulate their lives and affect their life chances most directly.<sup>13</sup> Thus control is sought over education, welfare, police, courts, hospitals, community development and similar social services. If political autonomy is taken to its extreme, it involves all of the above and seeks to activate these changes in the context of a geographically defined nation-state. At this stage, the opposite end of the decolonialization continuum is reached, its place marked by those indigenous leaders who will accept nothing less than *political independence*.<sup>14</sup>

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<sup>12</sup>(cont'd) (1961).

<sup>13</sup>Boldt, note 6, *supra*, p.494.

<sup>14</sup>*Ibid.*, p.493.

Those indigenes who seek this form of decolonialism recognize that, in order to survive as a distinct cultural entity, the Indian must possess a land base. As articulated to Boldt, such a base must be sufficient to accommodate the indeterminate number of natives who may choose to live there.<sup>15</sup> There would be no cultural prerequisites to achieving citizenship in the nation beyond that of being an *Indian*. In this aspect, such a nation would truly reflect the *pan-Indianism* discussed above, with its population relating to their polity first as indigenes and second as members of a specific cultural or linguistic group. Indian nationalism in this context is not a unified or systematically organized ideology; rather, the term assumes here a multivalent quality much like that anthropologists assign to "aboriginal rights"<sup>16</sup>. *Indian nationalism*, in the realm of Canadian Indian decolonialism, represents a cluster of related ideas that emerge from the historical experience of Canadian Native peoples. "It is given substance by the long tradition of tribal sovereignty in this land prior to the coming of the coloni[al powers], and by treaties, statements of general principle acknowledging aboriginal land claims, and irrevocable rights to reservation lands."<sup>17</sup>

The degree to which the leaders who spoke to Boldt have actually acted upon the sentiments outlined above will be discussed in the latter portion of this work. It is interesting to note, however, that despite the veracity with which some of the positions are held, most leaders are intimately aware of the reality of the constraints which could come to play upon their decolonialization drives. Of the Native leaders who held independence to be the *ideal status*, only 17 per cent considered it to be the *most feasible* status, while 66 per cent considered autonomy to be the most workable.<sup>18</sup> The explanations given by the leaders concerning why they opted for autonomy as the most practical goal, while they held

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<sup>15</sup> *Ibid.*

<sup>16</sup> Sally Weaver, "Federal Difficulties with Aboriginal Rights" in Boldt et al, note 6, *supra*, pp. 216-221.

<sup>17</sup> *Ibid.*, p.493.

<sup>18</sup> Boldt, note 6, *supra*, p.502.

independence as the ideal goal, stressed federal government opposition to independence, lack of economic resources, tribal loyalties and inter-tribal rivalries, as well as insufficient human resources.<sup>19</sup>

## [II] Indian Initiatives and Government Policy: Pragmatically Speaking

As a natural consequence of living in a world of conflicting ends and disparate means, the strategies designed by an individual or group to achieve a desired end are necessarily constrained by those held by other individuals and groups. When a clear contradiction of goals emerges, accommodation on behalf of all parties to the conflict is often required to resolve the situation to the relative satisfaction of all concerned. As a consequence of their history, the native peoples of this country are well-versed in accommodation and its costs. Hence many of the goals they seek to obtain through resolution of land claims are based upon an inherently pragmatic foundation, recognizing the social and political realities of the times. The federal government, by virtue of its legacy of almost total control over the Indian, is less familiar with reconciliation. It is perhaps for this reason that, prior to the 1950's, the federal government was the single largest constraint acting upon native land claims campaigns.

Acting upon the original policy statement made by the Royal Proclamation, early Canadian officials treated with aboriginal leaders for the extinguishment of title to their traditional lands. Although there is ample historical evidence to support the contention that many native signatories to the treaties did not fully appreciate the nature of these documents nor the proceedings which produced them, once the necessary signatures were obtained, the matter was deemed concluded for the purposes of the Canadian government.<sup>20</sup> When the

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<sup>19</sup> *Ibid.*; Boldt offers a more exact discussion, including percentages of leaders citing each impediment, at this point in his article.

<sup>20</sup> See Mel Watkins, note 2, *supra*; Hugh Brody, Maps and Dreams, (Douglas and McIntyre,

consequences of their misunderstanding of the treaties' ends became apparent to native people, they were offered no recourse by which to ameliorate the documents' deficiencies. In those areas where no treating took place, including most of Northern and Atlantic Canada, British Columbia and Quebec<sup>21</sup>, indigenous interests were little better off. Noting the rapid erosion of rights occurring around them, native groups of the southern coastal region of British Columbia began to pressure the federal government to acknowledge their title and provide compensation for losses incurred through westward expansion. The government refused the bands both. When the natives continued to press, their right to do so was eliminated through the addition of section 141 to the 1927 Indian Act. By this authority, all bands were barred from raising support of any type, monetary or human, for pursuing the resolution of title or clarification of rights.<sup>22</sup>

In 1950, pressure in the House of Commons to deal with indigenous claims led to the deletion of section 141 with the final amendments to the Indian Act. Additional requests for the creation of an "Indian Claims Commission" were rejected at that time. Subsequent entertainments of the commission question between 1950 and 1969 had no greater success, with initiatives regularly lost in the election process. The year 1969 saw the rise and fall of the Trudeau government's White Paper [Statement of the Government of Canada on Indian Policy]<sup>23</sup>, and the dawning of a new era for Indian/government relations in this country.

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<sup>20</sup>(cont'd) Vancouver/Toronto, 1981); A. Cummings and Neil H. Mickenberg, Native Rights in Canada, (2nd ed.), (General Publishing Co. Ltd.: Toronto, 1972); Menno Boldt and J. Anthony Long, note 6, *supra*; Dene Nation and the Metis Association of the Northwest Territories, "Public Government for the People of the North", (Yellowknife, 1982).

<sup>21</sup>Michael Asch, Home and Native Land: Aboriginal Rights and the Canadian Constitution, (Methuen Press: Toronto, 1984) p.58.

<sup>22</sup>Task Force to Review Comprehensive Claims Policy, "Living Treaties: Lasting Agreements Report of the Task Force to Review Comprehensive Claims Policy." (Ottawa, 1985), p.10.

<sup>23</sup>Chapter One of this work contains a complete discussion of this document and the effects it had on Indian-government relations. See especially pages 23-24.

Admitting that "Indians may have more rights than he thought"<sup>24</sup>, Trudeau issued a formal statement of his government's willingness to acknowledge and negotiate its "lawful obligations" to Canadian Indian people.<sup>25</sup>

Little was done to translate this declaration into action until 1973, when additional motivation to do so was provided by the decision in *Calder et al. v. the Attorney General of British Columbia*<sup>26</sup>. The lack of a bureaucratic framework in which native people could articulate their demands had resulted in some groups seeking acknowledgement of their rights in the courts. Through the resolution of *Calder* and the reality of three Supreme Court Justices' willingness to accept the probability of an enduring indigenous interest in unceded lands, the potential hazards of litigation were made patently clear. It appeared to be in the best interests of the state to remove the need and incentive for judicial clarification of title. Hence, in August 1973, the Department of Indian Affairs and Northern Development released its first official statement of land claims policy.

This policy<sup>27</sup> provided the means by which native groups could submit for negotiation claims arising on either *specific* or *comprehensive* grounds. Specific claims were defined as those arising from the failure of the government to live up to its duties and responsibilities under treaty or legislative enactments. Hence groups not included in the original treating process were for the most part excluded from undertaking claims negotiations of this type. Although not theoretically barred from pursuing restitution for specific legislative liabilities, the broader spectrum of comprehensive negotiations generally made this the preferable route for

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<sup>24</sup>"Indians may have more land rights than he thought, Trudeau says.", The Toronto Globe and Mail, 8 February 1973.

<sup>25</sup>Task Force to Review Comprehensive Claims Policy, note 22, *supra*, p.11.

<sup>26</sup>(1973) S.C.R. 313; (1973), 4, W.W.R. 1.

<sup>27</sup>Department of Indian Affairs and Northern Development, "Statement made by the Honourable Jean Chretien, Minister of Indian Affairs and Northern Development on the Claims of Indian and Indian People." Communique, 1-7339. (Ottawa, 1973).

non-treaty Indians. Included in the specific claims agenda were matters related to the administration of native lands and monies under the Indian Act;<sup>28</sup> hence specific actions could include such matters as failures to pay monies owed or to compensate for the removal of renewable resources or for the unlawful confiscation of reserve lands, as well as for fraud or similar wrongdoings on the part of DIAND agents or officials. *Comprehensive claims* were defined as emerging where aboriginal rights of *traditional use and occupancy* had been neither extinguished by treaty nor superceded by law.<sup>29</sup> Deriving their title from the tendency of such negotiations to involve a wide range of indigenous interests, comprehensive claims could include matters ranging from hunting and fishing rights to the more personal and communal modes of expression such as arts and crafts, language and culture.<sup>30</sup> In one sense, this process would provide for the creation of modern day treaties with native groups who had originally avoided this form of cession. Vaguely defined "Claims of a different character" were also mentioned in the policy statement, but no mechanism was provided for dealing with them.

In fulfillment of its 1973 statement, the federal government in 1974 established the Office of Native Claims (ONC).<sup>31</sup> It was the function of this organization to represent the Minister of Indian Affairs and Northern Development in the negotiation process. Acting not only as a representative but also as an integral office of Indian Affairs, the ONC was the initial recipient of all claims. Upon a Band's submission of a claim, it became the responsibility of this office to carefully scrutinize the basis of the submission in terms of its historical accuracy and legal validity. Any questions or conclusions concerning the latter were

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<sup>28</sup>Department of Indian Affairs and Northern Development, "Outstanding Business: A Native Claims Policy", (Ottawa, 1982).

<sup>29</sup>Task Force to Review Comprehensive Claims Policy, note 22, *supra*, p.12.

<sup>30</sup>Department of Indian Affairs and Northern Development, "In All Fairness: A Native Claims Policy", (Ottawa, 1981), p.7.

<sup>31</sup>*Ibid.*, p.13.



to be forwarded to the Federal Department of Justice for double-checking.<sup>32</sup> In the event of acceptance of the claim, the Band would be invited to enter into negotiations with the ONC for its settlement. Where a claim was rejected, the office would offer a full explanation of the reasons for its rejection — a small consolation given the absence of any avenue of appeal.<sup>33</sup>

As the processes for resolving indigenous claims became increasingly entrenched in the department bureaucracy, their imperfections became more salient. In order to avoid straining the resources of the ONC, the Department of Indian Affairs and Northern Development (DIAND) had limited the number of claims to be processed by the Office to six. This limitation, combined with the refusal of the ONC to include in the negotiations a number of matters considered important by many native groups<sup>34</sup>, greatly slowed the pace of the claims process. An additional wrench was thrown into the works by the federal government's insistence upon manipulating claims agreements in the direction of *extinguishment* of rights and title, thereby placing them at fundamental odds with the native aims of recognition and entrenchment. The state's end was part and parcel of its view that, once resolved, all claims agreements must be final. Given that they were disallowed the opportunity to negotiate fully all items on their claims agendas on their own terms, few native groups were willing to enter into negotiations of final agreements.

Notwithstanding the problems with the initial comprehensive claims process, three comprehensive claims agreements were reached under its authority: The James Bay and

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<sup>32</sup> *Ibid.*, pp.27-28.

<sup>33</sup> There is no mention in either of the preceding statements of how a Band might appeal a decision of the ONC. Beyond the opportunity to resubmit a rejected claim at a later date where new evidence is found, the determination of the ONC appears to be final.

<sup>34</sup> Task Force to Review Comprehensive Claims Policy, note 22, *supra*. Significant in this light was the DIAND's refusal to mediate such considerations as political rights, decision-making powers on land and resource management boards, revenue-sharing from surface and subsurface resources and offshore rights.

Northern Quebec Agreement in 1975; the Northeastern Quebec Agreement in 1978; and the Inuvialuit Final Agreement in 1984.<sup>35</sup> In all cases, these settlements were the consequence of the federal government's intention to facilitate economic development in the area claimed<sup>36</sup> The James Bay Agreement, for example, emerged out of a dispute between the Cree and Inuit Peoples and the government of Quebec over the latter's intention to erect a hydroelectric project which would flood much of the former's traditional lands.<sup>37</sup> When the Natives went to Court and secured an injunction to halt construction, the provincial government was forced to negotiate with them to obtain title to the lands in question. The policy of extinguishment maintained by the DIAND was patent in both the negotiations and the agreement it produced. As compensation for the extinguishment of aboriginal title to those lands necessary for the establishment of the hydroelectric project, the Cree and Inuit received a total of 410,000 square miles of territory in the northern region of the province. This area was divided into three reserves; 2000 square miles were retained for the Cree, Inuit, and others with the former's consent; 25,030 square miles were set aside for the exclusive traditional use of the James Bay Cree below the 55th parallel, while the remaining territory is to remain open to both natives and non-natives under ordinary provincial laws and regulations.<sup>38</sup> Monetary compensation consisted of a total of two hundred and twenty-five million dollars to be paid to the natives of Northern Quebec over the next decade in joint payments from the provincial and federal governments and the involved Crown Corporations. Limited powers of regional self-government were also included, enabling Cree and Inuit communities to form quasi-municipalities in areas set aside exclusively for them<sup>39</sup>.

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<sup>35</sup> *Ibid.*, p.13.

<sup>36</sup> *Ibid.*, p.13.

<sup>37</sup> J. S. Frideres, "Native Settlements and Native Rights: A Comparison of the Alaska Native Settlement, the James Bay Indian/Inuit Settlement and the Western Canadian Inuit Settlement", The Canadian Journal of Native Studies, vol.1, no.1, (1981), p.65.

<sup>38</sup> *Ibid.*, pp.68-71.

<sup>39</sup> *Ibid.*, p.70.

The James Bay Agreement constitutes a patent example of the federal (and provincial) policy toward the resolution of comprehensive claims. As such, it is also an intriguing illustration of the degree to which factors external to the claims process can affect an indigenous group's case. From the perspective of the state, the primary objective in the James Bay situation was the extinguishment of the Natives' rights to the affected land in order to facilitate economic development. For the Indian and Inuit parties to the claim, the conflict suggested a contrary end, one which would facilitate the perpetuation of their culture and traditional way of life. In their view, this end could be achieved through ensuring the minimization of negative ecological effects of the hydro project, the retention of lands sufficient to allow the continuation of customary modes of subsistence, participation in subsequent development projects, control of their own institutions and adequate monetary atonement.<sup>40</sup> The final agreement, arguably, did provide these ends. But it also did something else; it permanently dissolved their aboriginal title to their traditional lands. In so doing, it translated the birthright of these indigenous peoples to their traditional way of life to a privilege conferred at the discretion of the state — a realization virtually all native groups had consistently fought to suppress. Insofar as they may continue to hunt, trap and fish or practice their culture, they do so only at the pleasure of the governments of Quebec and Canada.

Inasmuch as this distinction may be seen primarily as an abstract one, it is sufficient to compel an inquiry as to why an indigenous group would enter an agreement which would destroy precisely that which it originally sought to preserve. Perhaps the indigenous parties to the agreement felt that there was more to gain from a "one-shot" materialization of their rights than from the maintenance of an unclear interest in land. More probably it was the increasingly vivid belief that other avenues of resolution were vanishing. Work on the project was progressing at a rate superior to that of the claims negotiation, exacerbating the urgency

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<sup>40</sup>Billy Diamond, "Aboriginal Rights: The James Bay Experience." in Menno Boldt and Anthony Long, note 6, *supra*, pp.265-285.

of the Indians' situation.<sup>41</sup> The Quebec government, having already made a substantial monetary investment in the project and cognizant of the potential payoff, had made clear at the outset that abstract notions of indigenous title would not bar its completion; should the James Bay natives refuse the offer made by the province, the project would continue as planned and they would simply lose the benefits tendered in the proposed agreement.<sup>42</sup> In light of these realities, it is probable that the natives saw gaining a bird in the hand worth losing a little bush.

To the degree that the James Bay Agreement reflected the colonial roots of present day claims policies, its negotiation and execution remained equally loyal. The product of a "take it or leave it" claims philosophy, within seven years of its activation, the DIAND reported "serious problems of implementation, unresolved disputes, and in some cases a failure to fully implement the Agreement in both its spirit and letter."<sup>43</sup> In this regard, the James Bay Agreement is not unlike the numbered treaties which inspired it; once again indigenous interests had given way in the face of government guarantees with little positive effect for the natives involved.

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<sup>41</sup>La Commission des droits de la personne du Quebec, "Statement of La Commission des droits de la personne du Quebec on the territorial rights of the native people of Quebec", Canadian Native Law Reporter, vol.1, no.3, (June, 1978). p.21; see also: Harvey Feit, "Legitimation and Autonomy in James Bay Cree Responses to Hydro-Electric Development", in Noel Dyck, (ed.), Indigenous Peoples and the Nation-State. Fourth World Politics in Canada, Australia and Norway, (St. John's, Newfoundland: Institute of Social and Economic Research, Memorial University of Newfoundland, 1985):27-67). In this article, Feit argues that the Cree accepted the terms of the James Bay Agreement out of a belief that the compact offered a means by which to preserve their distinctive way of life. The reality that the agreement does not appear to have achieved that end may be mitigated by Feit's additional assertion that the Cree did not necessarily view the agreement as constituting a comprehensive claim.

<sup>42</sup>Judge Thomas R. Berger (as he then was) quoted by "La Commission des droits de la personne du Quebec", *ibid.*, p.21.

<sup>43</sup>Department of Indian Affairs and Northern Development, "James Bay and Northern Quebec Agreement Implementation Review", (Ottawa, 1982).

The Northeastern Quebec Agreement was struck in 1978 between the federal and provincial governments and the Naskapi de Schefferville, a band of 400 Indians within the territory covered by the James Bay Agreement.<sup>44</sup> With few exceptions, this agreement provided the Naskapi with similar rights and benefits to those gained by the Cree and Inuit of the James Bay area. In so doing, it also conferred the same liabilities.

In the six year period punctuating the second Quebec agreement and the resolution of the Western Arctic Claim, a series of events came to pass which would alter significantly the context of claims negotiations. The patriation of the Canadian Constitution<sup>45</sup> was certainly one of the more far-reaching of these events, entrenching as it did any "rights that now exist by way of land claims agreements or may be so acquired".<sup>46</sup> At the same time, the comprehensive and specific claims processes had undergone renewed scrutiny, culminating in two new statements of policy. The first, released in 1981, was entitled *In All Fairness: A Native Claims Policy* and dealt specifically with the comprehensive claims process.<sup>47</sup> Beyond a clarification of the original comprehensive process, *In All Fairness* spoke to the issue of subsurface rights, agreeing to include these in the negotiating process where resource development threatened communities or critical wildlife areas.<sup>48</sup> In addition, given its pre-Charter arrival, this document included a promise on behalf of the federal government to negotiate the content of indigenous rights following patriation.

*Outstanding Business: A Native Claims Policy*<sup>49</sup>, was the second policy restatement.

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<sup>44</sup>Department of Indian and Northern Affairs, "Native Claims: Policy, Processes and Perspectives", (Ottawa, 1978), p.8.

<sup>45</sup>Constitution Act, 1982.

<sup>46</sup>Constitution Amendment Proclamation, 1983.

<sup>47</sup>Department of Indian Affairs and Northern Development, (Ottawa, 1981).

<sup>48</sup>*Ibid.*, p.24.

<sup>49</sup>Department of Indian Affairs and Northern Development, (Ottawa, 1982).

Emerging in 1982, this statement also involved a more detailed reiteration of the 1973 policy, though in this instance as it related to specific claims. Perhaps the most intriguing aspect of this policy statement is its implicit bias against litigation. Stated succinctly, the document contained the following contention: Given the passage of time since the signing of treaties and conferring of rights, the federal government has stated that, in a legal context, certain defences fall against "after-the-fact" recognition of treaty obligations/rights. Arguing the applicability of statutes of limitation and the "doctrine of laches", whereby the right to take legal action for remedy of an ill — however legitimate — may be removed if that action is not taken within a specified or reasonable length of time, the DIAND/ONC has agreed not to raise these defences provided natives pursue their claims within the confines of the mechanisms provided. Should a band prefer to step outside these to the realm of the courts, however, the government reserves the right to activate any and all defences open to it as a party to that litigation.<sup>50</sup> Even at this stage of its policy history, it would appear that the federal government is unwilling to abandon coercion as an aid to policy implementation.

The revisions to the Comprehensive Claims process were of limited significance in the resolution of the Inuvialuit's Western Arctic claim. With a slight, but significant, digression in the direction of subsurface rights, the Inuvialuit Final Agreement<sup>51</sup> offered little contrast to either the James Bay or Northeastern Quebec compacts: The Inuvialuit gave up all aboriginal rights stemming from, or implicit in, their title to their traditional lands in exchange for clearly delimited monetary, subsistence and territorial considerations. To obtain the benefits promised by title to 344,000 square kilometers of the apparently resource-rich Western Arctic, the federal government paid out 62.5 million dollars<sup>52</sup> to the group at a total per kilometer

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<sup>50</sup> *Ibid.*, p.20.

<sup>51</sup> Department of Indian and Northern Affairs, "The Western Arctic Claim: A Guide to the Inuvialuit Final Agreement", (Ottawa, 1984).

<sup>52</sup> To be made in payments of 1977 dollars over a period of thirteen years; the first installment of which was to remain with the government as payment against a \$9,675,000 loan made to the Committee of Original People's Entitlement to finance the negotiation

cost of approximately 55 cents. That this is a less than substantial amount is perhaps mitigated by the Inuvialuit's traditional view of the land as an entity above fiscal considerations, and land claims as more than mere real estate transactions. In relation to the subsistence and territorial awards, however, the monetary component borders on generous.

Subsequent to ratification of the Agreement, the Inuvialuit were promised continued enjoyment of a little less than one-third of their original territory through the exercise of a fee-simple interest. Of this area (approximately 91,000 square kilometers), title would extend below the surface to all resources over 11,000 sq. kms. and to sand and gravel only over a further 78,000 sq. kms. Should valuable resources such as oil or gas be discovered in the latter context, Inuvialuit subsurface rights would be held violable in those cases where doing so is clearly in the national -- as opposed to regional or native -- interest.<sup>53</sup> The federal Cabinet is to be the overseer of the assigning of such priorities, although the government reserves the right to act without Cabinet consent in "some cases".<sup>54</sup> Who is to be the judge of which cases are of sufficient import to require Cabinet approval is unclear. One appears safe in assuming that this determination rests in the hands of the minister or ministry considering resource development in one of the reserved areas, making the Cabinet safeguard dubious at best.

The 11,000 sq. kms. to which the Inuvialuit hold both surface and subsurface rights is composed of pockets of acreage on which the primary six Inuvialuit settlements rest.<sup>55</sup> This

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<sup>52</sup>(cont'd) process. At roughly .55 per kilometer, it is arguable that the federal government struck a rather good deal--indeed some other groups, especially the Dene of the Mackenzie Basin, have been highly critical of the Inuvialuit Final Agreement on grounds that the transaction did not accurately reflect the value of the lands in question, all things considered. See Bradford Morse, "Recent Canadian Developments in Aboriginal Peoples and the Law", Commission on Folklaw and Legal Pluralism, Newsletter, X, (Nijmegen, Netherlands, 1985), p.3; see also World News Digest, vol. 38 no. 1939, (6 January 1985).

<sup>53</sup>Department of Indian Affairs and Northern Development, note 51, *supra*, p.45.

<sup>54</sup>*Ibid.*

<sup>55</sup>Including: Sach's Harbour, Holman Island, Paulatak, Tuktoyaktuk, Inuvik and Aklavik.

wholesale granting of interest is perhaps not surprising as neither the federal nor provincial governments have prior histories of usurping entire townships in the interests of resource development. Whether this constitutes an adequate safeguard is uncertain, however, given the traditional outcome of regional versus national interest struggles, not to mention the record of Indian-government clashes. In addition, there is a certain ambiguous quality to the fee simple interest. It is apparent from the reality of "expropriation" that the state in almost any proprietary context retains a certain measure of title which may, in "some cases", override a fee simple tenure. Notwithstanding the compensatory practices traditionally associated with expropriation, the relatively consistent supremacy of national over regional interests combined with this Crown prerogative renders the natives' title over the remaining 11,000 sq. kms. somewhat dubious.

In the realm of subsistence considerations, traditional Inuit harvesting patterns saw a high measure of restriction under the final agreement. Although the pact granted an exclusive right to hunt certain species in certain areas, this license was made "subject to the laws of general application pertaining to conservation and public safety".<sup>56</sup> Given that their hunting area was reduced from 344,000 sq. kms. to 91,000 sq. kms. (11,000 sq. kms. of which is occupied by settlements) and qualified by harvesting quotas and possibly seasonal constraints, this aspect of the settlement would seem to offer little to the Inuvialuit. Furthermore, whereas Inuvialuit hunting practices were once a consequence of an aboriginal interest in the land, these would now apparently be exercised at the discretion of the federal and territorial governments. This discretion would not be unfettered, however, as the Inuvialuit were granted a role in the decision-making process on wildlife management questions.<sup>57</sup>

The right to speak to decisions on wildlife and conservation issues was not the only success for the Inuvialuit in their claim — it was, however, the most significant. Discussions

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<sup>56</sup> *Ibid.*, p.8.

<sup>57</sup> *Ibid.*, p.8.



of the Agreement in a cost-benefit context, reveal the Western Arctic Agreement to be consistent with the federal government's claims position. This latest offspring of the Comprehensive Claims process did not digress from the mandate of extinguishment, nor did it fully shed the state's legacy of assimilation. The latter colonial residue was patent in the concluding statements of the Agreement which established its intention to "expedite full Inuvialuit participation in the economy of northern Canada and Inuvialuit integration into Canadian society..."<sup>58</sup> As a consequence of these and other basic flaws and their detection and criticism by such groups as the Dene of the Mackenzie Valley<sup>59</sup>, the federal government in 1985 was back at the comprehensive claims drawing board.

[III] Coolican and Comprehensive Claims - or - When in doubt order further study!

The Task Force to Review Comprehensive Claims Policy was born in 1985 out of the unavoidable realization that, despite earlier study and amendment, the process was simply not working.<sup>60</sup> The government's record with regard to claims settled was less than sterling; reviews of the James Bay Agreement had revealed substantial problems with implementation, and the Northeastern Quebec and Inuvialuit Final Agreements were rapidly manifesting parallel defects. Propelled by commentary such as that of Thomas Berger, who asserted that unfulfilled or unsatisfactorily met agreements should not be deemed final, the Mulroney government contracted the Halifax firm of Peters, Coolican and Associates Ltd. to document and suggest remedies for the imperfections of the current claims policy.<sup>61</sup>

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<sup>58</sup> *Ibid.*, p.6.

<sup>59</sup> See note 52, *supra*.

<sup>60</sup> Task Force to Review Comprehensive Claims Policy, note 22, *supra*.

<sup>61</sup> *Ibid.*, p.131. Hereinafter, the "Coolican Report".

The Coolican Report<sup>62</sup> was published in 1985 under the title Living Treaties: Lasting Agreements.<sup>63</sup> It consists of six sections, the first of which contains the apparently mandatory discussion of the history and evolution of current land claims policies. The second through fifth chapters encompass the meat of the paper, contemplating possible alternatives for, and changes to, the present claims process; the Report concludes with a rather superficial discourse on the potential implications of claims settlements for Canada.<sup>64</sup> The proposed alterations to the comprehensive claims process are arguably the most potentially meaningful aspect of Coolican's Report and will hence occupy the better part of the discussion here.

