CONTEMPORARY ABORIGINAL LAND, RESOURCE, AND ENVIRONMENT REGIMES: ORIGINS, PROBLEMS, AND PROSPECTS

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1. Introduction

Since 1975, comprehensive claims agreements, or "land claims settlements", have created new management regimes for land, resources, and the environment across most of Canada's North. These regimes create a permanent, institutionalized relationship between governments and representative aboriginal bodies that is often referred to as "co-management". They guide activities on both public and aboriginal lands, and they regulate hunting and fishing rights, throughout the claims settlement region. The use and management of land, resources, and environment in the North must thus be understood in terms of three key elements of every comprehensive claim: land rights, harvesting rights, and management regimes.

Comprehensive claims agreements are modern treaties, from a legal, constitutional, and political perspective. The intentions of both the aboriginal parties and the Crown in reaching these agreements have remained remarkably constant over many decades and even centuries. Yet, how those intentions are realized in the substance of the agreements is in many respects quite different. As a result primarily of modern comprehensive claims agreements, there now exist in northern Canada a series of regimes respecting tenure, access to, and management of lands and resources, which are quite different from those in both other parts of Canada and other parts of the circumpolar world.

These regimes consist of both formal institutions (which are constitutionally protected), and informal practices and "cultures" which have developed through their negotiation and implementation. These regimes, in many respects novel and innovative, have set the use and development of a very large part of Canada's lands and resources on a new and uncharted course, with significant consequences to both aboriginal beneficiaries and other Canadians. Moreover these regimes will evolve, with practice and circumstances, in ways that those who framed them could not fully anticipate.

Modern comprehensive claims agreements are, thus, not simply once and for all transactions, in which Crown title is confirmed and "disencumbered" in exchange for cash, land, and hunting rights. They differ substantially, in this respect, from the treaties of the late 19th and early 20th centuries. The English language versions of those treaties, as published by Canada, make no mention of any treaty rights off-reserve except for hunting and fishing rights, and do not establish any treaty partnership with respect to governance off-reserve, whatever the intent and understanding of the aboriginal signatories may have been. For over a century after Confederation, the management of northern lands and resources was the exclusive prerogative of either federal or provincial management agencies.

Nonetheless, the development of comanagement institutions and a broadening view of land rights has not been entirely restricted to the comprehensive claims areas. The project therefore also considers some of these developments in southern Canada, even if they are not as firm or far-reaching.

Land, resource, and environment issues have been the driving force behind the negotiation of both the modern treaties and the reassertion of established treaty rights in a contemporary context. Hunting and fishing rights cases have been at the centre of aboriginal law for decades, and the first settled comprehensive claims arose directly from high-profile resource development conflicts. Concerns about lands and resources issues, about adverse effects on harvesting, and hence about the economy and culture that harvesting sustains, are frequently heard in northern communities, and clearly articulated at public hearings on these matters. Yet the substance and effect of the agreements on lands, resources, and environment often seem poorly understood by the general public, and even by politicians and public servants who are required to implement them, perhaps because of their complexity, and because they represent a new and perhaps unfamiliar way of doing business on these matters.

At the same time, these regimes are rooted in colonial and legal doctrine, in historical experience and practice, and in aboriginal visions, resistance, and accommodation. In order to understand their strengths and limitations, it is necessary to appreciate this background, and in particular their differences from and similarities to the Treaties. It is also necessary to see how they emerged from years of protracted negotiations, and the kinds of compromises that were necessarily made in this process.

1.1 Project objectives

In 1993, The Royal Commission on Aboriginal Peoples commissioned a research program, under the direction of the author, to document the origins and implementation of the land, resource, and environment regimes created by modern comprehensive claims agreements, and other co-management initiatives. This project was timely and appropriate because some of these regimes had been in place for many years (for example, the JBNQA of 1975, and the IFA of 1984). As well, some similar but non-claims based regimes -- for example the NFA in Manitoba (1977) and the Beverly Qamanirjuaq Caribou Management Board (1982) -- also offered considerable implementation experience. Yet, with the notable exception of the BQCMB (Osherenko 1985, Cizek 1990, Scotter 1991, Usher 1991, 1993b), the literature on implementation is sparse. The JBNQA was critically reviewed at a major forum on its tenth anniversary (Vincent and Bowers 1988). What other literature exists -- both published and unpublished -- is descriptive rather than analytic, telling us what is provided for but not how it works in practice.

In Phase I of this project, a background report was prepared, entitled Contemporary Aboriginal Lands, Resources, and Environment Regimes - Origins, Problems, and Prospects (Usher 1993c).

Phase II consisted of case studies of a range of regimes, intended to document and assess their implementation and experience. Usher was responsible for the selection and technical supervision of the case studies, which were contracted to various experts. The case study authors participated in a two-day workshop, sponsored by the RCAP, in November 1993, following the submission of their first drafts. Revised drafts were submitted early in 1994, and were peer reviewed. Authors submitted final drafts in late 1994 and early 1995.

In Phase III, Usher revised the phase I report to incorporate the results of the case studies and workshop (this report), and edited the final drafts of the case studies for publication.

1.2 Approach

1.2.1 Geographic coverage

The primary geographic focus of the project (and this report) is the Arctic and Subarctic of Canada. There are several reasons for this. First, these regions, lying north of the settled agricultural and industrial regions of Canada, are where aboriginal use of traditional lands and waters has continued with the least disruption into the latter part of the present century. Secondly, it is in the Arctic and Subarctic that large-scale resource developments (particularly those initiated in the early 1970s) were the chief impetus to the development of regional aboriginal political movements. Thirdly, the modern comprehensive agreements concluded to date cover only Arctic and Subarctic lands, since none of the former and only parts of the latter were included in the numbered treaties. Finally, even in the treaty areas, similar developments and responses have occurred primarily in the Subarctic rather than the more settled areas to the south.

Particular consideration is given to the regimes established through the major comprehensive agreements. These include especially the James Bay and Northern Quebec Agreement (1975), Inuvialuit Final Agreement (1984), because of their innovative nature and their implementation experience. However I also note the emerging trends in the more recent agreements, including the Nunavut Land Claim Agreement (1993), the Yukon Umbrella Final Agreement (1993), the Gwich'in Final Agreement (1992), and the Sahtu Final Agreement (1993), the last two patterned on the long-negotiated but ultimately unratified Dene/Metis agreement of 1990. I also refer to the federal environmental review process, which was established in the 1970s for some of the same reasons as the comprehensive claims process.

The problems that gave rise to the comprehensive claims process also exist in those parts of northern Canada covered by the numbered treaties: the Subarctic, boreal forest regions of Ontario, the Prairies, and northeastern British Columbia. However, both Canada and the provinces have asserted that because of the treaties (and in the Prairies, the Natural Resources Transfer Agreements), there is no, or least a lesser and much more restricted, obligation to deal with these problems. Federal and provincial governments assert that in these areas, aboriginal title and rights no longer exist, and they have traditionally taken a highly restricted view of Indian treaty rights off-reserve.

Nonetheless, Treaty Indians have successfully forced at least limited and more specifically focused responses. One example is the Northern Flood Agreement in Manitoba, which was the most important negotiated agreement to emerge from a major resource development initiative within an existing treaty area. There are numerous other negotiated or "*ex gratia*" agreements and arrangements pertaining to more restricted geographical areas (often a single community) or particular subject (comanagement, compensation, or mitigation). There are also certain spheres

of legislation -- whether federal, provincial, or territorial -- which have taken account of aboriginal interests and initiatives with respect to lands, resources, and environment. These include such matters as wildlife and fisheries, land use, and impact assessment and review.

1.2.2 Topical coverage

While land rights, harvesting rights, and management systems are intimately connected in the comprehensive claims, this project has given less than full attention to the details and implications of the land regimes themselves. Land quantum and tenure are discussed only so far as is necessary to elucidate the harvesting and management regimes, and because land rights as such were the legal basis and driving force behind the claims. The project did not consider at any length such important issues as the implication of the land selection strategies of each claimant group, or the subsequent land management system regarding third party access or economic development strategies based on non-renewable resources (however for some additional detail see Maclachlan 1993).

The focus is, instead, on integrated resource management throughout the comprehensive claim territories, in particular,

- Land selection and its relation to parks and conservation areas
- Land management and planning on both public and aboriginal lands
- Water resources
- Wildlife and fisheries management
- Environmental impact assessment
- Wildlife compensation

Also largely omitted from consideration in this project is the status of claims policy and negotiation in British Columbia, and particularly the problems of fisheries allocation and management there. Despite many obvious parallels with the Arctic and Subarctic, the situation in B.C. is sufficiently distinctive to merit separate treatment. Nonetheless we have included a case study of multi-party resource management from British Columbia.

Finally, there is the question of extinguishment clauses in the comprehensive claims. This has been everywhere controversial, and in some cases instrumental in non-ratification by aboriginal people. This debate is beyond the scope of this discussion (but see Hamilton 1995, RCAP 1995).

1.2.3 Organization

This report begins by examining the historical basis of comprehensive claims agreements: the aboriginal experience of and response to the settlement and development of northern Canada, and the emergence of the aboriginal political movement to solve these problems through land claims (chapter 2). In Chapter 3, I outline the government response in the 1970s, and the development of aboriginal objectives in land claims and the progress of negotiations. Chapter 4 examines the

emerging pattern of land, resource, and environment regimes created by comprehensive claims settlements, and compares these with the outcomes of the historic treaties. In Chapter 5, I outline the case studies and their results. Chapters 2-4 are updated and revised from the original background report for this project (Usher 1993c).

1.2.4 Abbreviations

The following agreements are referred to frequently throughout the text by their abbreviations.

ANCSA Alaska Native Claims Settlement Act. Enacted 1971.

DMFA Dene/Metis Final Agreement (Comprehensive Land Claim Agreement Between Canada and the Dene Nation and the Metis Association of the Northwest Territories). Signed 1990 but not ratified.

GFA Gwich'in Final Agreement (Gwich'in Comprehensive Land Claim Agreement). Signed 1992.

IFA Inuvialuit Final Agreement (Western Arctic Claim). Signed 1984.

JBNQA James Bay and Northern Quebec Agreement. Signed 1975.

NFA Northern Flood Agreement (Manitoba). Signed 1977.

NLCA Nunavut Land Claims Agreement. Signed 1993.

SFA Sahtu Final Agreement (Sahtu Dene and Metis Comprehensive Land Claim Agreement). Signed 1993.

YUFA [Yukon] Umbrella Final Agreement. Signed 1993.

Sections or articles of these agreements are referred to by numbers only: viz. 21.7.3(b).

2. Historical Basis of Comprehensive Claims Agreements

The chapter outlines the historical context in which the lands, resources, and environment regimes which are the subject of this paper emerged. I consider, first, the nature of aboriginal tenure, management, and use, and secondly, the policies and actions of colonial authorities and later Canada, with respect to these matters, in order to show the nature of the problem. Finally, I outline the events that precipitated the comprehensive claims and related processes as a means of resolving the problem.

2.1 Principles of aboriginal tenure and management

Prior to the arrival of Europeans, virtually all of the North was inhabited and utilized by aboriginal peoples. Whether they were comparatively settled fishers and horticulturalists or wide-ranging hunters, each of these peoples occupied specific territories, and had systems of tenure, access, and resource conservation that amounted to ownership and governance (whether or not they would have articulated those concepts in terms intelligible to Europeans).

2.1.1 Aboriginal territoriality, use, and occupancy

Northern aboriginal societies were largely or entirely hunting societies in which kinship was the organizing institutional basis of production and consumption. The household was the elemental unit of production, several of which constituted the camp or co-residential group. Day to day decision-making about production occurred mostly at the former level, while decisions about lands and resources occurred mostly at the latter. The band or tribe (a culturally and linguistically homogenous entity consisting of several of these groups) numbered several hundred or several thousand persons. Tribal territories -- often tens of thousands of km^2 -- were communal property to which every member had unquestioned rights of access.

The maintenance of territorial integrity (or more specifically, access to resources) was effected chiefly through the defence of social boundaries rather than of the territorial perimeter itself, although the latter also occurred. Because the core of the territory, and especially its key resource sites, were the primary concern, boundaries were rarely demarcated, and were liable to be variable and somewhat permeable according to social rules. Nonetheless, the limits were known to both the members of the territorial group and to their neighbours. Unauthorized presence in the territory of another group could lead to difficulties and was in some cases regarded as punishable trespass; people governed their behaviour accordingly.

2.1.2 Property and tenure

I have characterized aboriginal property systems as communal (Usher 1984, 1986) because they resemble neither individualized private property systems, nor common property (i.e. open access, state management) systems. Even where "family" territories existed, these systems combined principles of universal access and benefit within the group, universal involvement and consensus in management, and territorial boundaries which were permeable according to social rules.

Specific property arrangements have varied widely in northern Canada, but some basic principles are common to all. In no case was land or wildlife considered a commodity that could be alienated to exclusive private possession. All aboriginal peoples had systems of land tenure that involved allocation within the group, rules for conveyance of primary rights (and obligations) among individuals, the prerogative to grant or deny access to non-members, but not outright alienation.

Formal arrangements could be made between groups, based on mutual recognition of each other's needs and surpluses, but required adherence to rules of conservation as well as to norms regarding harvesting, exchange, sharing, and consumption.

Aboriginal tenure systems generally incorporated two seemingly conflicting principles: permission must be sought to use another's territory, but no one can be denied the means of sustenance. The key is the acceptance of the obligations that go with the right.

Typically, property rights in lands and resources included: (1) use by the group itself, and the right to include or exclude others (chiefly by determining membership); and (2) the right to permit others to utilize lands and resources. Excluded were the right to alienate or sell land to outsiders, to destroy or diminish land or resources, or to appropriate lands or resources for private gain without regard to reciprocal obligations.

2.1.3 Management

The aboriginal management system rested on these communal property arrangements, in which the local harvesting group was responsible for management by consensus. Management and production were not separate functions, although leadership and authority within the group were based on knowledge, experience, and their effective use. Management "data" included not only immediate observations of variation, and theories of cause and effect, but also accumulated historical experience. Oral culture, in the form of stories and myths, was coded and organized by knowledge systems for interpreting information and guiding action.

Spiritual beliefs, ceremonial activities, and practices of sharing and mutual aid also helped to define appropriate and necessary modes of behaviour in harvesting and utilizing resources. Although these practices did not operate in the paradigm or manner of western "scientific" management, they served to regulate access to and utilization of resources, and thus, under normal circumstances, guarded against resource depletion.

This system of indigenous management is in sharp contrast to the state system, in which managers are distinct from harvesters, authority becomes centralized and flows from the top down, and in which the environment is reduced to conceptually discrete components which are more or less independently managed (Freeman 1985, Usher 1986, 1987, Chapeskie 1990). This contrast applies not only to policy and practice, but also to systems of knowledge and understanding.

2.2 Aboriginal experience of settlement and development

2.2.1 Legal doctrine and treaty-making

To aboriginal people, aboriginal rights are basic rights of existence as distinct peoples or "nations", including the right to self-government. Canada's courts, while acknowledging aboriginal rights in principle, have tended to avoid comprehensive definition. However, the seemingly irreducible minimum recognized by the Crown in every major proclamation, treaty, and statement regarding aboriginal peoples has been the right to hunt, trap, fish, and gather in areas of traditional use and occupancy.

According to Canadian law, aboriginal rights are common law principles governing the Crown's assumption of sovereignty and its relations with aboriginal peoples (Slattery 1987). According to these principles, aboriginal title to land arises from long and continuous use and occupancy by Native peoples prior to the effective assertion of European sovereignty (although the criteria for dating this event in particular cases are not well established by the courts). Aboriginal title is therefore a form of property right, although again its substance and effect are not fully codified in Canadian law. The Royal Proclamation of 1763, which was the clearest statement of British imperial policy and precedent, recognized aboriginal title in Canada as an encumbrance on the Crown's capacity to manage, use, and dispose of lands and resources. It is for this reason that, for the next 150 years, treaty-making normally preceded settlement and development (with the significant exception of British Columbia).

Under the doctrine of aboriginal rights in general, and by virtue of the Royal Proclamation in particular, two classes of lands were recognized (Slattery 1987). The assertion of sovereignty by European nations was in effect a declaration of exclusive capacity (and implied intent) to acquire aboriginal lands. Thus, Britain acquired underlying title in the sense that aboriginal nations with whom the Crown formed an alliance or offered protection could cede land title only to the Crown, not to other imperial powers, or to individuals. (This doctrine leaves aside, of course, the question of whether the aboriginal nations consented to, or were even aware of, this arrangement).

A lawful process of acquisition was thus established whereby "Indian territories" (in which the tribes were to be "unmolested"), could be converted to "general lands" in which the land and property regime of the colony would apply. Only after such conversion could the Crown dispose of lands to settlers. Treaty-making -- negotiation and signing of a formal agreement at a public assembly -- was the normal legal procedure by which the Crown's "underlying title" to Indian territories was converted to a full (and in its later view, unencumbered) title. In theory, until this occurred, aboriginals were not only entitled to the full and free use of the lands, leaving their internal arrangements of property, tenure, and management undisturbed, but the Crown was obligated to protect this arrangement against third parties.

In practice, the doctrine of aboriginal rights has been observed inconsistently and incompletely. For a very long time, opinion has been divided about whether this doctrine imposed merely a political obligation on the Crown, or a legally enforceable one (Lester 1984).

Aboriginal title was recognized and dealt with in much of British North America through land purchases and the treaty process (Usher, Tough, and Galois 1992). Early exceptions are the case of the old colony of Quebec (where different principles of land acquisition had prevailed under the French regime prior to the British conquest), and the case of the Maritimes, where the subject of earlier treaties had been peace and friendship rather than land cessions in exchange for specified rights and benefits. In both cases the status of lands under the Royal Proclamation is ambiguous.

Land treaties were signed in the 1850s with Indians on the Pacific Coast (the Douglas Treaties) and the upper Great Lakes (the Robinson Treaties). These established three basic principles, from the Crown's perspective. In exchange for their land, Indians received cash payments (lump sums under the Douglas treaties and annuities under the Robinson treaties); the right to hunt and fish on ceded lands not granted to third parties (unoccupied Crown lands); and land reserves. The Robinson treaties set the basic pattern for all of the future treaties in the Western Interior and the Subarctic.

The timing and location of treaty-making in the former Rupert's Land and Northwest Territories, after their purchase by Canada from the Hudson's Bay Company in 1870, reflected the new nation's priorities for settlement and resource development. Between 1871 and 1877, Canada was mainly concerned with opening up prairie grasslands and parkland to agricultural settlement. East and north of Winnipeg, the major considerations were securing access to the timber, fish and mineral resources of the adjacent boreal forest (and in the case of Treaty 3, a transportation corridor to the fertile belt).

Between 1886 and 1914, resource industries expanded further into the Subarctic and the northern cordillera. Thus, the Yukon gold rush was the principle stimulus for Treaty 8 which, through a series of adhesions (1900-1914), was extended to northeastern British Columbia. Construction of the Hudson Bay Railway prompted adhesions to Treaty 5 in northern Manitoba in 1908 and 1910 (Tough 1988).

The last round of treaty making, until the modern era, occurred between 1921 and 1930. Treaty 11 immediately followed the discovery of oil at Norman Wells; however in northwestern Ontario, where there was minimal development pressure, adhesions to Treaty 9 did not occur until years after the northward extension of the provincial boundary. By 1930, the federal government had entered into treaties with Native people throughout most of the old HBC territory. Areas not covered by treaties included northern Quebec, most of British Columbia and the Yukon, and the Arctic.

Like the Robinson treaties, the eleven numbered, or western treaties (in the English language versions published by Canada), include the provision that the Native parties

> *... do hereby cede, release, surrender, and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and her successors forever, all their rights, titles and privileges whatsoever to the lands ...* (Morris 1971:322).

Native people also agreed to observe the treaty and "not to interfere with the property or in any way molest the persons of Her Majesty's white or other subjects" (Morris 1971:316).

The English language versions of the Treaties published by Canada indicate that treaty rights of Indians on ceded (Crown) lands were limited to pursuing

> *their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.* (Treaty no. 3 - Treaty 4 includes trapping; Treaty 7 omits fishing).

Despite government intentions, the western treaties proved different in some important respects from their eastern precursors. In the prairie/parkland region, Native demands centred on obtaining agricultural land, farm animals and seed, while in the Subarctic, the Cree and Dene (who in some cases petitioned for years to secure the benefits Treaty Indians to the south had obtained -- Tough 1988, Long 1989) sought to protect their hunting economy through the treaties. They insisted on ammunition and twine, and above all assurances that they could hunt and fish undisturbed as before (Fumoleau 1973, Ballantyne et al. 1976, Price 1979). Some treaties also specified the provisions of medicine chests and schools.

Some of the early anthropological and legal literature suggests that the absence of European concepts of private land ownership prevented Native people from understanding the treaty process (Cumming and Mickenberg 1972:123; Oswalt 1973:573). This alleged cultural incapacity to negotiate treaties ignores the oral dimension of treaty-making. In fact, Native leaders demonstrated an apt understanding of their property rights and of their own objectives in the treaty-making process (Friesen 1986, Usher, Tough, and Galois 1992).

