RESEARCH PAPERS
ON
GOVERNMENT IMPLEMENTATION
OF THE
LAND AND RESOURCE PROVISIONS
OF THE
INUVIALUIT FINAL AGREEMENT

PREPARED FOR:

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ON
GOVERNMENT IMPLEMENTATION
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LAND AND RESOURCE PROVISIONS
OF THE
INUVIALUIT FINAL AGREEMENT

PREPARED FOR:
INDIAN AND NORTHERN AFFAIRS CANADA

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The purpose of this report is to discuss a number of issues of import to resource managers arising from implementation of the Inuvialuit Final Agreement. As will become apparent to the reader, many of these issues involve questions of interpretation and opinion rather than fact. The views herein expressed are those of the study team and do not represent those of Indian and Northern Affairs Canada, the Government of the Northwest Territories or the Inuvialuit.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

EXECUTIVE SUMMARY

The purpose of this report is to present a series of research papers which address selected issues arising from government implementation responsibilities concerning the land and resource provisions of the Inuvialuit Final Agreement (I.F.A.). These papers are to be considered as background in nature, primarily reflecting a user perspective, and are intended to stimulate additional discussion of the issues. The remainder of this Executive Summary will be organized by issue, as is the balance of the Report.

Access to Inuvialuit Lands

The Inuvialuit Final Agreement ensures that there will be access to, and across Inuvialuit lands for three main categories of use: public, commercial and governmental. The public has a right of access for emergency purposes, for crossing to adjacent lands and for recreational purposes. There is also a general right of access, for the purposes of navigation, to a 100-foot strip on the banks of navigable rivers and lakes and the sea coast. In each case, access is subject to various conditions to prevent damage to the land and to prevent interference with Inuvialuit interests. These public rights of access do not require the establishment of any programs or procedures by the federal or territorial governments.

Commercial access is available for a variety of different purposes: transit of a casual nature, transit that is significant but still temporary, permanent rights of way, and activities on the Inuvialuit lands themselves, including mineral development. The procedural requirements and conditions vary from category to category. The main mechanism in the I.F.A. for regulating major surface access requirements is a Participation Agreement, concluded by the Inuvialuit and the operator company requiring access. The Participation Agreement is intended to cover all aspects of the entry, including the permissible activities and compensation. After negotiation with the Inuvialuit, Canada has a responsibility to establish procedures and timetables under which Agreements are to be negotiated in a fair and expeditious manner, subject to arbitration in the event of disagreement. It is recommended that government, through negotiations with the Inuvialuit, establish procedures for the conclusion of Participation Agreements. These procedures should not call for continuing government involvement. Since they can be revised in light of experience, they need not be comprehensive and should focus on small commercial projects in the first iteration.

Another aspect of commercial access that concerns the federal government is the relationship between the I.F.A. and future amendments to surface rights legislation. It is recommended that caution be exercised in drafting any new legislation dealing with rights of access to private lands for commercial purposes in order to ensure harmony with I.F.A. provisions.

Access to Inuvialuit lands is available under the I.F.A. to government personnel for legitimate government purposes. There are certain limitations on who may exercise these rights (an agent or employee of government) and on the purposes for which they are exercised. These limitations are discussed and clarified, along with the rather confusing requirement that access is to be in accordance with appropriate laws or approved procedures. It is recommended that government should establish internal procedures to clarify what constitutes a "legitimate government purpose" which necessitates access and to outline conditions to guide the action of its officials.

The Environmental Impact Screening and Review Process

These provisions have been the subject of considerable differences of opinion in interpretation and have not been adequately tested as yet through implementation experience. The process is a joint government-Inuvialuit responsibility which is intended to ensure that development does not take place in the Inuvialuit Settlement Region unless its environmental effects have been assessed and reasonable impact mitigation undertaken.