In a broad sense, the Report calls for an improvement in the spirit with which the federal and especially provincial governments have entertained claims proposals in the past. Asserting the need for greater aboriginal input into the negotiation process, Coolican recommends that the claims agenda be broadened to include a wider range of self-determination considerations. The expanded menu should be determined on the basis of the aspirations of each claim group, thereby accounting for regional variations. Obviously such changes would preclude the creation of a single policy approach to deal with all claims, thereby reflecting the Task Force's appreciation of the highly individual quality of each claim and the right of the claimants to include in their proposals whatever aspects they consider pertinent. To mitigate the increased confusion which could enter the new "individualized claims" process, the Task Force recommends that each claims proposal be fleshed out

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<sup>62</sup>*Ibid.*

<sup>63</sup>Department of Indian Affairs and Northern Development, (*ibid.*) It is important to preface any consideration of this document with the caution that it contains only *observations* and *recommendations*; whether any of these will be translated into action cannot be ventured with certainty. In the past, Commissions and Task Forces have often been associated with tokenism, giving impressions of attention and importance to issues which are not accorded either in any substantive context.

<sup>64</sup>In four pages at the back of the Report is a brief presentation on how the resolution of native claims can only better the Canadian polity through the increased economic and political self-sufficiency of Indian, Inuit and Metis peoples. This chapter contains the greatest proportion of rhetoric in a Report surprisingly free of such grandiloquence.

between the parties involved in preliminary negotiations. Once this is complete, substantive negotiations could begin.

Whether division of the negotiating processes would truly expedite their completion is uncertain. However, as an added catalyst, the Report suggests the creation of sub-agreements which could be implemented following the first stage of negotiations. In this way, some of the less contentious components of the claims could be activated almost immediately and their progress and productivity monitored prior to the ratification of the ultimate agreement. Should any of the active aspects prove problematic, they could be revised and included in the final document.

In the interests of preserving fairness in both the negotiating process and its consequences, the Task Force made two additional recommendations of note. Acting upon the unacceptable absence of an appeals procedure in the 1981 comprehensive claims policy, the Coolican Report stressed the need for written explanations for denial of access to the negotiation process as well as the creation of some form of redress in cases where the denial of process was questionable. In addition, the Report called for the appointment of a Commissioner for Aboriginal Claims Agreements who would act as an impartial overseer of the negotiation process. The Commissioner would be endowed with a wide range of discretionary powers, sufficient to suspend negotiations tainted by a lack of fairness or to set deadlines for completion of an agreement where grounds for delay are insufficient.<sup>65</sup>

In their proposed changes to the Comprehensive Claims process, the Task Force openly acknowledged that the failure of previous policies had arisen largely from the conflicting ends outlined above. In this context, the single most problematic source of this failure has been the drive of the federal government toward final agreements extinguishing all native claims. The friction between this goal and indigenous assertions that the negotiations should serve to

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<sup>65</sup>For a full discussion of the role and powers of the Commissioner, consult the Coolican Report, note 22, *supra*, especially pp.79-82.

acknowledge and protect traditional rights and title had been exacerbated by what Coolican referred to as "legal excesses" on the government's behalf in securing the surrender of rights.<sup>66</sup> Whereas pre-Confederation treaties sought only limited surrender of both land and rights, after 1867 and the creation of the Numbered Treaty policy, blanket extinguishment had been the primary mandate of the treating process.<sup>67</sup> While this may seem more a distinction of means than ends, for a substantial proportion of the native population it is unacceptable as either. To them,

the sweeping extinguishment clause found in the modern agreements...is perceived as an expression of the federal government's wish to abolish their unique identity and to destroy all aboriginal rights.<sup>68</sup>

In light of this basic disjunction, workable claims agreements should not involve extinguishment as a condition of settlement. Rather, the Task Force offers three broad alternatives to the previous policy, each premised upon an appreciation of cultural and regional variations which could distinguish individual claims agreements. The first alternative suggests a return to the pre-Confederation approach of rights "trade-offs". By this method, "aboriginal groups might retain their aboriginal title or aspects of it in relation to certain traditional areas, and surrender it, or parts of it, in others."<sup>69</sup> The second option is a variation of the first, providing for the constitutional preservation of rights where title to land and resources is surrendered specifically. In the third scenario, a group may elect to remove discussions of rights from the claims arena all together, reducing negotiations to matters of lands and resources alone. The Task Force promotes this scheme as a route to circumventing the resistance of some would-be parties to the process who refuse to concede that aboriginal

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<sup>66</sup> *Ibid.*, pp.40-41.

<sup>67</sup> *Ibid.*, p.40.

<sup>68</sup> *Ibid.*, p.40.

<sup>69</sup> *Ibid.*, p.41.

rights exist.<sup>70</sup>

A salient quality of these alternatives is their focus above all else upon lands and resources, an observation which at first glance may appear rather redundant. However, in the native view, land claims have always encompassed a quality above mere real estate. To divorce cultural, social and religious issues from the land would equate to cutting them off from their source and the destruction of a crucial symbiosis. In a more pragmatic context, if rights are to be determined in a forum outside the land claims process, what status would their determination ultimately achieve? By Section 35 of the Constitution Act, existing rights which receive clarification through land claims agreements earn constitutional recognition and affirmation; that is, those rights become *constitutionally guaranteed*.<sup>71</sup> It would seem to follow logically from this statement that rights determined outside the land claims process would not have this support. By the second of Coolican's options, these rights might eventually receive definition through the Courts, but only where the mandate of the proceedings is clearly established as *clarifying existing rights* as opposed to *creating new rights*. The latter is a talent traditionally beyond the means of the Courts. Notwithstanding this possibility, given the costs, both monetary and time-wise, of legal action, and the uncertainty associated with judicial resolutions, the Courts would not seem an appropriate forum for the determination of rights. Inasmuch as Coolican downplays time constraints and "final solutions" in preference to malleable agreements which would allow for alterations in rights as time and the progression of society would dictate, the delays and drawn-out nature of the judicial process are arguably not amenable to such "evolutionist" definitions of rights. The criticism might be similarly

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<sup>70</sup>For example, the government of British Columbia, which has historically refused concepts of aboriginal title, would no longer be able to enlist this philosophy as a track to avoiding claims negotiations. By section 109 of the British North America Act 1867, the province is given authority over land and resources not specifically held by the Crown; with the Indian rights aspect removed from the claims process, the provincial government would be hard pressed to abstain from matters of title which are so clearly within its purview.

<sup>71</sup>Joseph Elliott Magnet, Constitutional Law of Canada. (2nd ed.), (Toronto: Carswell Legal Press Ltd., 1985), pp.1591-1592.

levied against constitutional processes which could require formal amendment to update agreements which become dated.

The addition of a claims component which allows for changes to agreements over time, although potentially difficult to implement, constitutes a significant deviation from the "freeze frame" approach of the 1973 (and 1981) comprehensive claims policy. An additional revelation is found in Coolican's criticism of the practice of rejecting claims on the grounds that they have been "superceded by law".<sup>72</sup> Outlining a history of land surrenders based on cession as analogous to compensation for expropriation, the Task Force establishes the basic incongruity of this notion with the centrality of consent in the treating process.<sup>73</sup> Although the justifications for removal of this loophole are certainly compelling<sup>74</sup>, it is important to consider that land surrenders — whether by treaty or otherwise — were not contingent on consent in the *true form* of the term: that is, a consent freely given in full appreciation of its terms and their consequences. Indeed, there is both oral and written record that much treating was completed in less than honest circumstances — a reality that, by Vitoria's logic, would deny the validity of agreements reached therein. The equation of cession with compensation for expropriation would seem a tacit acknowledgement of consent as a secondary consideration. Given its right of "eminent domain", the Canadian government could lawfully take needed lands from an individual or group for the betterment of all, rendering consent irrelevant to the seizure. Thus it may be argued that criticisms of the "superceded-by-law" concept as being unacceptable on the grounds that it ignores consent are somewhat immaterial. The absence of a *true consent* has yet to stand in the way of extinguishment of

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<sup>72</sup> *Ibid.*, p.45.

<sup>73</sup> *Ibid.* pp.43-46.

<sup>74</sup> See: *Simon v. The Queen*, [1985] 2 S.C.R. 387. In this case, the Supreme Court of Canada suggests that the onus of demonstrating extinguishment rests with the party alleging extinguishment, and that the Courts will require strict proof thereof. Better late than never, this 1985 decision is similar in principle to that of the United States Supreme Court in *United States v. Sante Fe Pacific Railway Co.*, 314 U.S., p. 339, (1941) handed down over 44 years prior to *Simon*.

aboriginal title in the Canadian context. More weight for its dismissal should be placed upon the reality that the superceded-by-law concept embodies expropriation *without* compensation. The latter form of apprehension, when conducted in the absence of consent, constitutes what is more commonly known as theft.

Grounds for accepting as valid, claims which could be deemed superceded-by-law, would seem consistent with the overall tenor and philosophy of Coolican's proposed policy. In a document surprisingly limited in rhetoric, the Task Force articulates a Comprehensive Claims process "open to all aboriginal societies that continue to use and occupy traditional lands and whose aboriginal title to such lands has not been dealt with by land-cession treaty or by explicit legislation."<sup>75</sup> Once involved in the negotiation process, Coolican stresses bargaining which freely entertains a wide range of rights and interests, ranging from subsurface and offshore rights to economic development and self-government.<sup>76</sup>

The federal government issued its formal response to Coolican's recommendations in December of 1986.<sup>77</sup> Beyond the incorporation of a few relatively minor amendments, such as the agreement to provide claimants whose petition is rejected with a written statement for the grounds of the rejection<sup>78</sup>, the new comprehensive claims policy does not differ substantially from those which preceded it. While the policy states its willingness to broaden the scope of issues entertained in claims negotiations, it is careful not to imply that this expansion will in any way alter the outcome of those negotiations. At the same moment it embraces an increase in claimant participation in defining the scope and form of the negotiations, the policy rejects those issues most likely to be deemed important aspects of the resolution process by those same claimants. Thus the new comprehensive claims scheme continues to

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<sup>75</sup> *Ibid.*, pp.46-47.

<sup>76</sup> *Ibid.*

<sup>77</sup> Department of Indian and Northern Affairs. "Comprehensive Claims Policy", (Ottawa, 1986).

<sup>78</sup> *Ibid.*, p.24

seek extinguishment rather than recognition and entrenchment of native rights, focusing above all else upon the attainment of "final settlements".<sup>79</sup>

One of the most revealing additions to the new policy is found in the creation of a "Comprehensive Land Claims Steering Committee".<sup>80</sup> This board will serve in an advisory capacity to Ministers involved in claims negotiations, providing guidance and information on such matters as negotiating mandates, the negotiating process, framework agreements, agreements-in-principle and final agreements.<sup>81</sup> As resource people to the primary government actors in the negotiation process, the members of the Steering Committee could, at least in principle, make a valuable contribution to those processes by providing informal channels of communication between the claimants and the government. Unfortunately, as the government has limited membership in the Steering Committee to deputy ministers of pertinent departments, the potential for this body to work for the claims — rather than for the government— is sharply limited. Had the foresight existed to combine persons from the claimant groups with government personnel within the Steering Committee, it is arguable that this amendment to the comprehensive claims policy could have greatly facilitated claims resolution. As it is, this Committee constitutes a redundant accessory to the claims process — It is yet another source from which the pertinent officials can hear what they either already knew, wanted to hear, or both.

In essence, the new policy constitutes little more than an artfully contrived circumvention of Coolican's report. Where the Commission stressed the need for an entirely new philosophy of claims resolution, the federal government has chosen to reject all but the least contentious incidents of that philosophy. Thus it would seem that the recommendations of Coolican's report have gone the way of most such commissions; namely, the more change

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<sup>79</sup> *Ibid.*, pp.9,25.

<sup>80</sup> *Ibid.*, p.25.

<sup>81</sup> *Ibid.*



they advocate, the greater becomes the probability that things will remain the same.

## V. LAND CLAIMS IN THE LAST FRONTIER:

### THE DENE DESIGN

Although the Canadian north constitutes almost forty percent<sup>1</sup> of the country's land mass, most Canadians possess only a dubious appreciation of life above the 60th parallel. What is known is commonly a by-product of popular portrayals of the *ultima thule* offered by motion pictures and television, government-funded research productions and newspapers. Most recently these media have presented the southern public with numerous stories concerning land claims and aspirations toward self-determination by northern indigenous peoples. Often highly complex given the diversity of interests involved in northern land claims, these stories have repeatedly strained the resources of their writers in attempting to impart a balanced view of the situation. Significant in this regard is the counterbalancing of the Indian and Inuit interests on one end, and the requisite questions of aboriginal entitlement, political independence<sup>2</sup> and control of territory which typify these, with the many concerns of the federal and provincial governments which not only include constitutional matters, but are also necessarily attentive to the implications of northern claims in such areas as resource exploitation and distribution of monetary returns flowing from that exploitation. Inasmuch as these considerations are not unlike those which characterize southern claims, they are set apart not only by the unique geographical and historical temperament of northern claims, but by the distinct nature of Indian-white relations in this region as well.

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<sup>1</sup>Bracken, Susan. Canadian Almanac and Directory 1985, (Copp Clark and Pitman Ltd.: Toronto, 1986), p.1048.

<sup>2</sup>As this term has been elaborated by Boldt in his "Intellectual Orientations and Nationalism Among Leaders in an Internal Colony. A Theoretical and Comparative Perspective" (The British Journal of Sociology, vol.33, no.4, (December, 1982), and presented below.

In the discussion which follows, the problems and postulates outlined above will be examined in terms of the historical experience and present activism of one northern native group: the Dene of the lower Mackenzie River Valley of the Northwest Territories. This group, which includes in its membership peoples of Hare, Slavey, Dogrib, Yellowknife, Chipewyan and Loucheaux derivation, aspire to what Boldt termed *political independence*;<sup>3</sup> that is, to the right of Indian administration of Indian affairs and lives within an Indian-defined and held territory. It is arguable that, owing to the limited alienation of northern lands to third parties and its generally sparse distribution of population, the Canadian north constitutes the most promising geographical context for realization of such goals. There are, however, persuasive political and economic barriers which mitigate territorial concerns.

#### [I] Culture Before Canada: The Great Dene Race.<sup>4</sup>

In attempting to reconstruct regional cultural histories, archaeologists, ethnohistorians, and historical geographers commonly employ a tripartite chronological scheme that includes

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<sup>3</sup>As elaborated in the third chapter of this work, campaigns of this type have as their goal the securing not only of semi-autonomous political institutions (such as those held by provincial governments), but see as an intimate corollary of that independence the holding of a land base as well.

<sup>4</sup>Title taken from the missionary A.G. Morice's extensive series "The Great Dene Race", in the journal Anthropos composed in the early part of the 20th century and preserved in four volumes: 1(1906); 2(1907); 4(1908); and 5(1910). Although Morice concentrated his study of the far North American Dene on the Carrier peoples who traditionally resided below the Mackenzie Basin, many of his observations have been generalized to the natives inhabiting the latter area. For examples, see Slobodin (1980), Vanstone (1974), and others. Notwithstanding this extension of his studies, it is important to temper some of Morice's observations with the knowledge that their generalizability lessens the further north one ventures. The work of another missionary, Emile Petitot, speaks specifically to the Mackenzie Basin context and is thus a superior source of historical/ethnographical information on the Dene of this region. See specifically Emile Petitot, "Geographie de l'Athabaskaw-Mackenzie et des Grands Lacs du Basin Arctique", Bulletin de la Societe de Geographie de Paris, 10(5), 6e serie, (1875); Emile Petitot, "On the Athabasca District of the Canadian North West Territory", Proceedings of the Royal Geographic Society, 10, (1883); also Emile Petitot, Monographie des Dene Dinjie. (Ernest Leroux, Paris, 1876).

prehistoric, protohistoric, and historic periods as the basic frames of reference.<sup>5</sup> The prehistoric period is generally set apart from the proto- and historic eras by its pristine status. It is in this initial juncture that the original inhabitants of the region persist untouched by outside influences or intrusions, the introduction of which mark entrance into the protohistoric period.<sup>6</sup> In the chronology of the Canadian north, this chaste state is believed to have existed from the estimated point of arrival of indigenous peoples into the region as early as 12,000 years ago<sup>7</sup>, until as late as 1680 in some areas.<sup>8</sup> This latter date, which marks the nascency of European penetration of the north, coincides with the first tentative attempts at developing a northern fur trade.<sup>9</sup>

As the initial fur trade era, the protohistorical phase encompasses two "sub-periods": the *Middleman Period* and the *Indirect Trade Period*.<sup>10</sup> Spanning an interim of almost one

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<sup>5</sup>Arthur J. Ray, "History and Archaeology of the Northern Fur Trade", American Antiquity, 43, (1978):26.

<sup>6</sup>Ray, *ibid.*

<sup>7</sup>Alan Lyle Bryan, "The Prehistory of the Canadian Indians", in R. Bruce Morrison and C. Roderick Wilson, (eds.), Native Peoples: The Canadian Experience, (McClelland and Stewart: Toronto, 1986), pp.45-72. There is a great deal of controversy over the precise date at which extensive indigenous settlement may be said to have occurred. There is, for example, sufficient tangible evidence both supporting and disputing the point of time suggested above to render its credibility tenuous at best. The fact that the debate on this question has centered around this date is suggestive, but, at this time, little more than this can be said. As noted by Bryan, resolution of the question will be achieved only when "concrete, datable archaeological evidence is found". Until that point, postulations of the date of arrival of northern indigenous people will constitute little more than educated guesses.(p.50)

<sup>8</sup>Yerbury, C.J., The Subarctic Indians and the Fur Trade 1680-1860, (University of British Columbia Press: Vancouver, 1986), pp.10-16; 17-129. See also C.A. Bishop and A.J. Ray, "Ethnohistorical Research in the Central Subarctic: Some Conceptual and Methodological Problems", The Western Canadian Journal of Anthropology, 4(1), (1976):116-144. The model enlisted by Yerbury and discussed here is a modification of the chronology originally suggested by Bishop and Ray.

<sup>9</sup>C.J. Yerbury, *ibid.*, p.10; Bishop and Ray, *ibid.*, pp.125-145.

<sup>10</sup>Ray, note 5, *supra*, pp.26-33; Bishop and Ray, *ibid.*; Yerbury, *ibid.*, pp.10-13,17-49.

century<sup>11</sup>, these subdivisions may be understood in *spatial* as well as temporal terms.<sup>12</sup> In the latter context, the middleman and indirect trade periods reflect a point of time wherein European trading interests relied heavily upon the willingness of the fur trade to come to them. The Hudson's Bay Company<sup>13</sup>, for example, maintained a policy of restricting establishment of posts to the Bay area for most of the early trade period, not venturing inland until into the late 17th and early 18th centuries.<sup>14</sup> In this way, the company was forced to rely almost entirely upon their Indian middlemen to establish and maintain an indirect trading relationship with interior indigenes. The spatial dimension of these periods is derived from the "rippling effects" instigated by the erection of a trading post in a particular area. The initial ripple, closest to the post itself, encompassed the "local" or "direct" trade zone. In this region, income derived from the harvesting of peltries for trade might be supplemented through hunting and foraging activities, the fruits of which were made available as provisions for the post.<sup>15</sup> These activities sometimes took the hunter/trappers into the

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<sup>11</sup>Again, depending upon the region in question. Yerbury, (*ibid.*, p.13), suggests the boundaries of 1680 and 1769 on this period, but with a careful qualification that these dates may not hold true for all regions.

<sup>12</sup>Ray (noté 5, *supra*) speaks extensively to the spatial dimensions of these periods. His assertions, when combined with Yerbury's manipulation of the temporal aspects of the chronology, present a two-dimensional picture of the middleman and indirect trade concepts.

<sup>13</sup>The Hudson's Bay Company (hereinafter, the "H.B.C.") was created in 1670 and thus may be characterized as one of the factors precipitating movement into the historic era. Although it emerged on the coat-tails of protohistoric era, its policy of coastal posts is a good example of the sorts of elements which facilitated the development of the middlemen's role and were influential in fostering the indirect trade. See Yerbury, note 8, *supra*, pp.44-49.

<sup>14</sup>There is some dispute of this date. Yerbury sets the first marked European penetration of the middleman and indirect trade areas as within the "Historic Period", between 1770 and 1800 (*ibid.*, p.13.). Ray (*ibid.*, pp.33-34) would appear to agree with Yerbury, asserting that middlemen dominated trade in the protohistoric era, owing to the H.B.C.'s reluctance to establish inland posts until after approximately 1774. Those who challenge the positions of Yerbury and Ray appear to do so in conjunction with debates as to the era of significant culture contact and the point of time at which it is possible to detect substantial alterations in the conduct of native life owing to European penetration and the fur trade. These points will be considered below.

<sup>15</sup>Ray, *ibid.*, pp.26-27.

middleman zone which began on the outskirts of the local region and carried on into the indirect zone. For the most part, however, the middleman zone consisted of the mileage between the post and its direct trade, and those natives whose residence in the indirect zone prohibited them from participating in the direct trade.<sup>16</sup>

The position of Indian middlemen in the direct trade market of the protohistoric era was threatened to an increasing extent as this period drew to a close. The incipience of the historic era in the Canadian north was marked by an increasing willingness on behalf of the Europeans to enter into direct trading arrangements with natives in the indirect zone, an initiative which necessarily endangered the role of the "go-betweens".<sup>17</sup> In the Early Fur Trade Period which initiated the historic phase, traders from the H.B.C. as well as many of its French-Canadian competitors began to actively solicit trade in the protohistoric indirect regions. 1770 to 1774 saw the "beginnings of an intensive, large-scale trade to the northwest"<sup>18</sup> which, although eliminating much of the middleman market, served primarily to

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<sup>16</sup>Ray, *ibid.*, p.26. See also Innis, who in his sizeable volume The Fur Trade in Canada, elaborates extensively upon the part played by the middlemen in the developing trade. These individuals, as their name implies, were natives who bridged the often hazardous geographical gaps between interior indigenes and the eastern traders by carrying the furs of the former to the latter for trade. This became a highly profitable and coveted position as the middlemen came to realize that since the interior societies had never seen many of the European goods, they would not know a *new* tool from an old one. Upon this realization the middlemen came to trade their own often well-used —and beyond use — tools and goods for the unwitting natives' furs, which were in turn taken to the traders and exchanged for new products as if they were the fruits of the middlemen's own labors. When the commodities of the trade expanded to include muskets, the middlemen were provided with the means to fortify and protect their enviable position —a task which they approached with a feverish dedication when the French, and later the British, threatened their monopoly by sending their own agents into the northwest. See Harold A. Innis, The Fur Trade in Canada. An Introduction to Canadian Economic History, (rev. ed.), (University of Toronto Press, Toronto. 1956). Yerbury also elaborates on the role of Middlemen, most specifically in his "Protohistoric Traders and Middlemen", in note 8, *supra*, pp.17-50; as do Arthur J. Ray, note 5, *supra*, pp.26-34, esp.30-31; and, to a lesser extent, Sylvia Van Kirk, Many Tender Ties. Women in Fur Trade Society, 1670-1870, (Watson and Dwyer Publishing Ltd.: Winnipeg, 1980).

<sup>17</sup>As will be discussed below, those natives involved in the tertiary trade did not give up their profitable position without a fight; at this point, however, it is sufficient to appreciate that the historic era bore witness to increasing European penetration of the north.

<sup>18</sup>Yerbury, note 8, *supra*, p.56.

displace such activities into the few remaining "virgin areas".<sup>19</sup> As a consequence of this rearrangement, there remained as late as 1789 some groups of Dogrib and Slavey Indians untouched by the direct trade.<sup>20</sup> By the conclusion of the early trade period in 1800, however, virtually all natives of the northwest had experienced some measure of direct contact with European influences.<sup>21</sup>

The establishment of increasing numbers of rival posts in the northwest signals movement into the second term of the historic era. As might suggested by its title, the Competitive Trade Period (1800–1821) was characterized by intensive and sometimes violent competition between the Hudson's Bay and the French–Canadian North West Companies primarily, but was known to include challenges from a number of smaller enterprises which sprang up at various points in this period.<sup>22</sup> In their capacity as fur-harvesters, northern natives were placed at the center of the companies' ongoing feuds and received more than a few cuts from the cross-fire. The past few years had seen the introduction of a number of European goods and technologies which, although easing the subsistence routine, had rendered many native groups increasingly dependent upon the fur trade.<sup>23</sup> Few of the companies were loath to exploit those dependencies nor to introduce additional "incentives" to trade. Notable among the latter was the use of alcohol; the effects of the *spiritus frumenti* upon the natives was quickly recognized and used to the advantage of the less scrupulous traders.<sup>24</sup>

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<sup>19</sup>*Ibid.*, p.59.

<sup>20</sup>*Ibid.*

<sup>21</sup>Once again the caution must be made that the precise dates of the various periods differed from area to area. Notwithstanding this variation, it remains a safe assumption that the conclusion of the early fur trade period saw virtually all northern natives touched by some measure of European influence.

<sup>22</sup>See Yerbury, note 8, *supra*, pp.68–69; Innis, note 16, *supra*.

<sup>23</sup>Yerbury, *ibid.*, p.94; Innis, *ibid.*; Gustavus Myers, A History of Canadian Wealth, (2nd ed.), 1976, (James Lewis and Samuel Ltd.: Toronto, 1914), pp.48–62.

<sup>24</sup>Myers, *ibid.*, pp.60–61, "Rum...was given to the various parties in competition, to the Indians and the half-breeds; the whole country was demoralized; the Indian tribes were in conflict

An additional side effect of this heightened movement of traders into the north was a rise in the incidence of disease among the natives. Many of the Europeans brought with them afflictions such as smallpox and measles, to which the natives had no immunity and which thus raged through their numbers with unimaginable fury.<sup>25</sup> Small pox, measles, influenza and others claimed as much as two-thirds of some bands, destroying the economic/subsistence base of many groups. The costs of disease were greatly exacerbated by the death rituals of some Athapaskan groups, such as the Chipewyan,<sup>26</sup> whose mourning rites centered around destruction of the mourners' property. A diseased population lacking in functioning guns or traps could easily fall prey to starvation, and the destruction of clothing enhanced the vulnerability to illness. It was often left to the H.B.C. to re-provision the survivors in order to mitigate the possibility of mounting casualties and encourage resumption of fur harvesting activities. Disease was thus a costly and wasteful side-effect of the movement of the fur trade into the Canadian northwest.

The escalation of trade competition in this epoch required that natives direct increasing time and energies to the harvesting of fur, which in turn drastically curtailed the amount of time open for traditional subsistence pursuits. Before the close of the competitive trade period, a significant proportion of northern natives were dependent upon the posts for food as well as the upkeep of their now-necessary European technologies. This exacerbation of the trade reliance initiates the final phase of the historic era: the Trading Post Dependency Period

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<sup>24</sup>(cont'd) against each other. In fact, whatever a particular post thought was likely to ruin his competitor and to advance his own interest was done without the least regard to morality and humanity."

<sup>25</sup>Shepard Krech III, "Disease, Starvation, and Northern Athapaskan Social Organization", 5(4), American Ethnologist, (1978):712-715; Shepard Krech III, "Reconsiderations of Aboriginal Social Organization in the North American Subarctic", Arctic Anthropology, 17(2), (1980):5; Shepard Krech III, "The Influence of Disease and the Fur Trade on Arctic Drainage Lowlands Dene, 1800-1850", Journal Of Anthropological Research, 39(1), (1983):126-131.

<sup>26</sup>Yerbury, note 8, *supra*, pp.147-159.



