LAND CLAIMS: ENDING THE CONFLICT IN CANADA'S NORTH

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Native land claims have been an issue in Canada since before confederation. The British and Canadian governments entered into treaties to define the rights to and uses of lands traditionally occupied by aboriginal peoples. Through these treaties native lands were acquired and much of Canada was opened for settlement. Large tracts of land in British Columbia, northwestern Quebec and the Northern Territories were not included in these negotiations; yet they were developed and settled by non-aboriginal peoples. Since 1973 native groups have asserted their rights of title to these lands and are engaged in, or seek, comprehensive land claim negotiations with Canada's federal and provincial/territorial governments.

The governments and the aboriginal peoples have spent in excess of $150 million on negotiations which have yielded only three "comprehensive" agreements. Twenty-one claims are under or await consideration and as many as fifty more have yet to be accepted for negotiation.[1] This paper assesses the effectiveness of the land claims process as a means of concluding what has become a bitter conflict between the natives and the federal and provincial/terrritorial governments. It focuses on the historical relationship between the two sides as revealed through early agreements and more recent government policies and litigation. This evaluation offers insight into the evolution of the current land claims process, and it draws conclusions regarding the possibility of conflict resolution under the current policy. It is intended that this study provide a foundation for future research on specific settlement agreements in the Yukon and Northwest Territories.

Data for this paper were collected through field work and archival research. Information was obtained from the Territorial Archives in Whitehorse (Yukon Territory), the Department of Indian

[1]INAC, *Highlights on Federal Indian Policy*. Message from Deputy Minister Harry Swain (Ottowa: INAC, 1988).

Affairs and Northern Development, the Government of Canada Information Services, local newspapers, and interviews with government officials.

EARLY AGREEMENTS

The process for dealing with aboriginal title and rights through formal agreement began soon after Europeans made contact with the natives of North America. The first "Peace and Friendship Treaties" (1725-1763) were intended to secure either the neutrality or assistance of the natives in the ongoing war between England and France.

Once the colonial powers established themselves in North America, the European desire for private ownership of land conflicted with traditional aboriginal use. This resulted in treaties involving the cession of land culminating in the Royal Proclamation of 1763. This document stated that the aboriginal peoples had "legal and original possession of their lands" some of which were to be set aside specifically for use as native hunting grounds.[2] The proclamation also allowed for specific aboriginal rights to be surrendered to the crown colony. The colony would subsequently act on behalf of the natives in negotiations with prospective land purchasers. A process was thereby established in which consent of native peoples was required before clear title could be given to the land. The Royal Proclamation was never repealed by Canadian legislative action and therefore it remains a statute law.

Following the proclamation, the colony concluded a number of land cession agreements to clear title in southern Ontario. The purpose was to fulfill promises of land grants to Britain's military allies (the Iroquois), and to allow the settlement of United Empire Loyalists fleeing the troubled American colonies. These early agreements usually involved lump sum cash payments. In fact, it wasn't until the Robinson treaties of the 1850s, when title was cleared for the development of minerals in northern Ontario, that provisions were made for reserves, annuities, and the freedom to hunt and fish on unoccupied crown lands.

The British North America Act, (now the Constitution Act, 1867) gave the federal government jurisdiction over "Indians and lands reserved for Indians . . ." and obligated the government to provide

[2]Canada, Supply and Services, "The Royal Proclamation," *Revised Statutes Canada* (Ottowa: Supply and Services, 1970), app. 1:123.

"equitable compensation" for lands obtained under treaty. It did not, however, define the specific rights Indians had to the land, nor did it define what was entailed in equitable compensations. These omissions were to become the bases for native land claims made against the government more than a century later.

After confederation the federal government began the clearing of aboriginal title across southern Canada in order to facilitate construction of the transcontinental railroad and settlement of the country. Between 1867 and 1923 eleven treaties were signed between aboriginal groups and the colony. To guarantee a smooth transition of ownership, Canada declared the treaty agreements as final and decreed that no future claims based on aboriginal title could be made on the land.

Each of these treaties was designated by a number. Treaties 1 and 2 covered southern Manitoba and required that the natives adopt farming as a livelihood. They were given farm implements and seeds, but no mention was made of rights to other land uses (such as hunting, fishing, or trapping).