Although the responsibility is clear for government to ensure compliance with the process (s.11(31)) either directly or through alternative processes (ss.11(14),(15), (32) and s.13(12)), before issuing a development permit or authorization, there appears to be no requirement for a government role in referral of a proposal to the I.F.A. process. The scope of the process may appear constrained to issues of impact on wildlife harvesting and related compensation, but this limitation is meaningless since all aspects of a proposal must be examined in order to determine these effects.

Despite a number of attempts at regulatory reform, several still on-going, uncertainty and potential duplication of environmental impact assessment and project review processes remain a concern of many. Although the I.F.A. screening and review process clearly attempts to avoid such duplication (ss.11(14-16),(24), (27), (28), and (32)), it appears intended to protect Inuvialuit interests in light of the uncertainty in public government processes. The resulting operating problem for the Screening Committee and Review Board is simply the determination of whether or not other processes will address all relevant concerns. The need for operating efficiency would seem to provide incentive and opportunity for some level of rationalization/integration of processes.

The still-developing nature of the I.F.A. screening and review process means that many administrative issues remain unresolved. Principal among these are the questions of conflict of interest which arises out of the multiple roles forced on a limited number of people with appropriate administrative skills and experience, and the need for staff and advisory support for the Screening Committee and Review Board. In the latter context, it is worhty of note that the I.F.A. does not contemplate support for the Screening Committee function.

Finally, there are questions as to the decision-making power of the Screening Committee and Review Board with respect to what constitutes a quorum, non-cooperation by participants, and timing of deliberations in relation to government approval processes. The power of the Review Board, at least, is considered significant due to the supremacy of the Act and Agreement over other legislation and the requirement placed on government to ensure compliance.

It is recommended that the Screening Committee and Review Board establish and adopt by-laws for their internal management under provisions of ss.11(11) and (23) respectively, addressing the following issues:

* required response times for various steps;
* panel membership for the purpose of decision-making (quorum);
* categorizing of applications by type or level of activity (to separate routine from complex);
* the need for rules with respect to expert and administrative support;
* activity-based implementation funding, including rules for the funding of intervenors;
* conflict of interest rules for members.

It is recommended that as a first step toward greater integration of screening and review processes, agreement should be reached on common guidelines for applications (i.e. an Initial Environmental Evaluations). It is also recommended that integration of various processes be actively sought with respect to public hearings and issuance of terms and conditions of approvals.

Sand and Gravel

Sand and gravel on Inuvialuit lands belong to the Inuvialuit, but this private ownership is constrained by the I.F.A. to prevent the Inuvialuit from exercising monopoly powers to the detriment of the public interest. Sand and gravel supplies must be reserved in three levels of priority: public community needs, the needs of the Inuvialuit and then other projects. Canada has a role in the forecasting process on which these reserves are based. Subject to these reserves, the Inuvialuit may grant licences and concessions for sand and gravel. Various controls, including a maximum royalty, are imposed on pricing and availability, with disputes being referred to arbitration.

Detailed provisions in the I.F.A. deal with the possibility of a sand and gravel concession being granted to the Inuvialuit Development Corporation (IDC), with requirements for efficient operation and reasonable prices. The government has a special monitoring role in this situation (a role that it does not have with respect to sand and gravel matters generally) and possesses a special power to terminate the IDC concession in certain circumstances.

It is recommended that the federal government pursue their inventory responsibilities, including regular updates of supply information, identification of alternative sources and careful monitoring of demand. It is also recommended that an agreement as to precise monitoring information requirements pertaining to an IDC concession be reached prior to granting of such a concession, if possible.

Lands Reserved for Government Use

Inuvialuit title is subject to existing migratory bird sanctuaries and government reserve sites set out in Annex "R" of the I.F.A. Government files have been reviewed to procure information about the Annex "R" sites, which are poorly described in the I.F.A. This review revealed a problem with site #14, a former DEW line site which is now an Indian and Northern Affairs research site. It appears the reserve for its former use was cancelled and not reinstated for its later use. There is also a potential concern with Reserve #9, a research site at Ya Ya Lakes. This reserve was cancelled in October, 1975 which begs the question of why it was included in Annex "R". A survey program, currently underway, should hlep to determine the exact size and location of all these sites, which should be registered against the Inuvialuit title once a land registration system is in place.