(1821-1890).<sup>27</sup> It is in this concluding epoch that effects of the evils implicit in the competitive era became most apparent.<sup>28</sup>

The intense competition between the numerous trading companies of the preceding period declined substantially after 1821. The amalgamation of the Hudson's Bay and Northwest Companies in that year spelled an end to the intense conflict which had characterized the Companies' association of earlier times, leading to an unprecedented stabilization of the northern trade. This ballast was in large part the result of more pacific exchange relations with the natives. The erection of permanent posts throughout the north had led to the deterioration of almost all indirect trade areas and thus to the role of middlemen as well.<sup>29</sup> With the removal of the intermediaries, there remained only one impediment between the Company and the individual fur harvester: the Trading Chiefs.<sup>30</sup> The

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<sup>27</sup> *Ibid.*, pp.13, 96-128.

<sup>28</sup>As will be shown below, there is a substantial measure of controversy regarding the form and extent of those effects in this period. While Yerbury, Krech, Townsend ("The Tanaina of Southwestern Alaska: An Historical Synopsis". Western Canadian Journal of Anthropology, 2(1), 1970:2-16.) and others view the culture contact resulting from the fur trade as causing a good deal of change and adjustment on behalf of the northern Athapaskans. These scholars believe much of that change was readily apparent in the late 19th century while others, including Gillespie (see, for example, her "Changes in Territory and Technology of the Chipewyan" Arctic Anthropology, 13-14(1), 1976:6-12), Janes (e.g., "Culture Contact in the 19th Century Mackenzie Basin, Canada." Current Anthropology, 17(2), 1976:344-345.), and Smith (e.g., "Introduction: The Historical and Cultural Position of the Chipewyan", Arctic Anthropology, 13(1), 1976:1-3.) hypothesize that most, if not all, the trade's negative side effects did not surface until well into the 20th century. Prior to that time, it is argued, Athapaskans involved in the trade were able to pick and choose those aspects of European technology amenable to incorporation into their traditional subsistence patterns. It was not until the latter century, and a drastic escalation in the rate of introduction of those technologies, that substantial cultural change was effected among the northern Athapaskans. Both of these perspectives will be discussed in the body of this chapter.

<sup>29</sup>Yerbury, note 8, *supra*, p.96. Not that the primarily Cree and Chipewyan intermediaries gave up their indirect trade monopoly without a fight. In the declining years of the competitive period and in the initial stages of the dependency phase, no small measure of trading time and expense was lost in warfare over the indirect trade. In the latter stage, the Chipewyan continued as the predominate belligerent force against the European direct traders, causing the H.B.C. no small measure of heartache in its attempts to establish its own monopoly.

<sup>30</sup>*Ibid.*, pp.91,117; Innis, note 16, *supra*.

practice of appointing trading chiefs or captains had emerged early in the competitive period as a method of encouraging the most proficient trappers to make the harvesting of peltries their priority. It had involved singling out the best hunters and trappers with a salute of gun-fire upon their arrival at a post and the subsequent giving of gifts to the captain, both for himself and his immediate followers. As an inducement to trade with a particular post, the method had been successful enough; but with the ascendancy of the H.B.C. and the marked reduction in competition which accompanied it, trading chiefs became little more than a barrier to negotiating with individual traders. It is for this reason that, subsequent to 1833, the Company adopted a policy against the appointment or encouragement of trading chiefs, thereby eliminating yet another form of "middleman" between the traders and the trappers themselves.<sup>31</sup>

The direct trading relationship which emerged between the Company and its individual trappers after 1833 held advantages for both sides. The native fur-harvester had often been exploited by either the middlemen or trading chiefs or, in some cases, a combination of the two. Middlemen had rarely carried more trading goods than they needed for their own comfort, meaning that indirect trappers commonly received used commodities at well over normal, direct trade prices.<sup>32</sup> Where trading chiefs were involved, it was not unusual that the relationship they shared with their cohorts was of a "selfishly exploitive" nature.<sup>33</sup> With the abolition of these participants in the trade, the individual trapper was afforded at least the right to negotiate with the Company itself. The latter welcomed this opportunity, as it afforded them a greater control over the activities of single trappers.<sup>34</sup> Records of credits extended and furs received enabled the Company to keep track of the viability of each

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<sup>31</sup>Yerbury, *ibid.*, p.117.

<sup>32</sup>Innis, note 16, *supra*; Ray, note 5, *supra*, pp.30-31.

<sup>33</sup>Yerbury, *ibid.*, p.119-120.

<sup>34</sup>*Ibid.*, pp.118-119.

trapper; a viability which could be enhanced through the withholding of credit until the production of pelts increased.

The increasing pressure of the H.B.C. upon natives to make the harvesting of fur and provisioning of posts their priorities was not without dubious effects on the native population. Concentration upon a single endeavor was often at the expense of many others, resulting in an increased Indian dependency upon the trade. As trappers dedicated increasing amounts of time and energy to the securing and preparing of peltries, they were afforded less opportunity to engage in traditional subsistence pursuits. Hence they were forced to rely upon the posts to fill those needs the natives no longer had to time to attend to themselves. Many basics, including food and some articles of clothing, were obtained from the trade rather than traditional methods. In an ironic twist, the same fate befell those natives who emphasized subsistence in order to provision the posts. To the extent that the fruits of their efforts were traded for those European technologies which had become a major factor in post-trade subsistence regimens, the hunters were caught in the same cycle as the trappers. Whereas the trappers needed foodstuffs from the post to enable them to devote more time to trapping, the hunters needed such items as gunpowder, flints and replacement rifles in order to continue provisioning activities. Thus the H.B.C. had a some manner of hold upon virtually all natives participating in the trade.<sup>35</sup>

The Company's emphasis upon trapping and hunting had additional negative effects. The pervasive pressure to focus solely on these activities sometimes led trappers to neglect their own subsistence, leading to an enhanced reliance upon the H.B.C. for food.<sup>36</sup> This dependency became especially pronounced in those times when the posts themselves were least able to meet the natives' needs. In periods of extreme climatic conditions, for example, when sparse snows made hunting difficult or thick ice hindered fishing, the posts' supplies were rapidly

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<sup>35</sup>Yerbury discusses the interrelationship of the actors in the fur trade at *ibid.*, pp.121-126.

<sup>36</sup>Shepard Krech III, "Reconsiderations", note 25, *supra*, p.7.

depleted, resulting in terms of extreme want for both the traders and the trappers.<sup>37</sup> Climatic vagaries were exacerbated by faunal cycles. Some of the primary subsistence animals were affected by population oscillations the lowest points of which contributed greatly to meagre conditions.<sup>38</sup> The combination of such factors at various times meant that the trappers, who had neglected or been unable to meet their own subsistence needs, were almost entirely dependent upon the trading posts, who were in turn dependent upon the hunters' abilities to produce provisions in spite of hard times. The failure of one link in this chain could easily equate to starvation for all, and starvation to the downfall of the entire fur trade.

Climatic and faunal inconstancies were rendered all the more problematic by the tendency of some natives to over-trap or hunt in times of surplus. Hunters appear to have been most at fault in this regard, sometimes killing "thousands of reindeer (caribou), chiefly for the skins and tongues".<sup>39</sup> Moose and buffalo were equally affected, as were those smaller fur-bearers who formed the focus of trading activities.<sup>40</sup> By the mid-1830's, many of the species prevalent in the north prior to contact had been hunted or trapped to near extinction, reinforcing the ever-present vagaries of northern subsistence.

The toll on livestock was secondary to the human expenditure implicit in the advancement of the fur trade. Beyond the consumption of native lives by foreign diseases, an additional peril lay in the increased warfare which resulted from the competition for control of the indirect trade. The Chipewyan and Cree, for example, engaged in a protracted, often violent competition for control of the middleman trade necessitated by the H.B.C.'s early

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<sup>37</sup> *Ibid.*, p.4.

<sup>38</sup> Krech speaks at length of the importance of the "Hare cycle". Hares, as one of the primary subsistence animals, provided both food and clothing to many northern natives; pronounced drops in the hare population thus inevitably coincided with privation among those who depended upon them. See: Shepard Krech III, "Disease", note 25, *supra*, pp.710-732; Krech, "Influence", note 25, *supra*, pp.123-146; Krech, *Ibid.*

<sup>39</sup> *Ibid.*, "Influence", p.132.

<sup>40</sup> *Ibid.*

policy of limiting posts to the Bay area.<sup>41</sup> These tensions were greatly exacerbated when the company initiated movement into the northwest, thereby adding a third dimension to the struggle. The result was an intensification of the pre-existent violence and its redirection toward company officials and posts.<sup>42</sup> Besides aggravating hostilities which were often already present, the company set afoot further conflicts by persuading particular native groups to exploit territories not traditionally their own.<sup>43</sup> Forcible entry into alien regions was the root of many intertribal battles, as was the aggression of individual natives in harvesting another group's furs.<sup>44</sup> Such tensions reached their height in the competitive trade period, lessening somewhat with the stabilization of trade relations in the early instances of the dependency phase.<sup>45</sup>

It would seem clear from the preceding that the northwest expansion of the fur trade possessed profound implications for Athapaskan societies. What is less clear, however, is the nature of those effects as well as the point in time at which they became apparent in northern native society. Two distinct, but necessarily related factors appear capable of accounting for this ambiguity. The first stems from the relative lack of documentation of Athapaskan life originating in this era.<sup>46</sup> Beyond the findings of archaeologists, the best

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<sup>41</sup>Yerbury, note 8, *supra*, pp.44-49.

<sup>42</sup>*Ibid.*, p.44.

<sup>43</sup>Krech, note 39, *supra*, p.133.

<sup>44</sup>*Ibid.*

<sup>45</sup>The chronicle of warfare which accompanied the establishment of a northwestern fur trade is intricate and extensive; a consummate elaboration of this aspect is far beyond beyond the scope of this work. Those readers interested in obtaining an in-depth illustration of fur-trade hostilities are encouraged to consult Yerbury, note 8, *supra*; Krech, note 25, *supra*; Innis, note 16, *supra*.

<sup>46</sup>Scholars interested in this area seem to have resigned themselves that very little can be said with certainty when discussing the truly aboriginal state of northern Athapaskans. See: Elman R. Service, The Hunters, Foundations of Modern Anthropology Series, (2nd ed.), (Prentice-Hall Inc.: New Jersey, 1979), p.91; June Helm-MacNeish, "Leadership Among the Northeastern Athapaskans", Anthropologica, 2, (1956):131; Keith J. Crowe, A History of the Original Peoples of Northern Canada, (McGill-Queen's University Press: Montreal, 1974),

evidence concerning this period comes from the reports and journals of the earliest traders and missionaries, all of which are of very limited generalization and prone to a good deal of divergent interpretation. It is from this latter reality that the second factor emerges. In the absence of strict evidence supporting one interpretation over another, an ongoing controversy has raged among anthropologists, archaeologists and ethnohistorians regarding precisely what it is the evidence says.<sup>47</sup> The essential outcome of that controversy appears to be a situation where very little can be said with certainty and even less without extensive qualification.<sup>48</sup>

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<sup>46</sup>(cont'd) pp.7-8; and to a lesser degree A.G. Morice, note 4, *supra*; as well as Emile Petitot, note 4, *supra*. The traders were the first to enter the North, and it is perhaps not surprising that their primary interests provided little room for the recording of anthropological and ethnological data. The missionaries were the first to record the daily routines and philosophies of early native societies, however, as they arrived in many cases well after the traders, their writings inform only of the protohistoric lifestyle of northern indigenes. What is known of prehistoric aboriginals is largely the result of archaeological work, which offers at best a partial picture of these societies.

<sup>47</sup>To gain a full appreciation of the extent of this controversy, see: Shepard Krech, III, "Reconsideration", note 25, *supra*, pp.1-11. Robert R. Janes, note 28, *supra*; Robert R. Janes, "More on Culture Contact in the Mackenzie Basin", *Current Anthropology*, 18(3), (1977):554-556; J.C. Yerbury, "On Culture Contact in the Mackenzie Basin", *Current Anthropology*, 18(2) (1977):350-352; J.C. Yerbury, "Further Notes on the Ethnohistory of the Mackenzie Basin", *Current Anthropology*, (1978):458-459; J.C. Yerbury, "Protohistoric Canadian Athapaskan Populations: An Ethnohistorical Reconstruction", *Arctic Anthropology*, 17(2), (1980):17-33; Richard Slobodin, "Some Recent Developments in Subarctic Culture History and Ethnohistory: Comments", *Arctic Anthropology*, 17(2), (1980):52-59; Edward H. Hosley, "The Aboriginal Social Organization of the Pacific Drainage Dene: The Matrilineal Basis", *Arctic Anthropology*, 17(2), (1980):12-16; Charles A. Bishop and Shepard Krech III, "Matriorganization: The Basis of Aboriginal Subarctic Social Organization", *Arctic Anthropology*, 17(2), (1980):34-45; Eleanor Leacock, "A Reappraisal of Aboriginal Athapaskan Social Organization: Comments", *Arctic Anthropology*, 17(2), (1980):60-63; Michael I. Asch, "Steps Toward the Analysis of Athapaskan Social Organization". *Arctic Anthropology*, 17(2), (1980):46-51; Carol R. Ember and Marvin Ember, "Conditions Favoring Matrilocal Versus Patrilocal Residence", *American Anthropologist*, 73, (1971):571-594; Carol R. Ember, "Residential Variation among Hunter-Gatherers", *Behavior Science Research*, 10, (1975):199-227; Carol R. Ember, "Myths About Hunter-Gatherers", *Ethnology*, 17, (1978):439-448; Beryl C. Gillespie, "Changes in Territory and Technology of the Chipewyan". *Arctic Anthropology*, 13-14(1), (1976):6-11; I. Dyen and David Aberle, *Lexiconical Reconstruction, The Case of the Proto-Athapaskan Kinship System*, (Cambridge University Press: London. 1974).

<sup>48</sup>As put by Krech, "As it stands now there is empirical evidence of bilateral and bilocal organization in the late 19th and 20th century and of matrilocality in the 19th century; there is ample data (that needs collation and analysis) on 18th and 19th century fur trade processes; and there are two inferences on aboriginal social organization, one favoring a bilateral-bilocal model, the other favoring a matrilocal and perhaps matrilineal model. The *early* (sic) historical evidence in support of either is scanty, ambiguous, and not very revealing so far, and must be interpreted cautiously and judiciously". *Ibid.*, p.8.

Under these circumstances, it is rather difficult to gauge the degree of change experienced by Athapaskans as a result of Euro-Canadian contact; in the absence of a "defining standard", determining deviations from that standard becomes a highly problematic endeavor. Notwithstanding these considerations, it is well to attempt to compile a composite of pre-contact Athapaskan society in order to fully appreciate the nature of the effects of Euro-Canadian penetration of the North. In the course of that effort, however, the reader is well-advised to remember that this composite must be understood as simply the maximum that can be said given the state of the research.

Aboriginal Athapaskan society manifested a relatively simple social organization, with little differentiation between individuals or groups beyond age and sex in the former case, and kinship or family ties in the latter.<sup>49</sup> Individual distinction was not easily achieved in aboriginal Athapaskan society. A strong respect for personal autonomy precluded clear displays of a "will to power", and other routes to self-aggrandizement such as wealth, hereditary classes or physical dominance were for the most part non-existent.<sup>50</sup> A man or woman might gain passing prestige through the demonstration of superior hunting skills or exceptional gifts of oratory or common sense, but there existed no concrete, structured channels through which one might reveal these abilities and embark upon a climb to social prominence.<sup>51</sup> Although most members of Athapaskan society (save the incorrigibly incompetent or patently incapable)

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<sup>49</sup>Kaj Birket-Smith. "Contributions to Chipewyan Ethnology", Report of the Fifth Thule Expedition, 1921-1924, 6(3), (1893):66; Elman R. Service, note 46, *supra*, p.8; Elman R. Service, Origins of the State and Civilization. The Process of Cultural Evolution. (W.W. Norton and Company: New York, 1975); James W. Vanstone, "The Changing Culture of the Snowdrift Chipewyan", National Museum of Canada Bulletin, No. 209, Anthropological Series no. 74, (Ottawa. 1965), pp.70-71, 75.

<sup>50</sup>Service, *ibid.*, p.31; Birket-Smith, *ibid.*, pp.66-67.

<sup>51</sup>Morton H. Fried, "On the Evolution of Social Stratification and the State", in Stanley Diamond, (ed.), Culture in History: Essays in Honor of Paul Radin. (University Microfilms: Ann Arbor, Massachusetts. 1967). As articulated by Fried in contemplating the role of leader in the hunt, "A skilled and lucky hunter may gain prestige though it conveys no privileged economic or political role. There is frequently a feeling of transience as it is understood that the greatest hunter can lose his skill or his life", (p.716).

could look to the receipt of some measure of honor by virtue of the knowledge and skills accumulated by their reaching of old age, even the role of the gerontocracy was primarily advisory.<sup>52</sup> As a result of these considerations, the political and administrative aspects of Athapaskan life were remarkably limited,<sup>53</sup> as was the concept of authority.<sup>54</sup>

The minimal social structure exhibited by these peoples is characteristic of band-level, hunter-gatherer societies. These groups were characterized by generally small communities, consisting of a few families loosely integrated by marriage alliances and rarely complicated by notions of clan or lineage.<sup>55</sup> Taken together, this configuration of kin comprised the Band, a vague entity whose indefinite boundaries were often distinguishable only by the fact that their membership felt too closely related to intermarry. Beyond this familial aspect, there was a conspicuous absence of formal ties or commitments binding the component families to the band. Individuals were free to move from group to group and often did so as dictated by personal preference or subsistence needs. Post-marital residence conventions also spoke to band affiliation, disposing a newly-wedded couple to reside with the husband's or wife's band, as determined by the dictates of tradition and the necessities of context.<sup>56</sup>

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<sup>52</sup>June Helm. "The Lynx Point People: The Dynamics of a Northern Athapaskan Band". National Museum of Canada Bulletin, No.176, Anthropological Series No.53., (1961):170-173; June Helm MacNeish, note 46, *supra*; Michael I. Asch, note 47, *supra*; Birket-Smith, note 49, *supra*, pp.66-67.

<sup>53</sup>Service, note 49, *supra*, pp.1-9; 47-63 (note: Service's assertions about the nature of Athapaskan political life must be qualified with the caution that he believed these societies to be organized along *patrilineal/patrilocal* lines, a supposition which has been recently demonstrated as lacking a solid foundation). See: Shepard Krech III., "Reconsiderations", note 25, *supra*; Edward H. Hosley, note 47, *supra*; Carol R. Ember, "Myths", note 47, *supra*; Carol R. Ember, "Residential", note 47, *supra*; Ember and Ember, "Conditions", note 47, *supra*; Fried, note 51, *supra*.

<sup>54</sup>The nature of the role of authority in pre- and proto-historic Athapaskan society will be examined in detail in the concluding portion of this chapter.

<sup>55</sup>The Kutchin may be an exception to this tendency. Slobodin reports the existence of clans within this group, thereby setting them apart from other Athapaskan groupings. See Richard Slobodin, "Band Organization of the Peel River Kutchin". National Museum of Canada Bulletin, No.179, Anthropological Series No.55, Ottawa. (1962):42-45.

<sup>56</sup>It is almost impossible, given the degree of uncertainty generated by much of the research



To say that early Athapaskan society was simple is not to suggest the lack of delicately balanced relationships amongst its membership. The egalitarian nature of band society meant that men and women existed as relative equals, often working side-by-side in hunting, trapping/trading and warfare.<sup>57</sup> In many ways this cooperation was a product of the often harsh northern environment and the limited technologies available (prior to the advent of the fur trade) to the natives for harvesting its meagre resources.<sup>58</sup> Armed only with "crude bows and arrows"<sup>59</sup>, the greatest strength of the hunting unit was its collective skill and wisdom, a necessity which transcended gender differences. Collaboration was also related to the fickle nature of the hunt; the potential for even the best hunter to lose his/her skill, coupled with the realities of faunal uncertainties and climatic constraints, encouraged an ethic of sharing with the less fortunate. Dispersing the wealth acted as a sort of insurance against the day the less fortunate person was oneself. This interdependence was as influential in the

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<sup>56</sup>(cont'd) regarding the politics of gender influences among protohistoric Athapaskans, to make any sort of definitive statement concerning them. Beyond somewhat vague agreement on the "universality of gender distinctions" (See Eleanor Leacock, "Women's Status in Egalitarian Society: Implications for Social Evolution." Current Anthropology, 19(2), 1978:248), there exist only pockets of consensus regarding whether those distinctions are best described as following matrilineal (stated succinctly, matrilinearity refers to society organized upon female dominance in terms of lineage and post-marital residence patterns. See: Service, note 49, *supra*), patrilineal (a society organized along patrilineal lines manifested male dominance in terms of lineage and post-marital residence. See Service, *ibid.*), or bilateral lines (bilaterality describes a society characterized by flexibility in terms of lineage and post-marital residence patterns, where the preponderance of one form over another is determined in large measure by environmental conditions. Such a society could thus manifest a patrilineal disposition at one point in time and later reveal a matrilineal emphasis, as the larger context dictated). See also: Krech, "Reconsideration," note 25, *supra*; Eleanor Leacock. "A Reappraisal of Athapaskan Social Organization: Comments", Arctic Anthropology, 19(2), (1978):61; Michael I. Asch note 47, *supra*, pp.49-59.

<sup>57</sup>Eleanor Leacock, "Women's Status", *ibid.*; Sylvia Van Kirk, note 16, *supra*.

<sup>58</sup>There is some disagreement concerning the measure of hardship experienced by prehistoric Athapaskan aboriginals. Some researchers believe that prior to the shuffling of territories implicit in the northwest expansion of the fur trade, many of the original inhabitants occupied lands of reasonable prosperity and did not face much of the hardship commonly associated with northern subsistence. It was only with the increasingly aggressive movements of the Cree and Chipewyan middlemen into the interior, driving their fellows into unfamiliar and less bountiful regions, that such groups as the Slavey, Hare, Dogrib and Yellowknife experienced subsistence tensions. See: Yerbury, *ibid.*

<sup>59</sup>Service, note 49, *supra*, p.11.

interpersonal realm of the group as it was in matters of physical endurance: To the extent that individual survival rested upon the good will of one's cohorts, care was taken to minimize social friction and maintain positive relations.<sup>60</sup>

Because it lay at the heart of Athapaskan social organization, any alteration to the traditional mode of subsistence possessed profound implications for the smooth functioning of the group. The introduction of a fur-trading economy, as was shown earlier, cut at the very center of that heart and thus immeasurably affected Athapaskan culture. Modern technologies, faunal depletions and the shift to an emphasis on fur-harvesting could not help but influence Dene traditions, and in a way which has left some northern native populations reeling in the wake of their contact with the white man. Although they were spared the ghettoization experienced by southern indigenes on federally administered reservations, they have not escaped the legacy of paternalism and patronization implicit in that government's Indian policies. Neither have they avoided the rising tide of Indian activism in the past decade—Indeed it is in this Last Frontier that the most decisive and potentially divisive land claims actions will be played out.

## [II] Culture Within Canada: The Great Dene Plan

One of the most intriguing Northern claims is the Dene Nation's drive for political independence outlined earlier in the body of this chapter. Because it involves an actual transfer of ownership of lands—potentially resource rich lands—this claim faces a significant measure of resistance from a number of directions and interests. Certainly the Federal Government is concerned as it risks losing control not only of the territories involved, but of

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<sup>60</sup>Service, note 49, *supra*; Diamond Jenness, Indians of Canada, (University of Toronto Press: Toronto, 1977). More will be said on the interpersonal aspects of early Athapaskan society in the discussion of authority contained in the latter part of this chapter.

the indigenes as well.<sup>61</sup> Non-native northerners, whether industrialists or otherwise, also cannot help but wonder what is to become of the lands they have purchased or may wish to purchase from the Crown. In addition, it would seem reasonable that these individuals might wonder what their status would amount to as non-Indians living in an Indian Nation. This would seem especially true of the present members of the Territorial Government, whose jobs would be obviated by the fact of an Indian Government.

The anticipated design of "Denendeh"<sup>62</sup> would incorporate a quasi-provincial political status, but with a number of important distinctions. Government would consist of two levels with powers divided between a single National Assembly and a number of Community Assemblies. The latter may in turn consist of an amalgamated Band and Community Council or of the latter independent of the Band. In either situation, the Dene would be guaranteed thirty percent of the total seats on the councils, both national and municipal. These bodies would derive their powers from a "Charter of Founding Principles for Denendeh", which would uphold Dene culture through such features as entrenchment of native languages and control over educational, health, social and judicial matters and services.<sup>63</sup> As plans for the government now stand, no clear articulation exists of how the administration of these services might differ in the Dene context<sup>64</sup> nor how these might be constructed.

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<sup>61</sup>Since, in the event of their securing independence, they would no longer fall under the wings of the Department of Indian Affairs. Inasmuch as this might be seen as a positive turn of events for both the bureaucrats and the natives, it is doubtful that so entrenched and self-perpetuating a bureaucracy will unleash its charges without some sort of fight. In addition, any supposed saving of costs by the federal department achieved through Dene independence is little more than symbolic, as, in the larger scheme of things, the cost of funding the fledgling Indian government and its related institutions will still be borne by the same government which funded the DIAND. Consequently it would seem uncertain that the Federal Government has a great deal to gain by supporting the Dene claim —except perhaps some of the face they lost in previous land claims interactions.

<sup>62</sup>Athapaskan word meaning *Land of the People*.

✓<sup>63</sup>The Dene Nation and Metis Association of the Northwest Territories, "Public Government for the People of the North", Draft Document, (January 1, 1987), p.9.

<sup>64</sup>Beyond statements that they would be ministered in accordance with "Dene principles and traditions". *Ibid.*

To date the proposal has raised at least two contentious issues. Included here are the conditions placed upon eligibility to vote and hold office in Denendeh, which limit these privileges to those residing in the territory for ten years and a given community for at least two years. Given the highly transient nature of much of the northern Canadian citizenry, this requirement has spawned more than a little controversy. The Dene, who rightly perceive the bulk of this aspect of the Northwest Territories' population as non-native industrialists, promote the residence requirement as necessary to preserving the true "Dene nature" of Denendeh. Non-natives respond to it with charges that not only is the ten year requirement too high, but that the underlying rationale is questionable. Would the restriction come to play against newly arrived natives as well as non-natives? If so, does this not constitute discrimination? And who is to say that a ten-year resident is more committed to the fledgling Dene state than a non-tenured citizen? Admitting the basic logic propelling such concerns, the Dene have expressed a willingness to meet with their non-native counterparts to flesh out a more workable version of the residence rule. Among the proposed alterations to the rule is its reduction to at least five, but no less than two years.<sup>65</sup>

It would seem logical that the Dene have a right to take measures to protect the *Indianness* of Denendeh, inasmuch as it is that very quality which propelled its creation in the first place. However, as Denendeh would exist as a "state within a state", questions necessarily arise as concerning how far such measures can go before they conflict with the goals of the surrounding state. With regard to the residential requirement discussed above, there is some debate as to whether the rule is inconsistent with the democratic philosophy of the larger polity. As Canada itself has such a rule, requiring that immigrants to this country reside here for a minimum of three years before applying for citizenship and its accompanying benefits, the preceding concern would seem groundless. The true controversy would seem to be one of jurisdiction— Would Denendeh, through its capacity as a

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<sup>65</sup> *Ibid.*

"province", possess adequate power to effect such a requirement? If yes, this would appear to constitute one of the "significant digressions" from traditional provincial status alluded to above.