Subsequent interpretation of the treaties has been complicated by several factors. When negotiations became difficult, Government representatives made unwritten promises of the Queen's largesse (the "outside" promises, in some cases later attested to by witnesses to the proceedings). There are also differences between the oral and written versions of the treaties which arose in part from inadequate translation and recording. Sometimes only a very general overview of the provisions was given; sometimes the concessions obtained during negotiations were not subsequently incorporated into the English text. In the later treaties, signed with bands

among whom there were no English speakers, the exact legal text does not appear to have been translated and communicated at the time of negotiation, and it is doubtful if it would have even been possible to translate all of the legal concepts. As a result, contemporary Native understandings of treaties, based largely on oral transmission, often do not conform with "official" versions (Fumoleau 1973, Ballantyne et al. 1976, Price 1979, Waisberg and Holzkamm 1992).

Regardless of the circumstances, it appears that Native leaders did not approach treaty talks as an incomprehensible process, but came with a set of demands which they were prepared to negotiate on a rational basis. They sought, and to some degree obtained, an economic program to assist their people in facing an uncertain future.

Despite all that followed, to the descendants of the Indian signatories, the treaties continued to be of enormous symbolic importance: tangible evidence of their status as First Nations, of their special relationship with the Crown, and of their aboriginal rights.

2.2.2 Progressive encroachment and restriction

The Canadian government, however, and especially in the later years, did not envisage the treaty process itself as providing the basis for aboriginal people to make their own adjustments to the expanding commercial frontier, while at the same time maintaining essential resources and homelands. Instead, Canada adopted a paternalistic approach by which such adjustments would be dictated through the Indian Act, and the policies of the Department of Indian Affairs.

During the 19th century, the prevailing settler ideology, with its social Darwinist tenets and deeply embedded notions of progress based on economic development, viewed Native people not only as physical impediments to the realization of settler's dreams, but also as culturally and morally inferior (viz. Chamberlin 1975). The following statement by a British Columbia Indian Agent in the 1880s exemplifies the application of such views, rooted in agriculture and the Bible, to the question of aboriginal tenure:

> *Some of the old Indians still maintain that the lands over which they formerly roamed and hunted are theirs by right. I have to meet this claim by stating that as they have not fulfilled the divine command, `to subdue the earth', their pretensions to ownership, in this respect, are untenable.* (Canada 1886:92)

Judicial decisions reflected and supported such views. In 1889, the Judicial Committee of the Privy Council declared that "... the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign". This dictum, although of major authority for nearly a century after, emerged from a land title dispute between Canada and Ontario in which aboriginal rights were not even the primary issue. Aboriginal people were unrepresented at those pleadings.

As settlement and development marginalized aboriginal people, governments of the day came to regard their obligations under the doctrine of aboriginal rights, including treaty-making, as merely perfunctory. They also took an increasingly restrictive view of the substance of aboriginal and treaty rights (Lytwyn 1990, Van West 1990, Tough 1991). Both federal and provincial governments unilaterally redefined and abrogated treaty rights. Thus, both reserve land entitlements, and resource rights on Crown lands, came under intensifying assault from all levels of government from the late 19th century onwards.

Ontario, for example, began the process as early as 1857 through its first fisheries legislation (Hansen 1991), and continued the process well into the present century. The Dominion government did so through such initiatives as game regulation in the Northwest Territories (starting in 1894), the Migratory Birds Convention of 1916, which prohibited the spring hunt for waterfowl in the far North, and the Natural Resources Transfer Acts of 1930, which restricted Indian hunting rights in the Prairie Provinces to domestic purposes (although these rights could no longer be restricted by provincial regulation - McNeil 1983).

In Ontario and British Columbia, the conservation movement, especially as promoted by sport hunters and fishermen, resulted in the criminalization of many aspects of Native harvesting (Gottesman 1983, Galois 1989, Tough 1991), and of subsistence generally (viz. anon., n.d.; Overton 1980). Similar results followed the federal government'□ intensification of its regulation of the Pacific salmon fishery (Pinkerton 1987, Newell 1993). Even trapline registration, nominally justified to Native trappers as being for their benefit, often resulted in exclusion and expropriation (Usher et al. 1979, Weinstein 1980, McCandless 1985).

Hunting, trapping, and fishing rights were no longer seen as fundamental guarantees of Native livelihood, and much less as a proprietary right, but rather as mere licences or privileges granted at the Crown's pleasure. In the eyes of the Crown, these "privileges" were not exclusive, did not bind or encumber third parties granted competing land or resource rights (e.g. timber, pasture, mining, fishing), and provided no remedy for nuisance, trespass, or expropriation. Protection of this diminished access served the state only insofar as it kept Native people at a distance from the expanding settler economy and from dependence upon the public purse. Fish and wildlife became common property resources, regulated by the state on behalf of all citizens (Hansen 1991).

The rise of the conservation movement was associated with the development of "scientific management" as the guiding philosophy of the state system. This, along with increased enforcement capabilities, led to much greater intrusion by the state in the one sphere in which aboriginal people retained substantial autonomy. In practice, wildlife and fisheries management became an important instrument of social control over aboriginal peoples, perhaps no less pervasive than the administration of Indian Affairs itself. However, this control was exercised largely by provincial and territorial governments, against whom the Department of Indian Affairs' defence of aboriginal and treaty rights was generally ineffective.

It may be that neither party anticipated the full scope and effect of settlement and industrial development that followed treaty-making. The promises uttered by the Crown's representatives at every treaty ceremony, "as long as the sun shines and the rivers flow" proved hollow, in view of the degradation of lands and waters that followed upon river impoundment and diversion, clear cutting, resource depletion, and environmental contamination (see, for example, Waldram 1988, Usher et al. 1992).

Most abrogations of aboriginal and treaty rights occurred through legislative and policy initiatives, or judicial and administrative interpretations. These changes occurred without Indian representation, let alone consent. This happened not only because of the changing balance of power in favour of the settler population, but also because the treaties did not specify either how they would be implemented, or how disagreements would be resolved. By 1930, Canada had unilaterally terminated the treaty-making process as outmoded and counterproductive (which is one reason it was never applied to the Inuit), and outlawed Indians from seeking redress for grievances based on aboriginal or treaty rights. Such were the foundations of assimilation and termination policies, which persisted through to the 1960s.

Thus, after decades of unilateral interpretation of Treaties and aboriginal rights by the Crown by means of court decisions, legislation and regulation, and administrative practice, what remained, for immediate practical purposes, was a minimal and restricted interpretation of even the most basic hunting and fishing rights. Reserves were for Indians (until they could be induced to leave them behind), the other 99% of the country was for the settler population. With Indians, and lands reserved for Indians, a federal responsibility under the British North America Act, the provinces were effectively the governments of the settler population, and so provincial Crown lands were allocated and managed exclusively in the non-aboriginal interest.

In the everyday experience of aboriginal people on the land, the result was harassment by enforcement and conservation officers including arrests, fines, and seizures of property; failure to even recognize (let alone mitigate or compensate for) adverse impacts of development; failure to recognize proprietary type rights even in traplines; exclusion from federal and provincial parks (which were deemed no longer to be unoccupied Crown Land); failure of governments to establish exclusive harvesting areas which would give substance to promised rights; and inequitable application of game laws such as the prohibition of spring waterfowl harvesting in the North.

Progressive encroachment and restriction was the common experience across the Subarctic. There was certainly variation in intensity: up to about mid-century it was probably greatest in the railway belts of northern Ontario and Manitoba, perhaps the least in northern Quebec. It was hardly experienced at all in the Arctic to that time.

2.3 The modern period

The aboriginal experience of expanding markets for northern wildlife resources, and later of colonialism, is centuries old in most of northern Canada. But these processes rarely involved

large-scale permanent settlement by non-aboriginals. Often, commerce in wildlife resources depended on production by aboriginal peoples themselves (most notably in the fur trade, although less so in the modern commercial fisheries, and in Arctic whaling).

As a result, most of the Canadian Arctic and Subarctic is distinguished by the fact that until well into the present century, both disruption of aboriginal harvesting activities and subsistence practices, and forced removal of aboriginal peoples from their territories, were rare (although there was some indirect displacement). Indeed, in many parts of the north where treaties were signed, the selection of reserve lands occurred only many years later, or not at all. The normal forces of removal, displacement, and disruption -- enclosure and alienation of lands, and appropriation of or competition for resources -- were the exception rather than the rule in the Canadian North until after World War II, even though the groundwork was laid by the state in both the Indian Treaties and in legislation covering the use, management, and disposition of Crown lands and resources, long before that time (viz. Hansen 1991).

There were some episodes that affected aboriginal security of tenure and livelihood before the 1940s, such as the Klondike gold rush, oil exploration along the Mackenzie River, small mining and forestry developments on the southern fringe of the boreal forest, and small-scale hydro-electric developments on the southern edge of the Canadian shield. The effects on environment and resources were largely localized, however, and these developments were seldom supported by a significant transport and communications infrastructure that could support secondary activities and large-scale southern access. They sometimes entailed the establishment of company towns and operating colonies, but these were isolated enclaves, often deliberately separated from the local populace. The North was sometimes characterized at that time, with some accuracy, as a dual economy, in which the development of the "modern" resource sector had little impact on the aboriginal economy (viz. Rea 1968). Day to day conflicts over lands and resources in much of the North were, in the aboriginal experience, related to wildlife and fisheries management and enforcement.

2.3.1 Northern development, 1945-75

World War II and the development boom that followed it transformed the Arctic and Subarctic. The scale of wartime and cold war operations in the North presaged what was to come. New developments occurred on a grand scale, based on unprecedented levels of capital, technology, and organization, accompanied by a frequent disregard for the presence and interests of aboriginal northerners. New airfields, military bases, and roads were built, symbolized in the Subarctic especially by the sudden and widespread appearance of the bulldozer, manned by persons who knew nothing of the local situation and were just following orders.

Northern resource developments in the 1950s and '60s continued and advanced the pattern established in World War II. There was a significant northward advance of all major resource activities: chiefly hydro-electric development (often involving large-scale impoundment, diversion, and regulation), mining, and forestry, in the Subarctic, and oil and gas exploration and mining in the Arctic. These were often accompanied by an infrastructure of roads, railways, and

new towns, many of which constituted major projects themselves. Some of the major construction firms got their start in wartime projects, and applied military-style planning and organization to civilian projects after the war. These developments were accompanied by newly expanded and activist government administration, and also enabled much readier access to the North by a newly prosperous and mobile southern population.

The experience of postwar development in the Subarctic, especially on the southern edge of the boreal forest and the Shield, was often gradual but pervasive. What was small-scale and isolated became large-scale and more intrusive. As well, road, rail, and water access enabled a continued expansion of small-scale settlement and development. In the Arctic, the experience was more startling and disruptive. The capital and technological intensity required to operate in such an isolated and high-cost area meant that huge developments of the most highly advanced nature could suddenly appear in the most remote and untouched places.

2.3.2 Development effects and aboriginal responses

These developments intensified, and geographically extended, familiar forms of encroachment and restriction such as regulation and enforcement of subsistence harvesting, and competition from non-natives for subsistence resources. But they also introduced new and previously unimagined threats to the viability and autonomy of subsistence. These included:

- direct alienation of lands for industry, transport, and settlement;
- disruption of waterways for storage and hydro-electric development;
- alteration, destruction, or pollution of habitat;
- growing network of access roads and trails, making remote harvesting areas readily accessible to non-traditional users;
- increased stress on animals due to noise, harassment, obstructions or other consequences of human activity that result in death, ill-health, or dispersal; and
- contamination of fish and wildlife, for example by heavy metals, organochlorides, or radionuclides, making them unfit for human consumption.

In the Subarctic, the most wide-spread and disruptive adverse effects have probably come from river impoundment, diversion, and regulation (chiefly for hydro-electricity), and forestry. In the Arctic, concern has centred mostly on the production and transport of oil and gas, and to some degree on minerals, and their potential effects on the major migratory species (both marine and terrestrial). These and other forms of development activity have often been accompanied by a massive infrastructure of transport, communications, administration, and settlement which compound the adverse effects on environment, habitat, and harvesting.

The adverse effects on aboriginal people can be characterized most readily as harvest disruption. This refers not simply to the to the most visible and dramatic effects of fish and animal mortality, but also to dispersal of resources and disruption of access (which makes harvesting more difficult and costly) and contamination. Historically, harvest disruption has often been associated with relocation. Both harvest disruption and relocation have demonstrable adverse social and cultural

effects, as well as economic ones. These effects were widely foreseen (and in some cases already experienced) by Native northerners. In the intervening years, numerous instances of harvest disruption have actually occurred, many of which have been the subject of expert study. The literature on the subject is now quite extensive, and the causes and adverse effects are now fairly well understood. Regrettably, the weight of analysis and professional opinion largely substantiates the fears and predictions of aboriginal people.

It is useful to keep in mind some pertinent elements of the demographic and economic situation that prevailed in the North in the early 1970s (many of which still hold). There was a great disparity in the distribution of aboriginal and non-aboriginal peoples in the North. The great majority of the aboriginal population resided in somewhat over 200 small villages scattered across the Arctic and Subarctic (about 120 of these are located within the areas of comprehensive claims negotiations, the remainder in the treaty areas). Most of these villages numbered less than 1000 persons, of whom at least 80% were aboriginal (most of the villages in the treaty areas are on Indian reserves and they are nearly 100% aboriginal). A growing proportion resided in regional centres such as Whitehorse, Yellowknife, Iqaluit, Thompson, and La Ronge, where they constituted a substantial minority of the population. The non-aboriginal population was highly concentrated in these regional centres, as well as in some mining communities. However, the population of these regional centres was often as much or greater than that of all the villages that surrounded them. Thus, aboriginal people constituted a minority at the regional level, except in the eastern Arctic (Nunavut).

By and large the small villages had mixed, subsistence-based economies, meaning that people made their living (as they continue to do) by a combination of wage labour, transfer payments, commodity production, and subsistence harvesting. In other words, in much of the North, for most aboriginal people, hunting, fishing, and trapping, were important economic activities, and that in a larger sense, subsistence remained very much a part of the way of life.

Subsistence activities are economically productive, as a source of income in kind, and provide nutritious and highly valued food, for which there is often no import replacement. Without the subsistence base, the informal sector of the mixed, subsistence-based economy that typifies northern communities becomes largely nonviable. Subsistence, however, is not just a source of income or a set of productive activities, it is a social and cultural system. Kinship is the basis of its social organization; kinship is in turn reinforced by subsistence production and sharing. In the modern day, subsistence is a key means of reaffirming aboriginal identity and of intergenerational transmission of skills and values. Subsistence is also valued as a sphere of aboriginal autonomy and indeed supremacy; it is an aspect of life least fully and effectively controlled by the state despite the encroachments earlier described.
Further, just as the subsistence system had incorporated trade in fish and wildlife products during the fur trade era, it was anticipated that new products and new markets would provide income in cash as well as in kind, from harvesting activities. The potential for these new economic directions was also threatened by non-renewable resource development.

The consequences of development for subsistence and for the local way of life were, by the early 1970s, recognized with increasing clarity and precision by aboriginal peoples, partly through improved communications, but perhaps chiefly because of newly emerging aboriginal political organizations. Growing public awareness and support aided in the ability of northern aboriginal peoples to mount challenges to continued uncontrolled development and to call attention to the adverse effects of those already in place. Proposed pipelines in the Western Arctic, and hydro-electric developments in Quebec and Manitoba, stand out, as do such incidents as mercury contamination in northwestern Ontario. A number of smaller but high-profile conflicts, such as oil exploration on Banks Island and in Lancaster Sound, were also significant in drawing attention to the need for modern treaty-making, but also to the inadequacy of treaty content as then conventionally interpreted. These developments, which were often perceived by Native northerners as an unprecedented threat to their way of life and well-being, had the effect of mobilizing aboriginal political organizations at both the regional and national levels.

In Alaska, the prospect of a huge oil development on the North Slope, and an oil pipeline across the state, had led to the passage of the Alaska Native Claims Settlement Act in 1971. This was regarded by Canadian Natives as an important precedent, although due to some of the Act's specific provisions and omissions, not as an acceptable model.

In Canada, a series of judicial decisions on land rights cases in British Columbia (Calder), Quebec (Kanatewat), and the Northwest Territories (Paulette)--in part precipitated by "megaprojects"-- were important milestones in reclaiming the land. Indeed, the development of the judicial route was itself an important accomplishment, and one which continues to shape the definition and implementation of aboriginal title and treaty rights. In the short term, the most significant results were the federal government's abandonment of its termination policy and the re-opening of a route to negotiated settlements, and the establishment of impact assessment and other regulatory procedures.

3. Recognition and Negotiation of Land Rights

The federal government responded to aboriginal and public concerns about northern development by establishing new processes to deal with them. This section describes those processes, and outlines the approaches of Canada and of aboriginal claimants to the negotiation of comprehensive land claims, with particular reference to those features relating to land title and control, resource harvesting and management rights, and environmental protection. I also note some government initiatives outside of the claims process which were intended to address resource and environment issues of concern to aboriginal peoples, as well as the treatment of these matters in the treatied areas of the North.

3.1 Government response

3.1.1 Native claims

In a major reversal of the proposed termination policy of 1969, the Minister of Indian Affairs publicly acknowledged the claims of aboriginal groups whose title had not been extinguished by treaty or otherwise superseded by law, "where their traditional interest in the lands concerned can be established" (Chretien 1973). Furthermore, the federal government undertook to negotiate settlements through a series of comprehensive and specific claims (Canada 1981, 1982), and established the Office of Native Claims to process and validate claims and negotiate settlements.

The content and process of negotiations took some time to evolve, however. The claims process was at first seen largely as a means of compensating aboriginal people for the loss of their land and for their traditional way of life which was regarded as doomed. Claims policy was therefore a form of social policy designed to provide aboriginal people with a material basis for integration and participation in Canadian society, much like ANCSA. By the late 1970s, however, compensation was no longer the stated objective of claims. It was, instead, to translate the concept of aboriginal interest into concrete benefits, that would promote the social, cultural, and economic continuity of aboriginal life (Asch 1984:66-67).

The Office of Native Claims was given a mandate to negotiate, in exchange for extinguishment, certain land and resource benefits: title to a limited quantum of lands (including subsurface rights to a small proportion thereof); preferential or exclusive access to fish and wildlife, and limited participation in the management of these resources; and monetary compensation. Other benefits not related to lands and resources were also offered, but the overall package did not include self-government (Canada 1981).

The new policy included some significant departures from the old treaty pattern, with respect to lands, resources, and environment. For our purposes, these were:

- The land quantum to be negotiated was far greater than what was provided for (although not necessarily greater than what Indian signatories had understood they would get) in the numbered treaties, although much of this would consist of surface title only.

- The lands selected would be held directly by an aboriginal corporate entity rather than by Canada for the benefit of aboriginal people.

- Cash compensation for lost lands would be substantial, and would be paid to an aboriginal corporate entity rather than to individuals.

- Hunting and fishing rights would be exclusive or preferential, and to some extent compensable.

- Aboriginal people would have some involvement in wildlife and environmental management.

3.1.2 Environmental assessment and review

At the same time, in response to growing public (as well as aboriginal) concerns over the environmental consequences of northern development, Canada set up an environmental review process for major development projects, first on an *ad hoc* basis, and later as the Federal Environmental Assessment and Review Office (FEARO). Provincial and territorial governments subsequently also formalized impact assessment and review procedures, although with varying force and effect.

The proposed Mackenzie Valley gas pipeline became the first test for the environmental review process, and to some extent for the resolution of comprehensive claims. A Commission of Inquiry was established in 1974. This Commission agreed to hear a broad range of evidence relating to the environmental and social impact of oil and gas development, and its implications for land claims. In order to ensure that the full range of evidence and argument be presented, it held community hearings throughout the impact region, and hearings in southern Canada, as well as technical hearings, and it arranged for intervenor funding. The Inquiry report (Berger 1977) called for the resolution of Native claims before major development, raised public awareness of and receptiveness to both environmental and aboriginal issues, and ultimately led to a moratorium on the project (see also Page 1986, Usher 1993a).

The Berger Inquiry led Native people to expect that the environmental assessment process might provide them with an additional forum through which to press their land claims, and there were many demands for such hearings in the years following. For example, Canada struck an Inquiry Commission to consider the Alaska Highway Pipeline proposal in 1977 (Lysyk, Bohmer and Phelps, 1977). In response to northern forestry development proposals, Ontario established the Royal Commission on the Northern Environment (Hartt Inquiry) in 1977, and in Saskatchewan, a Commission examined a proposed hydro-electric development on the Churchill River

(MacDonald 1978). In the Northwest Territories, Federal Environmental Assessment Review panels were struck to consider marine oil and gas development in the Eastern Arctic in the late 1970s, and a comprehensive review of Beaufort Sea oil and gas development in the early 1980s. All of these provided for intervenor funding, and all of them at least considered evidence relating to land claims. As well, environmental and social impacts were also considered for the first time at National Energy Board hearings on these and similar projects.

3.2 Aboriginal objectives and strategies

The process of claims development and negotiations on the part of the aboriginal claimants has been marked by considerable diversity of approach, models, and strategies. These reflected not only different personal and local experiences and philosophies, but also different calculations of power and possibility. Nonetheless, some patterns may be discerned.

There has been a tension between disparate, although not necessarily incompatible, objectives on the part of the aboriginal parties. To characterize this tension as one between the preservation of subsistence and the promotion of development, is true enough but also an oversimplification. This was by no means always seen as a contradiction by leaders and staff, since it was often supposed that aboriginal control would reduce or resolve this tension.