It is recommended that an audit be taken of the use to which these sites were being put as of October 31, 1978, since only the use as of that date is protected. If conflicts are anticipated or if some sites are particularly important to Canada, consideration should be given to negotiating individual site agreements with the Inuvialuit. In regard to Migratory Bird Sanctuaries, Canada should consult the Inuvialuit prior to making regulatory amendments that would affect their management.

The I.F.A. entitles Canada to establish new meteorological and climatological stations. This should be done only after the negotiation of individual site agreements. Similar steps should be followed in establishing permanent navigational aids and safety devices.

Any new "developments" upon sites reserved to government will be subject to the Environmental Impact Screening and Review Process of s.11.

Expropriation of Inuvialuit Lands

The I.F.A. contains a number of safeguards to protect Inuvialuit lands, with the effect that the compulsory taking of an interest in Inuvialuit lands is more complex than for other lands, whether it be for the full interest in the land or for a lesser interest, such as a pipeline right of way. In particular, an order by the federal Cabinet is required before an expropriation can proceed, and the Invuialuit are to receive suitable alternative land as a replacement rather than compensation only.

The I.F.A. creates two broad categories: expropriation proper and "appropriation" of land for the provision of government services and roads. Expropriation proper will generally proceed under the federal Expropriation Act, subject to many modifications of procedure such as the requirement for approval by Order-in-Council, different principles for fixing compensation and the fixing of compensation by the I.F.A. Arbitration Board. "Appropriations" proceed under a somewhat different procedure, which will usually supersede the territorial Expropriation Act. It further appears that the provisions of the I.F.A. for commercial access and for Participation Agreements are intended to be the only method for fulfilling private sector requirements, with the effect that the National Energy Board (N.E.B.) Act does not apply to Inuvialuit lands in respect of expropriation.

It is recommended that the Expropriation Act of Canada, and possibly that of the NWT as well, be amended to ensure no Inuvialuit land may be expropriated without consent of the Governor-in-Council. It is also recommended that the N.E.B. Act be amended to confirm that no interest in Inuvialuit lands may be taken under that Act.

It is further recommended that the federal government consider reserving some Crown lands in the Settlement Region to ensure a supply for exchange with the Inuvialuit at future dates.

Wildlife Compensation

Section 13 of the I.F.A. imposes certain obligations upon the Government of Canada pertaining to wildlife protection. In addition to its own potential liability to the Inuvialuit for wildlife losses when it is a "developer" in the Inuvialuit Settlement Region, Canada is obliged to review proposed developments to ensure that environmental concerns are identified and that mitigative and remedial measures are imposed. As well, developers (other than governments) are required to establish their financial capability to meet their s.13 obligations to compensate the Inuvialuit for wildlife losses. It appears that this "proof of financial responsibility" should be procured by the Government of Canada in those situations where the Government is responsible for authorizing a development. Failure by Canada to properly scrutinize proposed developments or to procure proof of financial responsibility, may enlarge Canada's own liability under s.13.

In addition to ensuring that these requirements are met, it is recommended that Canada encourage its employees and agencies to impose remedial and mitigative conditions upon developers operating in the Inuvialuit Settlement region and encourage developers who enter into Participation Agreements with the Inuvialuit to include provisions relating to wildlife compensation and remedial and mitigative measures.

A survey of resource development legislation reveals that Canada may lack the legislative authority to require proof of financial responsibility in certain cases. Therefore, it is recommended that consideration be given to enacting regulations pursuant to s.3(5) of the Western Arctic (Inuvialuit) Claims Settlement Act which would give Canada this authority. Thought must also be given to the nature and level of proof of financial responsibility that Canada will require from developers.

It is unclear to what extent Canada might be liable for the failure of territorial governments to meet their s.13 obligations prior to devolution. This issue requires further examination. It is recommended that with devolution, Canada must ensure that territorial governments also accept Canada's s.13 responsibilities. If this is not done, Canada will remain liable.