Treaties 3 through 7 incorporated the land that the federal government anticipated would be needed for the construction of the Canadian Pacific Railway and settlement of the Prairies. Treaty 8 provided an overland route through Athabasca to the gold fields in the Yukon Territory. Treaty 9 opened up transportation routes through norther Ontario, whereas treaty 10 cleared title for homesteads in Alberta and Saskatchewan. Treaty 11 was a hastily conceived effort to clear title in the MacKenzie district after oil was discovered in Fort Norman in 1920. Concerns as to the validity of this final treaty arose almost immediately and were the subject of litigation in the mid-1970s when a major pipeline project in the MacKenzie valley was proposed.[3]

These treaties also included cash settlements, education, and reoccurring payment of goods such as ammunition and clothing. However adherents to the treaties were required to surrender all title and rights to the lands. In return the Canadian federal government granted tracts for reserves. This policy was a radical change from earlier treaties in which the natives had surrendered only specific rights and

[3]INAC, *The Berger Report* (Ottowa: Supply and Services, 1976).

were allowed use of unoccupied crown lands.

By 1920 most of the unsettled areas in which future settlement was anticipated had been covered by treaty or other arrangements and the federal government ceased to negotiate with the natives on land issues. They held that the question of aboriginal title claims was "not susceptible to easy or simple categorization and could not be dealt with in a way that satisfied anyone. Consequently, it was decided such claims could not be recognized."[4]

With the exception of the MacKenzie Valley, the North was not included in these treaties. Although there was some concern expressed, the sparse native population in this region was not considered to be at risk. The decision to accept no further grievances and the premature conclusion of the land settlement process left northern natives with no mechanism for settling disputes, other than through litigation.

Between 1920 and 1963 a number of cases were brought to court. As the result of decisions made in these cases, aboriginal rights came to be defined as the right to hunt, fish and trap on crown lands. However, it was realized that aboriginal title could mean much more than simply the right to occupy reserve lands. The federal government's response to these cases tended to be ad hoc and unsystematic until they issued the Statement of the Government of Canada on Indian Policy or simply the *White Paper* in 1963.[5] In the *White Paper* the government indicated that it would be prepared to resolve "lawful obligations," such as breach of treaty rights or improper administration of Indian funds, but it essentially called for the termination of the special rights of aboriginal peoples within Canadian society. The aboriginal peoples resoundingly rejected the *White Paper* and renewed efforts to clearly define and obtain aboriginal title to traditional lands through litigation.

MODERN CLAIMS AGREEMENTS

It was the result of litigation that effectively re-opened the question of aboriginal title. The Calder

[4]Canada, DIAND, *In All Fairness: A Native Claims Policy* (Ottowa: 1981), p. 81.

[5]Canada, Supply and Services, *The White Paper* (Ottowa, 1963).

case, which was brought before the Supreme Court of Canada in 1973, led to the current negotiation procedure.[6] This case involved application by the Nishga Indians for a court ruling on aboriginal title to lands they occupied in British Columbia. Although the Nishga lost the case on other grounds, the Supreme Court justices unanimously agreed that aboriginal title exists in Canadian law. However, the extent of the land use rights was not resolved.

The Canadian federal government could no longer ignore claims based on aboriginal title. When the issue was debated in the House of Commons in April 1973, opposition parties supported aboriginal groups in pressing for the resolution of claims. The Prime Minister was quoted as saying "Perhaps you had more legal rights than we thought you had when we did the White Paper. We give whole hearted recognition to the concept of aboriginal rights. . . ."[7]

In August 1973 the federal government responded to widespread demands for the resolution of outstanding claims with a policy statement indicating that the government would negotiate settlements with aboriginal groups where rights of traditional use and occupancy had neither been "extinguished by treaty, nor superseded by law."[8] These were to be settled as "comprehensive claims" and would be multifaceted. The policy also allowed for dealing with "specific claims," or those relating to outstanding lawful obligations of the government arising from its failure to live up to the terms of treaties.[9]

To facilitate the proceedings the government established the Office of Native Claims in 1974. Between 1974 and 1985 more than $26 million was spent on the administration of the claims process and more than $100 million in loans were made to claimant groups for use in negotiations.[10] Despite these efforts only three comprehensive claims agreements were signed: the James Bay and Northern

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[6]Canada, Department of Justice, *Calder et. al.* v. *Attorney General of British Columbia* (Ottowa, 1973).