In the early 1970s, the typical response to major development initiatives at the village level was to resist them. Either the development was regarded as so hazardous and threatening that it should not proceed at all, or it should proceed only if a variety of safeguards and mitigative arrangements were in place that would minimize the risks of development and ensure local benefits. However, the megaprojects of that era did not only trigger resistance at the village level in the North, they also provided the basis for a much larger, more coherent, and self-conscious project: the land claims movement.

The political conviction of that movement was that megaprojects were not simply problematic for subsistence, but symbolized what was fundamentally wrong with the relationship between aboriginals and non-aboriginals in Canada. What needed changing was not just the megaprojects, but the nature of the relationship between aboriginal peoples and Canada in which such projects were planned, authorized, and implemented.

A detailed history of the ideological development of the land claims movement is beyond the scope of this discussion, but a few observations may help clarify the strategies and outcomes with respect to lands, resources, and environment issues. Seldom were the leaders of the movement drawn directly from those most dependent on and familiar with subsistence. They were not the elders, or those most experienced on the land. They were often young, educated persons who had spent more than average time in residential schools, in wage employment, and in the larger centres. They were often the least experienced on the land and least dependent on subsistence. They were the people who could understand and articulate a new vision of the place of aboriginal people in a fast-changing world, and how to achieve that vision. Part of achieving that vision

was to draw upon the knowledge and expertise of non-aboriginals, only now as advisors whom they would hire, rather than what governments supplied.

For many of this new generation of leaders, subsistence was problematic. On the one hand, they knew its importance to the local economy, to family and household well-being, and to personal identity. But they also knew that the future required more than just the maintenance of subsistence, that it required education and employment. For most of them, subsistence <u>activities</u> would be marginal rather than central to their lives, so while subsistence would retain its symbolic value, it would not be experienced as directly. It would not be <u>their</u> way of life, nor would it be the core and fibre of their being. Because of their own education and experience, they could understand and accept a different style of life in a way many in the villages could not. If this was not so before the process began, sometimes the drawn-out negotiations themselves, which created a partnership of the actors on both sides, made it so.

There were, of course, many people in positions of leadership and influence in the land claims movement during the 1970s and '80s. It is no simple matter to generalize their experience and perspectives, and there were many exceptions to the pattern described above. Yet this picture is, I think, true enough to sustain some working hypotheses. And while it is not the purpose of this project to test these hypotheses, they may be strong enough to guide our understanding of the outcomes.

The themes of land, tradition, and subsistence were central to the language and rhetoric of the land claims movement. But most aboriginal leaders articulated their opposition to megaprojects in the North not in terms of stopping development, but of settling land claims before development. How to achieve this involved some major political and strategic calculations.

One strategy or model was self-determination, in which as many separate spheres of autonomy and control as possible would be retained or rejuvenated. In many respects this model called for non-participation in the institutions of the larger society, and rejection of its goals and values in favour of a separate path based on self-sufficiency and self-reliance. Radical as this model seemed to government and the public at the time, it was in some ways highly conservative. This approach emphasized consensus, and an unhurried pace of developing and negotiating both principles and details.

Another approach was participation as full citizens, in which aboriginal people gained direct access to the levers and instruments of power in the dominant society, and in so doing would share in the wealth and benefits produced. To achieve the latter model, given the demographic trends, would require quick action, because the more numerous and entrenched the settler interests, the more difficult it would be to achieve parity in the instruments of public government. The fate of aboriginal people in Alaska and the provinces was illustration enough.

Precisely because the land claims movement sought more than land, and indeed rejected the concept of a real estate transaction, its central problem became not so much the particular quantum and arrangement of the land base, but what all this would entail for the relationship of

aboriginal people and the state. That aboriginal people would be negotiating their way into such a relationship was by no means new. But the circumstances in which they would do so were new. The power relationship had changed, and the possibilities were quite different.

The capacity of the leadership to draw on the wisdom and experience of the elders had also changed. Because of their experience and orientation, many leaders could not easily communicate with the elders and with the experienced harvesters, who in turn regarded them at some distance precisely because they had not shared the life, and because of their education and outside experience. On the other hand, they understood enough of the language of administration, law, and politics, as practiced by the dominant society, to utilize it to gain entry in negotiations or other situations. The greater their understanding and experience of these spheres, the more readily they could accept the logic and the necessity of certain strategies and approaches, and of certain negotiating idioms (viz. La Rusic 1979), which more "traditional" people regarded as alien and unthinkable. Indeed, the negotiating process itself seemed to require persons fluent in English, so that many elders and prominent harvesters were least able to be involved in the process directly. This led to (or reflected) in some cases, a separation of function and power between traditional leaders and the new political and administrative class, with the latter representing the former at the table.

The course and outcome of negotiations should thus be seen not simply as a compromise between governments and aboriginal negotiators, nor even the result of unequal bargaining strengths. There were fundamental tensions within aboriginal society at the time with respect to basic demands and to the development and pursuit of negotiating positions. These same tensions beset the problem of evaluating claims institutions and implementation: what was and is the objective, and by whose criteria can we measure success?

Nonetheless, there has been consensus among aboriginal claimants and Canada since the late 1970s, at least, that claims negotiations had to address certain problems that the Treaties, in the outcome, did not. In recognition of the importance of the land base and the way of life and identity it sustained, the principle that aboriginal people would be given small reserves, and retain only hunting and fishing rights on the rest of the land which were non-exclusive and without defence from damage, nuisance, or limitation was no longer viable. Instead, much larger amounts of land would have to be granted in at least partial title. In order to defend the harvesting rights on Crown lands (and on aboriginal lands with only partial title), there would have to be both aboriginal participation in planning and management, and some provision for compensation where losses nonetheless occurred. It is the purpose of this report, and of the larger project of which it is a part, to assess how effectively these common goals have been achieved in the outcome.

3.3 The sequence and progress of negotiations

This section outlines the early models and proposals for claims settlements, and sequence and progress of negotiations. The lands, resources, and environment provisions of the James Bay and Northern Quebec Agreement of 1975 are described in some detail. That agreement

provided the first test of the Federal Government's new commitment to negotiate new land claims agreements, and consequently set some fundamental parameters for the formulation of Federal comprehensive claims policy.

3.3.1 Alaska Native Claims Settlement

When Canada first proposed to negotiate comprehensive claims, the only current model of what a settlement might look like was the Alaska Native Claims Settlement Act (ANCSA) of 1971. ANCSA was not a product of negotiations, but was legislated by Congress with the intent of providing for certainty and security of development, and of integrating Native Alaskans into the American mainstream. ANCSA extinguished aboriginal rights for cash and land, with these to be held by corporate entities. Title was split between the villages and the regional for-profit corporations. Aboriginal hunting and fishing rights were extinguished without replacement by any substitute: Natives were deliberately put on the same basis as other Alaskans. This became a source of grave dissatisfaction and conflict and set the stage for legislated subsistence preference and related provisions which have not, however, resolved these conflicts (viz. Berger 1985, Morehouse and Holleman 1994).

3.3.2 Early settlement proposals - Yukon and Nunavut

The first comprehensive claims settlement proposals submitted to Canada were those by the Yukon Native Brotherhood in 1973 (to the Commissioner on Indian Claims, prior to the establishment of ONC), and Inuit Tapirisat of Canada in 1976. These documents outlined the proposed settlements in considerable detail (82 and 61 pages respectively), and provided rationales for them.

The Yukon proposal was strongly oriented to economic and social development, and paid relatively little attention to environmental and subsistence issues. It called for land entitlement similar to reserves in the treaty areas. Quantum was not specified but the purpose of land selection was clearly for village sites, with title vested in the Crown for Indian use in perpetuity (YNB 1973:69, 73). Because so little land would be retained, the proposal called for royalty payments on all resource developments throughout the Yukon (YNB 1973:70).

Exclusive harvesting rights were demanded on Indian lands, but as noted above these were to be a very small proportion of the territory. For the rest, it was only proposed that Indians retain the right to hunt and fish for subsistence "on all Yukon Lands" (i.e. Crown lands), and the right to trap on all unoccupied lands. The proposal did not call for exclusive or preferential rights, but only the return of some alienated registered traplines. It also called for the management of game, fish, and fur to be placed under the control of a joint management authority (YNB 1973:68-69).

These minimal demands with respect to land and resource rights probably reflected the weak socio-economic and political position of Yukon Indians at that time in relation to settler and

development interests. The southern Yukon had already experienced thirty years of rapid change, encroachment, and effective expropriation, including harvest disruption, village relocation, and economic marginalization. All of the communities but one were connected to the outside by roads, many had substantial settler populations, and the territory as a whole had been numerically and politically dominated by settlers for decades. For these reasons, much of the effective use and value of most traditional harvesting lands seems to have been regarded as irretrievably lost. The exception was Old Crow in the far North, and the YNB proposal made special provisions for that community with respect to land quantum, impact assessment, and caribou (YNB 1973:64,69,45). Another factor may have been that in 1973 there was no immediate development initiative or apparent legal lever to force governments to respond. The proposals were submitted many months prior to Canada's about-face on the land claims issue, and may have been more cautious for that reason alone.

The first Nunavut proposal was submitted by Inuit Tapirisat of Canada in February 1976, after two years of preparation. Although it was withdrawn several months later, it contained virtually all of the basic principles of subsequent Inuit claims proposals. Like the Yukon proposal, it was philosophically committed to economic and social development, but its statement of principles also called for the enhancement and protection of Inuit culture and traditional way of life, and the protection of wildlife and the environment. Further, it called for the creation of a new Nunavut Territory in the eastern Arctic, in which Inuit would be the substantial numerical, and hence presumably political, majority.

The Nunavut proposal (ITC 1976) was in particularly sharp contrast to the Yukon claim with respect to lands and wildlife. It called for retention of about one-third of the traditional land base (as documented by land use and occupancy research - Freeman 1976), which would be held by Inuit corporations in fee simple title (s.601, 603). Of these retained lands, 20% would include subsurface title, in which existing rights would be cancelled (s.704). Unlike in Alaska, lands could be selected in large continuous blocks (s.602, 603). The purpose of Inuit ownership was to provide for 1) the retention and protection of lands for both the communities themselves and for subsistence away from them, 2) control of the extent and nature of development activities, and 3) involvement of Inuit directly in development activities. The last would occur through both an Inuit Development Corporation which would be an instrument of development on Inuit lands, and "agreements of consent" between Inuit surface title holders and corporate subsurface title holders (s.609, 610). These agreements were envisaged to include provisions for avoidance, mitigation, and compensation with respect to development impacts, as well as employment, training, and business benefits. Finally, the proposal called for limitations on expropriation of Inuit lands, specifically that this should only occur by special Act of Parliament, only for a public purpose, and with fair compensation in the form of alternative lands or money at fair market value (s.613).

Inuit would also obtain a management interest in public lands. A Land Use Planning and Management Commission was proposed, with representation of Inuit, government, and national environmental and conservation organizations (s. 1102), with advisory powers (s.1103), including temporary withdrawals of public lands (s.1104). Canada would also set aside

substantial blocks of public lands in the form of parks and preserves (s.1106), in which Inuit harvesting rights would be maintained (s.1107).

The proposals on hunting, fishing, and trapping rights consisted of three elements: the affirmation of Inuit harvesting rights, the limitations on and allocation of harvesting rights, and management.

Inuit would have exclusive harvesting rights for some species (s.503), and preferential rights for others (s.505). The latter was cast in terms of a subsistence preference, rather than one accruing to beneficiaries, but eligibility for a subsistence licence would be determined by community Hunters and Trappers Committees (HTCs) (s.504). All harvesting rights would be subject to the overriding limitation of conservation. Should quotas be required for that purpose, subsistence requirements must be met in full before any allocations to recreational and commercial users (s.505). Further, subsistence users would be given preference with respect to the establishment of new commercial wildlife ventures (s.507).

The ultimate authority for management would remain with existing governments or their successors (s.512, 513). However, a Nunavut Council on Game would be established (s.501), with advisory powers respecting such matters as conservation, quotas, allocation, legislation, and research. Its members would be appointed by the territorial government, the federal management agencies, and Inuit community HTCs, with the last group in the majority. The community HTCs, to be established pursuant to s.502, would not only appoint members of the Council on Game, but also act as advisory bodies to it (including matters relating to research - s.509), and administer local quota, allocation, and licensing matters (s.502, 506). The Game Council would both advise senior governments on international negotiations relating to wildlife in Nunavut, and provide membership for international delegations (s.501). Finally, Canada would agree to seek an amendment to the Migratory Birds Convention to exempt Inuit from the restrictions it imposed on springtime hunting (s.510).

All of these provisions were advanced in more detail the two later NWT Inuit proposals, and virtually all were successfully negotiated in some form or other (see part 4). Whereas the Yukon proposal may be seen as an attempt to enlarge and modernize the traditional treaty provisions with respect to land and resources, the proposed Nunavut land regime was much more strongly influenced by ANCSA, especially with respect to quantum and tenure.

The wildlife provisions of the Nunavut proposal, however, had no precedent in either ANCSA or the treaties. They appear to have been founded instead on the provisions of the James Bay and Northern Quebec Agreement (see 3.3.3), and on the overhaul of the administration of wildlife in the NWT begun in 1975. These included the creation of an advisory game council which included Native representation, the establishment of local Hunters and Trappers Associations (HTAs) as instruments of decentralization and devolution, and a major revision of the existing Game Ordinance (Clancy 1990).
Both the Yukon and Nunavut proposals (the latter in much more detail) called for significant expansion of the then prevailing state view of treaty hunting and fishing rights (see 2.2),

especially with respect to allocation and management. But they also clearly accepted limitations on the right which the treaties arguably did not entail, insofar as Native harvesters would come under the jurisdiction of the applicable wildlife authorities (and such laws and regulations they might pass with respect to them), and that the principle of conservation is both explicit and paramount.

3.3.3 The James Bay and Northern Quebec Agreement

The first negotiated settlement in the modern era in Canada was the James Bay and Northern Quebec Agreement, signed in 1975 after two years of negotiations. The agreement was precipitated, if not indeed forced, by hydro-electric development which by the time of signing was a *fait accompli*, but it also served to resolve outstanding questions of Quebec's obligation to the aboriginal residents of the territory acquired under the Boundary Extension Acts of 1899 and 1912. The agreement therefore involved not only Canada and the aboriginal parties -- the Crees and the Inuit -- but also the Province of Quebec and the public corporations responsible for the developments themselves. One result is that the agreement lays out a framework of rights and obligations with respect to the specific proposed developments that is absent from other final agreements.

The provisions and regimes established for the Crees and the Inuit differ in some respects (the 55th parallel being used as the dividing line), and are therefore described separately where appropriate. Further details on both the background to and substance of negotiations are provided by Brooke (1995) and Penn (1995).

The land selections and regimes are described separately for the Crees (s.4,5) and the Inuit (s.6,7). Just under two per cent of the claim area (referred to as the "Territory" in the Agreement) was allocated as Category I lands (mostly in and around the communities). Some of these lands were assigned to Cree and Inuit community corporations, in other cases title was assigned to Quebec but for the "exclusive use and benefit" of the Crees. These latter were thus more akin to Indian Reserves. About 20 per cent of the claim area was classified as Category II lands. On these, the Crees and Inuit were assigned exclusive hunting, fishing, and trapping rights as well management and administrative involvement. With respect to tenure, however, they were neither granted as fee simple lands, nor even held by Quebec for the exclusive use and benefit of the Crees and Inuit. They are public lands, over which Quebec has full rights of access and development. The province may grant other resource rights, including subsurface, forestry, and water, to third parties, albeit subject in some respects to the harvesting rights of the Crees and Inuit, and it can expropriate these lands, subject to replacement.

The Crees and Inuit retained their harvesting rights on the remainder of the territory (Category III or public lands). Throughout the territory, the right of Crees and Inuit to harvest at all times of the year was affirmed, subject however to conservation regulations provided for in the agreement (and to the Migratory Birds Convention) (s.24.3.10). In addition, two elements were secured that had not previously been recognized in law anywhere in Canada, and that were certainly not

part of Canada's interpretation of the Indian treaties. One was the priority of Native harvesting (s.24.6) throughout the Territory, and the other was a role in management (s.24.4).

The priority of Native harvesting meant that, subject to conservation, Native people were guaranteed levels of harvesting equal to present levels for all species. These levels were to be established by a four year program of "harvest surveys". Only if game populations permitted sustainable harvest levels above these guaranteed levels would a share of the harvest be allocated to non-Natives.

The management regime called for the creation of a Hunting, Fishing, and Trapping Coordinating Committee to "review, manage, and in certain cases, supervise and regulate" the regime established by the Agreement (s.24.4.1). The Crees, the Inuit, Canada, and Quebec would appoint three expert members each (i.e., in the case of the first two parties, not Native harvesters themselves). The Committee is characterized as consultative to the responsible governments (s.24.4.23) except with respect to certain harvesting limits and allocations where its decisions were binding (s.24.4.30). It can propose regulations, propose and review all measures relating to the regime (s.24.4.25), and make recommendations to the responsible Ministers respecting guidelines, regulations, allocations, use, trade, protection, research, outfitting, research, commercial fisheries, and international negotiations (s.24.4.27). It can participate in impact assessment of developments affecting harvesting (s.24.4.29), and is responsible for harvest surveys (s.24.4.31).

To summarize, Canada and Quebec retain the sole authority within their respective jurisdictions for the <u>protection</u> of wildlife, although they shall do this on the advice of the Coordinating Committee (s.24.5.1,2). Local Cree and Inuit authorities may pass bylaws more restrictive than those of senior governments, with respect to harvesting and licensing on Category I and II lands (s.24.5.3,4). Enforcement remains the duty of existing provincial and federal agencies, although both Quebec and Canada undertook to train and hire beneficiaries for this purpose (s.24.10).

Environmental protection regimes vary slightly south and north of the 55th parallel, and are dealt with in separate sections of the Agreement (s.22 and 23 respectively). Both, however, provide for the adoption of environmental and social measures to minimize development impact, for impact assessment and review, for special status and involvement of Native people beyond that of the general public in these matters, for the protection of the rights and guarantees specified in the hunting, trapping, and fishing regime and in particular the protection of Native people and their economy and resources, but at the same time, for the development of the territory (s.22.2.2 and s.23.2.2). The specific bodies established in each area for these purposes differ, but all are advisory. The emphasis is on impact assessment and review, and on environmental regulations; the Agreement does not provide for land use planning or water management bodies.

The JBNQ Agreement provides for mitigation of development impacts (s.8.9), chiefly through the establishment of SOTRAC (La Societe des Travaux de Correction du Complexe La Grande). SOTRAC's mandate is to undertake remedial works and programs to alleviate negative impacts of Complexe La Grande on hunting, trapping, and fishing and related activities, and to provide

for enhancement to offset negative impacts. Its board of directors consists equally of appointees of the Crees and La Societe d'energie de la Baie James. The Crees normally propose remedial works and measures, and their implementation is subject to budgetary constraints. The Agreement provides for the relocation of burial sites (s.8.13), and for compensation for damage to trappers' equipment and facilities (s.8.12). However, in exchange for these and other related provisions, the developers of La Grande are released from "all claims, damages, inconvenience and impacts of whatever nature related to the hunting, fishing and trapping of the Crees and of the Inuit and related activities and to their culture and traditional ways that may be caused by the construction, maintenance and operation of Le Complexe La Grande" (s.8.17), although this was later amended to exclude mercury contamination due to impoundment.

The Cree and Inuit negotiators placed substantial emphasis in negotiations to maintaining hunting, fishing, and trapping as a way of life. In addition to harvesting and management rights, and environmental protection, the Agreement provided for an Income Security Program for Cree Hunters and Trappers (s.30). This provides for significant cash payments to households spending part of the year on the land. After ten years of implementation, there were approximately 1200 "beneficiary units" (ca. 3500 persons) enroled, receiving about $12 million annually. The program is paid for by Quebec, "which shall ensure at all times that the necessary funds are provided to give full effect to the program" (s.30.1.2). Parenthetically, this is perhaps the strongest language in any of the agreements about implementation funding. The program is widely acknowledged to have maintained a large proportion of the Cree population on the land, which would not have been the case without it (there are several analyses of the program in the literature, the most recent and comprehensive of which is Scott and Feit 1992, see also La Rusic 1993).

The JBNQA also provides the beneficiaries with the exclusive right to establish outfitting facilities on Category I and II lands (s.24.9.1), and the right of first refusal for same on Category III lands for the first thirty years after execution of the Agreement (s.24.9.3).

3.3.4 Final agreements in the Territories

By the time comprehensive claims negotiations got underway in the territorial North, the basic elements of the lands and resources components were already established. The entitlement to large amounts of land, even if the proprietary interest was less than full, and the acknowledgement of a continuing aboriginal interest in Crown lands that would be entitled to legal protection as well as preservation and enhancement through some form of comanagement, were fundamental principles that constituted major advances over the then prevailing interpretation of treaty rights. The public statement of Canada's framework principles for claims negotiations (Canada 1981) was largely a confirmation of what had already been established (although it did clearly disassociate self-government from the comprehensive claims process). Instead of outlining the details of the ensuing agreements, I therefore draw attention (in part 4) to those elements which are distinctive and innovative, particularly with respect to the Inuvialuit Final Agreement of 1984, which was the first comprehensive claims agreement concluded in the

Territories as well as the first concluded under the 1981 policy framework. A more comprehensive comparison is provided by MacLachlan (1993).