Some Comparisons with the Alaska and James Bay Agreements

A comparison of the provisions respecting government interests in native lands of other land claims settlements with the I.F.A reveals interesting differences. The Alaska Native Claims Settlement Act (ANCSA) takes an integrationist approach and creates native land holdings which are governed by the general law of private property, as opposed to being given special protection as native lands. Government agencies generally retain ownership of their lands, either because natives were not allowed to select them or because the natives were required to reconvey portions of selected lands to, for example, municipal governments. For future government interests, land may be expropriated (subject to the payment of compenation) by the state or federal governments in the same way as any other private land.

In contrast to the ANCSA, both the James Bay and Northern Quebec Agreement and the I.F.A create a sort of native homeland and support the subsistence culture of the natives. The James Bay Agreement, like the Alaska Act in most cases, excludes government interests from being transferred to the natives. The I.F.A. takes a different approach and transfers the land to the native people "subject to" the government interest. Both Canadian agreements deal more extensively with expropriation and rights of access than does the Alaska Act. Both provide for compensation for expropriation in the form of replacement land rather than money. Nevertheless, the James Bay Agreement generally gives natives much less control over access to, and expropriation of, interests in their own lands than does the I.F.A. It clearly reflects the need to clear the way of the James Bay project.

P A R T I

1.0 INTRODUCTION

1.1 Study Objectives

As clearly stated in the Request for Proposals, the objectives of this assignment are to conduct research and analysis of current land management practices related to the new land management regime associated with the Inuvialuit Final Agreement (I.F.A.), and to develop appropriate research and procedural issue papers with respect to government interface with the Inuvialuit regarding their lands. These research papers are intended to provide government managers with the necessary background to prepare the required policies and procedures.

As outlined in the RFP, the key issues were seen to include, but not be limited to, the following:

(a) guidelines for access - government right of innocent passage related to participation agreements;

(b) an audit of sand and gravel operations, establishment of royalties;

(c) changes required to Federal legislation;

(d) Inuvialuit land title registration;

(e) government reserves - legal status, monitoring, cancellation, conditions of abandonment, flexibility;

(f) municipal airports land exchanges; and

(g) divided ownership of surface/subsurface rights.

To accomplish these broad objectives, RMC Resources Management Consultants (NWT) Ltd. (RMC) and Canadian Institute of Resources Laws (CIRL), in conjunction with a client Steering Committee, first identified several key land mangement issues to be resolved, then established a priority list of these issues. The study team then developed papers detailing the background of the issue in question, discussing matters of legal interpretation and administrative efficacy, including stakeholder views thereon, and outlining the implications for the Government of Canada. This information is contained in a series of Research Papers in Part II.

1.2 Approach

To undertake this assignment, RMC Resources Management Consultants (NWT) Ltd. and the Canadian Institute of Resources Law of the University of Calgary formed a joint study team. The workload was split to reflect each organization's expertise. To this end, CIRL concentrated primarily on legal and interpretational issues, while RMC focussed on administrative and implementation issues.

The methods employed included a review of land claims agreements literature, interviews with stakeholders in government, industry and among the Inuvialuit, and analysis incorporating these findings with the researchers' previous knowledge and experience. In addition to initial consultations with the client Steering Committee on issue identification and priorization, two detailed reviews of draft reports were carried out to ensure maximum utility of the end product.

1.3 Key Issues

As described in Section 1.2, a major task was to identify and priorize a list of key issues. Early consultation with the client resulted in the following list:

(1) Access to Inuvialuit Lands;

(2) The Environmental Impact Screening and Review Process;

(3) Sand and Gravel Resources;

(4) Lands Reserved for Present and Future Government Use;

(5) Expropriation of Inuvialuit Lands;

(6) The Government of Canada's Responsibilities Regarding Wildlife Compensation;

(7) A List of Recommended Legislative Changes;

Part II of this document consists of Research Papers on each of the issues listed above, presented in the indicated order of priority. Each Research Paper includes an overview of the issue; a discussion of the ramifications of the issue, and recommendations concerning various policy options and courses of action for Canada.