[7]Canada, House of Commons, *Debates* (Ottowa: House of Commons, 17 April 1973).

[8]Canada, DIAND, *Debates* (Ottowa: House of Commons, 17 April 1983).

[9]Ibid.

[10]Canada, DIAND, *Living Treaties: Lasting Agreements Report of the Task Force to Review Comprehensive Claims Policy* (Ottowa: Supply and Services, 1985).

Quebec Agreement (1975); the Northeastern Quebec Agreement (1978); and the Inuvialuit Final Agreement (1984).

The federal government has limited the number of negotiations that may proceed at one time to six. It is currently negotiating comprehensive claims with the Dene/Metis in the Northwest Territory, the Tungavik Federation of Nunavut, the Nishga Tribal Council, the Council for Yukon Indians (CYI), the Conseil Attikcmek-Montagnais, and the Labrador Inuit Association. Another fifteen claims have been accepted and await negotiation and three claims have been rejected on the bases of their having been preceded by law. The average time for a negotiated agreement was expected to be five years, although several unresolved claims have already been in process for fifteen years.

Several factors have contributed to the difficulties in reaching agreements. The most significant obstacles have been the Canadian federal government's requirements that native rights be extinguished and the insistence that all agreements be final.[11] Other problems have included the government's refusal to negotiate on issues such as political rights and decision-making power on land and resource management boards, as well as concerns about resource revenue sharing and rights to resources offshore.

In the face of these conflicts the Canadian government has attempted, on several occasions, to re-evaluate the policy. The objectives of the policy were restated and clarified in the 1981 publication *In All Fairness*; this document outlined revisions that expanded what should be included in negotiations.[12] This publication still called for the exchange of undefined aboriginal land rights for concrete rights and benefits that would be guaranteed by settlement legislation such as land titles, cash compensations, economic development measures, wildlife rights and self-government at a local level. Guidelines for the claims process were also established. They are as follows: (1) Any effort must begin with the preparation of a statement of claim together with the supporting documentation by a claimant group;[13]

[11]Canada, DIAND, op. cit., footnote 8.

[12]Canada, DIAND, op. cit., footnote 4.

[13]Canada, DIAND, op. cit., footnote 4; Canada, DIAND, *Comprehensive Land Claims Policy* (Ottowa: Supply and Services, 1987).

(2) Upon receipt of the claim, the Minister of Indian Affairs and Northern Development reviews the submission and obtains certification of its legal acceptability from the Minister of Justice; (3) If the claim is acceptable, federal negotiation mandates that the Canadian government meet with native leaders to determine a common ground; (4) Together they work toward the development of a framework agreement. The government also provides funding for the legal and other costs incurred by the claimant groups. The funding is in the form of loans to be repaid by any cash settlements the group may receive.

The framework agreement determines the scope, process, topics, and parameters for negotiation. It also dictates approaches to obtaining certainty with respect to lands and resources, and it offers order and time frame for negotiations. Once it is established, the agreement is considered and approved by the claimant group and the federal government. This approval paves the way for an agreement-in-principle which includes a description of the extent and location of land use and type of occupancy to be granted. An agreement-in-principle leads to a series of final agreements on a band-by-band basis.

RECENT DEVELOPMENTS IN ABORIGINAL RIGHTS

In 1982 the Constitution was repatriated to Canada, and aboriginal and treaty rights were incorporated into Sections 35 and 37.[14] Section 35 established "aboriginal right of title" to traditionally occupied land and gave the right of self-government at a local level. Section 37 provided for the convening of four First Ministers' Conferences to discuss the definition of aboriginal rights in the Constitution with representatives of Canada's aboriginal peoples. This section represented a commitment by the governments in Canada to treat the native peoples. A 1983 constitutional amendment furthered this commitment by calling for recognition of rights acquired through both future and existing land claims agreements.[15] Both the Constitution and the amendment were ratified by all provinces except Quebec. Quebec subsequently made its own agreements with native peoples.