A similar bone of contention is found in the context of land and resources in Denendeh. Based on the centrality of the man and land relationship to the Dene way of life, an important feature of their proposal is the assertion of full *proprietary* control over their traditional lands. The means of this control would be twofold; each community would have ownership and control of its immediate territories with all remaining lands owned by the Government of Denendeh.<sup>66</sup> This is not to say that the Dene are unwilling to acknowledge and respect third party interests, but rather that once in control of their land base, no further alienations will occur without Dene concurrence.<sup>67</sup> Subsequent to the activation of Denendeh, property titles will be granted only in the form of long-term leases, with occupancy rights, including the right to erect and own a building.<sup>68</sup> In line with the division of control, each community will decide which lands it will make available for leasehold within its borders.

Obviously the consequences of such a restriction on the development of resources are profound. The Dene have made plain their policy that, on Dene land, exploitation of resources must be in accordance with certain clearly defined conditions and directives.<sup>69</sup> Among these guidelines is the stated priority of the Dene right to hunt, fish and trap over all other renewable and non-renewable resource uses.<sup>70</sup> Constituting a clear intention to give

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<sup>66</sup>John U. Bayly, "Entering Canadian Confederation...The Dene Experiment", Unpublished Monograph, (August 1983).

<sup>67</sup>"Public Government", note 63, *supra*, p.11.

<sup>68</sup>*Ibid.*, p.11.

<sup>69</sup>*Ibid.*, pp.10-11; Bayly, note 66, *supra*, pp.486-488.

<sup>70</sup>"Public Government", note 63, *supra*, p.11.

priority to regional concerns over national interests, the Dene stand on northern development promises to be a highly problematic one. It is seriously debatable whether the federal government would be willing to transfer full land rights to a lesser government averse to the concept of exploiting subsurface assets; especially where such exploitation is clearly held as in the national interest. There is also an equal issue as to whether they should. If a democracy exists contingent upon some form of consensus among its components as to the desired ends of the whole they together comprise; why should one region have a greater power than another to guide the fate of that whole? Is there an as yet unrealized potential here for a tyranny of the minority?

Beyond the difficulties outlined above, the prognosis for realization of Denendeh is diminished by two impediments. The first of these concerns the reality that the Dene may not have grounds to act under the comprehensive claims process. In 1899 and 1921 the groups comprising the Dene and their Inuit counterparts acted as signatories to the eighth and eleventh of the Crown's Numbered Treaties.<sup>71</sup> Combined, these documents amount to the surrender of almost one-half the Denes' traditional lands in return for the usual modes of exchange.<sup>72</sup>

In the view of the Dene people, these treaties were signed as declarations of peace, not surrenders of land, an interpretation which has persisted to date. Justifying this construction is the Dene argument that, had these been true cession agreements in the tradition of the other Numbered Treaties, they would have resulted in the creation of reserves, which they did not. Further evidence supporting their position is found in the oral evidence of those few remaining witnesses to the signing of the treaties. Those present at the ratification adamantly recount the chiefs' insistence on assurances that signing would not affect

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<sup>71</sup>Commissioner on Indian Claims, "A Report Commissioner on Indian Claims Statement and Submissions", (Ottawa 1977) pp.19-20.

<sup>72</sup>*Ibid.*, p.20. Please consult the first chapter of this work for a full discussion of the contents of the Numbered Treaties.

the Dene right to continue to use and occupy their lands *indefinitely*.<sup>73</sup> In their opinion:

In 1899 and 1921 our forefathers saw fit to enter into treaties 8 and 11 with the Dominion of Canada. We did so in an effort to protect our interests from the continuing invasion of non-Dene. Our forefathers saw a need to obtain assurance from the non-Dene government, whom they felt was responsible for the actions of non-Dene on Dene lands, that the security of our way of life would not be undermined, that our right to continue to lead our chosen way of life and govern our own affairs would not be challenged.<sup>74</sup>

In the early 1970's the Dene attempted to translate their perception of enduring title into a court-ordered caveat. Their cause found solid support at the Territorial level where Mr. Justice Morrow (as he then was) rejected the treaties as cession agreements and approved the filing of the caveat.<sup>75</sup> The decision was overturned on appeal<sup>76</sup> and the case ultimately found its way to the Supreme Court of Canada. At this level the Justices did not deal with the issue of surrender, preferring to focus their reasons for denial of the caveat on other grounds. In their view, the lands in question qualified as "unpatented" and thus could not be protected by caveat on the basis of aboriginal title or otherwise.<sup>77</sup> The essence of the reasons for judgement lay in the Court's belief that land not protected by a patent of ownership could not be protected on the basis of a prior assertion of that ownership or interest.<sup>78</sup>

The crux of the issue lies in the differential interpretations of the effect of treaties 8 and 11 on the basis of the context in which these were signed. In compiling support for his

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<sup>73</sup>John U. Bayly, note 66, *supra*, p.476.

<sup>74</sup>The Dene Nation, "Agreement in Principle with Her Majesty the Queen in Right of Canada." (Yellowknife 1976). p.1.

<sup>75</sup>*Paulette et al and the Registrar of Land Titles*, (1973), 42 D.L.R. (3d), 8.

<sup>76</sup>*Re Paulette et al and the Registrar of Land Titles*, (1976), 63 D.L.R. (3d) 1.

<sup>77</sup>*Paulette et al v. The Queen*, (1977), 72 D.L.R. (3d) 161.

<sup>78</sup>*Ibid.*; definitions of key terms not offered in the decision were taken from the Black's Law Dictionary, Henry Campbell Black, ed., (St. Paul: 1979), pp.201-202 (caveat), pp. 1013-1014 (patent).

decision, Mr. Justice Morrow heard an abundance of evidence from Native people that, at the time of their negotiation, the treaties were clearly presented as pacts of peace with no reference to cession.<sup>79</sup> The written components of the documents, which clearly convey an intention of complete cession, were and remain immaterial on grounds that the signatories were neither a literate people or fully appreciative of the English language. Hence, at the time of ratification, they were almost entirely dependent upon the government's agents for an accurate presentation of the potential consequences of signing. In light of historical accounts, both written and oral, which present a rather machiavellian picture of the government's approach to securing cession<sup>80</sup>, it may be argued that the treaties are invalid inasmuch as the Indians' original assent was made neither freely nor in full appreciation of its potential effects. To uphold as lawful compacts ratified in this context would constitute the betrayal of the very foundation of the treating philosophy; for, as held by Vitoria: "A consent to the taking of possessions given in fear or ignorance is in truth no consent."<sup>81</sup> Thus it would seem that, in at least this case, the mere existence of a treaty covering a certain territory does not necessarily constitute conclusive proof of the extinguishment of a requisite aboriginal interest.

Even if it is accepted that treaties 8 and 11 did not remove the Dene's aboriginal interest in their traditional lands, an additional obstruction to self-determination may exist.<sup>82</sup>

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<sup>79</sup> *Re Paulette and Registrar of Land Titles* (no.2), (1973), 42 D.L.R. (3d), 8. See especially pp.30-35.

<sup>80</sup> See esp. Peter Puxley, "The Colonial Experience" in *Dene Nation: The Colony Within*, Mel Watkins ed., (Toronto: 1976) pp.103-120.; also: Commissioner on Indian Claims, "A Report Commissioner on Indian Claims Statements and Submissions." (Ottawa 1977) pp.19-20.

<sup>81</sup> Daniel J. Gormley, "Aboriginal Rights as Natural Rights," *The Canadian Journal of Native Studies* vol. 4, no. 1 (1984):41.

<sup>82</sup> The federal government would seem to have implicitly accepted the Dene's arguments by their acceptance of the Dene land claims proposal for negotiation. In agreeing to bargain with this group within the comprehensive claims scheme, the ONC automatically casts the claim as one arising where "rights of traditional use and occupancy have neither been extinguished by treaty nor superceded by law". See Task Force to Review Comprehensive Claims Policy, "Living Treaties: Lasting Agreements..." (Ottawa: 1985):12. If the federal



This impediment finds its base in the Dene desire to build a nation based on traditional Dene political philosophies and institutions. There are those who would argue, with some validity, that Dene culture did not — and hence does not — possess an institutional base sufficient to deal with the complex realities of the modern world. To the extent that such commentators choose to reflect upon the contents of *pre-contact*, truly aboriginal society, they might very well be correct. For, inasmuch as researchers possess a limited amount of information about Dene society at this time, what is known has awarded the Dene a "sort of anthropological renown for minimality of culture".<sup>83</sup> To the extent that this limitation is reflected in their political institutions<sup>84</sup> it would seem logical to anticipate some difficulty in translating those institutions to the highly developed and complex modern context.

### [III] Dene Traditions, Modern Complications: Reviving the Old to Address the New

The essence of the difficulty facing the Dene proposal would seem to lie in their wish to create a Dene nation-state which is sufficiently traditional to maintain its integrity and warrant its separateness, yet not so traditional as to put it out of step with the demands either of modern native society or those of the surrounding polity and population. When this requirement is tested in terms of the institutions which the Dene wish to activate in their Indian state, its problematical nature becomes even more apparent. Taking for example the Dene aspiration to assume control over the administration of justice in Denendeh, it becomes clear that the nearly three-hundred-year punctuation in Dene history caused by their

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<sup>82</sup>(cont'd) government, as the initiator of the original treaties, is willing to admit these did not extinguish the Denes' title, the author is equally accepting of the premise.

<sup>83</sup>MacNeish, note 46, *supra*; Helm, note 52, *supra*, p.131.

<sup>84</sup>Service informs that, despite the extremely simple nature of many band societies, none are so austere as to disallow the delineation of the basic social constructs. Hence, among the hunter-gatherers, the student should not be surprised to find institutions similar in spirit, if not so in form, to those manifested in more complex societies. See Service, The Hunters, note 46, *supra*, p.19.

discovery and colonization places some apparently insurmountable impediments on the road to Dene sovereignty.<sup>85</sup>

As it existed in early Dene society, the administration of justice was as simple and unremarkable as the society itself, operating without courts, police, formal laws or correctional services.<sup>86</sup> Despite this apparent lack of what is today associated with the workings of justice, Dene society was not unjust nor, as will be seen below, was it entirely "lawless" in the sense of lacking controls on individual behavior. It was not, as Hobbes said it would be, plagued by constant "wars of every man against every man"<sup>87</sup>; rather, individual battles were minimized through the constructive, *proactive* use of authority.<sup>88</sup> Unlike the contemporary context wherein preventive functions fall largely to criminal justice agencies created specifically for that purpose (i.e. police), responsibility for the control of deviance in aboriginal society was distributed with relative constancy across the group. Each individual was responsible to his/her peers for his/her behavior, and to the degree that membership in the group was necessary for survival in the harsh northern environment, care was taken to maintain balanced relations. The "constraint of custom" was perhaps the most powerful mechanism for ensuring harmony within the group. Labelled *reinforcement* by Service<sup>89</sup>, this control is perhaps best understood as the enforceable etiquette found in all relatively undifferentiated societies where all relations, whether predominantly social, political or economic, were of an intimately

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<sup>85</sup>The Dene wish to assume control over those areas of the law which fall under the jurisdiction of the provinces, including matters pertaining to policing, courts and correctional services.

<sup>86</sup>A reality which necessarily throws into question the legitimacy of these institutions as "traditional" for purposes of an Indian Nation.

<sup>87</sup>Cairns, Huntingdon. Legal Philosophy From Plato to Hegel. (John Hopkins Press: 1957), p.251. As Hobbes himself framed the situation: "Human passions stop only before a moral power they respect. If all authority of this kind is wanting, the law of the strongest necessarily prevails...and latent or active, the state of war is chronic".

<sup>88</sup>Service, note 46, *supra*, pp.47-61.

<sup>89</sup>*Ibid.*

face-to-face variety. Courtesies in this context were mandatory; those who failed to observe them could find themselves facing any of a number of penalties, depending on the nature of the breach and its frequency. Pressing or continual ruptures of the daily order by an individual or group of individuals were not often left unaddressed; construed as affronts to the community they were answered communally through

sanctioned forms of deterrence varying all the way from...ostracism and withdrawal of privilege to actual physical violence, even death.<sup>90</sup>

Thus although reinforcement was largely a proactive control, it was not without reactive capabilities.

To the degree that reinforcement acted as a regulator of individual interactions, *administration* may be seen as its counterpart in the directing of group activities.<sup>91</sup> This form of authority may be described as that which is *always already there*<sup>92</sup> and shifted from one individual to another as task and abilities dictated. The assumption of such authority required any number of qualities and talents, ranging from "success in hunting, in manipulating the supernatural and in war [to] skill in the management of tempers" and "superior powers of the mind".<sup>93</sup> Through such expertise the Athapaskan administrator might serve as

advisor, director and perhaps initiator of specific military actions<sup>94</sup> and/or of occasional and particular economic activities beyond the day-to-day hunting and

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<sup>90</sup>*Ibid.*, p.49.

<sup>91</sup>*Ibid.*, pp.48-54.

<sup>92</sup>In the Foucaultian sense of a power implicit in the social fabric which is open to use by different individuals at different times for different purposes. See Michel Foucault, Discipline and Punish. The Birth of the Prison. (Vintage Books: U.S.A. 1971).

<sup>93</sup>MacNeish, note 46, *supra*, p.153. See also: Birket-Smith, note 49, *supra*, pp.66-70; Jenness, note 60, *supra*, p.125; and Vanstone, note 49, *supra*, p.75.

<sup>94</sup>As noted earlier, warfare does appear to be a characteristic of pre-fur trade Athapaskan society. The introduction of trading with its emphasis on the market economy and highly divergent notions of power, wealth and authority greatly exacerbated early tensions. As a by-product of the trade, however, warfare was a relatively shortlived one. Reaching its most intense point with the apogee of the middlemen phenomenon, warfare became much less prominent with the extension of greater control over the trade by the primary trading companies.

gathering routine. Also, by virtue of his superior abilities and awe-inspiring powers, he might act as the prime opinion-giver in social matters within the band. His authority lay in putting his stamp of approval upon decisions or viewpoints of the group as a whole, or more likely by his male peers. The wise chief or leader had his finger on the pulse of individual or group opinions. He had to woo others to his way of thinking or, that failing, alter his course accordingly...The power of a strong or great leader lay in his influence rather than his *legal* (sic) authority.<sup>95</sup>

The potential for abuse of authority was constrained by a number of pragmatic constraints, not the least of which was the greater importance of the group to the chief over the converse association. As much as any other, the headman was dependent upon the cooperative efforts of the group when he/she was afflicted with poor luck in the hunt, and to the extent that a leader needs a following, he/she was easily as dependent upon their support to maintain his/her title. Authority could not be assumed without the consent of the community and, once realized, any leader who attempted to stretch his/her influence beyond acceptable limits was promptly usurped. The fundamental Athapaskan respect for personal autonomy exerted an on-going check on individual aspirations<sup>96</sup> and prohibited the manifestation of more concrete patterns of leadership.

Notwithstanding the largely informal, proactive nature of Athapaskan social regulation mechanisms, the creation of deliberate and formal assemblies to decide disputes not answerable through reinforcement and administrative functionaries was not unknown. These *adjudicative* bodies were called in to being in the face of a quarrel which, owing to its especially problematic nature, threatened to fester to the point of feud. If detected at an early stage, such a dispute could be handled by an elder relative common to all parties to the disagreement. Such an individual, by virtue of his/her increased years and the wisdom felt to accompany them, was usually in possession of sufficient esteem to allow him/her to decide an argument and have this decision respected. In cases where the elder did not wish to become involved, or where a clear distinction of rightness and wrongness obviated this

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<sup>95</sup>MacNeish, note 46, *supra*, pp.150-151.

<sup>96</sup>Jenness, note 60, *supra*, pp.120-121; Birket-Smith, note 49, *supra*.

role, the public acted as mediator with the case closed as soon as general opinion became apparent. In most cases the process proceeded something like this:

Two Indians, not of the same family were, at different times, wounded by their companions upon a hunting excursion. One died soon after of his wounds and the other recovered. The latter accident was soon settled by the aggressor giving his gun to the other, but the former case was debated by a full convention of both parties (evidently segments of the kindred of the two men), and at last, the affair being proved to be accidental and not wilful murder, the criminal was acquitted on giving up all his property.<sup>97</sup>

For the most part, however, this creation of formal bodies of arbitration was not a common occurrence, but rather constituted an infrequent reaction to a situation which had reached the crisis point.

That early Athapaskan social regulation mechanisms were largely unstructured and informal is perhaps not surprising given their context. Reinforcement, administration, and, to a lesser extent, adjudication were the products of a simple hunting-gathering society wherein power, predominance and privilege were individual-specific and situationally defined.<sup>98</sup> To the degree that individual license was tempered by the importance of group membership to surviving the harsh Northern environment, deviance was surprisingly limited. Sharply circumscribed technology and subsistence options intensified the importance of kith and kin and care was taken to maintain balanced relations. When an act of deviance threatened those relations, the response it elicited was a function not only of the act itself, but of the actor, his/her relationship and importance to the group as well as the relationship and importance of those the act offended.

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<sup>97</sup>George Keith, "Letters to Roderic Mackenzie 1807-1817", in L.F.R. Mason, Les Bourgeoisie de la Campagne du Nord Ouest, serie II, Quebec. p.88.

<sup>98</sup>Pospisil in his discussion of "E. Adamson Hoebel and the Anthropology of Law", (Law and Society Review, Summer: 1973) supports Hoebel in his assertion that law, as a social construct, is "not an autonomous phenomenon separated from the cultural matrix"(p.554). Rather, law exists as but one of a number of attributes which, when taken together, comprise the culture of a given group. See E. Adamson Hoebel, The Law of Primitive Man. A Study in Comparative Legal Dynamics. Harvard University Press: Cambridge, 1967.

In light of the preceding discussion, there would seem to be little doubt that, despite the apparent anarchy of early Athapaskan society, there did in fact exist relatively concrete mechanisms for regulating individual behaviors.<sup>99</sup> What is curious for those who would conduct a retrospective analysis of Dene social regulation is the conspicuous absence of virtually all the trappings which have come to be associated with social regulation and control. It is difficult to conceive of a peaceful society which could remain so without the benefit of a written code of laws enforced by an authority endowed with the express privilege of administering and enforcing those laws; that is, in a society which is, for all practical purposes, a "law-less" one. Yet it is clear from the evidence presented above that the Dene, who in terms of modern legal accoutrements were essentially "law-less", did not suffer from the lack of order or "lawfulness" which would be expected to accompany that condition. Precisely the opposite; the Dene were, by modern standards (and perhaps by prehistoric measures as well) a remarkably halcyon group. Thus the question arises: What made the Dene "lawful" in the absence of law?

At the root of this query lies many others, probably the most compelling of which suggests that law *may not be* the only route to lawfulness. In some societies, especially those early egalitarian ones such as the aboriginal Dene, the "authority of custom" may exert as powerful a control on deviance as law does in later, more complex circles. Indeed, it may be that owing to their intricate kinship connections and high measure of individual visibility, the control of custom was all that was needed to maintain an orderly existence. As framed by Hoebel,

As for law, simple societies need little of it...Because relations are more direct and intimate, the primary, informal mechanisms of social control are more

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<sup>99</sup>The term "anarchy" is, in this context, intended to carry the same meaning which it conveyed when used by E. Adamson Hoebel in his The Law of Primitive Man. A Study in Comparative Legal Dynamics (*ibid.*), when he said: "The simplest primitive societies [the Athapaskan Dene among them] are democratic to the point of near-anarchy. But primitive anarchy does not mean disorder. Anarchy as synonymous with disorder occurs only in complex societies when in a social cataclysm the regulating restraints of government and law are suddenly and disasterously removed" (p.294).

generally effective. Precisely as a society acquires a more complex culture and moves into civilization, opposite conditions come into play. Homogeneity gives way to heterogeneity. Common interests shrink to special interests...The need for explicit controls becomes increasingly greater. Law is but a response to social needs.<sup>100</sup>

To the extent that a society's institutions are a product of their social and cultural milieu, this may in fact be true<sup>101</sup>; but even so it fails to address the larger issue which comes to light when one juxtaposes law and custom as forms of social control. Any society, whether "primitive" or modern, of necessity requires a means by which to regulate interactions among its membership.<sup>102</sup> That is, some way of defining relationships within the group which makes clear what sorts of behaviors are acceptable and which are not and, as a corollary to this, provides some sort of mechanism for responding to unacceptable activities which enables the group to approach the status quo which existed prior to the commission of the deviant act. To the extent that the "controls of custom" achieved this end in Dene society, and "law and a legal system" look to the same goal in the modern Canadian polity, it becomes important to understand precisely what sorts of differences are involved and how these might affect the Denes' aspirations for juridical self-determination. In the past, researches into the differences between customary controls and legal systems have assumed the form of a debate between what constitutes custom and how this differs from those sorts of things which are found in law. Such a debate is of importance here as it is precisely the distinctions between law and custom which will come to play in Dene bids for juridical self-determination. Thus it is necessary to understand those distinctions and the implications they may possess for the administration of justice in Denendeh.

As a route to understanding these distinctions, the next chapter looks to the constructions of law presented by a variety of scholars working within both Anthropological

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<sup>100</sup> *Ibid.*, p.293

<sup>101</sup> *Ibid.*; Hoebel and others argue with some cogency that law, as but one form of social control, is merely one aspect of an overall cultural context which individuals create for themselves, consciously or otherwise, when they come together to live in groups (pp.4-5).

<sup>102</sup> *Ibid.*

and Jurisprudential traditions. These definitions are scrutinized for their relevance in the realm of customary controls, thereby opening discussion of the nature of the differences between social controls effected through custom and those created by law.



## VI. JURIDICAL SELF-DETERMINATION FOR THE DENE NATION I: DENE LAW AS A FUNCTION OF DIFFERING LEGAL CONCEPTIONS

*"Tell me", asked Faraday of Tyndale, who was about to show him an experiment, "Tell me what I am to look for".<sup>1</sup>*

Before one can enter into arguments concerning the presence or absence of law in the Dene context, it is necessary to determine precisely what is meant by the term *law*. It is the purpose of the following theoretical discussion to attempt such a determination, but it should be admitted at the outset that the quest for a definition of the term has eluded many greater minds than that at work here. Indeed, a history of research in jurisprudence, sociology and other related disciplines, albeit producing some of the most compelling dissertations on the nature of law, has led primarily to a scholarly agreement to disagree regarding essential ingredients of law. Accepting the historical reality of the field, the discussion which follows seeks not to define the *term* law so much as to arm the reader with an understanding of the concept it reflects. By focusing on what the law *does* rather than the terms which have been ascribed to those functions, it is hoped that the reader will be able to avoid the semantic confusion generated by much of that terminology to arrive at the heart of law.

Tapping the primary veins of that heart is greatly complicated by the vast amount of literature suggesting and critiquing definitions of law. In composing this portion of the thesis, it was necessary to narrow the field of that literature to a few select works which, for a

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<sup>1</sup>Unknown Author, quoted by: Huntingdon Cairns, Legal Philosophy From Plato to Hegel, (Johns Hopkins Press: U.S.A., 1959), p.1.

variety of reasons, rose above their fellows. In the majority of cases, the factor which most distinguished a given work was frequency with which other writings either consulted, critiqued or commended them; thus the simple element of what (or whom) has most often been chosen to write about helped to shape the focus of discussion here.

The fledgling works in a given area tend to generate a good deal of commentary, even after the reverberations of their initial impact subside. Often included for their historical significance more than any other quality, these volumes surface repeatedly in the texts produced subsequent to them. In treatises in the Anthropology of law, the significant historical document is Bronislaw Malinowski's Crime and Custom in Savage Society<sup>2</sup>, notable for its use of extensive field data at a time when fieldwork was relatively unheard of. Malinowski's counterpart in the field of Jurisprudence is Sir Henry Maine, whose contemplation of early Roman law, although now quite antiquated, remains an intellectual force with which to be reckoned.<sup>3</sup> As scholars on the threshold of their respective fields' movements into this area of study, Malinowski and Maine must be noted for their influence on the ultimate course of anthropological and legal considerations of law.

Throughout the early literature on law and legal forms runs an ongoing debate concerning the propriety of enlisting western legal concepts in studying non-western law. Because the general argument of the thesis turns upon the nature of the differences between these types of law, it is necessary to give some consideration to this debate here. On the side of assertions promoting the impropriety of this practice, attention will be given to the work of Leopold Pospisil, especially the views contained in his The Ethnology of Law.<sup>4</sup> In this publication, Pospisil develops his view of law as a concept consisting of a number of attributes. This theory, while not entirely original to Pospisil, is a good example of the

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<sup>2</sup>Routledge and Kegan-Paul Ltd.: London, 1926.

<sup>3</sup>Sir Henry Maine, Ancient Law, (J.M. Dent and Sons Ltd.: London, 1917).

<sup>4</sup>Cummings Publishing Company: U.S.A., 1978.

conceptual approach to the study of law and is thus deserving of attention. The contrary side of the debate is addressed through a discussion of the construction of law offered by E. Adamson Hoebel.

Hoebel's belief in the universality of the ends of law led him to promote the use of western legal conceptions as tools for tapping law in early societies; yet this is not the primary justification for his inclusion in this discussion. By virtue of the role he played in the composition of The Cheyenne Way<sup>5</sup>, and his own The Law of Primitive Man<sup>6</sup>, Hoebel has become one of the single most significant sources in studies of early law in his era. The contribution he made with Llewellyn to the technology of legal studies<sup>7</sup> in general, and to analyses of early law in particular, render Hoebel an integral part of discussions concerned with constructions of law.

Aiding Maine in presenting the jurists' constructions of law is H.L.A. Hart, most specifically his thesis in The Concept of Law<sup>8</sup> which well illustrates the contribution of legal theorists to the quest for a definition of law. Looking to law as a product of the actual expression of social rules, Hart's theory constitutes an important alternative to perceptions of law focusing upon purely coercive elements of social control; as such, his work tenders yet another possible understanding of legal forms.

Bohannon surfaces at different points throughout the analyses of the preceding theories, often as a departure point for critical discussion. Of especial note in this context is his theory of *double-institutionalization* which, when applied to the social control mechanisms of

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<sup>5</sup>Karl Llewellyn and E. Adamson Hoebel, The Cheyenne Way, (University of Oklahoma Press: U.S.A., 1941).

<sup>6</sup>The Law of Primitive Man: A Study in Comparative Legal Dynamics, (Harvard University Press: Cambridge, 1967).

<sup>7</sup>See William Twining, "Law and Anthropology: A Case Study in Inter-Disciplinary Collaboration", 7(4) Law and Society Review (1973):579.

<sup>8</sup>Oxford University Press: Oxford, 1961.

early cultures, offers an intriguing route out of the law–custom tautology.<sup>9</sup>

[I] Some Anthropological Ideas: Law as a Matter of Context

Bronislaw Malinowski<sup>10</sup>

As one of the first social scientists to engage in extensive fieldwork with aboriginal peoples, Malinowski generated some of the greatest and most hotly disputed propositions regarding the place and form of law in early societies. Time spent among the Tobriand Islanders of Melanesia impressed upon him the impropriety of applying western–based notions of law to the study of early social control – a radical innovation in a period when the majority of scholars believed that early law was simply a less sophisticated form of modern law. Primitive law, Malinowski asserted, must be understood on its own terms by its *functions* rather than its *forms*, in terms of the various "arrangements, sociological realities...and cultural mechanisms" manifested by a given society for the maintenance of a peaceful lifestyle.<sup>11</sup>

In the aboriginal societies of the Tobriand Islands where Malinowski conducted most of his fieldwork, these "arrangements" emerged in the form of an intricate network of interdependence and mutual reciprocity. Here, order was maintained through the "sociological realities" of economic and social dependency which characterized the day–to–day existence and demanded that each person do unto his fellows as he would have them do unto him. In Hoebel's terms, law in Malinowski's Melanesia was realized in those actions "which a man had to do because another would refuse to do something for him should he fail to do what

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<sup>9</sup>Paul Bohannon, "The Differing Realms of Law", in Paul Bohannon, (ed.), Law and Warfare. (The Natural History Press: New York, 1967), p.45.