The progress of development and negotiation of the major agreements in the Northwest Territories and Yukon was roughly as follows (the main elements of these agreements are outlined in chapter 4). After the withdrawal of the Nunavut proposal, the Inuvialuit of the Western Arctic decided to press ahead with negotiations on a regional basis, chiefly due to the existing pressures of development and the apparent imminence and inevitability of greatly expanded oil and gas development (for details see Staples 1995). The Inuvialuit proposal was modelled closely on the original Nunavut proposal, except that it did not involve the establishment of a separate territory. An Agreement in Principle was reached in 1978, but the new federal government elected the following year sought major changes to it, and a Final Agreement was not concluded until 1984 (shortly after which the oil and gas industry in the Western Arctic went into sharp decline).

The Inuit of the central and eastern Arctic entered a new round of negotiations in 1979, having agreed to separate the land claim from the quest for self-government. Negotiations proceeded element by element, and an agreement in principle on wildlife was initialled in 1981. This was rejected by Canada's resource ministries (Department of Environment and Department of Fisheries and Oceans) on the grounds that Ministerial discretion would be diminished. Another eleven years of negotiations were required to reach a final agreement (NLCA). During this time Canada's comprehensive claims policies were reviewed and slightly revised (Task Force to Review Comprehensive Claims Policy 1985, Canada 1986). Because the process was linked to the creation of a new territory, Inuit had to devote substantial organizational resources to securing agreement for both the principle and the boundaries of the division of the Northwest Territories.

The Dene and Metis of the N.W.T. began preparing for negotiations in 1980, and within a few years had reached agreement in principle on many elements, including wildlife matters. A comprehensive Agreement in Principle was reached in 1988, and a Final Agreement (DMFA) was initialled in 1990. This, however, was rejected by a Dene assembly, which was not prepared to accept extinguishment. Those regional councils of the Dene Nation that did not reject the proposed agreement subsequently entered into negotiations with Canada to obtain regional agreements. The Gwich'in negotiated the first such agreement (1992), with the Sahtu region following (1993). The Dogrib Nation is currently in negotiations. The Gwich'in and Sahtu agreements are closely modelled on the unratified Dene/Metis Final Agreement, and are in effect regional versions of it.

In the Yukon, an agreement in principle reached in 1984 failed to attract sufficient support from a general assembly, and was abandoned. Subsequent negotiations proceeded with the aim of reaching an "umbrella" agreement, which would provide the framework for specific First Nation or regional agreements with distinctive adaptations of the main elements. The Umbrella Final Agreement was initialled in 1990 and signed in 1992. Four individual First Nation Final Agreements have since been negotiated.

3.4 The situation in the treaty areas

The adverse effects of the modern phase of northern development were experienced with no less intensity in the northern parts of the treaty areas. In the provincial north, from northern Ontario west to northeastern B.C., major forestry, hydro-electric, mining, and oil and gas projects were completed or in progress. Some of these had devastating local and regional impacts, and it was in these areas that the first major instances of environmental contamination were discovered (for a review of the major incidents of environmental contamination of country food in aboriginal communities, see Usher et al. 1995).

Yet precisely because these areas were covered by treaties (Treaties Three, Five, Eight, Nine, and Ten), governments for many years disclaimed obligation or responsibility (the situation in the NWT, where Treaties 8 and 11 had not been fully implemented, was anomalous in some respects and led to the inclusion of those areas in the comprehensive claims process). At that time, Treaty Indians were regarded by Canada and the provinces as having no rights off-reserve in Crown lands or waters save the right to hunt and fish. They were therefore considered to have no legal recourse with respect to development, except where reserve lands themselves were affected.

However, prior to the 1970s, even incursions on reserve lands tended to be arranged between developers (in the case of hydro development, normally provincial utilities) and Indian Agents on the bands' behalf. Affected bands would normally be asked to provide formal authorization of a *fait accompli*, with promises of modest compensation (for examples with respect to hydro-electric development, see Waldram 1988, Morrison 1992, Usher et al. 1992).

Several major thrusts may be identified in the way that lands, resources, and environment issues have been dealt with in treaty and other areas where there was no forum for their comprehensive consideration and resolution. These include 1) court challenges, 2) out of court settlement agreements, 3) self-government negotiations involving lands and resources, and 4) "comanagement".

First, matters of rights and title have been frequently contested in the courts. On the one hand, there have been numerous individual hunting and fishing charges by the Crown. At issue, frequently, is not whether the defendants did what the Crown alleged, but rather whether they had the right to do so. On the other hand, aboriginal organizations have filed pleas for comprehensive declarations of title and self-governing rights. The latter have often been seen as a means to force all parties to the negotiating table; the former have sometimes unexpectedly resulted in dramatic redefinition of treaty and aboriginal rights, especially in light of s.35 of the Constitution Act of 1982.

Some First Nations have sought redress for damages long ignored or for promised remedies never implemented. Notable examples have included legal actions against industrial polluters (viz. Usher et al. 1995). However, there are evidently substantial problems in resorting to civil litigation in such cases and it would appear that none have been brought to a successful

conclusion in court, although they have sometimes resulted in a settlement by other means. Injunction, as a defence against encroachment, seems to be largely unavailable or unobtainable in the treaty areas, although it has occasionally been used with success in defence of aboriginal rights. Canada's specific claims policy (Canada 1982), provides no remedies for historical damages to off-reserve resources and activities.

Secondly, there have been a number of out of court settlements of historic grievances, precipitated by either or both legal or political action. These settlements have come about either through mediation (in the case of Whitedog and Grassy Narrows, as a result of a recommendation of the Royal Commission on the Northern Environment), or direct negotiations (for example between several Manitoba and Ontario bands with their respective provincial hydro corporations). All of these negotiations and settlements are *ex gratia*, in effect political settlements which neither acknowledge nor establish by way of precedent any legal liability or obligation on the part of the developer.

There has also been at least one case of comprehensive regional negotiations in advance of a completed development, intended to deal with its anticipated effects. The Northern Flood Agreement in Manitoba, negotiated as a result of Lake Winnipeg Regulation/Churchill River Diversion, underway but not completed by the time of signing in 1977, sets out the rights and obligations of four parties: the five affected Cree reserves (represented by the Northern Flood Committee), Canada, Manitoba, and Manitoba Hydro. As a four party agreement dealing with a specific development, it is similar in some respects to the James Bay and Northern Quebec agreement. The chief difference is that, because it occurred in a treaty area with established reserves, the off-reserve communities received few benefits from the agreement, and the rights and remedies on Crown lands are lesser. The agreement has, nonetheless, been characterized as a modern treaty (Waldram 1988, Hamilton and Sinclair 1991).

The NFA is described in detail by Larcombe (1995). In summary, it provides for specific remedies for losses occurring on reserves, including land exchange at the rate of four new acres per acre lost (s.3), ensuring a potable water supply (s.6), protection of cemeteries (s.7), provision of community infrastructure (s.12), and remedial works (s.22). The agreement is innovative insofar as it recognizes the adverse effects of the project on harvesting and livelihood on Crown Lands, and provides for remedial programs and policies to deal with these. These include minimization of adverse effects by the operating regime (s.10), shoreline clearing (s.13), priority access to wildlife in traditional areas, and a wildlife advisory and planning board (s.15), reporting and monitoring re environmental impact (s.17), compensation for trapping and fishing losses as well as programs to promote the continued viability of these activities (s.19).

The NFA provides for dispute resolution by arbitration (s.24). While Manitoba Hydro can settle directly with other parties, including individual claimants, such settlements may be reviewable by the arbitrator. The onus is on Hydro to prove that it is not responsible for adverse effects (s.23.2). Where the agreement calls on governments to implement certain policies, the arbitrator may fix damages arising from failure to implement (s.14). The NFA is like the comprehensive

claims insofar as it recognizes a defensible interest in off-reserve lands and resources in a way that Canada and Manitoba did not then interpret Treaty 5.

Thirdly, some provincial treaty organizations have entered into negotiations with Canada and the provinces on matters relating lands and resources issues, often under the rubric of "self-government". For example, Nishnawbe-Aski Nation signed a "Memorandum of Understanding" with Canada and Ontario in 1986 for this purpose. While this process was not intended to renegotiate or reopen Treaty Nine itself, it would clearly have the effect of refurbishing and implementing some of its key provisions. Matters relating to fishing, trapping, and hunting were among the first priorities for negotiations.

Fourthly, there has been a trend towards "comanagement" as a means of addressing resource use conflicts between aboriginal parties and governments. Often characterized as a "power-sharing" arrangement, comanagement bodies are technically advisory, with ministerial authority and discretion legally undiminished. Comanagement bodies consist of representatives of government (typically the management agencies) and of "users" (typically aboriginal persons), and usually have a mandate to make recommendations on allocation and licensing, and provide advice on conservation and research matters (Osherenko 1988, Pinkerton 1989).

An early example is the Beverly-Qamanirjuaq Caribou Management Board, established in 1982. Precipitated by a perceived "caribou crisis", in the context of on-going claims negotiations, it was nonetheless an institution established apart from and without prejudice to comprehensive claims, that also provided for inter-jurisdictional coordination (Monaghan 1984, Usher 1993). Similar comanagement boards have been established in Canada for the Porcupine Caribou herd, and in Alaska for marine mammals (Roberts 1995).

The genesis of comanagement arrangements in areas not covered by comprehensive claims is often a high-profile resource use conflict. A notable case the Barriere Lake Trilateral Agreement in Quebec (Notzke 1995). Other examples include (in Ontario) the Wendabin Stewardship Authority (Ross 1993), the interim hunting agreement with the Algonquins of Golden Lake (Montour 1994), and the Whitedog Area Resources Committee (Anthony Usher Planning Consultant et al. 1994), and there are several initiatives underway in Manitoba and Saskatchewan. (There are also several cases of comanagement of national park reserves, but these are outside the treaty areas and are generally regarded as interim arrangements pending comprehensive claims).

Finally, since there is no equivalent of the claims-based environmental assessment procedures, a common response to development initiatives has been to call for major review via especially established vehicles such as Royal Commissions (viz. the Royal Commission on the Northern Environment in Ontario), or to convene panels under existing legislation (e.g. EARP) but with special provisions for intervenor participation.

It is noteworthy that in the new Canadian Environmental Assessment Act, "environmental effect" is defined, in respect of a project, as

any change that a project may cause in the environment, including any effect of any such change on ... [inter alia] ... the current use of lands and resources for traditional purposes by aboriginal persons, ...

The Act does not, however, refer to adverse effects on aboriginal rights, title, and treaties *per se*.

To summarize, because of the deficiencies of Canada's interpretation of Treaties, and of aboriginal rights, the aboriginal interest in lands, resources and environment outside of the comprehensive claim areas is protected on an *ad hoc*, piece-meal basis, if at all. Such protection has been achieved by means of court decisions which have reinterpreted aboriginal rights and government obligations (e.g. Sparrow, Sioui, Guerin), and by topic or issue-oriented negotiations intended to address specific grievances.

Because Canada's interpretation of treaty and aboriginal rights provides no basis for aboriginal involvement in development planning processes, design modification, and mitigation, adverse effects tend to be treated as a cost of doing business and are dealt with *post hoc*. There is no systematic way of doing this.

In the absence of a clear and mutually acceptable process for resolving matters relating to lands, resources, and environment, in the treaty areas of the North, the emerging patterns are perhaps less clear. Nonetheless, through a combination of political and judicial processes, significant changes are occurring. Neither the judicial nor political interpretations of aboriginal and treaty rights are what they were twenty years ago when the modern treaty process began.

4. The Emerging Pattern

This section identifies the significant patterns that have emerged from the comprehensive claims process in the North. Particular emphasis is given to the Inuvialuit Final Agreement (IFA) of 1984, which was the first comprehensive claims agreement concluded in the territorial north, as well as the first concluded under the 1981 policy framework. The key features of the 1993 Nunavut Land Claims Agreement (NLCA), the 1992 Gwich'in Comprehensive Land Claim Agreement (GFA), and the 1992 Yukon Umbrella Final Agreement (YUFA), are also described. The GFA (and SFA - see 1.2.3) are closely modelled on the unratified Dene/Metis Agreement of 1990.

The discussion is organized according to the major lands and resources elements common to most or all Final Agreements. The purpose here is to provide a common background to the case studies. Maclachlan's comparative analysis of northern comprehensive claims agreements (1993) provides substantial additional detail on these and other provisions of the agreements.

4.1 Lands

4.1.1 Quantum, distribution, and selection

Table 4.1 provides a comparison of the amount of land selected, by type of tenure, for each of the territorial settlements (and, for comparison) the JBNQA. It also shows these data as a proportion of the "settlement area" (equivalent to the "Territory" in the JBNQA, and normally equivalent to the traditional use area). The Inuvialuit were the most successful with respect to total quantum selected, at about 35% of the total settlement area. These lands are in large continuous blocks, delimited largely by artificial grid boundaries. Under the Nunavut agreement, Inuit retained just over half of this proportion, at 18.5%, but the lands are in more scattered but numerous smaller blocks. The Gwich'in obtained over 28% of their settlement area, however this will probably be well above the average for the Mackenzie Valley as a whole, as the original DMFA provided for a land entitlement of about 17.5%. There are 53 separate parcels of Gwich'in lands, averaging about 150 square miles each, as well as a number of 1 ha plots for existing individual cabin sites. Yukon Indians obtained well under 10% of their traditional land base in fee simple.

Federal policy requires that the land entitlement be selected from within the settlement area, but in some cases there was a more restrictive provision, which is that lands must be selected from areas of "traditional use and occupancy", as documented in the claim. These provisions are based on common law principles of aboriginal title.

The agreements outline the principles guiding land selection. These include, in the case of the IFA, lands of importance for biological productivity or traditional pursuits, habitat and wildlife protection, Inuvialuit economic opportunities such as tourism, historic sites and burial grounds, and possible new communities (similar principles are expressed in the NLCA). Excluded from selection, however, were lands containing proved oil and gas reserves, and private lands or sites

of public works (s.9.2). The NLCA also placed restrictions on land selection, chiefly concerning existing tenure and reservation status, but did not preclude the selection of lands containing proved reserves of oil, gas, or minerals (s.18.1.1). In the GFA, hazardous waste sites are excluded from selection. In the Yukon, land cannot be selected on both sides of a highway. None of the agreements prohibits the selection of lands at potential hydro-electric development sites, but the YUFA explicitly provides that such lands (as well as those subject to flooding by impoundment), if selected, will be registered with a caveat and subject to expropriation if needed.

Inuvialuit lands include title to the beds of lakes and rivers therein (s.7.2), but not to waters themselves, which are in Crown title (s.7.3) (these particular provisions also apply in the other agreements). Marine areas were prohibited from selection, although certain Inuit management rights were recognized.

The IFA and NLCA both called for the designation by governments of certain additional lands as parks and reserves, within which Inuit would have guaranteed harvesting rights. This was seen as a means of protecting additional lands for subsistence purposes, while at the same time accommodating the public interest in the protection of significant natural areas, although Canada has not taken full advantage of this (Fenge 1993). Lands set aside amounted to about five per cent of the settlement area in the IFA and an as yet undetermined proportion in the NLCA. The GFA enables parks and reserves to be set aside on similar conditions to the IFA and NLCA: preservation of harvesting rights and other traditional uses within parks, impact benefit agreements to be negotiated, joint management of parks, boundaries not to be reduced without consent once established, and boundaries to be enlarged only upon consultation with beneficiaries. The YUFA leaves such arrangements to individual First Nation Final Agreements.

4.1.2 Title and tenure

Lands selected by the beneficiaries will be held by their designated organizations, usually a land-holding corporation or a municipal-type government, or band. There are some important limits on this corporate title and on the bundle of rights associated with title. Most importantly, it cannot be privatized. The large blocks of land which are held by community or regional corporations cannot be broken up and sold to individuals (whether beneficiaries or not), or to corporations. Indeed the only party to which the lands can be transferred or sold is to Canada (in the Territories) or a Province, since the Crown asserts underlying title.

These corporate lands are held in fee simple estate (mostly restricted to surface title but in some cases carrying the subsurface rights as well). As such, under the prevailing Canadian system of tenure, they have the status of private lands, and some significant title limitations follow from this. As well, because they are private lands and not reserves, Canada has no fiduciary obligations regarding their management and disposition.

4.1.3 Limitations on title: access and expropriation

Under the Canadian system of land titles, fee simple lands are subject to easements and expropriation, to zoning and planning, to taxation, and to access by public authorities and by other private resource right holders under certain conditions. As well, title holders are subject to laws of general application regarding the harvesting and conservation of fish and wildlife on their lands, albeit enjoying exclusive access.

Native lands are subject to many of the same restrictions (the notable exceptions being their exemption from taxation, and the special rights of involvement in management). They are subject to expropriation and easements, although the process is more difficult for governments, and there is provision for substitute lands as well as for cash compensation. But because of the large size of the holdings, the public, third parties, and especially governments have much more extensive provisions for access than is normally the case with private lands. In general, the public enjoys transit rights by water routes, some recreational use rights, and even some harvesting rights, on aboriginal lands. Governments have rights of passage and use for inspection, enforcement, and the delivery of government services, as well as use for military exercises subject to negotiation. Third parties holding subsurface or other resource use rights are also entitled to access under specified conditions. The IFA and NLCA call for Participation Agreements, or Impact Benefit Agreements, respectively, to be negotiated between the parties.

4.2 Harvesting

4.2.1 Harvesting rights

Harvesting rights are in all cases affirmed, and moreover become for the most part exclusive or preferential rights. However, they are also more clearly limited, being subject to existing management authority as determined by the comanagement boards. The right is explicitly subject to conservation, as well as to public safety.

This overriding principle of conservation is not novel -- on the one hand, aboriginal people assert that they have always practiced conservation, and did not need government to impose it on them; on the other hand, governments assert that they have had the authority and the techniques to promote conservation all along, despite certain court decisions and political considerations that restrict their exercise. However, because conservation is so central to the harvesting elements of the comprehensive claims agreements, it is always explicitly defined (table 4.2), and in some cases is alluded to as a fundamental principle or objective. This, as we shall see, predisposes the agreements toward a particular view of wildlife and fisheries management, although only in the NLCA is this made explicit:

> *there is a need for an effective system of wildlife management that complements Inuit harvesting rights and priorities, and recognizes Inuit systems of wildlife management that contribute to the conservation of wildlife and protection of wildlife habitat* (s.5.1.2.e).

The final agreements often seek to specify or clarify many incidents of aboriginal harvesting rights that have hitherto been the subject of court tests. They define who may hunt, for what purpose (i.e. personal and community use), and what laws they are subject to. With some variation among agreements, such matters as harvesting methods, gear, possession, trafficking, and commerce are addressed.

4.2.2 Allocation

All of the agreements affirm the priority of aboriginal harvesting rights over any other use. In some cases, the right is exclusive: only beneficiaries may harvest on aboriginal freehold lands (or Category II lands in Quebec); and only beneficiaries may harvest certain species anywhere in the settlement area. But in other cases, beneficiaries have only a preferential right, not an exclusive one. This preferential right is limited to need, specifically for subsistence which is often further defined as personal and community need. Except for furbearers, this preference does not include commercial harvesting.

This allocation system requires quantification in order to work. First, because all harvesting rights are subject to conservation, there must be a means of determining the upper limit of the allowable harvest. Secondly, where the allocation is preferential, it is necessary to establish what the level of need actually is. These two quantities are often referred to as Total Allowable Harvest (TAH) and Basic Need Level (BNL). TAH is, in effect, sustainable yield as determined by the principles of wildlife science. BNL is established on the basis of several cultural and historical factors, the most important of which is a formula based on actual recent harvest levels as determined by harvest surveys (viz. NLCA 5.6.21, and GFA 12.5.8). The IFA is an exception in that it makes no explicit mention of BNLs or the basis of their calculation (see Staples 1995).

If BNL is greater than TAH for any species or population in any particular year, beneficiaries may harvest only the TAH, but no other users may harvest any amount for any purpose. If BNL is equal to TAH, then beneficiaries may harvest the entire BNL, and there is no allocation for other users. If BNL is less than TAH, beneficiaries may harvest the entire BNL, but there will be some left over for other users. This surplus is in some cases allocated according to a hierarchy of preferences, for example in the case of the NLCA:

> *(i) personal consumption by other residents;*
> *(ii) continuation of existing sports and other commercial operations;*
> *(iii) new economic ventures sponsored by beneficiary organizations; and*
> *(iv) other* (s.5.6.31).

Sub-allocations within the settlement area, i.e. among communities for subsistence, are administered by local harvester organizations (see below).

The principle of minimum guaranteed harvest levels for subsistence, subject to conservation, was established by the JBNQA and followed with minor variations by the territorial agreements.

4.2.3 Management

All of the final agreements provide for a system of joint management or "co-management" of wildlife and fisheries. This is somewhat more than what Canada had originally envisaged (e.g. making recommendations and providing advice -- Canada 1981:24), but also rather less than what most claimants had originally sought. In all cases, a new structure is created: a board whose members are appointed in equal numbers by government and beneficiaries. The responsibilities and powers of the boards fall into two main spheres: allocation, in which they have actual decision-making power, and management, in which technically they have only advisory roles. In the case of the NLCA, for example, the Nunavut Wildlife Management Board (NWMB) may approve, *inter alia*, management plans, the establishment of conservation areas and management zones, and the designation of rare, threatened, and endangered species. It may provide advice to management and other agencies with respect to wildlife and fisheries management and research, and mitigation and compensation resulting from damage to wildlife habitat, and wildlife education (s.5.2.34-38). But the ultimate responsibility for management remains with government: the federal Department of Fisheries and Oceans (with respect to fisheries and marine mammals) and Department of the Environment (with respect to migratory birds), and the territorial Wildlife Management Service with respect to terrestrial mammals. The respective Ministers of these agencies can adopt, reject, or vary the recommendations of the Board, and also nominate the government representatives on these Boards.