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[14]Canada, Department of Justice, *A Consolidation of the Constitution Acts 1867-1982* (Ottowa, 1986).

[15]Canada, DIAND, op. cit., footnote 8.

First Minister Conferences were held in 1983, 1984, 1985 and 1987. During these conferences the native peoples continued to express concerns as to the rigidity of the land claims policy on the issues of self-government and the extinguishment of aboriginal rights once settlements have been concluded. This ongoing conflict slowed the negotiations, so in an effort to resolve the impasse, the Minister of Indian Affairs and Northern Development established The Task Force to Review Comprehensive Claims Policy in 1985. In six months the Task Force received and heard briefs from fifty aboriginal groups. They also received briefs and letters from twenty-one non-aboriginal organizations and met with government officials.

The report of the Task Force made public in December 1985 stated that comprehensive land claims could be the first step in building a new relationship with native peoples.[16] The report went on to recommend that any new policy should: (1) be flexible enough to respond to varying conditions in the different regions and should *not* require aboriginal peoples to totally surrender rights that the Constitution had so recently affirmed; (2) encourage aboriginal communities to become economically self-sufficient and establish the political and social institutions that would allow them to become self-governing; and (3) be open to all natives in Canada regardless of prior treaty arrangements. The Task Force chairman, in a letter to the Minister of Indian Affairs and Northern Development, stated that "land, without the power to manage what happens on it, or the right to fish without a say in the management of fish stocks, will only perpetuate the dependency of aboriginal peoples."[17]

The reassessment that followed release of the report led to the Comprehensive Claims Policy announced 18 December 1986.[18] In the new policy the federal government remained committed to negotiation rather than litigation to settle claims, and stood firm that the policy would apply only to those areas of Canada where aboriginal title had not been dealt with or superceded by law.

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[16]Canada, DIAND, op. cit., footnote 10.

[17]Canada, DIAND, op. cit., footnote 10, p. iii.

[18]Canada, DIAND, *Comprehensive Land Claims Policy* (Ottowa: Supply and Services, 1987).

The policy explicitly stated that only land-based rights would be subject to negotiations while other rights would remain unaffected by the process and would be dealt with separately. The 1986 policy allowed for aboriginal groups to negotiate membership on management boards that deal with decisions regarding renewable resources. It also provided for the granting of certain sub-surface rights as a means of gaining revenue. The policy reiterated the government's commitment to respect the rights of third parties that are utilizing lands while they are under negotiation. But the most significant part of the new policy was the recognition that alternatives to total extinguishment of aboriginal rights could be considered, "provided that certainty in respect to land and resources is established."[19]

A procedural framework, similar to that established in 1981, was instated. In addition, the federal government promised that reviews of formal comprehensive claims submissions would be completed within one year of submission. To improve the negotiation process, the status of claims currently under consideration is being reviewed and major efforts are being made to secure final agreements.

FUTURE OF LAND CLAIMS

The federal/territorial governments and the native claimant groups generally agree that the key to resolving the issues of native self-government, economic development opportunities and political development lies in the settlement of land claims. Claim settlements will allow native peoples to obtain private ownership over specific lands and resources necessary to maintain traditional activities and to participate in new economic ventures. It will also guarantee them a voice in issues such as hunting, fishing, off-shore drilling, and other land uses. For the non-native community, settlement of the claims will resolve the question of aboriginal title to crown lands. Land that has been tied up in negotiations for almost twenty years will be reopened and a secure environment for business and industrial development will evolve.[20]

It is imperative that the claims currently under negotiation be resolved. Several factors forced the resolution of outstanding claims: the 1986 Comprehensive Claims Policy, the appointment of a new

[19]Ibid., p. 5.

[20]INAC, "Claims Settlements: A Doorway to the Future," *Intercom* (Ottowa: INAC, June 1988).