<sup>10</sup>The following draws heavily on Malinowski's work Crime and Custom in Savage Society note 2, *supra*.

<sup>11</sup>Bronislaw Malinowski, "Introduction", in H. Ian Hogbin. Law and Order in Polynesia. A Study of Primitive Legal Institutions, (Shoe String Press: Hampden, Connecticut. 1934), p.xiii.

he should have done in the first place".<sup>12</sup> Such relations assumed a legal form when (1) each party to the association was identified, and (2) the reciprocity in performance was vital to both sides.<sup>13</sup>

It is perhaps not surprising, given his very broad conception of law, that Malinowski was able to argue for the proposition that law existed in an identifiable, albeit "primitive", form in Tobriand society. Law, in his terms, could be found in

those rules which curb[ed] human inclinations, passions or instinctive drives; rules which protect[ed] the rights of one citizen against the consciences, cupidity or malice of another.<sup>14</sup>

How these sorts of rules might be distinguished from "customary rules" or, stated another way, how law was different from custom in this context, was never adequately elucidated by Malinowski. Viewing law as "but one well-defined category within custom"<sup>15</sup>, Malinowski asserted that what would distinguish the two was the "definite social machinery of binding force" which accompanied law and gave it an additional imperative element.<sup>16</sup> This, he argued, "insured the adhesion to custom which made it binding or legal".<sup>17</sup> One is necessarily led to wonder, in light of this division, precisely where the line might be drawn between law and custom in Tobriand society. If custom is legal, how is it distinguished from law? Although Malinowski continued to struggle with this difficulty throughout the course of his career interest in primitive law, he was unable to remove the obfuscation of law and custom created by his expansive definition of law.

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<sup>12</sup>E. Adamson Hoebel. note 6, *supra*, p.180.

<sup>13</sup>Karl Llewellyn and E. Adamson Hoebel, note 5, *supra*, pp.233-234.

<sup>14</sup>Malinowski, note 11, *supra*, p. xiii.

<sup>15</sup>Bronislaw Malinowski, note 2, *supra*, p.54.

<sup>16</sup>*Ibid.*, pp.55-56.

<sup>17</sup>*Ibid.*

Paul Bohannon also viewed the law as a system of rights and duties, but he was able to avoid much of the confusion generated by Malinowski by assigning a crucial third aspect necessary to transform a right or duty into a law. In order for a right or duty to assume a legal nature, it had to be "recreated by agents of society in a more narrow and recognizable context — that is, in the context of institutions that were legal in character and, to some degree, different from all others".<sup>18</sup> A legal institution, in Bohannon's terms, possessed not only some regularized method of interfering in the non-legal realm to disengage a case for restatement, but was characterized by rules of its own. The rules manifested by the legal institution were twofold: Those governing the functioning of the institution itself, and those which the institution created when a non-legal relationship was restated as a legal one.<sup>19</sup> Without this "re-institutionalization", a rule might be a norm or custom, but never a law.<sup>20</sup> In his own words:

All social institutions are marked by customs and these customs exhibit most of the stigmata cited by law. But whereas...custom continues to inhere in, and only in, those institutions which it governs (and which in turn govern it), law is specifically recreated...by legal institutions.<sup>21</sup>

Thus although reciprocal relationships formed the basis of law for both Malinowski and Bohannon, Bohannon was able to limit the degree of confusion between law and custom by demanding a higher quality of the former. Because this additional capacity was contingent upon an explicit restatement of the association in question by an institution created specifically for that purpose, Bohannon's qualifier may be beyond the scope of Malinowski's perspective. Whereas Bohannon's model would impose structural requirements upon the society

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<sup>18</sup>Paul Bohannon, note 9, *supra*, p.45.

<sup>19</sup>*Ibid.*, p.46.

<sup>20</sup>Bohannon defined a norm as "a rule, more or less overt, which expresses *ought* (sic) aspects of relationships between human beings"; custom was merely "a body of such norms, including regularized deviations and compromises with norms, that is actually followed most of the time. (note 9, *supra*, p.45)

<sup>21</sup>*Ibid.*

under study as prerequisites to the existence of law; Malinowski's approach would look simply to the functions of law in that society without specifying what form those must assume. To remain true to his functionalist approach, Malinowski was denied the corollaries open to Bohannan in reaching a definition of early law.

Notwithstanding the often imprecise nature of his conclusions, Malinowski's theorizing on the nature of law in Tobiand society constituted an invaluable addition to the study of law through its "vigorous insistence upon law as an aspect of society and culture at large and on the occurrence of gaps between the ideal and the actual norm of law".<sup>22</sup> What must be avoided by those who choose to adopt his perspective is the tendency to blend law and custom too greatly with its social matrix, as this will leave the student in no better position than that in which s/he began.

Leopold Pospisil<sup>23</sup>

Pospisil, like many of his colleagues, openly acknowledged the methodological hazards implicit in defining social control among aboriginals in terms of western-based (or biased) legal traditions. He was concerned about the biases implicit in definitions such as that proposed by his predecessor Radcliffe-Brown, who had borrowed from Roscoe Pound the main ingredients that comprised his view of law as the "systematic application of force of politically organized society". The weaknesses of such constructions included a failure to recognize and account for the marked philosophical gaps between modern impressions of "systems", "force" and "political organization" and their aboriginal counterparts (if, indeed, there were any). Pospisil believed these flaws resulted from the erroneous understanding held

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<sup>22</sup>Hoebel, note 6, *supra*, pp.208-209.

<sup>23</sup>The information contained below is derived primarily from Pospisil's own work, The Ethnology of Law (note 4, *supra*). The views contained in that work have been complemented with others he has written, including "Kapauku Papuans and their Law" [54 Yale University Publications in Anthropology, (1958):257-271]. as well as with commentaries of his views extracted from other authors, such as Wim Rasing in his On Conflict Management with Nomadic Inuit. An Ethnological Essay, (unpublished Doctoral Thesis, 1984).

by earlier scholars of law as a *phenomenon* rather than a *concept*.<sup>24</sup> This assumption led researchers to believe that law could be "objectively and absolutely defined", a perception which Pospisil rejected in his view of law as standing for a "category of constructs" composed of individual phenomena. As a social, and therefore *human* construct, law necessarily embodied much of the characteristics and frailties of its creators which could not be adequately accounted for in "absolute or objective" terms. Inasmuch as these qualities could tap the ideal or *ought* aspects of a given society's social control mechanisms, they would be of little value in portraying the *is* of alien law. In addition, this view of law as a phenomenon tended to deal in "sweeping criteria" which were imposed upon the culture under scrutiny in an all or nothing search for law, characterized by little consideration of the variations in social control created by the different requirements and goals of law in different social contexts.

It was Pospisil's belief, developed primarily through his study of the Papuan culture of New Guinea, that the presence or absence of law in a society other than the researcher's own might best be discovered through employing a pattern of several attributes. By using a series of indicators which measured the existence of laws by their *content* or intentions rather than the extent to which these manifested some predetermined form, Pospisil was able to account for variations in social control across different cultural contexts. Drawing on the practice of the Romans who gauged the extent of law through the application of a series of criteria they believed capable of tapping legal mechanisms<sup>25</sup>, Pospisil devised a series of four

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<sup>24</sup>Leopold Pospisil. The Ethnology of Law, (*ibid.*).

<sup>25</sup>The Romans saw two elements as central in determining the presence of law. These were: (1) *longa consuetudo* or long use, and (2) *opinio necessitatis*, or the existence of a general opinion as to the indispensability of the rules. The significance of the Roman model lies in its avoidance of any specification of the forms which these criteria might assume in a practical context; it does not argue that the long use must have occurred in a *Court* or that the rules must be contained in a written document. In this way the generalizability of the model was maximized. That the Romans had only a tenuous acquaintance with those who later came to be described as "primitives" perhaps delivered them from overcomplicating the process of defining customary law.



ingredients of law. The first of these, *authority*, was the most important of the four, its whereabouts being dependent to a great extent upon the appearance of the other three, namely: An intention that the rules made by that authority have *universal application*, *obligatio*, and be backed up by *sanction*.<sup>26</sup> Authority was to be distinguished from leadership, the former involving decision-making powers only, whereas the latter included the active administration of and participation in the execution of decisions made.<sup>27</sup> Although an individual or group could embody both functions, Pospisil nonetheless saw a relatively distinct separation of executive and administrative functions in early societies. The only way to determine the who's who of authority here was to look to the effect of a would-be decision-maker's opinions upon others, which is the point at which the three sub-elements of law enter the analysis.

For an authority to be such in law, the decisions made by the authority had to possess an intention of *universal application*; that is, the decisions were made with the intention that they be applied in all similar or identical cases in the future. In a word, the aboriginal authority set "precedents". In formulating the precedent, the decision-maker was required to take a view of the facts in line with the principle of *obligatio*, whereby the "rights of the entitled and the duties of the obligated parties to a dispute" were determined.<sup>28</sup> So-defined, this association was then reinforced through the imposition of any of a variety of negative or positive *sanctions*. Negative consequences usually consisted of the withdrawal or withholding of rewards or favors that would have been granted had the breach not occurred, as opposed to those positive sanctions which involved the imposition of pain, whether physical or psychological. Pospisil was careful to point out that sanction, as the application of force to cement a decision, was in and of itself "incapable of defining

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<sup>26</sup>Leopold Pospisil, note 4, *supra*, p.29.

<sup>27</sup>*Ibid.*, p.29.

<sup>28</sup>*Ibid.*, p.46.

phenomena as laws" given the tendency for any number of non-legal decisions (e.g. political) to contain an element of sanction.

Laws revealed by the above constructs could assume one of two forms, either *authoritarian* or *customary*, depending upon the degree to which the law was internalized by the population.<sup>29</sup> Those laws which adopted an authoritarian structure lacked any substantial measure of internalization, deriving their ability to influence behavior through "inducement or compulsion, reward or punishment"<sup>30</sup> — that is, through entirely external modes of persuasion. Undetected violations of authoritarian laws were rarely, if ever, accompanied by a sense of guilt or remorse on the part of the perpetrator. Customary laws were those which, although generally unwritten, had persisted since time immemorial and were thus highly internalized by the group. Breach of a law of custom was almost always attended by a profound measure of guilt both on behalf of the perpetrator and his peers.<sup>31</sup>

Pospisil admits that, without the recognition and application of customary laws by authority, they would lose all legal character and be reduced to the status of "mere custom"; a term which he neglects to define.<sup>32</sup> If one construes this omission as categorizing custom as internalized behaviors which lack altogether the external constraints of authority, it is difficult to imagine how custom might reveal itself in those relatively undifferentiated societies which are of interest here. If custom is only that which law is not, namely the object of authority, it is questionable how Pospisil's distinctions between authoritarian law, customary law and custom may be realized for practical purposes. If customary law refers to those

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<sup>29</sup>Internalization may be defined as an "intrinsically motivated conformity" which is accomplished through the subject's conviction of the desirability of the prescribed conduct, which she/he often espouses irrespective of his feelings toward the group or the authority; (*ibid.*).

<sup>30</sup>*Ibid.*, p.64.

<sup>31</sup>*Ibid.*, p.64.

<sup>32</sup>*Ibid.*

traditional practices which are so internalized as to render their violation improbable, if not impossible, how might custom be revealed if its breach and the ensuing response to that breach reconstitute custom as law? If a crime is not a crime until it is detected and defined as such, is a custom only a custom if it is able to remain unviolated? The distinction is problematic, at best.

To the extent that Pospisil views the judgements of authorities as manifestations of law<sup>33</sup>, he overlooks the precarious nature of most forms of authority in societies such as the Dene. Earlier discussions of the aboriginal Dene informed of a pattern of leadership and authority marked by a high measure of instability and inconsistency owing to its highly transient nature. It is not easy to accept the implications of Pospisil's model which would have this inconsistent authority rendering decisions consistent with prior decisions (in terms of the precedent-setting aspect of universal application), nor is it an formidable task to conceive of such authorities imposing "judicial decisions" in a culture so firmly entrenched in practices of non-interference.

E. Adamson Hoebel<sup>34</sup>

Whereas Pospisil was motivated to espouse a phenomenological view of law by a fundamental belief in the impropriety of applying western legal conceptions to the study of social control in early societies, Hoebel was moved to the same sort of approach by the opposite sentiment. It was Hoebel's conviction that much of the confusion between law and custom, and the ensuing uncertainty concerning social control among "primitives", was a consequence of the reluctance of scholars to recognize the generalizability of western legal

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<sup>33</sup>Rasing, note 23, *supra*.

<sup>34</sup>The following discussion of Hoebel's research and conclusions draws primarily from his two primary works: The Law of Primitive Man. A Study in Comparative Legal Dynamics, (note 6, *supra*); The Cheyenne Way, (with Karl Llewellyn, note 5, *supra*). These works were complemented by articles written by Hoebel to further elucidate his views in The Law of Primitive Man as well as reviews of these works by his contemporaries.

notions to non-western cultures.<sup>35</sup> Law, he felt, sought the same ends among the "savage" and the civilized, and hence the manifestations of law in the latter constituted excellent tools for tapping the presence of law in the former.<sup>36</sup> The failure to recognize the underlying similarities between the different processes evinced by various cultures for maintaining "lawfulness" served to elevate the variations amongst forms of law to the point of obviating their commonalities. Hoebel felt that the ends of law, which he saw in a broad sense to include the channeling of behaviors in order to prevent or avoid conflict, were relatively constant across all groups and that, by looking to these, the legal processes unique to a given group could be revealed. In his view, "[w]hat distinguish[ed] primitive law from developed law...[was] the range and clarity of available administrative machinery"<sup>37</sup>, rather than the ends to which these aspired.

In Hoebel's estimation, the primary determinants of that machinery could be reduced to three: The presence of (1) some measure of privileged force, and (2) official authority, both of which possess (3) some degree of regularity.<sup>38</sup> Out of these arose what he saw as the "fundamental sine qua non" of law in any society — the legitimate use of physical coercion by socially authorized agent(s).<sup>39</sup> Hence his view that

[a] social norm is legal if its neglect or infraction is met, in threat or in fact, by the application of a physical force by an individual or group of individuals possessing the socially recognized privilege of so-acting<sup>40</sup>

As it stands here, Hoebel's formula evinces a significant deviation from Pospisil's conception of law. The primary distinction arises in Hoebel's limitation of retributive options

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<sup>35</sup>Hoebel, note 6, *supra*; and Rasing, note 23, *supra*, p.6.

<sup>36</sup>Llewellyn and Hoebel, note 5, *supra*, pp.41-43.

<sup>37</sup>Hoebel, note 6, *supra*, p. 49.

<sup>38</sup>*Ibid.*, pp.22-28.

<sup>39</sup>*Ibid.*, p.26.

<sup>40</sup>*Ibid.*, p.28.

to those which qualify as physical force, a defect which fails to account for the many forms of psychological sanction manifest in earlier cultures. Although Pospisil neglects to clarify adequately his inclusion of such forms of recompense in his definition of law, the simple fact of that inclusion marks an important advantage over Hoebel's work.<sup>41</sup> It should be noted, however, that owing to the *public* nature of most psychological sanctions, such as ignoring an offender, these may not qualify as originating with one group or individual who enlist their "socially recognized privilege of so acting". It may be that Hoebel viewed these responses as coming to play only in the case of minor breaches which did not qualify as true disruptions of the law or that, owing to simple societies' reluctance to interfere in their members' interactions, only those situations which had reached a "crisis point" fell into the realm of the legal.<sup>42</sup> To the degree that psychological sanctions were successful in maintaining a good

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<sup>41</sup>Rasing, note 23, *supra*, p.10.

<sup>42</sup>This view is confirmed by the position taken by Hoebel and Llewellyn in their 1941 work The Cheyenne Way, (note 5, *supra*). In formulating their theory of "Law Jobs", these authors explicitly stated that only those rules backed by authority qualify as laws and thus only those acts which elicit the response of that authority might qualify as violations of law. Stated succinctly, the theory of the law jobs holds that in any human group certain jobs have to be done in order for the society to endure and operate successfully as a group (See: William Twining, note 7, *supra*, p.579). In those groups which may be labelled as "societies", these jobs are performed by a variety of institutions, of which the law is the only mechanisms whose sole purpose is the performance of the law jobs. As summarized by Twining, the primary law jobs specified in the "Cheyenne Way" included:

- I. The disposition of trouble-cases (that is, those crises requiring the intervention of authority).
  - II. The preventive channeling and reorientation of conduct and expectations.
  - III. The allocation of authority and the arrangement of procedures which legitimize action as being authoritative.
  - IV. The net organization of the group or society *as a whole* (sic) so as to provide cohesion, direction, and incentive.
  - V. The job of juristic method, which has been indicated roughly above as that of keeping claims and the order in balance, but which may be defined here more fully as that of keeping both law-stuff and law-personnel up to the demands of all the law-jobs.
- The importance of this theory, according to Nader [Laura Nader, "The Anthropological Study of Law". 67(6) American Anthropologist (1965):3-33] Nader and Todd [Laura Nader and Harry F. Todd, Jr. "The Case Method in the Field of Law" in The Disputing Process: Law in Ten Societies. (Columbia University Press, New York, 1965) pp.1-41], Pospisil [L. Pospisil, "E. Adamson Hoebel and the Anthropology of Law" in 7(4) Law and Society Review (1973):537-560] and others, lay in its creation of a new approach to the study of law in alien contexts. The law-jobs/trouble-case perspective re-oriented academic attentions from looking at law as a simple set of rules or higher form of custom, to a concentration upon the actual workings of law in the social milieu. In this way Llewellyn and Hoebel shifted

measure of peace and, when disputes arose, resolving these before they escalated too greatly, law in Hoebel's early society would be relatively limited. In this realization Hoebel would be supported by the assertions of such anthropologists as June Helm MacNeish, whose research has shown that the formation of deliberate and formal bodies for responding to deviance was an infrequent and unusual occurrence.<sup>43</sup> If, however, Hoebel construed the "threat of physical force" as a form of psychological sanction, his failure to address the notion explicitly may be mitigated. Even so, it is difficult to see how such a threat might be understood as it appears intended here, as a *reactive* rather than a *proactive* mechanism.

Notwithstanding this construction of the Hoebelian formula, there remains the possibility that in early societies the group as a whole possessed a generally recognised privilege of communal response. Because Hoebel concentrates primarily upon the processes of administering that response rather than upon what might distinguish the assignment of the "privilege of so-acting", it remains unclear what might separate an individual privilege from a general group privilege. Emphasizing social recognition of the "response-right" as the legitimating aspect of the application of physical force, he does not inform how such social recognition might vary and, following from this, how such variations might come to play upon whoever obtained the privilege of reacting to infractions of law.

The ambiguities implicit in his notion of the socially recognised privilege-right can be extended to the distinction he perceived to exist between law and custom. In his own terms,

[c]ustom has regularity and so does law. Custom defines relationships and so does law. Custom is sanctioned and so is law. Law is distinguished from mere custom in that it endows certain selected individuals with the privilege-right of applying the sanction of physical coercion, if need be. The legal, let it be repeated, has teeth that can bite. But the biting, if it is to be legal and not just gangsterism, can be done only by those persons to whom the law has allocated the

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<sup>42</sup>(cont'd) the focus of legal analyses to the incidents of disputing that inspire and shape the laws of a given group.

<sup>43</sup>June Helm MacNeish, "Leadership Among the Northeastern Athapaskans". Anthropologica 2 (1956):131-163.

privilege-right for the affair at hand.<sup>44</sup>

Acknowledging that this statement recognizes the often transitory nature of such a privilege-right in early societies, it offers little in terms of understanding the distinctions between law and custom. If the only factor separating these two is the attribution of the privilege of responding to deviance, how is one to deal with the possibility that the community as a whole might possess such a right in terms of customary constraints? To the extent that one person might be singled out to wield the club in the event of physical force, the privilege-right theory holds. To the extent that the threat of such a reaction qualifies as a psychological force administered by the group, unqualified acceptance of Hoebelian formula is problematic.

Hoebel's fascination with the administrative machinery of the law raises some interesting questions. He rallies a good measure of support for his thesis that the "evolution of law has been in procedure"<sup>45</sup>; however, having done so, he fails to rationalize the somewhat paradoxical position that the evolution of the law has not been in the law *per se*, but rather in the administrative machinery.<sup>46</sup> Although it is not impossible to have one without the other, Hoebel's presentation does not expound the nature of the relationship between these two nor how advancement or change in one might affect the other.

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<sup>44</sup>Hoebel, note 6, *supra*, p.276.

<sup>45</sup>C.W.M. Hart, "The Law of Primitive Man. A Study in Comparative Legal Dynamics: Review". 58 American Anthropologist, (1956):566.

<sup>46</sup>*Ibid.*, p.566.

## [II] Some Ideas from Legal Philosophy: Law as a Function of Codification

### Sir Henry Maine<sup>47</sup>

It was Maine's belief that, in their progression from an early to modern state, all societies move through a number of fixed phases and thus undergo the same sorts of changes. As they progress and change, so do the institutions which they manifest, law included. At the most "primitive" stage, societies were organized on the basis of kinship and regulated through the exercise of authority by the oldest male member of the group. To this individual fell the responsibility of resolving intra-group conflicts, a task which was achieved in the complete absence of guiding principles or formal dispute resolution processes.<sup>48</sup> This deficiency, in Maine's view, prohibited the realization of law. With the coming together of a number of kin groups and their settlement on a territory claimed as their own, the potential for development of "mature law" was obtained. In the latter portion of this phase and early into the next, this potential is actualized as socially recognized leaders are consistently called upon to decide comparable cases and, in so doing, draw upon rudimentary forms of precedent and prior practices developed in other cases. At this juncture, because the power of decision is left with one or a few individuals who keep the means by which they reach their determinations to themselves, law is the domain of the elite. When the ability to codify the rules and record decisions made regarding them is realized, the fourth and final stage is reached. At this stage the monopoly of legal knowledge previously possessed by the elite is removed by the commitment of laws to the written word and the dissemination of that word among society at large. Those societies whose legal mechanisms changed in unison with the

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<sup>47</sup>The discussion which follows focuses on Maine's view of early law as articulated in Ancient Law (note 3, *supra*).

<sup>48</sup>Whether this was in fact the case will probably never be determined. Given the limited availability of documentary evidence which could inform of the structure and content of early dispute resolution mechanisms, Maine's belief in the paucity of process must be handled with care.



changes taking place around them Maine labelled *progressive* societies. Those whose legal institutions were unable or failed to keep pace with the larger evolution were termed *stagnant*.

Integral to this evolution was the movement away from a kin-based society and orientation to one based on an aggregate of individuals held together by the interplay of needs and desires peculiar to the individual. As a family-based entity, society was composed of two classes of persons: The "despotic father", in whom resided the exclusive rights of procurement of property and administration of the daily routine, and those whose position might best be described as *status*. The latter category consisted of all those who fell under the authority of the father and who therefore lacked the ability to acquire or possess assets or enter into contracts regarding them.<sup>49</sup> At this level, individual efforts are directed to the maintenance and improvement of the familial position. As the society which the various kin groups together comprise evolves and grows in complexity, the family orientation diminishes. The authority of the father is undermined, initially by the rapidly rising elite and later by the democratization of legal knowledge formerly held by that elite and used to entrench their position. With the emancipation of the individual from the tyranny of the father, all those "of legal age" obtain — at least theoretically — the capacity to enter into independent legally binding agreements with strangers (that is, persons unknown to the family group).<sup>50</sup> This sort of evolution, which occurs only in progressive societies, was summed up by Maine as a movement from *status* to *contract*:

The movement of progressive societies has been uniform in one respect. Through its course it has been distinguished by the gradual dissolution of family dependency and the growth of obligation in its place. The individual is steadily substituted for the family, as the unit of which civil laws take account...the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the family...is contract. Starting from a condition of society in which all the relations of persons are summed up in the relations of family, we seem to have moved steadily towards a phase of

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<sup>49</sup>J.H. Morgan, "Introduction" in Maine, note 3, *supra*, p.vi.

<sup>50</sup>*Ibid.*, p.vii.

social order in which all these relations arise from the free agreement of individuals.<sup>51</sup>

Owing to the origin of Maine's thesis in the study of the progression of Roman law, care must be taken in generalizing its measurements to emerging societies outside the Mediterranean.<sup>52</sup> For example, the essence of law in the earliest of societies is held by Maine as residing in the authority of the father, as it is the family which constitutes the basic social unit. Although few would argue the latter, it is unlikely that the "empire of the father"<sup>53</sup> could be as absolute and tyrannical as Maine depicts it. In the simple egalitarian societies which characterized the inauguration of modern history in North America, the overriding respect for the individual experience would seem to deny the potential for autocracy, even within a single family. As will be recalled from discussions of leadership in early Dene society, any authority which moved beyond influence to subjugation was actively discouraged.<sup>54</sup> In terms of the ad hoc appointment of authority to decide particularly problematic interpersonal quarrels, it is true that, where ever possible, this appointment fell to an older male relative common to both parties to the dispute. It is also the case that most major decisions were made by men. Yet it would be incorrect to equate the almost exclusive male prerogative in these areas with an absolute rule. Where decisions were made, they rarely involved more than the restatement of the apparent group sentiment, and they most certainly had to be implemented through means acceptable to the group.

In light of post-Maine anthropological research, it should also be cautioned that a number of researchers now believe that many early societies traced lines of descent *maternally* rather than *paternally*, as Maine believed, and that in still others neither line

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<sup>51</sup> *Ibid.*, p.91.

<sup>52</sup> Hoebel, note 6, *supra*, p.328.

<sup>53</sup> Maine, note 3, *supra*, p.97.

<sup>54</sup> See MacNeish, note 43, *supra*, pp. 154-155.

clearly predominated.<sup>55</sup> Whether a society leaned more to one than the other was, in most cases, the outcome of circumstances peculiar to a given group. That the circumstances of early European society gave rise to a strong patriarchal family network did not establish, in and of itself, a precedent followed by non-European societies. As tools for understanding the development of the latter and their law, Maine's conclusions regarding the family and patrimony must be handled with caution.

Further in this regard is the criticism levied at Ancient Law by the anthropologist Robert Redfield, who finds fault with Maine's highly delimited view of "primitive" peoples. To Maine, "primitive" society was the society of the Greeks at the time of the Homeric poems, or of Rome at the time of the early kings, and "primitive" law was the law of that society.<sup>56</sup> This focus, complemented in the latter portions of Ancient Law by a brief excursion into the early civilizations of Northern India, was emphasized at the expense of any mention of early American Indian, African or Oceanic tribe.<sup>57</sup> In confining himself to the Roman, Greek and Hindu societies of a few hundred or thousand years ago, Maine assumed that the attributes of the earliest conditions of humankind included complex currency-based economic systems, intricate political systems and, perhaps most significantly, literacy. That the "primitives" he excluded from his study manifested nothing similar to these necessarily throws into question the generalizability of many of his conclusions regarding ancient civilizations and their law.

Maine's thesis, as one encompassing an evolutionary philosophy, further manifests the same fundamental defect which appears to characterize most theories of this type: a failure to account for the possibility that some societies may skip certain phases of the evolutionary

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<sup>55</sup>Robert Redfield, "Maine's Ancient Law in Light of Primitive Societies", 3(4) The Political Quarterly, (1950):574-589.

<sup>56</sup>*Ibid.*, p.576.