The actual structure and powers of the boards under each claim vary somewhat, for example in the IFA there are separate boards for wildlife and fisheries (and these are charged with preparing management plans), and in the JBNQA the equivalent body is characterized as a "coordinating committee". In the case of the IFA, Inuvialuit appointments to all joint management bodies are made by the Inuvialuit Game Council (IGC), an entirely Inuvialuit entity drawn from the Hunters and Trappers Committees (HTCs) of each community. The IGC and HTCs also provide advice to the joint management bodies. The HTCs may pass by-laws, subject in certain respects to the laws of general application (s.14.76.f), but the enforcement of all laws and regulations remains with the Crown, as is the case in all of the other agreements.

The boards are thus clearly not instruments of self-government or self-management, but rather of public government. They do not replace the existing management systems, they provide a structured basis for aboriginal participation in them. They are the designated instruments of wildlife management, but governments retain ultimate responsibility (e.g. NLCA s.5.2.33). While it is the intent of most agreements to incorporate and utilize aboriginal knowledge and systems of management (viz. IFA s.14.5; NLCA s.5.1.2.e; GCLCA s.12.1.1.d,e), none of the agreements specify how this shall actually be done or what the criteria or tests of implementation might be.

Since the ultimate obligation of the comanagement boards is conservation (and presumably they are accountable to the Ministers, not the beneficiaries, in this regard), the definitions of conservation found in the agreements (table 4.2) assume particular importance. Such terms as populations, productivity, ecological systems, and the like, would appear to require the type and

quality of data that wildlife managers traditionally use, without any necessary reference to aboriginal knowledge or understanding.

4.2.4 International relations

The final agreements attempt to deal with the fact that Canada has the power to, and in some cases already has, entered into international agreements with respect to the allocation and management of certain species, most notably migratory birds, salmon, and large whales. The agreements (JBNQA as well as territorial) specifically require Canada to seek revisions of the Migratory Birds Convention so as to decriminalize the spring hunt in the North. They also provide for Native consultation and involvement with respect to the development of Canada's negotiating positions in all such cases where the aboriginal interest will be affected (JBNQA 24.14.2; IFA 14.37; NLCA 5.9.2; GCLCA 12.10.1).

4.3 Environmental protection

The territorial agreements all provide for certain comanagement regimes to deal with environmental protection. These consist of boards for land use planning and management, and impact screening and review. The basic principles of the establishment, structure, and authority of these boards are similar to the wildlife management boards described above. Consequently they are described only briefly here (see also MacLachlan 1993).

4.3.1 Planning and management

Each agreement provides for a land use planning agency, and some (NLCA, YUFA) for separate water boards. The GCLCA provides for a land use planning board and a lands and water board, as well as a surface rights board. These boards are advisory, and do not replace existing government agencies. Members are appointed equally by governments and beneficiary organizations, except in the case of YUFA, in which the ratio is 2:1. The scope and powers of these boards appear greater in the territorial final agreements than in the JBNQA, undoubtedly because in the latter, the key development was already underway and the developer was a signatory to the agreement.

4.3.2 Environmental screening and review

Each agreement provides for an impact review board (in the case of the IFA, there are separate boards for screening and review). All were negotiated in the context of the existing Federal Environmental Assessment Review Process and to some extent mirror its major features, except that members are appointed equally by governments and beneficiary organizations. A detailed comparison of the various Inuit regimes is provided by Edmondson (1993). (See also Staples 1995, Wilkinson and Vincelli 1995).

4.3.3 Mitigation and compensation

While the JBNQA is quite specific about mitigation procedures with respect to development impact (see 3.3.3 above), it does not call for Cree or Inuit involvement in the planning and design stage, so that the need for mitigation and compensation could be avoided or minimized. The Territorial agreements provide for impact benefit agreements or surface rights access agreements in Native lands, which provide the framework for affected communities to negotiate a remediation/mitigation/compensation package.

The philosophy of all the agreements is that avoidance or mitigation of environmental or social damages is the most desirable course. All make provisions, however, for compensation where damage occurs. (Cash compensation for title extinguishment through negotiations is a separate matter, not considered in this report. Nor do I consider compensation relating to specific claims, which are more strictly property and commercial loss claims and hence more amenable to conventional evaluation).

The Territorial agreements provide specifically for wildlife compensation. The IFA specifies the intent as to prevent damage to wildlife and habitat and disruption to harvesting by development activities, and if damage occurs, to restore wildlife and habitat and to compensate harvesters for subsistence and commercial losses (s.13.1). It establishes a system of no-fault liability, if demonstrable losses can be shown to be the result of development (s.13.21-22). However, it is the claimants who must demonstrate, on a balance of probabilities, both the cause and the extent of the loss. Losses may include equipment and property, actual harvest losses, and future harvest losses. If negotiation fails, an arbitration board is provided for. Compensation may include relocation, replacement of equipment, product replacement, and cash. However, cash compensation awards for harvest losses are not intended to provide guaranteed income in perpetuity, but will be made on a diminishing scale for a limited time (s.13.23).

The wildlife compensation principles of the NLCA are very similar (although less detailed), except that the onus of proof is not specified. A surface rights tribunal (s.21.8) rules on wildlife compensation, if the parties cannot reach agreement themselves, and it is not bound by strict rules of evidence and must take into account Inuit knowledge of wildlife and the environment as well as the social, cultural and economic importance of wildlife (s.6.4.3). The GFA includes provision for wildlife compensation along the same principles of the IFA, but provides little detail. The issue of burden of proof is not dealt with, but is left for legislation (s.17.1.8). The YUFA makes provision for compensation only with respect to furbearer harvest opportunities, but the process for this shall be established by Government (s.16.11.13).

4.4 Economic and socio-cultural viability

All of the final agreements acknowledge the importance of maintaining the economic, social, and cultural viability of subsistence, but the practical recognition varies greatly. The most significant example is the Income Security Program for Cree Hunters and Trappers, under the JBNQA (see 3.3.3). No comparable program has ever been provided for since, although some of the agreements provide for much more limited forms of harvester support.

The IFA establishes an Inuvialuit Social Development Program (funded at $7.5 million) which may among other things provide for "the maintenance of traditional practices and perspectives" (s.17.2). The NLCA provides a basis for the maintenance of outpost camps, by ensuring that lands are available (s.7.4.), and by providing a form of tenancy (s.7.3), and free occupancy (s.7.5.1), but no cash support (however, the Inuit of Nunavut negotiated a separate harvester support arrangement with the Government of the Northwest Territories). The YUFA calls for a feasibility study of harvest support (s.16.15.1), but there is no commitment on the part of either Canada or the Yukon to implement whatever that study might recommend.

The administrative and operating costs of local hunters and trappers committees or organizations are provided for in the agreements, but this does not constitute direct cash support for harvesters for harvesting. The agreements provide for some commercial opportunities with respect to renewable resource use. The NLCA and GFA provide their beneficiaries with the first opportunity to obtain licences for new economic opportunities, and the right of first refusal upon sale of existing licences. The YUFA leaves the negotiation of such priorities to individual First Nation agreements (s.2.2.3.3, 2.2.3.6).

Finally, it may be observed that all of the territorial agreements include provision for dispute resolution.

4.5 Modern and historic treaties compared

How do the land, resource, and environment regimes of the modern treaties compare with the treaty provisions of a century ago? Certainly these elements of modern treaties are much more clearly defined, and a plain reading of the texts suggests that they are for the most part much more beneficial to the aboriginal party (for a direct comparison of the land and resource provisions of Treaty 3 of 1873, and the IFA of 1984, see Usher, Tough, and Galois 1992). The major differences are as follows.

4.5.1 Land rights and access

The aboriginal land base has included, on average, about a fifth of the traditional territory (under the old treaties, by contrast, reserve lands amounted to about one per cent of the territory). The remainder has become Crown land "disencumbered" of aboriginal title and hence open to development, albeit subject to the regulatory regimes created. In some cases, additional lands have been protected as parks and reserves, also subject to comanagement.

The claims agreements in the Northwest Territories have constituted a significant advance, from an aboriginal perspective, over the JBNQ Agreement (and the treaties) in that selected lands are held by the beneficiaries, not by the Crown. Consequently the effective quantum in fee simple is much greater (Table 4.1). Aboriginal lands superficially retain the feature of collective title, an essential characteristic of aboriginal tenure systems. That title, however, vests not with the former socio-territorial entities -- the -miut groups or bands, but with aboriginal corporations.

Formal title can no longer be said to be communal, and informal indigenous tenure systems, to the extent that they survive, would appear to be at a disadvantage.

The gains with respect to access and expropriation are more modest: Canada has been insistent on an overriding public interest on what are in effect private lands. (A more detailed account of the elements relating to tenure, access, and expropriation is provided by MacLachlan 1993). Effective control and tenure is beset by some significant limitations. One result is that aboriginal lands, despite their status as private lands, are for the beneficiaries not a sphere of autonomy but of comanagement, or at least coexistence, with the state.

4.5.2 Harvesting rights

The comprehensive claims differ from the treaties perhaps most importantly with respect to harvesting rights, which are understood broadly as guarantees of subsistence, and indeed of livelihood insofar as certain rights of trade, barter, and sale are also recognized. The right to harvest is clearly affirmed (as are its limits, explicitly with respect to conservation), but it is an exclusive or preferential right, subject to compensation if lost or diminished. Hunting and fishing rights have thus become at least partially defensible against nuisance, trespass, and damage. Further, at least limited management rights are recognized.

However, the status of treaty and aboriginal harvesting rights have not remained static in other parts of the country. During the nearly twenty years of claims negotiations in the North, developments have been occurring independently through legal challenges in the regions outside of those under comprehensive claims negotiations. As a result of several Supreme Court decisions (most notably Sparrow), aboriginal and treaty hunting and fishing rights are much less restrictively interpreted than was the case in the early 1970s.

4.5.3 Protection of lands and resources

The problem of environmental protection was not addressed at all in Canada's interpretation of the early treaties, and was therefore a matter of top priority for aboriginal organizations entering into the modern round of comprehensive claims. The environmental regimes created by the modern treaties therefore represent a significant advance. These regimes apply to land use planning, impact assessment, and water. In the most limited sense, they were intended by Canada to provide some protection to Crown lands on which traditional aboriginal uses obviously depended (Canada 1981:23-24).

4.5.4 Comanagement

The principle of comanagement is perhaps the most innovative and yet least understood elements of the modern treaties. It applies not only to wildlife and fisheries -- the so-called "traditional"

resources of fish and wildlife for personal consumption -- but also to environmental protection and regulation as noted above.

Comprehensive claims have not been the only basis for the development of comanagement. Some important and enduring examples (such as the Beverly Qamanirjuaq Caribou Management Board referred to in the Introduction) pre-date many of the claims, and limited forms of comanagement have been implemented outside of the comprehensive claims areas. However, the claims-based regimes are the strongest and most enduring, not least because they are constitutionally protected under section 35 of the Constitution Act, 1982. They cannot be unilaterally disbanded as was the case, for example, with Ontario's Wendaban Stewardship Authority.

At the time that comanagement options were first seriously negotiated in comprehensive claims, the alternative was continued and more comprehensive devolution to the territorial governments. Instead, at least a nominal form of power sharing was the outcome. Governments were not entirely averse to this compromise, certainly in preference to self-government with respect to lands and resources. The Supreme Court's Sparrow decision also provided an impetus for comanagement, because consultation has become one of the key tests of constitutionally acceptable limitations on aboriginal harvesting rights. The comanagement boards provide a useful "single window" for governments to deal with specific resource issues.

On the positive side, from an aboriginal perspective, comanagement establishes a principle completely ignored (if not explicitly rejected) in Canada's interpretation of the historic treaties. It is that aboriginal people retain, as a result of claims settlements, some rights not only of use but of management, and in effect governance, that apply on all Crown lands and in more limited respects on private lands, throughout the traditional territory or "settlement region". The modern treaties create an institutional basis for cooperation and coexistence, for problem solving and for the harmonizing of mutual interests, with respect to all lands and resources. This is quite different from the traditional denial of all collective aboriginal rights save residual hunting and fishing rights, outside of reserve lands.

On the other hand, the emerging pattern is not one of self-determination. It would certainly appear, based on the structures and mandates established by the comprehensive claims, that the state management system has been retained. Despite some variations among the final agreements, the general pattern is that allocation and licensing is delegated to the boards and the local harvester organizations, but management for conservation is reserved to governments, with the boards having only an advisory role. The chief instruments of management are technically institutions of public government, on which aboriginals are guaranteed equal representation with governments. The comanagement boards do not replace existing resource management agencies, at most they provide guidance to them. This is by no means consistent with what many, and perhaps most, harvesters wanted, and there is some evidence that no claimant group has been as successful in negotiating its opening position on management rights as it has on harvesting rights (viz. Usher 1985).

4.5.5 Factors affecting outcomes

The regimes and provisions that emerged from comprehensive claims negotiations and related processes appear to be related to certain factors identified in the previous sections, including:

- Geopolitical realities. Favourable outcomes for claimants are more difficult where a) provincial jurisdiction is involved, and hence divided Crown responsibility for lands and aboriginal administration, b) there is a larger and better established settler population with competing interests in resources, and c) a project is deemed to be a matter of national security or destiny.

- Experience with settlement and development. The strategic assessment of the relative urgency of development pressures; the degree of existing poverty and despair (it is a common observation that the poor sell their assets for less); and whether the experience has been dramatic and sudden innovation or long term progressive encroachment, appear to be significant factors in determining what compromises are necessary or acceptable.

- Unity of claimants. There may be some significant differences between large territorial settlements and those where there has been fragmentation (viz. the Nunavut claim vs. the Dene/Metis claims in the NWT).

- Experience and capabilities of aboriginal leadership. The prevailing political traditions of the claimant group, as well as previous experience of negotiating with the state or other powerful interests, the record of success or failure in dealing with similar problems, the personal education, experience, and ideological orientation of the leadership, are probably significant factors.

- Knowledge of and perspectives on existing models and precedents, for example court precedents, and the demonstration effect of other claims settlements (e.g. ANCSA on the Inuvialuit, IFA on the Gwich'in).

The claims agreements are the results of negotiations, hence do not represent so much what the aboriginal parties actually sought as much as what they (or their advisors) thought they could get governments to agree to in the particular historical context in which they were negotiated. How the beneficiaries view their claim may depend in large measure on implementation experience and in particular the length of time they have had to evaluate that experience. Those most involved in negotiating the claim (normally a small leadership group) are often, perhaps naturally in the first flush of achievement after signing, quite confident of the adequacy of their agreement as written and as it will be implemented. Those less involved, i.e. the mass of the beneficiaries voting on ratification, will be more or less well-informed about the content and implication of the agreement and its implications. The complexity of modern agreements, and the apparent need for substantial technical and legal assistance in making them, raises the question of whether ratification votes are the real modern-day equivalent of old requirement for open assembly.

The implications of the negotiating process itself for the outcome also needs to be explored. La Rusic (1979) drew attention to this some time ago, when he identified the problem of adopting certain technical "idioms" as the framework and language of negotiation; for our purposes this is probably best illustrated in the sphere of wildlife. His work is also notable in drawing attention to the increasingly divergent interests of town and bush residents in Cree society, a theme with more general application as noted below. Few have addressed these themes since, however.

Table 4.1 Northern comprehensive claims -- Aboriginal land quantum, by form of tenure

		Lands obtained, by tenure category			
Final Agreement	Settlement Area (mi^2)	Total (mi^2)	surface and subsurface	surface only	exclusive harvesting rights only
JBNQA	410,000	65,418 (16.0)		5,288 (1.3)	60,130 (14.7)
IFA	100,920	35,000 (34.7)	5,000 (5.0)	30,000 (29.7)	
NLCA	740,000	136,527 (18.5)	14,140 (1.9)	122,387 (16.5)	
GFA	30,000	8,658 (28.8)	2,378* (7.9)	6,280 (20.9)	
YUFA	205,000	16,000 (7.8)	10,000 (4.9)	6,000 (2.9)	

Lands obtained as a percentage of the total settlement area (estimated) indicated in brackets

*includes 136 mi^2 subsurface only in Aklavik lands outside settlement area

Table 4.2 Definitions: conservation and wildlife

Each agreement defines conservation, as follows:

JBNQA

... the pursuit of the optimum natural productivity of all living resources and the protection of the ecological systems of the Territory so as to protect endangered species and to ensure primarily the continuance of the traditional pursuits of the Native people, and secondarily the satisfaction of the needs of non-Native people for sport hunting and fishing (s.24.1.5).

IFA

... the management of the wildlife populations and habitat to ensure the maintenance of the quality, including the long term optimum productivity, of these resources and to ensure the efficient utilization of the available harvest (s.2).

NLCA

The principles of conservation are:

(a) the maintenance of the natural balance of ecological systems within the Nunavut Settlement Area;
(b) the protection of wildlife habitat;
(c) the maintenance of vital, healthy, wildlife populations capable of sustaining harvesting needs as defined in this Article; and
(d) the restoration and revitalization of depleted populations of wildlife and wildlife habitat (s.5.1.5).

GFA

... the management of wildlife populations and habitat to ensure the maintenance of the quality and diversity including the long term optimum productivity of those resources, and to ensure a sustainable harvest and its efficient utilization (s.2.1.1).

YUFA

... the management of Fish and Wildlife populations and habitats and the regulation of users to ensure the quality, diversity and Long Term Optimum Productivity of Fish and Wildlife populations, with the primary goal of ensuring a sustainable harvest and its proper utilization (s.1).

In addition, some agreements explicitly specify conservation as a basic objective or principle, as follows:

IFA

(c) to protect and preserve the Arctic wildlife, environment, and biological productivity (s.1).

GFA

To protect and conserve the wildlife and environment of the settlement area for present and future generations (s.1.1.8).

Each agreement defines wildlife, as follows:

JBNQA

... all populations of wild fauna in the Territory (s.24.1.29).

IFA

... all fauna in a wild state other than reindeer (s.2).

NLCA

... all terrestrial, aquatic, avian and amphibian flora and fauna ferae naturae, an all parts and products thereof (s.1.1.1).

GFA ... all *ferae naturae* in a wild state including, fish, mammals, and birds (s.2.1.1).

YUFA ... a vertebrate animal of any species or subspecies that is wild in the Yukon, but does not include Fish (s.1).

5. The Case Studies

5.1 Selection

The case studies were selected on the basis of 1) significance of the case, in terms of geographic area covered, precedents set, distinctive aspects of regime, etc., 2) length of experience of implementation, and 3) availability of knowledgeable commentators. The case studies fall into two major groups.

The first group covers "comprehensive claims" or similar type agreements covering large geographical areas, concluded since Canada's acknowledgement of outstanding aboriginal land interests in 1973. The studies include two of the James Bay and Northern Quebec Agreement (JBNQA) of 1975 (Penn 1995 dealing with the Cree experience, and Brooke 1995 dealing with the Inuit experience), one of the Northern Flood Agreement (NFA) of 1977 (Larcombe 1995), and one of the Inuvialuit Final Agreement (IFA) of 1984 (Staples 1995). A fifth case study, on impact assessment as a decision-making procedure, focuses primarily on the JBNQA, but compares its review and assessment regime with federal and provincial regimes as well as those of other claims settlements (Wilkinson and Vincelli 1995). These agreements provided (in 1993) a range of nine to eighteen years of implementation experience to examine.

The first two agreements may be characterized in key respects as out-of-court settlements regarding adverse impacts of development already initiated. However, they also incorporate elements of long-standing treaty-making policy by Canada with respect to outstanding claims. The IFA, on the other hand, is more truly a "modern" claims agreement and incorporates important features not present in the other two agreements. From the perspective of the aboriginal parties, the IFA has succeeded in many respects where the JBNQA and NFA have failed, and important comparisons can be drawn.

The second group covers a range of local arrangements and initiatives undertaken in more southerly areas of Canada where settlement and development have a longer history, and where governments have either denied aboriginal land interests outright, or regard them as long extinguished according to their own interpretation of nineteenth century treaties. These arrangements are often loosely characterized as "co-management" agreements. These case studies include the Barriere Lake trilateral agreement of 1993 in Quebec (Notzke 1995), a local watershed comanagement initiative in the Shuswap area of British Columbia (Pinkerton, Moore and Fortier 1995), and Anishinabe perspectives on co-management in northwestern Ontario (Chapeskie 1995). Because the developments described in the second group are of more recent origin, the studies focus more on the issues at stake and the means of dealing with them, than with actual implementation experience.

The case studies were intended to focus on the implementation experience of claims-based or other land, resource, and environment regimes, and particularly the mechanism of comanagement. The authors were selected on the basis of their existing knowledge of and familiarity with the specific cases, and were asked to write primarily from personal experience

and reflection, rather than undertake new research (chiefly on account of budget limitations). Most had been employed by or on behalf of the aboriginal parties in the negotiation and implementation of the regimes. The case studies are therefore not uniform in substance or style. The authors were, however, asked to consider some common research questions and themes, which emerged from the project background paper (Usher 1993c), and which were considered again at the November 1993 workshop.

5.2 Research questions

Research questions focused particularly on actual implementation experience, and the extent to which the regimes addressed the problems that gave rise to them, as well as such broader social objectives as equity, efficiency, and conservation. Certain major themes or groups of questions emerged.