The intention was not to produce an exhaustive treatment of any of the issues, but rather to highlight key concerns, arguments and options, and suggest possible methods or courses of action resolving the issues. These papers are intended to form the basis for further government policy analysis and formulation.

Finally, the client expressed an interest in the arbitration procedures set out in the I.F.A. This was acknowledged, however, as an important but last priority issue to be addressed if time and budget constraints allowed. The reader will note that arbitration-related issues are raised at various points in this report. It is the view of the study team that there are potential legal issues surrounding the interpretation of these procedures that may arise in the future. These issues require more detailed attention, and therefore are not addressed separately in this report. They include, but are not limited to the following:

* In what circumstances is the Arbitration Board's jurisdiction exclusive, and in what circumstances may the courts also have jurisdiction over disputes under the I.F.A.?

* What is the precise meaning of s.18(32), which gives the Arbitration Board jurisdiction over "any difference between the Inuvialuit and industry or Canada as to the meaning, interpretation, application or implementation of the I.F.A."?

* Does the Arbitration Act of the NWT apply, and if so, to what extent?

If it is likely that there will be a need for deliberations of the Arbitration Board in the near future, it may be desirable for Canada to seek resolution of these and other related concerns.

2.0 OVERVIEW OF THE INUVIALUIT CLAIM

2.1 Background

On June 5, 1984, the Federal Government signed an agreement with the Committee for Original People's Entitlement (COPE) representing the Inuvialuit of the Western Arctic. Under the Inuvialuit Final Agreement (I.F.A.), the Inuvialuit relinquished their claim to lands in the Western Arctic in exchange for legal title to selected lands, financial compensation and a variety of other rights; for example, wildlife harvesting, land management, environmental protection and economic development. As anticipated by the document itself, the Final Agreement was given effect later that summer, with the enactment and proclamation of the Western Arctic (Inuvialuit) Claims Settlement Act.

The Inuvialuit Final Agreement had been long in the making. In early 1976, the Inuit Tapirisat of Canada advanced a settlement offer to the Federal Government on behalf of all the Inuit of the Northwest Territories. The withdrawal of this proposal spurred submission of another in March, 1977, this time by COPE and covering only the Western Arctic. The "Inuvialuit Nunangat", as that proposal was titled, formed the basis of an agreement-in-principle which was concluded on October 31, 1978. From that point it was nearly six years before negotiations produced the Final Agreement.

The Inuvialuit Final Agreement constitutes a settlement of the Inuvialuit claim, based on traditional use and occupancy, to lands in the Western Arctic. The geographic area to which most of the provisions of the Final Agreement apply is contained within the boundaries of what the Agreement calls the "Inuvialuit Settlement Region" (ISR).

Somewhat roughly, the ISR can be described as a parallelogram, bounded on the south by the 68th parallel, on the west by the 141st longitude, on the north by the 80th parallel and on the east by the 110th longitude: it includes the northmost reaches of the Yukon Territory, the northwestern corner of the NWT, the eastern half of the Beaufort Sea, some of the Arctic Ocean, Banks Island, much of the western part of Victoria Island and some of the Parry Islands. The ISR covers most of the lands traditionally used and occupied by the Inuvialuit. But by incorporating within its boundaries much of the Beaufort Sea and some of the Arctic Ocean and Parry Islands, the Settlement Region is more extensive than those traditional lands.

The Inuvialuit received legal title to roughly 35,000 square miles of land through the combined effect of the Final Agreement and the Western Arctic (Inuvialuit) Claims Settlement Act. Of this total, 5,000 square miles were granted: "in fee simple absolute (which for greater certainty includes all materials whether solid, liquid or gaseous and all granular materials)."