<sup>57</sup>*Ibid.*, p.576.

grid — voluntarily or otherwise — through any of a variety of forms of cultural contact, including conquest, colonization or cultural borrowing. What are the implications for the development of law in these sorts of circumstances? A possible answer to this question is offered by Hoebel who, in analyzing Maine's proposition, found an additional forum for his argument that changes occur only in procedure, not in law *per se*, leading to the suggestion that while skipping phases of the "legal evolution" may very drastically affect the ways in which law is articulated or implemented, such changes may not alter the law itself. In the case of conquest or colonialization, the subject culture might find their original laws and legal processes removed and replaced with those of the new sovereign, but they still possess law — whether these would constitute laws which are obeyed is less certain. Unfortunately, whether one accepts or rejects Hoebel's offering does not mitigate the criticism which inspired it.

#### H.L.A. Hart

Where other researchers had looked to notions of orders, threats and coercion for a better grasp of the concept of law, Hart turned to those legal forms which were revealed in the active articulation of social rules. Hart believed these forms to be of two types, the *internal* and *external*, each crucial to delineating the field of law from other social institutions. The internal aspect of a social rule was found in the general social attitude<sup>58</sup> toward the rule, a "critical reflective attitude to certain patterns of behavior as a common standard which is actively displayed in criticism, demands for conformity and in acknowledgements that such criticism and demands are justified."<sup>59</sup> This aspect was expressed

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<sup>58</sup>Throughout his theory Hart appears to have simply assumed the presence of a "general social attitude" which may or may not have been present. Although it may be safe to accept the presence of such a consensus in the relatively undifferentiated societies under scrutiny in this thesis, that safety is undoubtedly diminished the higher one climbs in social/political evolution and population mass.

<sup>59</sup>H.L.A. Hart, The Concept of Law. (note 8, *supra*), p.56.

through terms such as *ought*, *must* and *should*, *right* and *wrong*<sup>60</sup>, which bring into account how the group feels about its own behavior.<sup>61</sup> This is to be contrasted with the external component of the law, which Hart argued as comprised of the observable regularities of behavior; the *is* rather than the *ought*, the actual manifestation of conduct guided by or rejecting the *must* and *should*, the *right* and *wrong*. Whereas the internal is the general attitude of the group toward its own behaviors, the external constitutes the actualization of that attitude both in the behaviors of those who respect the generally accepted rules and in the mechanisms for responding to those who do not. In the latter form are realized those official agents such as police and courts who owe their existence to the rules and embody the means justifying a general apprehension that a hostile reaction will follow violations of the rules.<sup>62</sup> It is this physical embodiment and the response it promises which minimize deviance among those for whom the internal constraint is insufficient, and who will be retrained only by external threats of punishment.

Hart asserted that in most societies law would be a composite of the internal and external aspects, yet he did not see the two as necessarily mutually inclusive. Although it would seem logical that the realization of external law would be greatly limited in the absence of its internal incentives, Hart accepted the possibility of societies in which social control was almost entirely a function of internal constraints. In such societies the social structure was one of *custom*, a term which Hart rejected in favor of the label *primary*.<sup>63</sup> These groups, Hart maintained, lack the centralized systems of punishment characterizing more complex social structures, preserving order on the basis of an often intricate series of obligations intimately intertwined with the morality of the group. These obligations are not

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<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*, p.88.

<sup>62</sup> *Ibid.*, p.88.

<sup>63</sup> *Ibid.*, p.89.

systematized and exist simply as a set of separate standards, bare of any identifying mark beyond a basic indication that they are the rules by which a particular group lives. Because of this they rely heavily upon the capacity of group pressure to elicit feelings of guilt, shame and remorse in those who contemplate or engage in an act of deviance.

In order for a primary society to be successful in controlling the behaviors of its membership, two things are required. In the first place there must be some form of restrictions upon the free use of violence, theft and deception.<sup>64</sup> Without the control of these very human impulses, Hart believed, the ability of individuals to live together in close proximity would be greatly threatened. Second, although there may exist tensions within the group between those who accept and those who reject the rules, those of the latter category who would act on that rejection in the absence of a clear and present group pressure to conform, must remain in the minority. Should such a minority grow to outweigh those who uphold the rules, there would be inadequate social pressure to prevent violation of the law and, ultimately, the behavior it prevented would cease to be sanctioned.

Acknowledging the success of primary controls in "primitive" communities in a number of contexts<sup>65</sup>, Hart cautions that these possess a number of potential defects which might easily surface in other than ideal conditions.<sup>66</sup> Three of these flaws are of note here, the first of which arises from the *uncertainty* of the primary controls. Because the rules form neither a system nor code, there exists no "authoritative text, procedure or official" which could be consulted in the event of uncertainty as to the nature or content of the law.

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<sup>64</sup> *Ibid.*

<sup>65</sup> See Hart, *ibid.*, p.89. "[T]here are many studies of primitive communities which not only claim but depict in detail the life of a society where the only means of social control is that general attitude of the group towards its own standard modes of behavior...we know of primitive communities where, though there are dissidents and malefactors, the majority live by the rules seen from the internal point of view".

<sup>66</sup> "Ideal conditions" which Hart defines as "a small community closely knit by ties of kinship, common sentiment and belief and placed in a stable environment", (*ibid.*, p.89).

For, plainly, such a procedure and the acknowledgement of either authoritative text or persons, involve the existence of rules of a type different from the rules of obligation or duty which *ex hypothesi* (sic) are all the group has.<sup>67</sup>

The second defect surfaces when a rule, whether disputed or simply out-dated, is clearly in need of amendment. The only mode of change in the rules known to such a society is the slow process of growth, whereby courses of conduct once thought optional first become habitual or usual and then obligatory, and then the converse process of decay, when deviations once severely dealt with are first tolerated, and then go unnoticed.<sup>68</sup> There will be no procedure for adapting the rules to fit changes in the environment for, as with the first defect, the simple ability to do so implies the presence of rules other than the primary. Perhaps the most potentially serious of the three defects noted here, however, is the third and final one. To the extent that primary controls establish those actions which the individual must or must not do, they lack any sort of mechanism for determining conclusively at what point a *must do* has not been done or a *must not* has been engaged in. That is, there is no means for determining absolutely the fact of violation in all, one might add, but the most blatant of circumstances. Hart distinguishes this flaw from those which invariably accompany it, such as the delegation of proactive as well as reactive controls to those persons immediately affected or society at large. When the resolution of conflict is left to those immediately involved (which may, at this level, be the entire group), it is perhaps not surprising that deciding the dispute could be a long and difficult task. In the absence of an objective decision-maker, all outcomes are open to question and criticism and therefore unlikely to be respected by all. The potential for feuding is high and, owing to the danger this poses to the simple structured primary society, steps must be taken to prevent it.

It is with the realization of the preceding defects and the implementation of steps to

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<sup>67</sup> *Ibid.*, p.90.

<sup>68</sup> *Ibid.*, p.90.

remedy them that the "pre-legal" realm of primary law moves toward the truly legal.<sup>69</sup> For the first time, attempts are made to preserve the primary rules in an orderly and consistent fashion and, along with this, procedures arise for the organized and systematic implementation of the rules. To cure the ills of uncertainty, for example, *rules of recognition* are created. These rules establish the means by which a primary rule may be conclusively affirmed as a rule of the totality which all alike are obliged to respect. This is achieved by the commitment of the previously unwritten rules to the objective written form, usually in the form of a code or list of acceptable and unacceptable behaviors and, in the latter case, modes of response to their violation.<sup>70</sup> The translation of the rules from an oral to written form constitutes an extremely significant shift, but it is not this evolution alone which is of importance here. What is equally and perhaps more important is the acknowledgement of reference to that code or list as *authoritative*, i.e. as the proper way of disposing of doubts as to the existence of a given rule.<sup>71</sup> This authoritative mark introduces the seed of a legal system,

for the rules are not now just a discrete unconnected set but are, in a simple way, unified. Further, in the simple operation of identifying a given rule as possessing the required feature of being an item on an authoritative list of rules we have the germ of legal validity.<sup>72</sup>

Inasmuch as rules of recognition resolve the inconstancy of the primary law, they do little to ameliorate its resistance or reluctance to change. This defect is remedied by the interposition of what Hart terms *rules of change*, edicts which, in their most simple form, empower certain individuals to introduce new primary rules and amend or eliminate old

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<sup>69</sup> *Ibid.*, p.91.

<sup>70</sup> *Ibid.*, p.92.

<sup>71</sup> *Ibid.*, p.92.

<sup>72</sup> *Ibid.*, p.92.



ones.<sup>73</sup> In so doing, rules of change manifest a strong connection with rules of recognition, for where the former exists the latter will necessarily incorporate a reference to legislation as an identifying feature of the rules, though it need not refer to all the details of procedure involved in legislation.<sup>74</sup>

Once rules of recognition and change are in place, there remains to be addressed the lack of persons or processes for determining the fact of violation of primary laws. To remedy this final flaw, *rules of adjudication* are composed which, as their title implies, capacitate certain individuals to adjudicate on whether in fact a primary rule has been broken in a given set of circumstances.<sup>75</sup> In order to inject a measure of consistency and order into the adjudicative process, these rules also specify the procedures which are to be followed by the decision-maker. In this way the rules set boundaries on such important legal concepts as "judge" and "court", "jurisdiction" and "judgement". Like rules of change, rules of adjudication maintain a close connection with rules of recognition.

This is so because, if courts are empowered to make authoritative determinations of fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are. So the rule which confers jurisdiction will also be a rule of recognition, identifying the primary rules through the judgement of the court and these judgements become a source of law.<sup>76</sup>

When the primary and secondary rules unite in the manner outlined above, the society may be said to possess at least the seeds of a legal system. To nurture and sustain these seeds to their fruition as a mature legal system, two conditions must be satisfied. First, the rules of behavior which are valid according to the society's secondary criteria of validity must be obeyed by the society in general and second, those rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted

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<sup>73</sup> *Ibid.*, p.93.

<sup>74</sup> *Ibid.*, p.93.

<sup>75</sup> *Ibid.*, p.94.

<sup>76</sup> *Ibid.*, p.94.

as common public standards of official behavior by its officials.<sup>77</sup> At this stage, Hart believes, the truly legal form of law has been achieved.

Despite their individual differences, the preceding perspectives manifest a number of significant commonalities. In the first place, whether anthropologically or jurisprudentially considered, law is consistently dealt with as a two-sided entity.<sup>78</sup> To the one side falls the conceptual component which consists of the principles and rules restricting or requiring action.<sup>79</sup> This is the realm of Hart's *primary controls* or Pospisil's *customary laws*, to the extent that these are laws which constitute a social objective in and of themselves, independent of any structure for their administration. In the contemporary context, the conceptual element might best be described as the *ought* element of law, those ideals which lead to the creation of a system designed to approach them. This system becomes the structural side of law which, in the contemporary setting, reveals itself in courts, police and correctional agencies.

What makes the pursuit of law in early societies so challenging is the relative lack of any structural component — or at least a structure which the contemporary thinker, so entrenched in the modern trappings of law, can recognize. It was probably this dynamic which Max Radin was attempting to articulate when he proposed that

there is an infallible test for recognizing whether an imagined course of conduct is lawful or unlawful. This infallible test, in our system, is to submit the question to a court. In other systems exactly the same test will be used, but it is often difficult to recognize the court.<sup>80</sup>

This inability to recognize the "court" hints at a more profound difficulty which necessarily

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<sup>77</sup>*Ibid.*, p.113.

<sup>78</sup>Robert Redfield, "Primitive Law" in Paul Bohannon, Law and Warfare, (Natural History Press: New York, 1967), p.5.

<sup>79</sup>*Ibid.*

<sup>80</sup>Max Radin, "A Restatement of Hohfeld", 51 Harvard Law Review, (1938):1145.

affects all researches into other, earlier forms of law. This encumbrance is found in the distinction between the world views of early and modern peoples and how this affects the institutions they manifest. One of the most significant contributions to these differing world views is the lack of literacy in most early societies, a deficiency with profound implications for the formation and development of law and legal systems. At the heart of law as it is known today lies a legal code — a list of behaviors which will not be tolerated by a society which also establishes how contravention of items on the list will be handled, as well as the structure for handling them. Early societies, such as the Dene, have no writing and thus no such code. Without the code, they possessed nothing like what is presently understood as a system. Hence in the terminology enlisted above, the Dene may have possessed the *concept* of law, but a structure? The status of the latter is highly uncertain and, if the presence of law requires both concept and structure, the prognosis for finding "law" among the early Dene is not good. Yet Hart tells above of societies very much like the Dene who were able to possess one without the other, and it is clear from earlier discussions that the Dene did in fact possess some form of mechanisms for maintaining order. What remains to be established is whether in fact one of these mechanisms was law.

This chapter has provided the theoretical tools for making such a determination. In the discussion to follow, these tools will be applied to what is known of Dene social control in hopes of determining the presence or absence of a form of law which might become the law of Denendeh.

## VII. JURIDICAL SELF-DETERMINATION FOR THE DENE NATION II:

### LAW, LITERACY AND THE POLITICS OF DISCOURSE

Prior to applying the instruments honed in the previous chapter to Dene society, it is perhaps well to recapitulate briefly what is known of social control in this context.

The Athapaskan distaste for strong authority so prominent in Dene politics was no less apparent in their mode of justice.<sup>1</sup> The Dene ethic of non-interference and individualism greatly impaired the potential for development of formal social control mechanisms. Policing of behaviors was essentially an individual affair, as was the resolution of most minor disputes. In the event of skirmish, settlement was usually left to the parties immediately involved and it was only when the group was threatened by the imminent escalation of an altercation that outsiders would become involved.

In the absence of a clear structure of authority, Dene society was regulated and conflicts dealt with through one or a combination of three social entities: reinforcement, administration, or adjudication.<sup>2</sup> As *quasi-legal* functions, administration is the least law-like of these three, referring as it does to the direction of concerted group actions such as the hunt or relocation of the camp. Although it may have included the empowering of a given individual to orchestrate the imposition of sanctions in the event of deviance, its activities in this regard were rare in comparison to its purely non-legal functions. Reinforcement leans more to the legal, encompassing both proactive and reactive controls on behavior. At the proactive level, reinforcement appears in the admonishments of parents and elders to the

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<sup>1</sup>June Helm MacNeish, "Leadership Among the Northeastern Athapaskans", 2 Anthropologica (1956):155.

<sup>2</sup>Elman R. Service, The Hunters, (Foundations of Modern Anthropology Series: Prentice-Hall Inc., New Jersey, 1979), pp.48-56.

young concerning acceptable and unacceptable actions which, internalized over time, exert a significant measure of sway over behavior. Unfortunately, as Service notes, the teachings of childhood are not always sufficient to compel compliance with group standards of behavior, and it is at this point that the reactive arm of reinforcement enters. When acting in a reactive capacity, reinforcement most often involves the withholding of rights or privileges or exertion of some form of punishment — whether physical or psychological — in response to the failure of an individual to respect general rights and duties.

In its inclusion of sanctions as an incentive to conform, reinforcement is often closely associated with adjudication. This latter entity is found in the practice, albeit a rare one, of empowering a "neutral third party" to decide disputes which could not be worked out between the combatants themselves. In resolving such a conflict, it was not unusual for the adjudicator to extend the community's perception of the quarrel to include some form of sanction against the party in the wrong as an added inducement to conduct him/herself appropriately in the future.

Whether acting in a reinforcing, administrative or adjudicative capacity, the allocation of authority in Dene society was always highly dependent upon individual and situational factors. This inconstancy, coupled with the Dene ethic of non-interference, greatly impeded the formation of more concrete methods of dispute resolution<sup>3</sup> The question arising from this for purposes here, however, is whether these same considerations also prohibited the elaboration of law.

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<sup>3</sup>MacNeish, note 1, *supra*, p.156; Service, note 2, *supra*, pp.54, 91-92; Diamond Jenness, The Indians of Canada, (University of Toronto Press: Toronto, 1977), pp.120-121; Kaj Birket-Smith, "Contributions to Chipewyan Ethnology", Report of the fifth Thule Expedition, 1921-1924, 6(3), (1893):67; June Helm, "The Lynx Point People: The Dynamics of a Northern Athapaskan Band", National Museum of Canada Bulletin, No.146, Anthropological Series No.53, (1961):175.

[1] Integrating the Theory with the Reality: Applying Differing Conceptions of Law to Dene Social Control

It is doubtful that the obscurity alluded to above would prevent Malinowski from finding a form of law among the Dene, given his very broad interpretation of the term. For Malinowski, the origin of law in simple societies rested within the network of mutual interdependence and reciprocity which formed the social structure of the group. The relationships which arose out of this structure assumed a legal nature when the parties to a given association were clearly recognizable and the duties each performed within that association were considered vital by the other parties.<sup>4</sup> To the degree that entrance into such an association was contingent upon a perception held by the prospective party of what s/he could gain by participation, the general significance of the duties involved would seem incidental. As was noted earlier, Dene society was highly anarchic, with each individual enjoying the maximum exercise of a freedom curtailed only by the execution of those obligations necessary for the survival of the group. Given this, it is doubtful that the average Dene would have constrained him/herself within relations the fruits of which were not absolutely necessary to his/her continued enjoyment of life. Whether such relationships fulfilled Malinowski's criterion that their membership be recognizable is uncertain since he failed to specify who would have to do the recognizing. Would it be sufficient that the parties to the association were able to recognize each other, or must this recognition be generalized throughout the community as a whole? The former requirement would seem necessary for the existence of any relationship and hence is of little use in distinguishing legal associations from their non-legal counterparts. If extension of that recognition to the community as a whole is sufficient to entrench the relationship firmly in the realm of the legal, what of "private" partnerships which are equally vital but not publicly acknowledged? Are these not

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<sup>4</sup>Bronislaw Malinowski, Crime and Custom in Savage Society, (Routledge and Kegan Paul Ltd.: London, 1926) pp.233-234.

legal? To the extent that all relations in Dene society were profoundly "face-to-face", the legal potential of truly private consociations is probably quite limited, but the analogy is a good one insofar as it lays bare the implications of Malinowski's failure to elaborate fully on the condition of recognition.

If it is accepted that the Dene did in fact enter into relationships in order to satisfy vital requirements and that someone in some capacity might have been able to discern the parties to such a relationship, the potential for finding law in Dene society by Malinowski's terms is qualified by one further requirement: the presence of a "definite social machinery of binding force".<sup>5</sup> This binding force was a by-product of the extension of a single relationship into the overall social network of such relationships which, taken together, comprised the very fabric of a given society. This force existed primarily in the probability that failure to perform a service vital to another could result in the withholding of a service vital to oneself in the future. It was supplemented with a sort of "what-if-everyone-did-that" philosophy which reflected the realization of the group that the perpetuation of these relationships was central to the continued functioning of the group itself.

Just as the ability to recognize one's partners in a relationship qualifies as a necessary condition for the existence of that relationship, it would seem no less logical to perceive a basic loyalty to the perpetuation of the group as imperative to its endurance over time. The fact of Dene society in and of itself would seem to support the presence of such relationships as well as a social machinery of binding force. Yet this does not serve to distinguish what was legal in Dene society from what was not legal. Thus insofar as Malinowski would have probably advocated the presence of some manner of law among the Dene, his work would not suggest much more than this, thereby greatly limiting his approach to proposing what *is* law without distinguishing what it is *not*. Following Malinowski down this road, as Robert Redfield asserts, "one has not too little law to talk about, but far too

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<sup>5</sup> *Ibid.*, p.55.

much!"<sup>6</sup>

Where Malinowski's very broad interpretation of law allowed him to avoid the present problem of authority in Dene law, Pospisil and Hoebel must confront it head on. Pospisil, as will be remembered, saw law as composed of four elements: Authority, an Intention of Universal Application, Obligatio, and Sanction.<sup>7</sup> As the first of these, authority was distinguishable from leadership as it encompassed the act of making the decision rather than its implementation, which was a function of leadership. It was Pospisil's belief that in any society, some persons' opinions and determinations would hold greater sway over the masses than others, and that it was this ability to have a verdict respected or enforced that constituted the hallmark of legal authority. In his words,

[A]n authority is an individual (or group of individuals, such as a council) whose advice and decisions are usually followed by the rest of the members of a group.<sup>8</sup>

To the extent that such an authority appears relatively unstructured, the Dene would seem to have it. Whether in fact they did possess Pospisil's authority, however, may depend greatly upon the interpretation of "usually" in the preceding quote. If "usually followed" is intended to present a picture of a core authority whose membership is relatively constant and whose status as authorities may be determined by the impact of a series of their opinions or judgements over time (as one might gauge a modern court by the number of appeals it inspires), its presence in Dene society is questionable. For although the small stature of most early Dene communities afforded a relatively limited number of potential authorities from which a decision-maker might be drawn, this in no way ensures that the same individual or combination of individuals will be so empowered consistently over time. If, on the other hand, Pospisil's use of the term is intended to reflect the flexibility of such societies in

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<sup>6</sup>Robert Redfield, "Primitive Law", in Paul Bohannan (ed.) Law and Warfare, (The Natural History Press: New York, 1967) p.4.

<sup>7</sup>Leopold Pospisil, The Ethnology of Law, (Cummings Publishing Company: U.S.A., 1978) p.29.

<sup>8</sup>*Ibid.*, p.30.



responding to the transferrable or transient nature of authority, its presence among the Dene is far easier to accept.

Should it be accepted that Dene decision-makers correspond with Pospisil's concept of "authority", fulfillment of this criterion alone would be insufficient to confirm the presence of law in Dene society. Only if the Dene authority formulated his/her decisions with adherence to the principles of obligatio, sanction and an intention of universal application would the Dene qualify as a "lawful society". In accordance with the intention of universal application, the authority would be required to render his/her determinations with the intention that the rules thus interpreted be adopted in all similar or identical cases in the future.<sup>9</sup> Given the lack of any means for the preservation of such precedents beyond the powers of individual memories, and the transitory nature of the decision-making position, it is difficult to see how the intention of universal application might be realized among the Dene. If this concept of "primitive precedent" could be correctly construed as setting precedent on the *individual* or *behaviors* involved in a given case, with the intention that the new standards be generalized throughout the community (rather than creating precedent in the strict sense of a rule of procedure to apply to future authorities in deciding similar cases), the potential for finding an intention of universal application in the Dene authority's decisions is improved. This improvement is limited, however, by the Dene appreciation of, and emphasis upon, the individual nature of each case. Given that the outcome of most, if not all, disputes was influenced by factors peculiar to the actors involved as well as the act itself, it is doubtful that the Dene would have allotted the same measure of importance to consistency of outcomes as do present legal systems. Although Dene society was remarkably egalitarian, each member of that society was considered unique, a uniqueness which rendered each case different and probably impeded the attribution of similar principles to similar cases.

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<sup>9</sup> *Ibid.*, pp.28-30.

As will be recalled from the discussion which introduced this chapter, much of Dene social control was achieved outside the context of adjudication and the more formal processes it implies, in the realm of reinforcement. In this latter forum, responsibility for the regulation of deviance and resolution of disputes was diffused throughout the group; the individual was expected to control him/herself and, failing that, the most common response was a sort of informal shunning of the individual and his/her act which conveyed a general group dissatisfaction with the behavior in question.<sup>10</sup> A similar pressure might be brought to bear against parties to a dispute which, while disruptive to the general peace, did not yet require outside intervention. In most cases these informal mechanisms were successful in controlling unwanted behaviors and restoring the status quo.<sup>11</sup> Because they were rarely orchestrated by a single authority<sup>12</sup> — which would have elevated them to a more formal level — these controls cannot be seen as legal unless Pospisil accepts that an entire society could together comprise a legal authority. Even if it were to be admitted that the group as a whole could function legitimately as such an authority, setting precedent of the variety outlined above, the most common Dene controls would qualify as law only where the restatement of rights and duties required by obligatio could be made implicitly or inferred from the actions of the whole. On the subject of sanctions, there would seem little difficulty in accepting their place in either the adjudicative or reinforcement capacities of Dene authority. Sanctions could, by means of physical or psychological means, exact a negative penalty through the withdrawal of rewards or favors or impose a positive one by way of the direct application of physical punishment. By either means the concept of sanction may be seen to correspond with the notions implicit in the concept of reinforcement.

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<sup>10</sup>MacNeish, note 1, *supra*; Service, note 2, *supra*; A.G. Morice, "The Great Dene Race", *Anthropos* 2 (1907):1-195; George Keith, "Letters to Roderic MacKenzie 1807-1817", in L.F.R. Mason, *Les Bourgeoisie de la Campagne du Nord Ouest*, serie II, Quebec.

<sup>11</sup>Service, *ibid.*; Keith, *ibid.*

<sup>12</sup>MacNeish, note 1, *supra*; Birket-Smith, note 3, *supra*.

Whether such laws are respected out of a fear of the consequences of noncompliance (authoritarian laws) or out of some internal loyalty to age-old standards or ethics (customary laws), Pospisil deemed their recognition by a legal authority as *The Laws* as central to their legal nature.<sup>13</sup> Without such recognition, laws are not legal at all, but "mere custom".<sup>14</sup> In this light, the measure of law in Dene society is contingent upon definitions not of law, but of authority. If, by the strict use of Pospisil's concept of authority, rules or "mere customs" would have to undergo some manner of adjudication in order to qualify as "law", there would seem to be very little law and a great deal of custom regulating behavior in early Dene society. On the other hand, if in the realm of reinforcement it is permissible to see the community as an authoritative mechanism in the capacity discussed above, then Dene society would seem to have an abundance of law accompanied by an uncertain, but highly delimited, measure of custom.

Hoebel runs into a similar difficulty in his conception of authority as a "socially recognized privilege".<sup>15</sup> It was Hoebel's opinion that in any "primitive" society, the weight of public sentiment was such that very little action could be taken in response to deviance without at least the tacit approval of the group. Any individual acting beyond the boundaries of that approval could find him/herself rapidly transformed from prosecutor to prosecuted. Thus he held that the very fact of an individual taking action against a violation of social rules presupposed the recognition of his/her right to do so on behalf of the general public.

If the rest of the tribal population supports him in opinion, even though not in overt action, it can only mean that the society feels that the behavior of the defendant was wrong in its broadest implications, that is, against the standards of the society as a whole.<sup>16</sup>

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<sup>13</sup>Pospisil, note 7, *supra*, p.64.

<sup>14</sup>*Ibid.*, p.64-65. Left largely undefined by Pospisil, "mere custom" can only be construed as that which authoritarian and customary laws are not.

<sup>15</sup>E. Adamson Hoebel, The Law of Primitive Man. A Study in Comparative Legal Dynamics, (Harvard University Press: Cambridge, Massachusetts, 1967), p.27.

<sup>16</sup>*Ibid.*, p.27.

In essence, the actions of the "primitive prosecutor" were right until the public took some form of action to declare them wrong. What is perhaps most troubling about this conception of authority is that if the social recognition or approval is *tacit*, how might the early authority confirm that his actions were in fact supported by the group rather than simply *tolerated*? Consider the circumstances of the Dene apparently in possession of such a "socially recognized privilege". Given the general social ethic of non-interference, the appointment of an adjudicator to resolve an especially troubling dispute was relatively infrequent<sup>17</sup>, hence a Dene authority might be confronted with only a few cases over an entire lifetime. It would not be inconceivable, given the rarity with which s/he exercised his/her public privilege, that a poor judge might obtain his/her power to act not out of any positive appreciation of his/her abilities, but for the same reasons that so few cases arose: almost any situation that could be tolerated, would be tolerated until such a point as continued inattention to the individual and his/her actions became a threat to the general peace. Moreover, whereas the group might implicitly support an authority's *intended* mode of response, should the *actual* outcome be less popular, the socially recognized privilege of response could be shifted to another as implicitly as it was originally awarded.