Minister of Indian Affairs and Northern Development in 1987, and negotiation mandates approved by the latter office. Government negotiations were renewed with the CYI and the Dene/Metis in the summer of 1987.[21] Both groups had begun negotiations in 1973, but had reached impasses in 1984 on the issues of self-government and the extinguishment of rights. A deadline of 1 July 1988 was established for an agreement-in-principle. The Minister of Indian Affairs and Northern Development stated that if an agreement was not reached, he would discontinue negotiations and offer the funding to groups willing to move forward.

On July 11 an agreement-in-principle was brought to the Dene/Metis peoples. It involved clear title to 180,000 square kilometers of land and over $500 million in a cash settlement. The Dene/Metis rejected the settlement because there was no provision for self-government and, although they had been granted "fee simple" ownership, the highest form of tenure in British law, they had not been given "aboriginal title." On July 19 the Minister of Indian Affairs and Northern Development announced that he did not intend to reopen negotiations with the Dene/Metis.[22]

During the week of 18 July 1988 the General Assembly of the CYI met to consider an agreement package put together by federal negotiators. An invited speaker urged the CYI not to sign anything with the words "finality or certainty" in it. He said the Nishga people would hold out for "an open ended amendable framework, so that if anything goes wrong it can be corrected."[23] With such warnings in mind the CYI General Assembly voted on July 22 to accept the package as a framework agreement rather than an agreement-in-principle.

The agreement is very general, but it does set some guidelines from which an agreement-in-principle can be reached and negotiations can be constructed. The total amount of land to be granted

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[21]INAC, "Federal Negotiating Team Named for Yukon Indian Land Claims," *Communique* (Ottowa: INAC, 6 July 1987); INAC, "Negotiating Mandate for Dene/Metis Comprehensive Land Claims," *Communique* (Ottowa: INAC, 8 May 1987).

[22]CBC radio newscast, 19 July 1988.

[23]Jim Durham, "CYI in Little Salmon," *Yukon News* (Whitehorse), 20 July 1988.

is 41,500 square kilometers of which 25,000 will be under aboriginal title. Aboriginal title remains undefined, but this clause allows whatever future legal definitions arrived at to be included in the agreement. In addition, individual bands will be asked to design their own self-government structures. CYI Chairperson Mike Smith described the agreement as a "framework agreement of a framework agreement . . . the outstanding issues deal with financial compensations, type of land ownership, taxation, and resource revenue sharing."[24] Although the agreement is not as comprehensive the Minister of Indian Affairs and Northern Development requested, Smith views the signing of the agreement as a statement that the CYI is still willing to negotiate.

CONCLUSIONS

The CYI agreement provides some hope for resolution, but it leaves the very basic question of land tenure unresolved; although aboriginal title was granted, the extent of that title has yet to be determined. In the more than 200 years that the government has been treating with the natives on land rights, they have been unable to reach agreements that provide the finality desired by the government or the security desired by the native peoples.

The natives of southern Canada were stripped of all rights and were either assimilated or put on reserve land. However, the isolation of the North allowed native cultures to remain intact well into the twentieth century. Only recently have they been subjected to the painful process of land claims settlements. The modern concept of fairness has made northern natives more astute and better prepared than their southern brethren in negotiating equitable agreements. However, the negotiations and litigation processes that have been taking place since 1973 have taken a new turn in the past several months.

The Canadian federal government has made resolution of the land claims issue a priority, stating that if a compromise is not reached soon in the cases already under negotiation, the government will cease to deal. This stance was confirmed by the recent decision on the Dene/Metis negotiations, and it

[24]Jim Durham, "CYI Ratifies Land Claims," *Yukon News* (Whitehorse), 22 July 1988.

has intensified discussions with those groups still negotiating for agreements within specified time frames. How successful these talks will be in leading to the establishment of final agreements is questionable, because the two sides will have some basic conflicting values. The natives want a land base to retain a traditional way of life which, for the most part, no longer exists in the political and economic reality of modern society. The federal government, while affluent enough to try to maintain some aspect of native culture, cannot afford to give up the land-based resources on which the future economy of the North, and possibly the country, depends. Until these objectives can be brought more in line with each other and toward a common goal of economic development, it is likely that negotiations will stagnate and the land claims issue will ultimately be resolved by the court.