Land rights. How have the limitations on quantum and selection of lands, and limitations on title (e.g. with respect to access and expropriation, and the absence of title to water), affected a) the implementation of lands, resources, and environment regimes, and b) the interests of the beneficiaries? If there have been adverse and unanticipated effects, what are the remedies?

Environmental Protection. How have the environmental screening and assessment provisions worked? Are they being overtaken by developments in both process and technique? How can this be remedied, without diminishing what the claims agreements do provide for?

In what ways can the aboriginal interest be effectively incorporated into the planning stages of both land use generally and development projects specifically, rather than dealing with adverse effects after the fact?

How effective have the provisions for mitigation and compensation been, where damage has occurred? Do existing remedies truly mitigate and compensate, or do they create other, larger problems? Are better remedies available? What are the implications for existing regimes which have not yet been tested in this manner?

Co-management. What are the essential preconditions for the acceptance and success of co-management arrangements? What are the essential ingredients of success in the continuing conduct of co-management arrangements? What benefits accrue to aboriginal and other parties? Do these answers apply equally to local, inter-jurisdictional, and international situations?

Implementation. What are the key lessons to be drawn from the actual experience of negotiation and implementation? What powers and capacities are required to implement the agreements as intended? What fiscal and personnel resources are required to do so? What powers of enforcement are available and how effective are these? What legislative or other provisions need to accompany claims or related agreements, and how should these be effected? Despite marked differences in the specific provisions between treaties and claims with respect to lands,

resources and environment matters, how different will they look a generation or two after signing?

Are the institutional arrangements put in place by claims agreements and other means sufficiently flexible to deal with new problems and needs, or will people be burdened by outmoded arrangements that are difficult to alter? How can adaptability be incorporated without jeopardizing the basic intent of the agreements?

Impact on aboriginal societies. Do the claims provisions serve the interests of harvesters in enabling them to perpetuate and enhance their activities and preferred way of life? Do they serve the interest of aboriginal communities in maintaining harvesting as an integral element of their cultural identity and survival? Do they do so in ways that would otherwise not be possible, for example, through the courts? Does the implementation of these provisions serve to strengthen or weaken local knowledge and practice, or put another way, do they assist or obstruct the beneficiaries in developing their communities and cultures in their preferred ways?

The comprehensive claims process is not the basis of, but is certainly an important expression of, the emergence of social and class differences within aboriginal societies. Arguably, the provisions of the agreements do much to internalize conflict within aboriginal societies, and deflect it from the existing faultline between aboriginal peoples and other Canadians. As aboriginal society itself becomes more complex and differentiated, the perhaps inevitable cleavages between development and environment, employment and subsistence, progress and modernization versus conservatism and tradition, becomes more internalized. How do the present structures allow for and anticipate this? Do they privilege one set of interests against others? Can they somehow enable aboriginal societies to transcend these divisions?

Arrangements which are intended to solve real problems for some people can be used instrumentally to achieve quite different ends by others. The basis of the power and authority of the new class of leadership in the North is in no small way related to the legal principles of aboriginal title. Both the facts of current use and occupancy, and the heritage and practice of subsistence, provided the territorial basis and the range of rights now vested with the new state/corporate institutions created by the comprehensive claims process. The language and rhetoric of subsistence, environment, and tradition serve many purposes.

5.3 Evaluation criteria

How to evaluate the lands, resources, and environment regimes described here? What are the proper criteria of their success or failure? There are several possible approaches, which depend on the objectives of the exercise and the perspective of the evaluator.

One set of criteria are those generally applied to resource management policies: efficiency, equity, and conservation. But these are quite general, and in some ways beg the question of measurement or standards. Nonetheless, some specific applications can be proposed, of which the following are examples:

Efficiency. Is wildlife and habitat management more integrated or more fragmented as a result of the claims-based regimes? What are the consequences? What problems of harmonization and overlap will arise from the creation of a patchwork of boards and management regimes across the North? Are the processes by which decisions are made and problems resolved efficient and effective? Are the principles of mitigation and compensation conducive to efficiency?

Equity. One approach, suggested by MacLachlan (1993:23-24), is a comparison of the Final Agreement provisions with the protections enjoyed by other title holders, whether private or corporate. But there are also questions of equity among the beneficiaries, and between beneficiaries and their neighbours. Put another way, we could ask of any final agreement whether the benefits are:

- as great as those the beneficiaries already have (keeping in mind the extent to which those might otherwise be maintained, expanded, or eroded in future);
- as great as what other claimants obtained, under the circumstances;
- consistent with what the claimants actually required to defend and advance their stated interests.

A comparative approach along these lines is utilized explicitly by Wilkinson and Vincelli (1995).

Conservation. The most restricted, but perhaps most easily measured indicator, would be whether wildlife populations and habitat are enhanced or at least maintained. What the appropriate level of maintenance would be is perhaps best indicated by fulfilment of management plans, especially if these truly incorporate aboriginal priorities. The extent to which the regimes have enhanced this objective turns to some extent on the meaning of conservation by the parties. As noted above, conservation as defined in the agreements (table 4.2), may or may not adequately reflect aboriginal conceptions.

In a larger sense, the relevant measure might be whether resources are managed more sustainably. This implies socio-economic considerations as well as purely biological ones. Pinkerton (1995) suggests that while sustainability is difficult to measure in the short term, that other criteria that correlate with it can be adopted. These, which in this context involve cultural relevance and compatibility, include:

- improved data collection and analysis
- more holistic approach to management priorities
- more effective implementation of a plan or enforcement of regulations
- more effective resource enhancement
- more effective habitat protection
- more appropriate harvest regulations
- reduction of conflict among parties with different historical use patterns.

Another approach is to turn to the preambles and guiding principles of the final agreements themselves, which merit a systematic comparison. However, at least two problems arise. One is the extent to which these are really shared by the parties or left deliberately ambiguous. For example, while both conservation and subsistence are identified as guiding principles in the agreements, these terms were not necessarily well understood by the negotiators or mutually agreed on by them, and much less so by the contracting parties.

The second problem is that the content of the final agreements, including the basic principles, are the product of negotiation, and therefore reflect government concerns and priorities as well as those of the aboriginal parties. Hence the importance of knowing where these principles come from and whose objectives they serve. Certainly there were differences along the way between lawyers and advisors advocating approaches that could most successfully be negotiated or would in their opinion be workable or practical, and what those most concerned with subsistence actually wanted. The self-determination option (at least anything resembling the Dene approach of the 1970s) was eventually defeated everywhere in the claims process. But there is a good deal of evidence that, stripped of its ideological overlay, this is precisely what many of those committed to subsistence actually wanted, at least in respect to matters of lands, resources, and environment, which were the chief spheres of their autonomy and expertise.

In the previous chapters, I identified several ways in which the treaties as interpreted by Canada and the provinces failed to protect the subsistence and commercial interest in lands and resources from progressive encroachment and restriction. The prevention of harvest disruption, and the maintenance of cultural integrity based on harvesting, were objectives of fundamental importance at the community level, and provided popular support for the political objectives of the claims, including self-government.

If the comanagement and environmental protection regimes were developed to protect the mixed, subsistence-based economy, have they done so? And if it is true that a fundamental dimension of aboriginal title and rights is a coherent and viable indigenous management system, then it seems appropriate to ask if the claims institutions will promote and protect the indigenous system, or be a means of incorporating it into the state system?

What would the indicators of these criteria be? Are people still harvesting, are there fewer land and resource use conflicts, is traditional knowledge effectively incorporated into the management system, is cultural identity maintained, is subsistence maintained as a relatively autonomous sphere?

These, however, are not exactly the same questions. To ask whether subsistence will survive -- whether aboriginal people will survive as hunting peoples -- is not quite the same as whether aboriginal people will be able, by virtue of these institutions, to maintain their identity and shape their future to their own satisfaction.

Whether (and to what extent) these goals and provisions of the final agreements are achieved has to be considered in the context of the agreements as a whole. All of the agreements are

philosophically committed to "development" in the modern sense. Self government and economic development are "projects" in themselves, that consume the interests of important segments of aboriginal society, not least the political and economic leadership. Do the lands and resources provisions of the agreements become subservient to the development agenda? They are rarely if ever uppermost at constitutional conferences, economic development conferences, or in the work of national or regional level aboriginal organizations. The IFA appears unique in providing for a separate and parallel structure in which the land-based interest is not subsumed internally. Having to make the trade-offs in public is in itself probably an important protection of the subsistence or harvester interest.

Whether and how harvesters and others who represent that interest deal with this problem is ultimately their own responsibility, but all should be aware of how the structure of both the settlements and related developments may have favoured some outcomes over others. The checks and balances, and the provisions for accountability, may well be due for reconsideration in the light of implementation experience.

5.4 Case study findings (group one)

While the first group of case studies nominally deal with "claims-based" agreements, there is substantial variation among them. From a legal perspective, the JBNQA and NFA are modern treaties, but their land, resource, and environment provisions could also be characterized as out-of-court settlements for adverse effects of hydro-electric projects already initiated, and for which applications for injunctive relief had failed. The IFA, while negotiated during a period of intense oil and gas exploration activity, did not deal with existing or anticipated adverse effects of a particular project. It established both a land base and an environmental regime both larger than and qualitatively different from those in previous arrangements.

Because aboriginal rights in the James Bay territory were arguably unextinguished, and more particularly because Quebec had not fulfilled its obligations to aboriginal peoples pursuant to its incorporation of the territory, the JBNQA also constituted the first modern-day treaty or "comprehensive claims settlement", and indeed became something of a model for same. In its particulars, however, it incorporated many aspects of the earlier treaties (including the traditional formula of one square mile per family for Category I lands; harvesting rights on Crown lands, and extinguishment).

The IFA also covered untreatied territory and entailed title extinguishment. However, the rights and title specified in exchange are significantly different. The NFA covered an area already included in Treaty no. 5, and was therefore framed in terms of the then-prevailing Crown interpretation of treaty rights. Extinguishment was considered to have been fully and finally dealt with in the original treaty.

5.4.1 James Bay and Manitoba experience

The case studies by Brooke (1995), Penn (1995), and Larcombe (1995), indicate that the adverse impacts of the hydro projects on the Crees of Quebec and Manitoba were broadly similar. These included fundamental alteration of the major river systems on which much harvesting and travel activity occurred and on which most communities were located, and hence profound disruption of subsistence activities and livelihood, as well as the relocation of some communities. In both cases, the adverse effects of flooding, and of the alteration of river regimes, involved several tens of thousands of km^2 of traditional territory, several thousand people, and several communities. Likewise, in both cases, the aboriginal parties perceived themselves to be in a weak position at the time of negotiations, both legally (having suffered judicial defeats), and practically, because of the recent expansion of third party interests due to development and settlement in the preceding two decades. Canada, for its part, reminded the aboriginal parties of their vulnerability in these regards.

In Quebec, the Crees sought to secure their subsistence economy through guaranteed harvest levels, participation in wildlife management through the Hunting, Trapping, and Fishing Coordinating Committee, environmental and social impact assessment procedure, and a remedial works agency. The Inuit had similar objectives, and regarded the Hunting, Fishing,and Trapping regime as the cornerstone of the agreement.

In Manitoba, the Crees sought to protect their land rights and subsistence interest through land exchange (four acres of new land for every acre of reserve land lost to flooding), priority harvesting rights in their traditional areas, consultation on wildlife management, and programs to encourage harvesting. With respect to adverse effects of the project, the NFA provided for impact assessment and monitoring, and mitigation of and compensation for adverse effects, foreseen and unforeseen (including those on community infrastructure).

There was substantial emphasis in the JBNQA negotiations on the protection of harvesting, perhaps less on addressing the problems of equity and participation in an expanding and diversifying society. The NFA did not provide for any lump-sum compensatory payments, nor did it include an income support program for harvesters, although there was a nominal commitment to the "eradication of mass poverty and mass unemployment" (NFA Schedule E). In both cases, however, the utilities and the provincial governments strenuously asserted the benefits of development generally to the aboriginal parties.

The Crown agencies party to these agreements (notably, in both cases, the utility companies as well as the provincial and federal governments) saw them as confirmation of their own right to develop the respective territories. There is no evidence that governments (especially provincial) have interpreted and implemented the agreements any differently from the earlier treaties: namely, that governments have virtually unencumbered title and jurisdiction over the bulk of the territory, while Cree and Inuit jurisdiction and rights are confined to Category I lands (Quebec) or reserves (Manitoba).

The parties thus appear to have had profoundly incompatible and perhaps irreconcilable objectives: protection of the territory and a way of life versus the development of the territory and its complete incorporation under provincial jurisdiction and authority. Underlying this were profoundly different views of the meaning and significance of land, not only with respect to title and jurisdiction, but also to use and stewardship.

Nonetheless, the Cree signatories to the NFA and JBNQA (and Inuit signatories to the latter) appear to have regarded these arrangements as partnerships with the Crown in which their estate and their future in their homelands would be secured, in exchange for enabling certain developments. They expected that the agreements would be implemented in good faith, in a cooperative rather than adversarial spirit.

In the outcome, harvesting rights and environmental protection are clearly subordinate to "the right to develop". Far from achieving a partnership in the use and management of the territory, the implementation of the agreements has largely excluded the aboriginal signatories from any significant influence on development, or on the use and allocation of natural resources.

The Crees and the Inuit consider that the failure to operationalize the wildlife management regime limits the effectiveness of the JBNQA even in the limited sphere of protecting subsistence. They feel even less in control of events affecting wildlife and habitat, despite the intent of the regime, and no better prepared to deal with continuing assaults on land and resources. In Manitoba, the dissatisfaction with the NFA focuses more on the failure of the land and resource replacement provisions, and of mitigation and compensation.

The failure of comanagement in Quebec and Manitoba may be explained by both the original provisions of the agreements, and their implementation.

<u>The land base</u>. Quebec insisted on a traditional treaty formula for Category I land provisions. The Category II lands, although a substantial portion of the territory, do not belong to the Crees or Inuit in any way, they merely have preferential rights there, and even these can be revoked.

The principles of "land selection" imposed by Quebec were entirely inconsistent with aboriginal concepts. In the case of the Crees, they were at odds with the tenure system for hunting territories; in the case of Inuit, contrary to the free use of all areas, including marine and offshore islands which, although as much or more important than the land areas, were not included.

Quebec also imposed substantial constraints on land selection, for example they were not to include shorelines, blocks were not to straddle rivers or highways, or include known mineralization or recreational areas. A range of servitude provisions also applied, under the doctrine of public access. Category II lands have not yet been demarcated on the ground by survey.

In Manitoba, Hydro received an easement to 5000 ha, but no land selected by First Nations in exchange have actually been transferred to date.

Harvesting rights. In Manitoba, despite provision for compensatory harvesting access and allocations, almost all viable opportunities were already allocated to third parties whose rights were protected under the agreement. Actual harvest levels have declined substantially since the project began. Third party interests have become an increasing problem in Quebec, due to expanded road access. However, harvests there have not generally decreased, due both the harvest level "guarantees" (in reality, priorities), and to the Income Support Program for the Crees.

Management rights. A central problem has been the mandate, structures, and operation of the advisory committees. Quebec never intended to delegate management to them, or to make them instruments of government. There are cultural, linguistic, and operational problems. Cree knowledge and perspectives have not been effectively incorporated into the management system (although there has been somewhat greater success in the case of the Inuit). The experience in Manitoba with the WAPB has been similar, if not even more frustrating, than that of the Crees of Quebec.

The aboriginal parties are a minority on all committees in both Quebec and Manitoba, and their representatives sit without a clear mandate or adequate support. The consultative status of these committees is part of problem, but their mode of operation may be an even greater obstacle to effective participation. While the concept of consultation in resource management was considered innovative at the time, it has now become widespread if not standard, and is indeed a mandatory incident of aboriginal harvesting rights according to the Supreme Court's Sparrow decision.

The advisory committees have proved impractical as a means of influencing government policy, and are considered by the aboriginal parties to be used by government for inaction or containment.

Environmental protection. Quebec insisted that impacts cannot be predicted, but only mitigated. The Federal Government largely backed away from its environmental obligations. The JBNQA specifically provides for Quebec's right to modify river regimes, and it exempts such developments from SIA (and forestry from EIA), despite the fact that these are the most obvious and troublesome sources of harvest disruption. The burden of proof regarding the disruption of subsistence lies with the aboriginal parties.

The NFA is an agreement about adverse effects, but without any definition of or criteria for them. It apparently relied on good faith for its implementation, as it provided neither a framework or funding for same. In practice, to the extent that implementation has occurred, this has been the result of claims filed under arbitration. However, as time passes, it becomes more difficult for the Crees to "prove" damages, despite the "reverse onus" provision. There is also a nearly complete absence of any baseline data, due to failure to implement the assessment and monitoring provisions.

The case review of the environment regimes provided for by the JBNQA (Wilkinson and Vincelli 1995) judged them to have been a limited success. Ironically, they have been applied much more often to reviewing community infrastructure than major projects. They are an improvement on the previous situation, and relative to other jurisdictions they did provide for greater aboriginal involvement. But they are not clearly integrated into government decision-making. The objectives of EIA are not clearly defined, in the absence of which, the Crees view it as a means of addressing justification, alternatives, design modification and even stopping a project, whereas proponents see it as a forum for identifying mitigative measures and compensation for residual impacts. There is also ambiguity over the level of detail and the basic process. A further problem is the absence of standards or criteria for approval or rejection, resulting in inconsistent approaches among the several review bodies established under the JBNQA.

Thus, there is an essentially *ad hoc* determination of these matters in each review (admittedly not unlike EIA elsewhere in Canada), and Quebec and the proponents usually prevail. There is a lack of baseline data, for which both Quebec and Hydro-Quebec are responsible. Under the self-assessment system, and declining public commitment, there are no independent data. Intervenor funding, although increasingly recognized as essential, is not provided for except on an *ad hoc* basis. Assessment and review procedures were not defined, perhaps because they were in their infancy in Canada at the time. The agreement was intended to enable the review bodies to develop and evaluate these procedures, but there has been little attempt to do so. A lack of commitment to the process is evident, and some indications of bad faith. The scope of reviews is limited to projects, and does not include plans and policies (as is possible, for example, in Ontario).

General. One notable problem is the absence of preambular statements of the objectives of the agreements, against which their success can be measured. There is also the absence of any clear planning authority. In the case of the Quebec Inuit, the Kativik Regional Government was effectively subsumed under the Quebec government, and the HTFCC and KEQC have no direction from a planning document developed through local consensus. This problem was recognized by Makivik, which took steps to deal with it, but with limited success. Inuit now regard the integration of Cree, Naskapi, and Inuit under same regime as a problem, because their interests have grown too divergent over the years. They now believe that each group must develop its own positions and exercise its own responsibility in each region (recognizing nonetheless the need for coordination with respect to migratory species).

Neither agreement provides operational definition of the administrative provisions of the regimes, in terms of funding, resources, and procedures. Neither included an implementation plan or implementation funding. While this has been corrected in more recent claims settlements, the legacy of problems created under the JBNQA and NFA remain.

As a result of these problems, there has been a failure to provide a secure land and resource base of any significant size, or to achieve integrated or holistic resource management. The

constraints on quantum, tenure, and resource access have rigidified and rendered less adaptable a system of customary tenure and use of which flexibility was once the hallmark. The beneficiaries of these two agreements have not been able to play an effective role in the planning and development of their settlement regions. Implementation experience suggests that the Cree communities are regarded by their respective provincial governments as non-participating enclaves in regional economic and social development. In this respect, there is not much change from the situation that characterizes the historic treaty areas.

There has been little commitment in the implementation of either agreement to the creation of a common data base for management purposes based on research and monitoring, although this was clearly mandated under the NFA. Socio-economic research and monitoring has been particularly absent in both situations. Indeed there is no evidence that the regimes in either case have even reached consensus on the basic elements of and criteria for research and monitoring.

Finally, many specific commitments to enhance renewable resource-based economic opportunities have also gone unfulfilled. These include rights of first refusal on outfitting operations under the JBNQA, and numerous trapping and commercial fishing provisions under the NFA, which have since been the subject of protracted arbitration proceedings.

Because of the time when the agreements were signed, many provisions for resource and environment regimes were trial solutions, untried and untested. There has been a significant evolution of public policies regarding land adminstration, resource development, and environmental protection, but these have occurred independently of the regimes and are not being incorporated by them. In Quebec, both the Crees and the Inuit prefer to bypass the consultative committees and deal bilaterally and politically on specific issues. The mechanisms for renovation, while not entirely absent, do not appear to work.

The JBNQA did not provide for a dispute resolution mechanism, and there has been increasing recourse to litigation. The costs of this have been high, both financially and in terms of dependence on outside expertise. Implementation has in effect become a continuation of negotiations, except that the Cree and Inuit must now bear its costs. Although the Agreement has been amended by mutual agreement on several occasions, these amendments have not extended to the substantive elements of the land, resource, and environment regimes.

However, the mere presence of a dispute resolution mechanism is no guarantee of success, as the NFA experience demonstrates. The failure of the other parties, and especially Manitoba Hydro, to acknowledge the claims for implementation, mitigation and compensation have resulted in a highly adversarial approach, although in that case, the costs are not borne by the Crees. Perhaps one reason for the increasingly adversarial approach by the other parties is that neither agreement includes enforcement provisions, or penalties for non-compliance.