Hoebel further qualified his conception of authority with the element of regularity, an inadequately elaborated quality which he vaguely compared with the "doctrine of precedent".<sup>18</sup> In early law as in modern, decisions necessarily drew "upon old rules of law or norms of custom and new decisions which are sound tend to supply foundations of future action".<sup>19</sup> This, unlike Pospisil's "Intention of Universal Application", Hoebel's "regularity" had both procedural and substantive qualities — decisions led to new standards for behavior on behalf of both the public and their "officials". Where precedents were translated into action by the

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<sup>17</sup>MacNeish, note 1, *supra*; Service, note 2, *supra*; Keith, note 10, *supra*.

<sup>18</sup>Hoebel, note 15, *supra*, p.28.

<sup>19</sup>*Ibid.*, p.28.

public, it is possible to perceive the potential for a sort of informal record of the decision(s) made which could be drawn upon by future authorities in later disputes. Taken any further than this, however, Hoebel's notion of regularity would seem to overestimate the degree of consistency in the conduct of juridical tasks in simple societies.

In Hoebel's terms then, the Dene possessed law inasmuch as there existed an individual or group of individuals who, from time to time, were the recipients of some measure of support or toleration for responding to deviance and who, in formulating that response, drew upon the apparent behavioral standards (both of actions and reactions) of the group. The amount of law thus possessed would be sharply circumscribed by Hoebel's qualification, discussed earlier, of the legal as backed by *physical force*. Although there is little doubt that the Dene had occasion to resort to "actual physical violence"<sup>20</sup> in responding to deviance, ostracism and withdrawal of privilege were more commonplace forms of sanction. If "sanction" is taken to refer to bodily force, the latter responses would seem to answer to something less than violations of the law.

Determining the presence or absence of law in traditional Dene society is greatly simplified by Sir Henry Maine's thesis. In his view, all "primitive" cultures maintained order through the autocracy of the father which constituted the most rudimentary form of law. As the early society progressed over time to a more complex modern state, its social institutions, including law, would evolve accordingly. Perceiving the evolution of progressive societies as the natural ascendancy through a series of specific states to an inevitable future, Maine's theory requires only that the mode of social control held by the Dene at the time of contact be placed in its rightful position on the evolutionary grid.

As was established earlier, the role of the father in early Dene society was quite unlike the despotic function awarded him by Maine. He, too, was ruled by the ethic of

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<sup>20</sup>Service, note 2, *supra*, p.49.

non-interference and, when acting in a capacity above that of father, as the decision-maker for a particular time and situation, his actions were sharply circumscribed by the power of public opinion. In relation to Maine's despotic father figure, the thing to be determined is whether Dene "law" at the time of contact is best understood as antecedent to the rise of the father or subsequent to his reign. As no data exist concerning pre-contact social control, it is impossible to determine whether the father was rising to or falling from his apex. Yet it might be ventured, as an intriguing aside, that the strict Dene ethic of non-interference and ingrained dislike of the authoritarian figure could be interpreted as a backlash against an earlier state wherein the father ruled absolutely.

If it is to be assumed for present purposes that Dene social control (as described in this thesis) constitutes a "pre-status" period, it would seem equally safe to suggest that this period was a pre-legal one. Whether this pre-legal juncture could be described as maintaining order through *custom* is uncertain; however, Maine considers this stage to be one wherein an elite minority retains all knowledge of the laws and hence all the power associated with that knowledge. Bearing in mind the fact that Maine drew his conclusions from the early Greeks and Romans, it is perhaps not surprising that a lack of fit occurs when one tries to place the Dene within the Mainian scheme.

Hart's separation of primary and secondary rules is perhaps the most promising of the theories elaborated in the search for Dene law. According to Hart, the society ruled by primary controls maintained order in the absence of a centralized authority or *system* of law, relying on the power of a remarkably uniform group ethic to check deviance. This ethic comprised the internal aspect of a society's rules and was capable of translation into action in the event of its breach. The ultimate form assumed by such actions was dependent upon the nature of the violation and those involved in it, as well as the resources available to the group for dispute resolution and restoration of the status quo. These actions, which Hart termed the *external* manifestations of the internal ethic, were free to vary with the preceding

considerations and did not affect the legal status of the internal rules. This flexibility facilitates the finding of primary law in Dene society — a finding which is further supported by the Denes' fulfillment of Hart's dual qualities of primary societies. The Dene most certainly possessed controls on the "free use of violence, theft, and deception", as revealed in the earlier discussions of reinforcement. As well, they were able to constrain deviance within a minority of the population — a fact established not only by ethnological reports of an earlier era documenting the apparent peacefulness of Dene social life<sup>21</sup>, but by the simple fact of the continued existence of the group itself prior to the arrival of the Europeans.

Had the Dene been left to their own devices, it is possible that they would have detected the deficiencies of primary controls and, in so-doing, progressed as Hart described into the realm of secondary rules. As it was, however, they were prevented from making their own way into the truly legal by two factors. The first of these was the interruption of their social development by the fur trade and colonization, an historical fact discussed in detail in the first and fourth chapters of this thesis. The second, and perhaps more fundamental, impediment in the Denes' path to law existed in the total absence of any means by which to commit their primary rules to a written form. Both Hart and Maine regard the advent of literacy as crucial to the progression from the pre-legal to the legal.<sup>22</sup> For Maine, the transcription of laws heralded the decline of the minority elite's monopoly on legal knowledge and a movement into an association of law with words rather than individuals. Implicit in this drift was a shift in emphasis from the subjective texture of "oral" laws to the objectivity afforded by the concrete permanence of the written word. Safely ensconced in a code or list, law was delivered from the "transitoriness of oral

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<sup>21</sup>See Service, *ibid.*; Morice, note 10, *supra*; and others.

<sup>22</sup>As do others: "Literacy, it is said, separates prehistory from history (Goody and Watt, 1968), primitive societies from civilized societies (Levi-Strauss *in* Charbonnier, 1973), modern societies from traditional societies (Lerner, 1958)." See Sylvia Scribner and Michael Cole. The Psychology of Literacy, (Harvard University Press: Cambridge, Massachusetts, 1981), p.4.

communication"<sup>23</sup> and the imperfection of individual memories; its concept so established, law could begin to devise a structural component. It was in the latter regard that Hart saw the importance of literacy. The legal code, as the nucleus of a legal system, was a necessary precondition to the conformation of such a system. Law as the "union of primary and secondary rules"<sup>24</sup> depended upon the ability to transpose the oral idea of primary rules into a more substantial form capable of articulation through the structures created by the secondary rules.

## [II] Modern Theories versus "Primitive" Realities: Lack of Fit as a Function of the Differing World Views of Oral and Literate Societies

Codification of a society's rules of behavior was thus an integral step in the development of legal systems, but one which cannot, independent of other considerations, fully account for the vast differences between the administration of justice in pre-literate and literate societies. This is so because, simply stated, the ability to codify is much more than that. Codification is a creature of literacy; the writing down of laws is impossible prior to the advent of an ocular representation of the words used to convey legal ideas. The introduction of a writing technology into a previously non-literate context makes possible the commitment of words to an objective<sup>25</sup>, permanent space. Ideas once confined to the potential

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<sup>23</sup>Jack Goody, "Introduction", in Jack Goody, (ed.) Literacy in Traditional Societies, (Cambridge University Press: London, 1968), p.i.

<sup>24</sup>H.L.A. Hart, The Concept of Law, (Oxford University Press: Oxford, 1961). See especially Chapter 5: "Law as the Union of Primary and Secondary Rules".

<sup>25</sup>Objective in the sense of "not belonging to the consciousness or the perceiving or thinking subject, but to what is presented to this, external to the mind, real." [The Concise Oxford Dictionary, (7th. ed.), (Oxford University Press: Oxford, 1983) p. 669]. It is interesting to note that the dictionary, as the "Bible of literates", views objectivity as synonymous with realism. The mere existence of such association points to the magnitude of modern entrenchment in literacy: The dictionary, which contains the objective referents of all commonly used words, by its own definition of the term "objectivity" implies that the words it contains are the only authentic ones. Taken one step further this proposition suggests that,



of the individual to articulate or recall them can be preserved *outside* the reader in a code, list or text<sup>26</sup>, which can be returned to long after the spoken word is lost for confirmation or criticism of what was said.<sup>27</sup> This ability to perpetuate the word over time and space inaugurates an entirely new mode of communication, one which has implications not only for expression of ideas but for their development and structure as well.

Probably the most profound effect of the advent of literacy is the assignment of some form of visual representation to words which previously existed only as sounds. In the pre-literate context, words possess no ocular counterpart; there is no means by which the spoken word can be removed from the realm of oratory to a more durable medium. Thoughts and ideas exist only in the potential of individuals to articulate them or, once spoken, in the memories of the parties to the communication. There can be no more permanent record of any interaction because there is no concrete means of committing the word-sounds to a permanent, written form. There is nothing *outside* the speaker or the listening audience which would permit the separation of the sounds from their origin: no alphabetic or phonetic script which might represent the spoken word in a text or list. In the absence of such capabilities, the persistence of words and the message(s) they convey are contingent upon their communication with others.<sup>28</sup>

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<sup>25</sup>(cont'd) until they are written, words are something less than real. The implications of this view of writing as the authenticating force behind words will become increasingly apparent as the discussion progresses into elaboration of the role of the printed word in the development of modern law and legal bureaucracies.

For purposes of this thesis, the term "objective" is construed in accordance with the definition assigned it by Walter J. Ong in his Orality and Literacy. The Technologizing of the Word. (New York: Methuen Press, 1982). In this work Ong states that "Writing separates the knower from the known and thus sets up conditions for objectivity *in the sense of personal disengagement or distancing*". (my emphasis), (p.46).

<sup>26</sup>Goody, note 23, *supra*, p.1.

<sup>27</sup>Ong, note 25, *supra*, p.31.

<sup>28</sup>*Ibid.*, p.34.

This is especially true in the elaboration of protracted thoughts. Were an early thinker confronted with a particularly complex problem to resolve, it is highly unlikely that he/she would be able to resolve the challenge without the benefit of his/her fellows. The would-be problem-solver in the pre-literate context is not permitted the luxury of making written notes concerning the progression of his/her thoughts. The only receptacle of potential solutions is the mind. In the case of a relatively simple question, the individual might with relative ease recall the two or three steps enlisted in approaching a solution. In the more complicated cases, however, involving many more steps, it would be a tall order indeed for one person to retain all the intricacies of a given outcome, and even more problematic would be the articulation of those processes to others after the fact. Any prolonged thought thus required the input of others; "an interlocutor is virtually essential: It is hard to talk to yourself for hours on end"<sup>29</sup> — and even harder to retain what was said if you can. Thus in the complete absence of writing which characterized pre-literate societies, the growth of complex ideas was clearly contingent upon their effective communication to others.

This dependency upon an audience for the preservation of oral utterances placed important provisos on the content and transmission of thoughts and ideas. Conversation and oration required *something more* to ensure the retention of their contents. To be intrinsically memorable was insufficient: Memorable thoughts must also be *memorably* expressed. This expression gave prominence to turns of phrase and patterns of thought which would promote memory. Thus the pre-literate thinker thought and spoke in

heavily rhythmic, balanced patterns, in repetitions or antitheses, in alliterations and assonances, in epithetic and other formulaic expressions, in standard thematic settings, in proverbs which are constantly heard by everyone so that they come to mind readily and which are themselves patterned for retention and recall...Serious thought [was] intertwined with memory systems. Mnemonic needs determine[d] even syntax.<sup>30</sup>

So-expressed, thoughts become intimately intertwined with the narrative of their inventor and

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<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*, p.34.

thus with the inventor him/herself. There is no separation of the speaker and the spoken; pre-literate cultures do not possess the necessary tools to structure knowledge at a distance from live experience.<sup>31</sup> In a similar vein, there is a far closer connection between individual word-sounds and the objects they represent.<sup>32</sup> Subsequent to the advent of literacy, the link between symbol and referent is punctuated with the written form of the word-sound. This disjunction intensifies as the word-sound is increasingly identified with its chirographic symbols, rather than the original object. The sounds which once represented, for example, "tree" now reflect the symbols "t", "r", and "e", not the actual article complete with barked trunk, branches and leaves. Prior to literacy, the sounds represented the tree itself, not tree as a collection of markings, and as the direct product of the living person's ability to articulate those sounds were closely related to their source.

Thus, in the pre-literate culture, all erudition is closely associated with the present, living society and the needs and experiences of those who comprise it. Words are dynamic; they convey not only the postulations and preferences of individuals, they are part of the living being itself. Co-existent with this dynamism is the tendency of oral cultures to do away with or modify myths and recollections which carry information no longer relevant to the group. Items of history or culture are maintained only insofar as they conform to or complement the present state of affairs. An interesting example of the oral culture's automatic adjustment of historical "records" is offered by Goody and Watt and concerns the state of Gonja in Northern Ghana.

[T]he founder of their state, Ndewura Jakpa...conquered the indigenous inhabitants of the area and enthroned himself as chief of state and his sons as rulers of its territorial divisions...When the details of the story were first recorded at the turn of the present century, Jakpa was said to have begotten seven sons, this corresponding to the number of divisions whose heads were eligible for supreme office by virtue of their descent from the founder of the particular chiefdom. But at the same time the British arrived, two of the seven divisions disappeared, one

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<sup>31</sup>*Ibid.*, p.42.

<sup>32</sup>Jack Goody and Ian Watt, "The Consequences of Literacy", in Goody, note 23, *supra*, pp.30-31.

being deliberately incorporated into a neighboring division...and another because of some boundary changes introduced by the British administration. Sixty years later, when the myths of the state were again recorded, Jakpa was credited with only five sons and no mention was made of the founders of the two divisions which had since disappeared from the political map.<sup>33</sup>

Because the present tense required Jakpa to have two less sons than he started out with, the legend of Gonja's beginnings was amended accordingly. When the British challenged the later records with the earlier ones which included the two lost sons, the people of Gonja saw no great problem: Those aspects of the earlier records which contradicted with the present ones did not speak to the greater accuracy of either of the documents, rather these reflected what was true once but is no longer. Those aspects of the past which conflict with the present are not incorrect, but simply irrelevant. Had the Gonja's genealogy never been committed to the written word, no such contradiction could have occurred; without prior records to consult, the accuracy or inaccuracy of the present genealogy could not be determined. The oral historian adapted history to fit the context of his/her oratory; conflicts and contradictions, when these emerged, were simply omitted. Unnecessary information clutters the mind; the pre-literate person has enough to remember without cluttering the mind with knowledge for knowledge's sake alone.

With the introduction of literacy, the transitoriness<sup>34</sup> characterizing oral communication is greatly reduced. It becomes possible to separate the speaker from the spoken word, to commit word-sounds to a text or list using visual referents of words. The implications of words' newly acquired permanence are profound. In the first place, as was elaborated above, writing introduces a new dimension into the relationship between words and their referents. When words existed as sounds only, they manifested a mystical component; words were closely associated with the individual who spoke them and his/her power to do so. With the removal of word-sounds into the silence of the text, much of that mystical component is

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<sup>33</sup> *Ibid.*, p.33.

<sup>34</sup> Goody, note 23, *supra.*, p.1.

lost. Words become objective, losing much of the subjective quality they held as appendages of the speaker, and hence less connected with the peculiarities of person, place and time:

"As long as the legendary and doctrinal aspects of the cultural tradition are mediated orally, they are kept in relative harmony with each other and the present needs of society in two ways: through the unconscious operations of memory and through the adjustment of the reciter's terms and attitudes to those of the audience before him/her".<sup>35</sup>

When moments of culture or history are frozen within a text, they no longer react to their audience, rather their audience reacts to them. Texts must be read as they are written; it is not possible to alter the original document to suit whatever sorts of changes may arise in the context of its reading. A "text cannot discard, absorb, or transmute its contents", it is able only to reflect the state of things at the time of its composition.<sup>36</sup> Because of this, the consistency between past and present promoted by oral transmission of anecdotes is lost; it becomes possible to distinguish between ancestors and their possibly disparate traditions and the current situation. The past is thus set apart from the present, a separation facilitated by the realization of any number of previously unanticipated contradictions between these periods. The emergence of disparities between what they are *told* and what they *read* inspires an unprecedented cynicism on behalf of the newly-literate population. The ready-made lifestyle perpetuated by orality is rejected as the early thinker is increasingly moved to a conscious, comparative and critical disposition toward his/her former view of the world.

Because literacy lacks the natural sloughing abilities of oral communication, the only means by which to remedy those aspects of texts which become dated is to compose a new text correcting and complementing the old one. The result is an ever-increasing mass of information the magnitude of which is such that any one individual is prohibited from possessing more than a small fraction of it.<sup>37</sup> In the pre-literate context, if for no other

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<sup>35</sup>Goody and Watt, note 32, *supra*, p.44.

<sup>36</sup>*Ibid.*, p.67.

<sup>37</sup>*Ibid.*, p.56-57.

reason than the relatively limited amount of knowledge available, the average individual was in possession of most, if not all, the group's cultural information. This combination of a smaller range of cultural variables with the oral mode of transmission meant that, in general, the degree of involvement of the individual in the total cultural experience was far greater than is the case in literate cultures.<sup>38</sup> When the predominant mode of cultural transmission is the written word, obtaining cultural information becomes an inherently solitary pursuit. Reading and studying are most fruitful as individual ventures. Thus not only is the literate person set apart by the solitude of literary endeavors, but by his/her inability to gain more than a fraction of the sum of the knowledge available. Literacy, therefore, isolates.

Literacy further intensifies the potential ambiguity of human communication. In the oral context, devoid as it was of dictionaries, there existed a limited number of words with a limited number of meanings; confusion might be generated by improper usage of a given word in a given context, but was less likely through the misunderstanding of the word itself. Once it becomes possible to record definitions, and thus to assign more than one meaning to a word, the potential for obtaining a confident grasp of the essentials of any interaction is greatly reduced. Cottage industries spring up for the elaboration of single terms, diverting attentions from the message to the intricacies of the medium. To the extent that the medium and message intermingle, analyses of the words used to convey ideas is certainly justified. What is less justifiable, however, is the tendency of such ventures to assign greater importance to words than the ideas they convey.

From the preceding, it is apparent that codification, as a capacity incumbent upon the development of a literate component of the spoken word, affects much more than the mere word of the law. As with words in general, the ability to objectify the laws in a permanent list or code alters not only the laws themselves, but also the ways in which people structure, respond to, and think about legal ideas. Where pre-literate social control was grounded in

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<sup>38</sup>*Ibid.*, p. 57.

little more than "just ideas betwixt right and wrong"<sup>39</sup>, literacy translates those ideas into a permanent, objective form with all the attributes of the written form which that implies. In this light it is perhaps not surprising that Hart and Maine saw the movement to a codified scheme of laws as an integral step in the movement from the pre-legal to the legal. As scholars working within a literate tradition, they were unable to divorce their conception of law as an inherently literate enterprise from the purely oral form of legal ideas. This is so because, once firmly enshrined the habit of literacy, the direct relationship between the spoken word and its referent is interrupted by the visual component of the aural symbol. It becomes increasingly difficult to think of words entirely as sounds, without bringing to mind some picture of the spelled-out word.<sup>40</sup> Literate persons *think* in letters<sup>41</sup>, and thus it is not surprising that literates would have difficulty relating to those who lack them. In this light the question necessarily arises whether it is the unwritten aspect of early law which renders it *pre-legal* or the equation of laws with literacy which prohibits modern researchers from fully appreciating other, pre-literate forms of law.

### [III] Modern Theories as Impediments to Understanding "Primitive" Realities: How Literacy Affects Legal Conceptions

For Hart the distinction between the pre-legal and the legal was synonymous with the distinction between societies ruled by primary controls and those manifesting a combination of primary and secondary controls. Primary controls were defined as those which arose out of the morality of the group, compelling the individual to certain behaviors through a genuine belief in the propriety of those acts.<sup>42</sup> These precepts were learned by the individual largely

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<sup>39</sup>George, note 10, *supra*, p.87.

<sup>40</sup>Ong, note 25, *supra*, p.12.

<sup>41</sup>*Ibid.*, p.12.

<sup>42</sup>The distinctions between *primary* and *secondary* controls are discussed in detail in the Fifth

through trial and error, by watching and imitating the successful behaviors of others. In other research, Hart's primary controls have been referred to as the "controls of custom", and indeed Hart himself acknowledged the overlap between these two terms.

A society where the only means of social control is the general attitude of the group towards its own standardized modes of behavior...is often referred to as one of custom; we shall refer to it as one of primary rules of obligation.<sup>43</sup>

What separated these customs from law in the sense of the union of primary and secondary rules was the ability to objectify the internal prescriptions outside the person. This capacity was gained with the advent of literacy which, as was seen above, also provided the means to expand custom into the complex system characteristic of *truly legal* modern forms of law.

The true difference, then, between law and the pre-legal controls of custom lay not in the *concept* of law, but rather in the *structure*.<sup>44</sup> Literate and pre-literate cultures might prohibit many of the same behaviors, but the means of that prohibition, rather than the behavioral ideals which inspired them, would form the visible distinction between their respective forms of law. Pospisil and Hoebel would seem to support this notion, especially in the methodologies they devised for studying law in early societies. These scholars focussed upon the various ways and means by which legal aspirations were articulated, rather than on defining the aspirations themselves, since it was held that law sought the same sorts of ends in virtually all contexts and was thus distinguishable only by the various sorts of means developed to approach those ends. Custom and law were similar inasmuch as each aspired to legal ideals, what prevented customary controls from entering the realm of *true* law was their lack of a truly legal structural component. It was for this reason that the Dene law, when seen from the perspectives of Hoebel and Pospisil, was not law at all, but "merely custom".

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<sup>42</sup>(cont'd) Chapter of this work, pages 125-130.

<sup>43</sup>Hart, note 24, *supra*, p. 89.

<sup>44</sup>See Chapter Six of this work, p. 145, for a complete discussion of the relationship between the concept and structure of laws.



Yet the lack of a structural component was insufficient to prevent Hart from finding law in contexts highly similar to the Denes' culture. He held that many "primitive" societies were quite capable of regulating the behavior of their membership through primary constraints alone. Order here was maintained through a relatively constant, covert consensus regarding acceptable and unacceptable behavior which was articulated through the daily routine rather than a "legal system".<sup>45</sup> The absence of literacy, which would have permitted the translation of that consensus into an objective, permanent form, prevented the elaboration of a structural framework for the administration of law. Custom or, by Hart's terms, primary rules, may in this light be seen as the *unwritten* law of pre-literate societies. But the question remains, posed by scholars who, unlike Hart, lacked the ability to perceive law in both its internal and external — or primary and secondary — elements: Can unwritten, and hence purely conceptual, forms of law actually qualify as Law?

The continued debate over this question, which may for present purposes be seen as grounded on one side by Hart and on the other by Pospisil and Hoebel, would seem to reside in the differing definitions these scholars apply to "law" and "custom". Yet these have been explored above and have, ultimately, offered little insight into the problem. It seems hardly adequate to dismiss the issue with assertions that how one chooses to define law will determine whether s/he finds it; Malinowski's work was sufficient evidence of the folly of that position. Definitions, although they have their purposes, are not alone enough to close the discussion; there is clearly something else at work which must be tapped and understood. If how law is defined is not sufficient to determine whether in fact law is or is not found to exist in a given setting, then perhaps the question should be extended to include questions of why scholars cling so tightly to the habit of definition. The very act of defining is a profoundly literate one, rendering its position as a tool for understanding pre-literate constructs at least somewhat questionable. By the same token, law, in Hart's explanation of it

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<sup>45</sup>Hart, note 24, *supra*.

as the union of primary and secondary rules, is also a profoundly literate construct and is thus equally questionable as a term which might convey a sense of an earlier, pre-literate form of social control.

Literacy, it was established above, provides the means to engage in complex analyses, to separate things into categories and types, and to engage in the processes of definition so prominent in modern literate cultures. These "logical procedures"<sup>46</sup> are necessarily literate, and even as they emancipate the individual from the transitoriness and constraints of orality, they distance him/her from the important internal aspects of non-literate constructs. The further into literacy the previously non-literate thinker ventures, the more difficult it becomes to perceive phenomena independent of the word-symbols which describe them. Perception becomes inextricably intertwined with literacy.

It is in the distancing of literate cultures from their earlier orality that the essence of arguments over whether law or custom prevailed in pre-literate cultures is found. Modern law is bound up with written documents which provide as much as possible for the pursuit of legal ideals. Outside these documents, in the realm of the administrative bodies they create (e.g., Courts), the legality or illegality of behaviors often hinge upon how the written codes define such behaviors; guilt or innocence can become little more than a semantic distinction. Furthermore, the status of many associations, whether these concern people or people and property, rests in many cases upon the presence or absence of a written agreement defining the nature of that relationship and the responsibilities involved. Literacy touches virtually every facet of modern law, to the point where it becomes difficult to separate the concept from the structure of legal ideas.

Given the measure of entrenchment of literacy in contemporary law, it is understandable that some scholars would perceive the presence or absence of law as concomitant with the

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<sup>46</sup>Goody and Watt, note 32, *supra*, p.53.

presence or absence of literacy. Bound up in the complex, objective perspective accompanying protracted literacy, profoundly literate individuals have little frame of reference for the rustic subjectivity characteristic of oral peoples and their institutions. Pre-literate law is deemed nonexistent not because it does not exist, but because the distance between oral and literate traditions engendered by literacy prohibits the appreciation of custom as merely another *form* of law. From its inception, literacy transcends orality, a superiority which attends the entrenchment of literacy to the point where little that is spoken is accepted without its echo in print. As print devalues the spoken word, so the logical method of the literate begins to supercede the subjective tenor of purely oral thought. This tendency of the written word to prevail over the spoken is paralleled in the elevation of contemporary law as superior to the merely customary controls which prevailed in the pre-literate context. As literacy surpasses orality, so literate thinkers ultimately hold law as predominant over custom.

To the extent that the primary controls of custom equated with the internal, subjective restrictions on behavior and the secondary rules reflect the external, objective realm, the elevation of the latter over the former by modern legal theorists comes dangerously close to constituting a *false dichotomy*. As articulated by Lewis Mumford<sup>47</sup>, the essence of this dichotomy lay in the "falsely oppositional separation of certain phenomena" which are essentially similar and the elevation of one over the other. Although he acknowledged the presence of a number of such splits in the contemporary context, Mumford held the severing of the subjective, inner world from the outer, objective one (with greatest validity being accorded the latter) as the most important of all such splits. In Hart's terms, this elevation would equate to the raising of the secondary over the primary rules; that is, to the predomination of external controls over those internal to the individual. Yet it is arguable that this elevation is quite inappropriate, an improper split created by the contemporary

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<sup>47</sup>The concept of the false dichotomy is taken from Lewis Mumford's works Technics and Civilization (Harcourt, Brace and World: New York, 1934) and Art and Technics (Columbia University Press: New York, 1952).

thinker's obsession with law as a product of literacy. To the extent that law is created through the union of the primary and secondary rules, the internal and external aspects cannot be viewed as entirely separate entities one of which may be held superior to the other. That modern scholars perceive the split between the primary controls of custom and the secondary realm of law as profoundly as they do may be attributed to their deep involvement with literacy. Seen in this light, the distinction between law and custom is revealed as a false dichotomy produced by falling prey to the methodological hazards implicit in the conduct of a retrospective analysis of an earlier, oral culture by scholars working within a firmly entrenched written tradition.

Law and custom, it may thus be seen, constitute two sides of the same coin; if they are too cleanly split, the researcher is left not with half a penny but with no penny at all. Although the currency may differ in other countries and contexts, these differences cannot and indeed must not, be construed in terms of superiority or inferiority. Such comparisons overlook the possibility that collation may not be appropriate; divergent systems, whether of currency or law, must be understood as what they are: the different products of different environments with varied needs and resources. Superiority or inferiority are purely external considerations.

Only when the integration of different social products is contemplated is it permissible to speak in comparative terms, for in such a situation it is necessary to appreciate divergence and account for it. Thus, in the context of the Dene proposal for self-determination and juridical autonomy, it is important to be cognizant of the disparities between traditional Athapaskan modes of social control — not that these might be used as barriers to the acknowledgement and activation of Dene institutions within the larger Canadian context, but rather that they might offer insight into how best to reconcile Dene rights and traditions with those of the larger polity.

Some of the most compelling of these disparities have been found to reside with the friction between pre-literate and literate societies. In the traditional context, the Dene lacked any form of literacy and thus all those capacities which accompany it as well; a defect which was discussed extensively for the effect it had on Dene legal mechanisms. The contents of that discussion suggest that, although their law was unwritten, the Dene nonetheless possessed a form of law unique to their culture, needs and environment. Whether that law is capable of translation to the modern context of Denendeh, however, is uncertain. The contemporary context plays host to a variety of factors alien to that in which Dene law originated, not the least significant of which is the massive legal bureaucracy of the larger Canadian legal system and the firmly entrenched literate tradition which lies at its base. To ensure its survival and peaceful co-existence with that system, Dene law would have little alternative but to assume a literate legal form.

Yet it is questionable whether Dene law could survive such a translation. It was established above that transfiguring oral conceptions into literate ones alters not only the means by which that conception is communicated, but also the way it is conceived of, thought about and reacted to. It is thus apposite to ponder what sorts of effects codifying Dene traditional law might have upon that law. To what extent could those practices adopt literacy and remain true to their pre-literate roots or, stated another way, remain truly *Dene*? For inasmuch as the Dene have lived on the margins of the larger Canadian literacy for at least a century, the potential of that literacy to convey Dene traditions with accuracy is greatly mitigated by the following considerations: It is the written rendition of an alien language (English as opposed to Athapaskan) which was imposed from without, rather than developed and embraced from within. If the fundamental ratiocination for the construction of Denendeh is to revive traditional ways and means, a balance must be struck between renovating those ways to meet the needs of the present tense and preserving the cultural heart of the past.

If the differing world views of the predominantly non-literate Dene and the larger Canadian polity promise to affect the articulation of traditional Dene law, it would seem logical to suggest that they might play an equally decisive role in the larger processes of the Denes' claims negotiation. It was asserted in a number of contexts throughout the course of this thesis that a lack of communication between Indian and government organizations unnecessarily frustrates the resolution of many claims.<sup>48</sup> Differing conceptions of the human-land relationship render the finding of common justifications for settlement difficult, as do the manner in which these are documented. Often the sole record of "use and occupancy" are the oral declarations of those who remember -- declarations which are delivered in the highly poetic manner of oral peoples. The fact that the intensively literate Canadian polity depends upon highly technical written records for the establishment of such matters necessarily affects their perception of the validity of the Natives' submissions. In light of this it would seem reasonable to suggest that until a better balance is obtained between the objective requirements of the literates and the subjective quality of the predominantly non-literate, there will continue to be a significant measure of misunderstanding and lack of communication characterizing their interactions.

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<sup>48</sup>See especially Chapter Two of this thesis, pp.41-53.

## VIII. FROM LAS CASAS TO LAND CLAIMS – SOME CONCLUDING COMMENTS

If it were possible to confine in a single term the ingredient most necessary to the satisfactory resolution of Canadian land claims, that word would most likely be *communication*. In the progression of history which has fostered Native aspirations to self-determination, it has been the presence or absence of this element which has been most influential in establishing the tempo of contemporary Indian-government interactions. As was illustrated in the first chapter of this work, early Canadian Indian policy reflected a minimum of input from its recipients, and was thus often of limited relevance and benefit to native peoples. Policies directed to the "christianization, education and assimilation" of Indian and Inuit persons flourished into the 1970's, resulting in widespread acculturation stress and anomie.

More recent initiatives indicate a growing realization on the part of governments of the importance of soliciting native input in developing native policy. Yet while federal and provincial agencies have on numerous occasions met with Indian and Inuit groups to discuss native issues and concerns, legislation proposed subsequent to such meetings suggests that, although they are talking, there is in reality very little communication. Nowhere is this deficiency more patent than in the context of both federal and provincial postures toward resolution of native land claims. With only limited exceptions, land claims policies at both levels of government have adopted highly protectionist attitudes toward national and regional interests which are often at odds with the claims of native people. As a consequence, those claims which have been settled<sup>1</sup> are proving as notorious as the infamous "Numbered Treaties" which preceded them, offering little reason for optimism among those native groups whose claims are currently navigating government resolution processes.

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<sup>1</sup>For example, the James Bay Agreement and the Western Arctic Claim (See Chapter Three of this work, especially pp. 67-70).

In the latter chapters of this thesis an attempt was made to explain the problematic nature of Indian—government interactions in general, and land claims negotiations in particular, through an analysis of the intricacies of Indian—government communication. It was hypothesized that, given the strong oral bias of the majority of Canadian native peoples and the profound literacy of the non-native polity, interactions between them are thwarted by the effects of orality and literacy upon expression and understanding.<sup>2</sup> As will be recalled, in the aboriginal context most Canadian indigenes lacked a written referent of their spoken language, qualifying them as oral populations. To this day only two of these groups, the Cree and Inuit, possess such a referent, while the remainder of native people have either avoided literacy all together (as in the case of the elderly members of some bands) or participate in the literacy of the English language endemic in the surrounding country. To some, the latter group might be seen as no longer qualifying as oral peoples and, as regards their partaking in the margins of the larger literacy, this observation is accurate. In terms of their position vis-a-vis their aboriginal tongue, however, these peoples remain oral. The implications of this juxtaposition of orality/literacy await illumination through further research, but it is probable that the clashing of world views implicit in this duality will emerge as a significant factor in the overall anomie characterizing Canadian native persons. An additional area of study may be directed to gaining a better appreciation of the potential effects of imposing the literacy of an alien language upon an originally oral population, as these too are largely a mystery.

The movement to literacy was shown to produce profound changes not only in the relationship of words to their referents, but in the manner in which that relationship is thought about and structured by the individual. These alterations possess significant implications

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<sup>2</sup>It is perhaps in response to this type of difficulty that many Native groups are supplementing their oral records with some very sophisticated work documenting land use and occupation patterns. Hugh Brody's inclusion of maps specifying land usage among the Athapaskan peoples of the Treaty 8 area of British Columbia in his Maps and Dreams. Indians and the British Columbia Frontier, (Toronto/Vancouver: Douglas and MacIntyre, 1981), is a good example of such work. More recently, the Gitksan—Wet'suwet'en Tribal Council have led the field in confirming aboriginal land use through extensive and detailed mapping of their traditional territories.



for language, for inasmuch as literacy restructures thought, it is equally influential in the expression of that thought. Given the pervasive effects of literacy, it should not be surprising that the interactions of predominantly oral peoples and their literate counterparts would meet with a good deal of misunderstanding and confusion. Although it constituted a secondary consideration in this thesis, it is clear that the orality/literacy concept offers a remarkably lucid rationalization of the lack of communication characteristic of the majority of Indian-government interactions.

The central theme of the thesis contemplated the possibility of land claims and self-government as a route to securing justice mechanisms better directed to native needs. The Dene Nation's aspiration of asserting control over the administration of justice in its proposed state of Denendeh formed the core of the discussion. Focusing primarily upon potential theoretical impediments to this end, the orality/literacy dichotomy was scrutinized for the role it might play in activating Dene Law in the modern context of Denendeh. Moving beyond the purely literate task of defining what might qualify as law among Dene legal traditions, discussion turned to the task of addressing the concern that the Dene did not, in the aboriginal state, possess a form of law capable of translation to the present tense. The inadequacy of literate constructions of law as tools with which to assess Dene legal mechanisms was exposed, revealing that successful attempts to elucidate aboriginal controls must take into account the role of orality and literacy in shaping legal institutions. There is little doubt that to compare law among literates with its approximation in oral cultures, or worse, to enlist inherently literate definitions of law as a measuring rod for determining the presence or absence of law among pre-literate peoples may be considered a rather fruitless, "apples versus oranges" contrast. Cast in this light, allowing questions concerning the vitality or adequacy of "primitive" institutions to impede the progress of self-government deliberations borders on the nonsensical.

Unfortunately, the acceptance in theory of potentially viable aboriginal juridical mechanisms does little to alleviate the many pragmatic impediments to the resurrection of Dene legal traditions. Given the limited degree of elaboration by the Dene of the nature of the juridical powers they desire<sup>3</sup>, and the equal uncertainty of government agencies in terms of the sorts of law-making authorities they are willing to relinquish to Denendeh<sup>4</sup>, it is possible only to estimate the height and breadth of the hurdles confronting Dene juridical autonomy. Yet this does not preclude the necessity or importance of attempting to gauge those impediments here, especially as they harrow a fertile ground of future research important to land claims and juridical self-determination.

It is arguable that the mere fact of the Federal government's expressed willingness to entertain matters of law-making powers within the context of self-government negotiations constitutes an important step in the direction of obtaining such powers. Prior to the latest comprehensive claims policy statement<sup>5</sup>, the self-government aspect of land claims proposals was, at best, sadly limited. Beyond the potential for achieving the largely illusory independence of municipal status under Bill C-52, or the carefully circumscribed participation in advisory capacities on boards or administrative tribunals<sup>6</sup>, little room for true autonomy

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<sup>3</sup>At this time, the Dene Nation has not yet clearly articulated the design their justice mechanisms might follow. The most that has been said is nicely summarized in the Dene Nation and Metis Association draft document, "Public Government for the People of the North", January 1, 1987.

<sup>4</sup>The Department of Indian and Northern Affairs response to the recommendations of the Coolican Report goes no further than to state that the shape of self-government institutions will be determined through framework agreements and confirmed through legislation. Almost as an afterthought, the report of the new Comprehensive Land Claims Policy adds that "most aspects of such arrangements will not receive constitutional protection unless a constitutional amendment to this effect is in force".(Canada. Indian and Northern Affairs. Comprehensive Land Claims Policy, Ottawa, (1986), p.18.) To pursue the implications of this corollary is far beyond the capacity of this thesis, and certainly beyond the context of a footnote. However, as a project for future study, the question of constitutional protection of aboriginal self-government capacities and institutions is a significant and challenging one.

<sup>5</sup>*Ibid.*

<sup>6</sup>Such as that accorded the Inuvialuit in their Western Arctic Claim. See pp.70-74, this work.

existed. With the federal government's stated amenability to discussing wider, native-defined forms of self-government, there emerges at least the *potential* for realization of independence for Canadian native peoples. To the degree that this potential must be tempered with the realities of the federal government's less-than-sterling past record with regard to claims negotiations, however, it is probably best to withhold celebration of this potential until it has been tested in actual negotiation.<sup>7</sup>

Assuming for the sake of discussion that the federal and territorial governments are truly interested in endowing the Dene with quasi-provincial legal authority, the central issue becomes one of how traditional controls might influence the shape of that authority. Equally important in this regard are the potential constraints upon Dene law created by its necessary interaction with the federal system, as well as federal and territorial government willingness to entertain novelty in the legal posture of Denendeh. Clearly, the position of these agents will exert a powerful influence upon what is or is not possible in the context of Dene law. To the extent that they are in the position of granting, and the Dene in the position of receiving, legal powers, the upper hand will most probably remain with the state in terms of defining the law-making potentials of Denendeh.

From the description of Dene traditional controls presented in the fourth chapter of the thesis, it may be surmised that something more than these would be required in order for Dene law to succeed at the present juncture; it is doubtful that a precise reproduction of the original sanctions would be capable of meeting the wide variety of challenges faced by

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<sup>7</sup>The Dene may have more cause to applaud this policy statement than other, especially southern, claimants. The recent positive response of the Territorial Government to the Dene and Inuit plans to divide the N.W.T. along the boundaries of the proposed territories of Denendeh and Nunavut (See "Division of N.W.T. praised by minister" The Globe and Mail 17 January 1987; "Pact reached on N.W.T. split" The Vancouver Sun 15 January 1987.), coupled with the on-going discussion of federal devolution of additional powers to the territorial governments, suggests that the new Comprehensive Claims Policy might be used to the advantage of the Denes' claim. The progress which has been made in terms of territorial divisions and the familiarity of devolution issues place the Dene far ahead of other Canadian groups who have less experience in such matters.

modern legal systems. The question necessarily arises, then, of how to supplement or update traditional Dene law in a manner which maximizes its efficiency as an agent of social regulation, yet does not too greatly compromise its "Indianness". Should it become apparent in the course of negotiations that the blueprint for Denendeh's institutions arises more from a general Dene life philosophy than from a particular infrastructure generated by that philosophy, the process of translating Dene traditions to the contemporary idiom may be eased somewhat. It is doubtful that such a discovery would have any substantial effect, however, given the absence of a tendency among the early Dene to justify actions in metaphysical terms. It could be difficult to promote the existence of a "Dene philosophy" independent of traditional Dene institutions where little or no separation of these existed in the original state. In addition, to argue the division of these for modern purposes could undermine the very goals the Dene seek to achieve: If Dene philosophies can be so cleanly distinguished from Dene institutions, it may become increasingly difficult to establish a case for revitalization of *both* in the form of Denendeh.

To impede the preceding criticism from acting against the resurrection of Dene traditions, it is imperative that the ultimate legal form assumed by Denendeh balances modern imperatives with traditional philosophies. In the United States this aim was approached through the creation of a system of Native Indian Tribal Courts which, in essence, combined American procedural principles with a substantive law derived from indigenous traditions.<sup>8</sup> Although a court system is certainly not germane to Dene tradition, it is arguable that this option could offer them the greatest measure of juridical independence<sup>9</sup>;

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<sup>8</sup>Samuel J. Brakel, American Indian Tribal Courts—The Costs of Separate Justice, (American Bar Foundation: Chicago, Illinois, 1978).

<sup>9</sup>Depending, of course, on the monetary feasibility of this option. The erection of an independent court system would constitute an enormous drain on Denendeh's capital and, given that much of those monies would come from the federal government, the true extent of Dene juridical independence could be jeopardized. Inasmuch as other provinces receive justice-related funding from the federal coffers, it is arguable that the potential effects of this patronage in Denendeh's legal scheme are quite distinct from their counterpart in provincial legal organizations. Provinces need not worry about compromising the philosophical roots of

a network of Dene-designed courts based upon a Dene-derived legal code and administered by Dene people seems like a rather good instance of the type of balance discussed above. The nature of the problems which could arise in attempting to implement this option, however, might disqualify this option from serious consideration. Assuming that definition and activation of such a system would require a written code, it would have to be determined precisely how much *literalizing* the Dene's oral traditions could sustain without compromising the integrity of that oral form. As a necessary corollary to this, it would have to be determined whether such a completely non-Dene institution as a court could ever be made sufficiently Dene to fit into Denendeh. In his study of operating tribal courts in the United States, Brakel found that the native clientele rarely viewed their own courts as any more Indian than those of the larger court system, especially in terms of relevance and fairness.<sup>10</sup> This lack of identification with the tribal court system was deemed by Brakel as resulting from a reality present in virtually all such systems – "historically and presently, the justice dispensed in the tribal courts represents nothing more or less than an effort to copy white man's precepts and white man's institutions".<sup>11</sup> If Brakel's findings are correct, and the American experience even potentially transferable to the Canadian context of Denendeh, then it would seem tribal courts may not be the best possible option.

If the details of construction of separate administrative bodies render the tribal court option unfeasible, the Dene may wish to turn to juridical options which do not require such radical action and/or expense. The Australian Law Reform Commission in 1987 released its suggestions for the best possible means of incorporating aboriginal legal traditions into the

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<sup>9</sup>(cont'd) their system when accepting monies from a higher authority; to say that Denendeh could avoid such considerations in the same situation is highly questionable. Beyond this, it must also be recognized that the cost of setting up a separate Dene legal system may be greater than the monies allocated for justice services in Denendeh, as determined by the ultimate settlement agreement. Quite simply, separate justice may be too expensive.

<sup>10</sup>Brakel, note 8, *supra*, pp.92-93.

<sup>11</sup>*Ibid.*, p.92.

dominant justice system.<sup>12</sup> Among these was the proposal for a "customary law defence" and a "partial customary law defence".<sup>13</sup> which would be available to aboriginal defendants charged with offences which conflict with customary practices. The former defence would have the effect of exonerating a defendant from any liability for an act perpetrated under a customary imperative which, had it not been so-impelled, would constitute an otherwise criminal act. This suggestion has also been entertained by the Law Reform Commission of Papua, New Guinea, where a full customary law defence was held as a valid response in murder cases where the killing was impelled by custom.<sup>14</sup> Whereas the Australian Law Reform Commission has discouraged implementation of this alternative as generally unnecessary, potentially unworkable, and possessing the problematic appearance of endorsing tribal violence, the same criticisms apparently do not extend to Papua, where the prognosis for its activation appears good.<sup>15</sup>

The Australian Commission appears to prefer the creation of a system of partial customary law defences which would, if accepted in a given case, diminish the culpability of the accused on grounds that, by his/her own laws, the act in question was either necessary or a non-offence. The defence would not lie against general offences, but rather against those few specified crimes in which the consequences of conviction are highly punitive (e.g., murder). Like the full defence, this plea has the advantage that it constitutes a clear acknowledgement of the potential conflicts between aboriginal and dominant legal concepts; unlike the full defence, it is far less likely to give an impression of condoning traditional violence as it speaks to sentence rather than to the charge itself. In this way the system is afforded an opportunity to articulate its nonacceptance of the act resulting in criminal charges,

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<sup>12</sup>The Recognition of Aboriginal Customary Laws. Summary Report of the Australian Law Reform Commission. (Australian Government Publishing Service: Canberra, 1987).

<sup>13</sup> *Ibid.*, p.42.

<sup>14</sup> *Ibid.*, p.42.

<sup>15</sup> *Ibid.*, p.43.

while at the same time respecting the traditions pertinent to the situation. An additional advantage of the partial customary law defence is the relative ease of its implementation. As noted by the Australian Commission, and revealed in Canada through the experiences of Justices Sissons<sup>16</sup> and Morrow of the Northwest Territories, such a defence may already be in effect in some jurisdictions. Although unofficial and highly influenced by the nature of the court hearing the offence, there are cases in both Australia and Canada where judges have entertained and accepted the validity of the actions at issue because they possessed a base in aboriginal tradition.

In Australia, the case of *Mamarika v. R.*<sup>17</sup> is pertinent. In this case, which involved the murder of an aboriginal man by "spearing" (a traditional response to certain forms of deviance among some Australian aboriginal groups), three of the four accused were found guilty on related charges but released on "good behavior bonds" while the fourth was given a truncated term of incarceration and officially banished from his community for three years (at the request of the community).<sup>18</sup> The Canadian experience, although not a precise parallel, is best illustrated by the rulings of Mr. Justice Sissons (as he then was) in the "Katie case"<sup>19</sup> and Mr. Justice Morrow in *Re Beaulieu's Petition*.<sup>20</sup> In the former case, the Court held that, although it would have been virtually impossible to reconcile traditional Inuit adoption practices with the bureaucratic regulations contained in the Territorial adoption ordinance, the fact that Inuit adoption practices did not violate the ordinance outright led perforce to the creation of a new category of adoptions "made according to the laws of the

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<sup>16</sup>Jack Sissons, *Judge of the Far North*, (McClelland-Stewart Ltd: Toronto, 1968).

<sup>17</sup>(1982), 42 A.L.R. 94.

<sup>18</sup>P.K. Hennessy. "Aboriginal Customary Law and The Australian Criminal Law: An Unresolved Conflict" in Bruce Swanton, (ed.) *Aborigines and the Criminal Justice System*. Proceedings—Training Project No. 27/1/5, (Australian Institute of Criminology, 1984) pp.336-349.

<sup>19</sup>*Re Katie's Adoption Petition* (1961), 38 W.W.R. 100.

<sup>20</sup>(1969), 67 W.W.R. 669.

Territories".<sup>21</sup> In *Re Beaulieu*, the precedent set in *Re Katie* was followed by Mr. Justice Morrow, who held that Dogrib adoption customs, like those of the Inuit, had not been abrogated by the Territorial laws of adoption.<sup>22</sup> To the extent that the decision in *Re Katie* was without precedent in either the common law or statute<sup>23</sup>, it speaks strongly to the ease with which these sorts of customary law defences could be implemented. Whether their inclusion in criminal law matters would be as uncomplicated is uncertain, but the presence of precedents like *Re Katie*<sup>24</sup> is encouraging.

An additional means for respecting potentially criminal traditional practices within the pre-existing legal system arises from the role of prosecutorial discretion in initiating criminal proceedings. The Australian Law Reform Commission suggests that prosecutors be officially afforded the means necessary to decline to launch proceedings in cases where the circumstances surrounding an act reveal that the matter can be handled satisfactorily without official intervention.<sup>25</sup> In situations where it appears the offence has a clear basis in customary practices and can be dealt with in a peaceful manner by the individuals or community involved, there would be little gained by instigating general system legal action – save perhaps the intensification of aboriginal versus general law conflicts. Turning to the Canadian context, it may be ventured that, although this option is accessible in both monetary and policy terms, it is questionable whether there are sufficient human resources to make it work. The loss of traditional knowledge and reduced subscription to customary values implicit in many northern native communities suggests that the cultural repertoire necessary to

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<sup>21</sup>Norman K. Zlotkin. "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases". Paper presented to the XIth International Congress of Anthropological and Ethnological Sciences, Canada, 1983. p.875.

<sup>22</sup>Northwest Territories Act. R.S.C. 1952, c.331, as amended by S.C. 1960, c.20, s.2.

<sup>23</sup>Zlotkin, note 21, *supra*, pp.875–876.

<sup>24</sup>*Re Katie's Adoption Petition*, note 19, *supra*.

<sup>25</sup>The Australian Law Reform Commission, note 12, *supra*, pp.88–89.



informal dispute resolution may be lacking. If the primary rationale for diversion of native cases to traditional mediation is to permit Indian disputes to be handled through traditional Indian means, then the success or failure of this initiative would depend absolutely upon the degree of cultural retention in a given group. Should it become apparent that natives are doing in the diverted cases nothing different from that which would occur if non-natives were left to their own devices to handle disagreements, then the entire foundation for independent native structures is lost.

Even in those communities which possess the necessary cultural means to establish mediation, there remains the problem of ensuring adherence to the resolutions once struck. The success of diversion and mediation in any context is in direct proportion to the willingness of the parties involved to respect its processes and outcomes. When the informal workings of mediation are juxtaposed with their more official tribal court counterparts and one considers the problems with the latter noted above, it is possible to envisage the same problems of respect and identification coming to play in informal mediation. It may be postulated that, in the absence of even the limited formalism characterizing tribal courts, there exists little reason to deny that disputes supposedly addressed informally within a given community might yet find their way into the general legal system.

Tribal courts, customary law defences and diversion, constitute only a fraction of the options open to the Dene Nation should they succeed in their ambition to achieve juridical self-determination. None of these alternatives are problem-free and there is a great deal of variation in terms of their eventual costs and benefits. Tribal courts, inasmuch as they accord with the general tenor of Denendeh, would be highly expensive and difficult to implement. To the degree that they risk the impoverishment of Dene law by Common law principles and procedures, tribal courts might also prove ineffective. Inasmuch as diversion offers a *next best thing* to tribal courts, it appears to suffer from many of the same flaws as the courts and is thus of equally uncertain fruition. While these alternatives suffer from attempting to

color non-native structures with native philosophies, the customary law defences allot those philosophies no substance outside their role as responses to non-native structures; in so doing, these defences undermine the entire foundation of self-determination: Namely, that native people are tired of merely responding to others' definitions of their environment.

The inappropriateness of those definitions may be extended to the juridical alternatives examined above. It is arguable that external assessments of the best possible option for Denendeh, whether postulated by natives or non-natives, remain the conceptions of outsiders. For the institutions of Denendeh to be truly Dene, they must come from the Dene. Statements that tribal courts or customary law defences will not work for them should not be taken as supporting suspicions that juridical independence is unworkable; such assertions inform only that the search for the juridical form apposite to Denendeh must continue. In the same breath that argued external constructions of law constitute spurious indicators of the presence or absence of Dene law, it can be contended that external designs of "Indian Justice" are no less invalid as models for Denendeh's legal mechanisms. The resurrection of Dene law *is* possible, but the form and content of that law must, ultimately, come from the Dene themselves. Only in this way can Denendeh retain the integrity of the Dene way.<sup>26</sup>

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<sup>26</sup>Taken a step further, this rationale suggests that the "Dene way" must also come from the Dene; it must be conceived by the Dene, shaped and nurtured by them in accordance with modern Dene insights. That some aspects of that perspective might ultimately be derived from outside the aboriginal realm of Dene life should not detract from its "Dene-ness"; the various attributes of the Dene way will be Dene inasmuch as it is Dene people who practice them and colour them with the Dene experience, whether past or present. At this time, and for purposes of this thesis, those outside the Dene can only approach an understanding of the Dene way; gleaning a basic idea of the concept as it is hinted at through the many publications and presentations offered by the Dene Nation. Some examples of the latter include, the Dene Nation and Metis Association of the Northwest Territories, Public Government for the People of the North, (January 1, 1987, Draft Document); Indian Brotherhood of the Northwest Territories and the Metis Association of the Northwest Territories, The Dene Declaration, (passed, 2nd Joint Assembly, July 19, 1975, Fort Simpson, N.W.T.); The Dene Nation, Denendeh. A Celebration, (D.W. Friesen and Sons Ltd.: Canada, 1984); The Dene Nation, The Dene: Land and Unity for the People of the Mackenzie Valley. A Statement of Rights, (Charters Publishing Company Ltd.: Brampton, Ontario, 1975).

It is probable that at least some of the difficulties implicit in reviving traditional Dene legal mechanisms will prove generalizable beyond the context of courts and codification. It must be left to later research to determine the intricacies of implementing policing or correctional services in Denendeh; although it is probable that these will prove no less of a challenge than the legal mechanisms dealt with here. To the extent that neither police or prisons (nor probation or parole) were characteristic of the aboriginal state, rendering these relevant to the milieu of Denendeh could prove highly challenging. It is doubtful, for example, that the sort of informal policing of behaviors found in the pre-contact Dene society would be transferrable to the present day, especially since these depended in great measure upon the pronounced social cohesion present among pre-contact band society members — A solidarity which may be hard to come by in many contemporary Dene communities. To the degree that traditional penalties also relied upon the importance of group membership to the individual, these too may be difficult to articulate in the present tense. With the exception of *banishment* which, as a customary correctional device, has survived as a sentencing option for contemporary non-native courts (e.g. Mamarika), it may be transferrable to the legal make-up of Denendeh. For purposes of responding to lesser crimes, Denendeh may wish to draw upon its traditional requirement of victim restitution.<sup>27</sup> In their similarity, to the modern imperatives of community service work or restitution, these informal penalties may be easily integrated into Denendeh's correctional continuum.

The means chosen by the Dene to define the juridical environment of Denendeh can ultimately be determined only by them in conjunction with those agencies with which they will have to interact. In orchestrating that interaction, balance will, once again, figure prominently and will be ascertainable only through productive communication. It is hoped that, in some small way, this work has enhanced the attainment of that communication and thus the satisfactory resolution of the Denes' self-government goals.

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<sup>27</sup>See Chapter Four of this work, p.104.

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