The problems are regarded as fundamental, and cannot be resolved simply by modifying the operation of the consultative bodies. In Quebec, there is a need to re-examine the system for Cree participation in the administration of natural resources. There is a basic problem with the

current asymmetrical relations of power and authority. This is probably compounded by the problem of extinguishment. These factors would appear to apply also in Manitoba.

In general, in both cases, the aboriginal parties appear to regard themselves as in substantially less control over their lands and resources than when they signed their respective agreements two decades ago.

Some specific recommendations with respect to both agreements were the need for:

- parity of representation, and joint determination of *modus operandi*, as a basis for comanagement;
- consequential and enabling legislation;
- a dispute resolution mechanism (or revision of it, in Manitoba), and compliance provisions;
- periodic evaluation or independent audit;
- implementation plan and adequate funding;
- the development of common data bases, and systems for research and monitoring.

5.4.2 Western Arctic experience

The IFA was, by contrast, a truly modern treaty with many features not found in the JBNQA.

The land base. The Inuvialuit obtained a much larger quantum as a proportion of the traditional territory (ca. 30%), and their selections were not as strictly constrained as in Quebec. The selection strategy was thus able to incorporate a mix of subsistence protection and development possibilities, as well as negotiated park designations to ensure environmental protection of some Crown lands but also retain subsistence access to them. All of the lands were received as fee simple (some including subsurface title), again a radical contrast to the JBNQA. Inuvialuit lands are thus private lands, although still subject to many similar public servitudes as Category I and II lands in Quebec. More than is the case in any other modern treaty, Inuvialuit lands were selected in very large, contiguous blocks, which enables more efficient land administration and more effective land use planning. This, combined with fee simple ownership, has given the Inuvialuit significant control over the nature and impact of development, although unauthorized trespass has been a problem.

Harvesting rights. Exclusive or preferential harvesting rights were obtained for most species throughout the settlement region. Both subsistence and commercial harvesting rights are protected, and governments are obligated to implement a management regime that meets the fundamental principles of the IFA. Conservation must be achieved in the context of sustainable use and priority of Inuvialuit harvesting rights. Harvesting rights are further strengthened by the specific definitions in the agreement. These protections exceed those provided by the Sparrow decision, and are enhanced by the fact that they must be implemented through comanagement, rather than unilaterally by government.

Management rights. Harvesting and management rights are explicitly linked in the IFA. The Inuvialuit role in management is not derived solely from the protection of harvesting rights, but also the explicit principles of the claim. Canada recognizes the goals of the Inuvialuit in signing the claim, which include the preservation of Inuvialuit cultural identity and values within a changing northern society, and the protection and preservation of Arctic wildlife, environment, and biological productivity (s.1).

The principle of conservation in the IFA achieved two important objectives: improved harvesting opportunities for the Inuvialuit free from restrictive government regulations and discretionary policies, and improved wildlife management throughout the settlement region. With respect to the first, it required government to justify limitations on Inuvialuit harvesters according to conservation (as defined in the IFA). With respect to the second, it legally obligating government to justify harvest restrictions, and it provided government wildlife managers and researchers with more funding to improve their knowledge of wildlife populations and the levels at which they could be harvested on a sustainable basis. This is a significant difference between the IFA and non-claims based regimes, where objectives may be more narrowly defined to meet uncontested, or un-negotiated, Crown interpretations of its own obligations.

The comanagement structures are not merely consultative, as in the JBNQA, but are technically advisory. While this falls well short of full jurisdiction on paper, in practice, no recommendations, even controversial ones, have been overturned or rejected. There has been a high degree of Inuvialuit integration and participation in the comanagement bodies, which is attributable to universal fluency in English, cultural comfort in working with non-Inuvialuit, trust in technical resource staff and the chairs of the comanagement bodies, and confidence in the strength of the IFA's provisions in protecting the Inuvialuit interest in land and resources.

The Boards are designated instruments of public government, on which Inuvialuit have equal representation. The Inuvialuit members are directly appointed by the self-governing bodies (Inuvialuit Game Council and local HTCs). This system provides effective accountability as well as political authority, of which their government counterparts are aware. The IGC, which is the guardian of Inuvialuit conservation and harvesting interests, is a parallel and co-equal body to the Inuvialuit Regional Corporation which is the guardian of the economic development interest. One cannot subsume the other.

Under the IFA, the HTCs may pass by-laws which are generally enforceable under the NWT Wildlife Act, and specifically enforceable by the HTC with respect to its own members. Enforcement of laws and regulations remains with the Crown. HTCs have regulated or closed harvesting where local shortages have occurred. These voluntary closures were initiated by harvesters themselves, not just because they recognized that there was a problem, but also because they had the confidence that through this solution, they would actually reap the benefits of their sacrifice.

The IFA has resulted in significant changes in the system of wildlife management (see also Bailey et al. 1995). Inuvialuit have taken effective advantage of participation in wildlife policy, including international agreements. Notable among these have been cooperative management agreements directly between Inuvialuit and their Alaskan Inupiat neighbours regarding beluga and polar bear, as well as substantial advocacy work in southern Canada and the United States in the lead-up to the recent negotiation of amendments to the Migratory Birds Convention. The level of wildlife management and research has improved dramatically in the region. Stocks of fish, wildlife, and marine mammals are generally at least as abundant and healthy as they were when the agreement was signed, and there is also a greater certainty and consensus about the status of these stocks for management purposes. There is a high degree of compliance with fisheries and wildlife legislation. Enforcement requirements are minimal, and HTCs have taken on a greater responsibility for compliance among their own members.

Environmental protection. Environmental assessment is divided between two bodies: a screening committee and a review board. Like the other comanagement bodies, they are important instruments for protecting and giving effect to Inuvialuit harvesting rights, and the primary purpose of screening under the IFA is to determine if the development could have a significant negative impact on the environment generally, and on wildlife harvesting specifically. The screening committee currently reviews about 30 submissions each year, about half relating to government initiatives and the remainder to industrial and commercial ones. Governments are prohibited from issuing licences or permits until the applicant has complied with the screening process, although the effectiveness of this provision relies in the first instance on federal government cooperation. Any of several Inuvialuit organizations can request that developments on Inuvialuit lands be screened, although to date this has not occurred because of their small scale, and because such developments must be subject to Participation Agreements with developers, which address environmental impacts along with social and economic considerations.

The screening and review boards' mandates have been generally accepted to include the marine as well as the land areas of the settlement region, an important consideration because much of the oil and gas exploration is offshore. The Review Board has made two significant decisions which although not well-liked by some government agencies, were allowed to stand by the Minister.

The IFA provisions for wildlife compensation are closely related to the mandate of the EIRB, which must provide the authorizing agency not only with recommended terms and conditions, but also an estimate of the potential liability of the developer. The Game Council has negotiated compensation agreements with specific developers in advance of projects, on the strength of the provisions of the IFA, but these agreements are confidential and, fortunately, have not had to be tested to date. There are differing interpretations between the Inuvialuit and Canada as to the limits of a developer's liability and the extent to which Canada must assume these.

General. For all comanagement bodies, there is a common recognition that there is a high standard of data and information required to operationalize the agreement. In fact, research and

information is far superior to other areas, and is mandated by the claim. This research is under significant control of the comanagement bodies and effectively of the Game Council. There is significant Inuvialuit participation in research, including traditional knowledge and perspectives, and they have had a strong if not indeed controlling influence on the priorities and conduct of wildlife-related research.

The authority of the boards has been enhanced in three important ways: first, by the quality of appointments by each party, and the clarity of mandate and level of confidence vested in the appointees; secondly, by the transparency of the decision-making process; and thirdly by a credible and responsible record. The boards are effectively accountable not only to Ministers, but also to Inuvialuit themselves, particularly through the Game Council. The success of the comanagement system in the region is due in large measure to the confidence that Inuvialuit now have with respect to the effectiveness of their input, that their knowledge is accepted, that their interests are taken into account, and that their access to their lands and resources as well as the sustainability and health of those resources, as reasonably assured. Historic mistrust of biologists and managers has been largely overcome. The Inuvialuit have greater confidence in government agencies and officials, who in turn have greater respect for Inuvialuit knowledge and initiatives. With more meaningful input into recommendations, the Inuvialuit have an increased sense of ownership of the decisions and consequently are more committed to implementing them.

The cost of comanagement, as indicated by IFA implementation expenditures, is currently in the order of $5 million per year. In 1992-93, about one-third went directly to wildlife research, most undertaken by government agencies. The actual operating costs of the boards was about $1 million, and of the Secretariats somewhat less. Allocations to HTCs were about $268,000, for an average of $43,000 each. In 1994, a new five year funding agreement was negotiated. A dispute between GNWT and DIAND in 1995 over legal responsibility for Inuvialuit participation costs brought the entire comanagement process to halt for some weeks, and a permanent solution has not yet been found.

Clearly the maintenance of comanagement's successes in the Western Arctic are dependent on the continuing financial commitment by governments. There was no formal implementation plan and associated budget in place when the IFA was signed in 1984. The parties negotiated agreements based on their understanding of their legal obligations under the agreement. Such interpretations are naturally subject to change, especially as overall government expenditures are being reduced, and there is no guarantee that existing funding commitments will be sustained in the future.

There are diverging interpretations of the agreement between the parties, but there is a political will, in most cases, to implement the agreement. The agreement requires considerable collaboration between the parties to be successful.

However, there are some significant problems with the IFA. These include:

- Failure by Canada and N.W.T. to enact consequential and implementing legislation, and lack of a formal implementation plan. Many government agencies are unaware of their obligations under the IFA, despite its constitutional protection. This suggests a need in future agreements of this type for a law list with target dates for enactment or amendment.

- The burden of implementation lies with the Inuvialuit, and the lesson of implementation is that it is important to give practical effect to the spirit and intent of an agreement as early as possible or it will erode. Despite financial compensation and better funding than other agreements, the parties are by no means equal in terms of resources to ensure interpretation of and compliance with spirit and intent. The willingness of government to act as a partner rather than an adversary is therefore essential. This underlines the importance of those implementing, on both sides, to have a clear understanding of spirit and intent. Generosity of interpretation is also important.

- Care in establishing common purpose to an agreement, particularly as evidenced in the fundamental principles and in the definitions (for example, conservation and development in the IFA), is essential.

- The Inuvialuit have been successful in negotiating international agreements with other aboriginal groups, but there is a greater concern in dealing with national governments. Questions remain of how governments fulfil their obligations with respect to the constitutionally protected rights of Inuvialuit, and the relative standing of these with respect to other international obligations (or interests) of Canada.

- Political will is essential to the success of an agreement, and actual experience suggests that local and regional officials are more likely to be understanding of and cooperative with the spirit and intent than head office.

- The success of comanagement is highly dependent on effective participation by all parties, and on a high degree of mutual confidence in the information base on which management decisions are taken. This has required substantial funding in the past, and the security of future funding may be a significant area of vulnerability for comanagement under the IFA.

5.5 Case study findings (group two)

The Barriere Lake and Shuswap area case studies are in untreatied areas in which the aboriginal parties claim title and jurisdiction; the Anishinabe case study is in the area of Treaty no. 3. In none of these cases, however, are the co-management structures grounded in an explicit recognition of either aboriginal or treaty rights, or of specified rights negotiated through a claims settlement agreement. Indeed, only the first exists as a formally negotiated agreement.

The impetus for comanagement also varies in each case. At Barriere Lake, there was a growing encroachment by forestry and recreational non-aboriginal hunting on local subsistence, and the Algonquins took the initiative to negotiate an agreement. In British Columbia, the context is an allocation crisis, and the First Nation's objective is to build trust and capacity for local comanagement. In northwestern Ontario, it is the province and to some extent the Treaty 3 Grand Council which have initiated comanagement, while local harvesters are themselves wary of both the objective and the process.

The expressed rationale for the Barriere Lake Agreement was not to assert their aboriginal title, but to protect their subsistence economy through integrated resource management and sustainable development. It does not actually establish comanagement bodies but is intended to lay the groundwork for a cooperative approach to integrated resource management. Specifically, it calls for interim protection measures, the collection and analysis of baseline management data, the preparation of a draft management plan, and recommendations for implementing it (Notzke 1995).

Quebec insisted on the integrity and authority of its own resource management regime, and wanted the agreement to be implemented entirely within the framework of its own laws and regulations. There was certainly no acknowledgement of delegated authority, and this insistence led to a breakdown of the 1991 agreement due to Quebec's overt non-compliance and the failure to protect the resources of the territory. Blockades, a public relations campaign, and mediation efforts eventually led to a renewed agreement providing for an interim management regime in 1993. There is some optimism on the part of the Algonquins that this provides sufficient funding, time, and organization to create the climate and the ground rules, and generate the necessary data, for future joint management. The next phase is the development of an integrated resource management plan. The area in question is over 1 million ha, and there is a sufficiently comprehensive approach, and binding decision-making power, that the process should work.

In British Columbia, the problem of salmon allocation between Indians and non-aboriginals is of crisis proportions, and is directly related to questions of aboriginal title and jurisdiction. Without prejudice to the fundamental claim, the Shuswap Nation Tribal Council undertook a pilot project to develop a locally-based cooperative approach to local watershed and fisheries management (Pinkerton et al. 1995).

The watershed planning model was based on the following considerations:

X the need to start planning at the local community level, i.e. with the First Nations. A First Nation could access expertise at the Shuswap Nation Tribal Council offices, but was ultimately responsible for its own watershed;

X the need to develop the capacity and expertise at the First Nation level to work with the broader watershed community in its area;

X the need for the co-operation and support of key watershed interests in order to do effective planning and management;

X the need to build commitment to problem-solving, and to create constructive relationships between people where they can experience the benefits of improved management together before entering contemporary conflict negotiation forums;

X the need to use holistic integrated planning to address the range of problems at the local level;

X the need to develop a united voice at the local level to bring management issues to the attention of management agencies in an effective way;

X the need to work at a level where good stewardship can be observed and supported, and where some of the benefits of good stewardship can be circulated back into the local community, e.g. through improvement projects, increased access to fish, and clearer development guidelines; and

X the need to work at a level where the local First Nation can be a leader and a "co-ordinating agency" that mobilizes the energy of other parties, and helps focus the other local agencies.

In sum, the watershed as a planning unit was perceived by the Shuswap as a practical place to build the human relationships which would make a realistic plan possible, and a place to work toward a watershed plan, and to explore the institutional possibilities for a more longterm collaboration at the local level in the implementation of the plan.

The local conditions were favourable to the success of the project, and the first stages of collaboration have been successfully achieved. Matters of mutual interest and concern, the operation and accountability of the committee, and procedures for data collection, have been resolved locally, and should provide a basis for mutual respect and confidence if local resource management conflicts occur.

In northwestern Ontario, by contrast, there is a substantial gulf between aboriginal and provincial government conceptions of the nature and objectives of resource management, which may not be bridgeable currently by conventional approaches to comanagement (Chapeskie 1995).
For nearly a century, Ontario has imposed its own land and resource management regimes without regard to the interests or practices of the Anishinabe. This has been especially troublesome with respect to so-called "wild" rice, which in much of the territory is in fact the product of Anishinabe cultivation and labour, and was simply expropriated by the province. The problem for comanagement, at present, is that the Ontario system has virtually no knowledge of Anishinabe management systems, practices, and knowledge, and there is no common

institutional base from which to begin a dialogue. Perhaps more fundamentally, there is not even a common set of ideas and concepts, even in translation, to work with respecting such basic terminology as "resources", "management", and "wildlife".

Nor does there appear to be a sufficiently common view of the objectives of management (indeed, Anishinabe do not articulate their knowledge and practices in terms of "management"). Anishinabe relationships to land are built on normative values of equity, cooperation and reciprocity, where as those of the state are based on the value of competition, exclusive property rights, and centralized management. The problem is not merely one of disparate values, however, because the entire provincial land and resource regime is grounded in a legal and policy view of aboriginal and treaty rights in which the one set of values is simply displaced by the other.

Anishinabe objectives are better described as co-existence rather than co-management. There needs to be a base of self-governing Anishinabe territory in which customary relationships to land prevail. This provides for the possibility of developing cooperative access arrangements that would respect cultural pluralism, rather than forcing people to work toward incommensurable objectives in the same area.

From an Anishinabe perspective, based on both cultural norms and historical experience, the risk of comanagement is that despite nominal "recognition", it would erode existing customary relationships to land and centralize authority in a manner inconsistent with existing practices.

5.6 Conclusions and observations

The land, resource, and environment regimes established under modern treaties are innovative in several respects. They address problems perhaps not foreseen, and certainly not explicitly dealt with, in the historic treaties. They do so by acknowledging and balancing both aboriginal and non-aboriginal interests throughout the traditional territory. Some incidents of aboriginal title are formally recognized on all lands, more in some categories of land than in others, yet nowhere are they complete. The modern treaties also provide an institutional framework for mediating these interests in the governance of land, resources, and environment. They provide for aboriginal involvement in the management of the entire territory, but not their exclusive governance over any of it. This is a vision of integration and participation, rather than of separation and coexistence.

In this concluding section, I consider the effectiveness of these arrangements with respect to land rights, comanagement, and environmental protection, as well as problems of their implementation. I also consider the sustainability of these arrangements in the broadest sense, how they will last into the future, and their applicability in other parts of Canada.

5.6.1 Land rights

Traditional use and occupancy is the basis of aboriginal claims in law and policy. What are the implications of using this concept to define the territorial limits of "state-like" institutions? The comprehensive claims process is creating subnational (or sub-territorial) political and administrative units, with mandates and responsibilities organized along state or corporate lines. This is very far from the recognition and entrenchment of traditional aboriginal forms of socio-territorial organization. By reifying what were formerly fluid and imprecise boundaries according to contemporary requirements of state administration (even if an aboriginal government is in charge), there is a probability as time goes on of separation of title and use, contrary to aboriginal principles and traditions. Some evidence of the social difficulties this poses with particular respect to registered traplines have been reported in the Cree area of Quebec (McDonnell and La Rusic 1987) and the Yukon, and the general phenomenon has been reported elsewhere (viz. Fiji - Overton 1987) as an incident of British colonial policies. The emergence of "overlap" and boundary disputes among neighbouring claimant groups is also an indication of the effect of creating state-like jurisdictional boundaries.

In the NWT and Yukon, the amount of private aboriginal land, the criteria for its selection, and its freehold status, provide for much greater security of tenure and access to large and significant areas than was the case under the old reserve system. These conditions have not held to the same degree in Quebec and Manitoba, however.

It may be that the altered property regime will bring new and unforeseen complications, but it is too early to say. The costs and complications of effectively administering such large tracts of land bring both problems and opportunities, although this project did not examine land administration for development purposes. The slowness of actual demarcation on the ground has been a problem where development pressures are great, as in the case of forestry adjacent to southern Cree lands in Quebec.

5.6.2 Comanagement

Comanagement is another major difference between the modern and historic treaties. While the principle was not solely developed and implemented within the framework of the modern treaties, they provided the strongest impetus for it, and the most secure framework for implementation, as noted in 4.5.4.

For aboriginal people, comanagement is one solution to the progressive encroachment and restriction on the use of customary lands and resources, to harvest disruption, and to the loss of social and cultural as well as economic values. For governments, comanagement is a means of enlisting hunter cooperation to ensure conservation, as an alternative to deploying draconian and expensive enforcement measures with limited success.

In some cases, aboriginal groups have found that their comanagement arrangements suit their needs well, and that they can use them to their advantage. Others find comanagement at least acceptable in as much as it is a significant improvement over the former closed-door system of management. Still others have no desire to comanage resources with outsiders but seek

exclusive management authority within a limited geographical area. Are these responses based in cultural and historical experiences and material circumstances, and if so, how? If comanagement is not a universally acceptable solution, what are the alternatives? In assessing comanagement, it is necessary to consider the diversity of circumstances surrounding its negotiation and implementation.

There is some indication that comanagement is more likely to be preferred where migratory or transboundary populations are involved, since such regimes bring both governments and users together among jurisdictions. Perhaps not surprisingly, those groups (such as the Inuvialuit) most dependent on migratory species such as caribou, waterfowl, and marine mammals, are comanagement's most convinced advocates and regard it as the key to resource conservation and social and political stability, despite some day to day problems and frustrations. By contrast, the Anishinabe of northwestern Ontario historically relied largely on fish and wildlife resources with quite restricted ranges, or even stationary resources such as wild rice. Such resources could be and were managed exclusively within a limited area, and the benefits of comanagement are less obvious. The differences between these two aboriginal peoples, for example, is compounded by both ideology and historical experience -- certainly, in the case of the Anishinabe, of a much more thorough and devastating history of progressive encroachment and restriction (Usher et al. 1992).

There is no one answer to the question of whether comanagement has proven an advantage more to governments or to beneficiaries, or for that matter, whether it has been to the equal advantage of both. Nor is it clear whether it is better to have single, comprehensive boards dealing with large areas (such as the Nunavut Wildlife Management Board), or several more specialized boards (as in the case of the IFA boards).

The composition of boards is quite similar in all of the agreements; in particular the provision for equality of representation. But who in practice appoints (or which set of interests appoints) the members, the effective mandate and accountability of the members, and the actual operating procedures, are all crucial to the outcome. These can either serve to paper over and suppress real differences, or give proper recognition and expression of them.

It is also the case, however, that the boards are essentially bilateral arrangements between aboriginal peoples and governments, and hence do not necessarily include all interested parties. That is probably one reason that boards have often been able to achieve consensus over basic management objectives (for example, management for subsistence in the case of the BQCMB). As well, the boards are mandated to implement the objectives of the claims agreements, which in the case of the IFA, for example, clearly link aboriginal harvesting rights with conservation. The effect, however, is that potentially competing interests, such as resident sport hunters, or the guiding industry, are not directly represented on the boards (although governments may choose in some cases to nominate such individuals as their representatives). While this has not been a significant problem in the NWT, it accounts for some of the differences in board structures in the Yukon, and for some of the resistance to comanagement in the provincial North. Where third

party interests are well established, multi-party approaches at the local level, as in the Shuswap pilot project or Barriere Lake agreement, are likely to be essential elements of success.

Some observers have suggested that comanagement arrangements offer a potential bridge between indigenous and state systems of knowledge and management (Usher 1987, Osherenko 1988). The record of achievement in this regard is mixed, but unquestionably they have provided a forum or venue for continuing negotiation over matters crucial to both aboriginal peoples and governments.

How does "traditional knowledge" get incorporated into comanagement, when despite nominal commitments, both the structures and the idiom require English-speaking participants, and use non-aboriginal concepts and paradigms to operationalize the management system? For example, how wildlife managers explain scarcity and abundance is often quite different from how traditional harvesters do so, yet the Boards are expected to produce consensus on total allowable harvests. The everyday tools of wildlife managers, such as populations and productivity, are not necessarily shared as key concepts by traditional harvesters, nor are the basic tasks of management boards and agencies, such as drawing up management plans.

While there is a much wider acceptance of the need for a genuinely cooperative approach to the use of both "scientific" and "traditional" knowledge in comanagement, the practical difficulties are significant. The establishment of comanagement rather than self-management structures necessarily formalizes (for aboriginal participants) a previously informal system. Possible responses by aboriginal parties include:

> 1. Direct representation by elders and traditional harvesters. This requires the system (including the managers and scientists) to accommodate fully to the use of aboriginal languages, knowledge, and procedures.
>
> 2. User representation, also involving experienced people but ones who can accommodate themselves to the state system, even if the cost is more passive participation on their part.
>
> 3. Train young aboriginals to participate in the dominant technical idiom, i.e. to become (in the state's terms) qualified biologists and resource managers who can sit on comanagement bodies without technical assistance, or who can even provide technical assistance to board members.
>
> 4. Assign non-aboriginal technical or legal advisors to participate in these technical committees, with aboriginal harvesters or politicians providing occasional (and inconsistent) attendance.

It would appear that strategies 2 and 4 are the most common. The Inuvialuit regimes are the closest to strategy 1, but as already noted, this may be at least partly explained by the high local fluency in English, and level of comfort in working with non-aboriginals for this purpose. There are very few examples of strategy 3, and it seems that although growing numbers of aboriginal

northerners are obtaining post-secondary education, very few opt for advanced study in the natural sciences and resource management (a matter that should itself be addressed with respect to implementation).

Whether the integration or bridging of traditional and scientific knowledge is always an appropriate or achievable objective of comanagement remains to be seen. However, one substantial achievement of comanagement in most cases is agreement on research objectives and methods, and the sharing of data. The scientific research on which management is based is at the very least, undertaken with the knowledge and consent of harvesters (for example the BQCMB), and often the research priorities, design, and budgets are effectively directed by the comanagement board and, for example in the IFA, the Game Council. In the NWT, the boards have their own secretariats with technical as well as administrative capacity, hence aboriginal representatives have access to expertise outside of the line management agencies.

Comanagement may work best when the parties have similar interests in and objectives regarding the resources in question. Ideally each contributes its own knowledge to achieve a shared objective of sustainability. If objectives are not shared, then knowledge may not be shared and communication impaired. This problem is likely increase as the number of parties to comanagement increases.

On the other hand, while consensus may build among board members, and the agencies they represent, this is not sufficient, at least on the government side, to bind all those whose actions (or inactions) may have an impact on management. For example, support for IFA implementation on the part of local or regional government agencies is not necessarily sustained at headquarters, and there are several government departments not directly represented on the boards who are indifferent at best, or hostile at worst, to board recommendations.

Three features of the claims-based regimes appear to be critical to the successful implementation of comanagement (Usher 1995). First, the comanagement structures, and their mandate, objectives, and mode of operation, are themselves negotiated. This is very different from inviting people to sit on a body whose parameters have already been determined unilaterally. Secondly, aboriginal members of claims-based boards are politically accountable representatives of one of the parties to an agreement, not simply "stake-holders" or "users", as is the case on the *ad hoc* boards. In some of the latter type of boards, (including the well-known BQCMB), only governments are signatories to the management agreement. The rights and powers of users are specified but not guaranteed; they are granted by governments and do not constitute a recognition of existing rights. Thirdly, only the claims-based arrangements are permanent. The *ad hoc* arrangements are in place only for a limited period, subject to discretionary renewal and funding by government.

Many of the observations on wildlife comanagement apply to the planning and impact assessment regimes intended to comanage Crown lands. These institutions face many of the same problems of implementation, in particular the level of funding and the capacity of aboriginal people to staff them in the required numbers. Without adequate resources, there can

be no effective participation in comanagement regimes. The seats may be there, but that is not much help if people have neither the money nor the capacity to fill them, or if for these and other reasons they are discouraged from filling them.

The costs of implementation and of effective participation are proving to be quite substantial, because these things require consistent attention, expert research and advice, and extensive travel. The final agreements themselves do not specify what human and financial resources are required to implement their provisions. That has been a matter for subsequent negotiations, and has often proved the source of fundamental disagreement between the parties and of substantial dissatisfaction on the part of the beneficiaries.

5.6.3 Environmental protection

The environmental regimes established under the comprehensive claims process provide some measure of protection of land and resources from the adverse effects of development, and also for mitigation and compensation where such effects do occur.

The impact assessment process deserves particular comment. Several similar but not entirely comparable regimes have come into existence through the claims process, but all in the context of the EARP process (Edmondson 1993). Since the concepts for both federal and claims-based regimes were first elaborated in the 1970s, there has been substantial evolution of impact assessment as a science, as a planning and public policy instrument, and as a democratic process. This is part of a larger societal evolution but has been strongly informed by aboriginal experience in the North.

The assessment of social and economic impacts (SIA) has become integral to the environmental assessment process. But SIA in JBNQA, FEARO, and CEAA is restricted to the direct effects of environmental change, e.g. loss of traditional lands, and harvest disruption. The indirect adverse social effects of harvest disruption, or the direct social effects of development, are excluded by at least some of the assessment processes, perhaps because it would invite assessment panels to comment directly on government social and economic policies. From both a scientific and policy perspective, emphasis on notions of tradition and subsistence brings its own difficulties, because these terms are fraught with misunderstanding and because they invite inappropriate standards of measurement.

It is now much more widely appreciated that SIA cannot be a narrowly technical, "value-neutral" or positivist exercise, although the basic paradigms remain contested (Lang and Armour 1981, CEARC 1986, Usher 1993a). But it remains a basic problem of environmental legislation that while the checklist of phenomena to consider grows, the criteria for and tests of adverse effect remain largely unspecified. Under the FEARO guidelines, neither scoping nor the tests of significance are standardized, but are left for each panel to consider. This is especially so since the decline and recent demise of the Canadian Environmental Assessment Research Council. Recent trends toward provincialization and regionalization of impact assessment may have important benefits, but also creates a patchwork of procedure less likely to advance the standards

of impact assessment in any coherent way. So, for example, while there have been significant improvements in understanding and methodology, which are reflected in at least some recent panel guidelines, nowhere is it clear on precisely what grounds or according to what tests a project or other initiative will be approved, rejected, or varied.

I noted earlier that aboriginal organizations have tended to use the assessment process not only to consider the specifics of project impact, but also (and in some cases exclusively) as a forum for advancing comprehensive claims, in particular the demand that no development should occur before the settlement of these claims. The recommendations of the Berger Inquiry in 1977 suggested that this would be a very productive strategy. However, consideration of subsequent major reviews (for example, Norman Wells, Beaufort Sea, low level flying in Labrador) suggests that aboriginal assertions that their land rights are placed in jeopardy by specific projects have had little effect on the outcome.

How aboriginal organizations will view the process of impact assessment after claims have been settled is not entirely clear. The application of the process on aboriginal lands, especially if aboriginal organizations are the proponents of development, may be in question. How different parties view the benefits and disbenefits of "harmonization" of review processes, as a response to the emerging patchwork, may be very revealing. Impact assessment is not simply an inquiry after truth, it has significant instrumental value, as aboriginal organizations have been quick to perceive. If it is the preferred discourse of the powerless, what happens when they become powerful? One option appears to be direct negotiation with the developer, to obtain an acceptable combination of mitigation and benefits, rather than leave the outcome to an independent panel. The provisions of recent claims agreements for the negotiation of impact benefit agreements, where developments occur on aboriginal lands, enhances the possibility of such negotiations. However, the doubtful status of title in untreatied areas continues to be a lever, for example in the case of proposed diamond mines in the NWT and nickel mines in Labrador.

It is virtually inevitable that developments, once authorized to proceed, will have some adverse effects on habitat, wildlife, and harvesting. The Crown's objective in comprehensive claims is to achieve certainty for development by removing the encumbrance of aboriginal title. That is the central point of extinguishment. The final agreements are not designed to prohibit the taking of lands or the degradation of the environment, but only to ensure that such taking is in accordance with due process.

Rarely do existing impact assessment procedures encourage development proponents and the affected parties to try to avoid or minimize impact at the design stage. Typically, developers have accepted mitigation and compensation as after the fact costs of doing business, but have sought to minimize both their liability for and the magnitude of the damages.

But what remedies really are available to subsistence, and how are they effectively operationalized? Restoration is one nominal remedy, but is often difficult if not impossible to implement. In the case of river regulation, for example, many adverse effects are unavoidable

and permanent, being a consequence not only of impoundment but of the operating regime. Where damage is accidental but catastrophic, there is neither technical nor financial capability of restoring the environment to its prior state (for example, the *Exxon Valdez* oil spill in Alaska, or industrial mercury contamination in northwestern Ontario). Restoration is only feasible in smaller scale, localized cases.

Mitigation -- consisting of programs of remedial works, alternative transport to harvesting sites, local habitat enhancement, and the like -- is possible and has often been tried, again especially in connection with hydro-electric development. The mitigation provisions of the JBNQA and the NFA have been at least partially successful. However, in cases where damage was ignored for years (again, most often in connection with river regulation or pollution in the Subarctic), or where mitigation is impossible, compensation is the necessary alternative.

Liberal-democratic principles of compensation in Canadian society call for those who suffer damage to be made as well off as they were before, insofar as that is possible. Economists refer to this as the Pareto criterion: a change is an improvement only if no one is hurt by it. The economist's initial presumption is, then, that

> *... northern development could proceed without anyone's welfare being compromised. ... A second possibility is that, although some people's lives may be disrupted by economic development in the North, it will be possible to compensate them out of the economic benefits that development confers on other citizens. In view of the rather small number of people who live there and the possibly quite large economic benefits to be had from resource extraction, the possibilities for generous compensation appear to be good. On the other hand, it really may be true that nothing can compensate for the loss of a lifestyle. ... [in such cases], however, Pareto may have to cede pride of place to Bentham, the utilitarian. Where gains to the South are extremely large it may make sense to proceed with development even if this means running the chance of inflicting uncompensated losses on some northerners.* (Watson 1985:175).

This has been and continues to be the guiding perspective of government and industry in the North, but it is based on two not necessarily sustainable assumptions. One is that there are shared values and perspectives between aboriginal and non-aboriginal cultures about what constitutes personal and social well-being, about what can properly be bought and sold in the market, and about how such things might be valued. The other is that, when calculated, compensation requirements will be inconsequential relative to the benefits gained.

A central problem is that what is being compensated is the loss not simply of foregone income (difficult enough to estimate in view of substantial annual variability), much of which is in-kind rather than in cash (for which there are technical problems of estimation and valuation), but subsistence itself, which is not simply a set of goods and services, or even of activities, but also of a way of life, and a socio-cultural system.

How to value non-market production, loss of access, loss of enjoyment, and consequent social and cultural disruption? Just as subsistence itself is not widely understood in mainstream

society, neither are damages to it easily conceptualized and measured. These things are not exchanged in the market place, and although methods have been developed to quantify and value some important aspects of subsistence, they are constantly challenged by those responsible for the damage. They are also challenged from the opposite direction by those who have suffered the damage but believe their losses cannot be calculated in dollar terms, because what has been lost is sacred and does not properly belong in the market place at all.

Most agreements have tried to avoid the strict standards of proof in civil litigation, recognizing the difficulties these would impose on harvesters who have no resources to go to court and no records to back them up. But these agreements limit wildlife compensation to property and production losses, measured as income in kind. Major catastrophic events (e.g. involving widespread and long-lasting contamination of country food), are now widely recognized as involving much more than the loss of income or even nutrition; the real damage is social and cultural disruption as well. The problems of proof and evidence, widely noted in claims cases adjudicated in the court system (viz. Tough and Ray 1990, Cassidy 1991), also apply to compensation cases.

Even where the onus of proof is on the respondent to show that his activities did not cause the damage (as in the Northern Flood Agreement), it remains for the plaintiff to demonstrate the economic and social extent of the damage and therefore its value. Here the problems of proof are still substantial: whether the damage is within the range of natural variability, whether the decline of subsistence and related social problems are the result of specific adverse effects or the more general process of "modernization", and so on. For this there are no clear standards of proof. Indeed, in the case of the NFA, there is a long pattern of rejection of claims, no matter how well supported by social scientific research, as mere self-interested pleading. Even if there is an explicit intent to respect and incorporate aboriginal perspectives and knowledge, this seems rarely to be achieved in practice.

While there is specific provision for wildlife compensation in the major comprehensive claims, actual experience with compensation -- especially due to catastrophic events like river regulation, oil spills, and contaminant releases -- has been almost entirely outside the comprehensive claims areas. It is necessary to look at cases dealt with in civil litigation, or arbitration or mediation processes, such as hydro compensation in Manitoba and Ontario, and mercury compensation in Ontario, and consider their implications for the as yet largely untested claims-based regimes.

Despite numerous cash awards in the millions of dollars, the record is not promising. In the NFA, for example, land exchange provisions remain largely unfulfilled, as does alternative resource provision, in the latter case largely because there are substantial third party interests which the provincial government will not expropriate. Food replacement programs in contamination events are largely unsuccessful, because it is not simply food but activities that have been lost, as well as the fact that, for example, trucked-in frozen fish from central warehouses is not regarded as an acceptable substitute for fresh, local fish.

The common experience with compensation, whether or not arbitration or mediation is provided for, is that major damage cases take a decade or two to resolve (low value, individual property loss cases are in contrast usually resolved very quickly). For example, compensation for mercury pollution at Whitedog and Grassy Narrows took fifteen years to negotiate. Recently, both Manitoba Hydro and Ontario Hydro have offered to negotiate payments to flood-affected bands, as redress for adverse effects experienced between thirty and sixty years ago.

With such a lapse of time, those who experienced the damage most acutely -- often the older, most active harvesters -- are dead, or their lives are in ruins. They will never do again what they loved doing before, and no amount of money will replace what they have lost. In the end, a resource freely available to everyone in perpetuity is transformed into a limited, scarce resource (cash), whose distribution is controlled by local elites. So cynical have many who suffered become that they no longer want collective solutions to the loss of common property, but only a personal cash payment, even knowing that it can never bring back what they lost.

Despite these problems, compensation in the form of cash awards for major damage cases are becoming more numerous. Whether adequate or not in the eyes of the plaintiffs, they are proving substantially more costly than anticipated by government and industry. One recent study calculated that unanticipated external costs -- in effect, mitigation and compensation -- of hydro-electric projects with respect to northern aboriginal communities had to date exceeded "$100,000 per capita for those adversely affected" (Symbion 1992:2).

And where there is poverty, unemployment, and little hope for viable alternative economic activity, compensation for harvesting damages becomes a form of dependence, a way of generating cash flow often desperately needed by an indebted Band Council. Instead of just compensation that restores well-being, experience seems to show that existing methods may only compound disunity and unhappiness in the communities, and cynicism in government, industry, and the public. Compensation is supposed to be an incident of a defensible property right in lands and resources; administrative regimes should in principle provide for efficiency of process in addition to equity of outcomes. There is much reason to doubt that either result is being achieved.

The wildlife compensation provisions of the recent claims agreements, coupled with the provisions for negotiating impact benefit agreements, may provide significant improvements, but there have been no significant tests of them yet from which to draw.

5.6.4 Implementation and interpretation

The case studies point to many problems of drafting, structures, mandates, and implementation procedures in existing agreements and their implementation. They also suggest the importance of establishing common purpose through principles and definitions, and a need for adequate performance monitoring, evaluation, and dispute resolution mechanisms.

The present regimes were developed in an era of advancing acceptance of aboriginal and treaty rights by both governments and the courts, as well as by the Canadian public. Yet the experience with negotiated comprehensive claims agreements could in the long run be similar to that of the negotiated treaties. They will be subject to constant reinterpretation and challenge, and the beneficiaries, for their part, will have constantly to resist. The final agreements establish continuing forums of negotiation, not least the comanagement institutions. But their interpretation over time will also occur through judicial processes, whether civil litigation or the arbitration processes specifically provided for in the agreements. Whatever the process, it will be arduous because there is nothing in the agreements that permits the beneficiaries to enforce their provisions against the Crown (MacLachlan 1993:9). This points to the importance of examining the passage and fulfilment of the required implementation legislation on the part of the Crown, as well as the agreements themselves.

Perhaps more important, are the courts likely to interpret the comprehensive claims more narrowly than the treaties? The claims are much more detailed and specific in their provisions, the aboriginal signatories had the "advantage" of armies of lawyers and consultants, and the process of negotiations is much better documented. While recent Supreme Court decisions provide for liberal interpretation and favourable construction of doubtful expressions with respect to the historic treaties, this would appear not to apply to modern claims settlements. The Federal Court of Appeal has ruled (in Eastmain Band v. Canada) that this principle did not apply to the JBNQA, on the grounds that it was the product of long and considered negotiation, with both parties adequately represented by counsel. The Crees and Inuit were, therefore, not "vulnerable" in the way that First Nations of a century before had been. If the courts will be problematic for the long run interpretation of the final agreements, what are the alternatives? And what will be the effect of extinguishment?

It would appear that a critical factor in the success of land, resource, and environment regimes as key elements of claims or similar agreements is the political will, especially by governments, to implement them. The aboriginal signatories enter into these agreements in a philosophy of partnership, whereas governments, and third parties where they are involved, tend to view these agreements as narrow contractual relationships and seek to minimize their obligations, sometimes through an explicitly adversarial approach.

Ensuring political will may be a rather intangible exercise, but it is nonetheless essential. Whatever the legal status of the Crown's fiduciary obligations may be under the modern treaties, a clear recognition of partnership obligations must be effected at all levels of government. Assuming the agreements constitute sound public policy (and it may be asked why governments would agree to something that is not), partnership rather than adversarial relations are obviously essential for implementation.
Disputes may now more likely occur not over differing legal interpretations of substantive obligation, but what expenditures are required to meet these obligations. Funding may therefore constitute the major vulnerability of comanagement. New measures of management effectiveness and efficiency, and perhaps new practices to realize those objectives, will be required. How to trade off higher costs of doing business, and of research, against reduced

enforcement costs, the avoidance of crisis, and enhanced sustainability? To the extent that comanagement reduces conflict, it becomes less noticeable, and politicians and administrators become less aware that problems are being avoided. And how to measure the success of comanagement with respect to sustainability and conservation? Evidence of such a connection to date is largely circumstantial, because there are so many confounding factors that might equally or better explain the maintenance or enhancement of environmental quality since the implementation of comanagement.

Another area of disagreement in future may be the role of government in the management of land, resources, and environment. Claims agreements to date have been negotiated in the context of an activist government role in management, policy, and research. What are the implications of government withdrawal from this role in an era of downsizing and privatization? Is such abdication consistent with fiduciary and other legal obligations?

The process of claims resolution examined by this project has evolved substantially over the last twenty years or so. This evolution is a credit to the both the tenacity and vision of the aboriginal parties, and the responsiveness of governments. The agreements reviewed are in some important respects quite different, even though they are intended to address the same fundamental problems. As already noted, there are several factors that have led to these differences, but one important one is timing. The earlier agreements, such as the JBNQA and the NFA, have proven substantially less satisfactory to the beneficiaries, in both substance and implementation, than the IFA and subsequent agreements. Justice and equity call for change, but the needed mechanisms are not apparent.

What the land, resource, and environment regimes created by future claims agreements, especially in areas such as British Columbia where the next major round of negotiations is likely to occur, remains to be seen. What has succeeded in the NWT and Yukon, cannot necessarily be implemented without significant adaptation in the provinces, where third party interests are more entrenched, the history of dispossession and encroachment more bitter, and governments are answerable to quite different constituencies. Our provincial case studies suggest that local level political development will be essential, and that court victories and even agreements between senior governments will not be sufficient.

Whatever the case, making treaties is only the beginning. The case studies suggest that the early years of implementation are critical to long run success, from an aboriginal perspective. It is the aboriginal parties that will have to be vigilant and ensure that the gains at the bargaining table do not gradually lapse through non-observance and barely perceptible adverse precedents. It is the harvesters, the communities of which they are such an essential part, and their representative organizations, who will have to set the standards. How effectively they do that will be a key test of claims implementation.

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