These 5,000 square miles were granted in seven blocks: six blocks of 700 square miles each, with each block near one of the following Inuvialuit communities: Aklavik, Holman, Inuvik, Paulatuk, Sachs Harbour and Tuktoyaktuk, and a seventh block of 800 square miles on Cape Bathurst. As is clear from the wording of the grant of these 5,000 square miles, the Inuvialuit were made owners of both the surface and subsurface of these lands.

The remaining 30,000 square miles to which the Inuvialuit received title were granted to them "in fee simple absolute (less oil, gas, related hydrocarbons, coal, native sulphur and minerals as defined in Annex M)."

The Final Agreement imposes two significant limitations on the rights of land ownership conveyed to the Inuvialuit. First, the grants of both surface and subsurface and of surface only were made subject to existing alienations. In the case of the blocks of land near the six communities, the grants are "subject to subsurface alientations listed in Annex P and existing surface rights for limited terms listed in Annexes Q and R." In the case of the 30,000 square miles, less surface minerals, the grant is made subject to the surface rights in Annex Q and the government reservations in Annex R. Title to those 30,000 square miles is also made "without prejudice to holders of valid subsisting rights granted pursuant to the Territorial Lands Act or regulations made thereunder and other appropriate legislation."

The rights contained in existing alienations of lands selected under s.7(1)(a) and s.7(1)(b) are expressly protected by s.7(93) of the Final Agreement which provides that "subject to the provisions of this Agreement, with respect to Inuvialuit lands selected pursuant to paragraph (1)(a), any holder of valid oil and gas, coal, mineral and quarrying rights referred to in Annex P, and with respect to Inuvialuit lands selected pursuant to paragraph (1)(b), any holder of valid quarrying rights issued before December 31, 1983, shall be entitled to enjoy such rights without alteration or interruption until their termination.

The second major limitation on the Inuvialuit's fee simple absolute to the lands selected is contained in s.7(44) of the Final Agreement. This provides that the rights granted by the Crown were made subject to the restriction that "title to Inuvialuit lands may not be conveyed except to Inuvialuit individuals or corporations controlled by the Inuvialuit or Her Majesty in right of Canada." The intent of this provision is clear: title obtained by the Inuvialuit under the terms of the Final Agreement is to remain in Inuvialuit hands, unless it is transferred to the Federal Government. This reflects the importance attributed to maintaining Inuvialuit control over the lands received. In the opinion of many, the goals that the Inuvialuit have sought to achieve through negotiating a settlement of their claim cannot be realized unless the land base remains intact. If the land were to be lost to outside interests, then their cultural identity, potential economic independence and ability to exercise control over their physical environment would also disappear.

The lands conveyed to the Inuvialuit under the terms of the Final Agreement and settlement legislation ceased, by virtue of that conveyance, to be Crown lands. It is therefore not surprising that the Final Agreement should provide that, generally, the lands conveyed "shall be subject to the laws of general application applicable to private lands from time to time in force, including, without restricting the generality of the foregoing, territorial laws and ordinances that apply or are made to apply generally to private lands." Correspondingly, the Inuvialuit are "to enjoy all of the rights of any property owner under the laws of general application" except where those are expressly limited by the Agreement itself. Those rights of ownership include the right to impose environmental and safety standards upon those to whom the Inuvialuit grant new resource exploration and development rights that are more strict than those generally applicable to operations on privately-held lands.

While the general thrust of the Agreement is clear on the status of lands received by the Inuvialuit under it (that is, that they have become private lands) s.7(98) of the Agreement confuses the issues at least slightly. As originally drafted, that section read, in part, as follows: ". . . it may be agreed that laws and regulations that apply only to Crown lands shall apply to Inuvialuit lands if the Inuvialuit or the appropriate minister so request and the other party consents."

This report does not attempt to answer the difficult legal questions that may be asked about the fundamental character of the Inuvialuit Final Agreement and the Act that gives effect to it (the Western Arctic (Inuvialuit) Claims Settlement, S.C. 1984, s.24). Focussing on the information and analysis needs of federal land managers, the report concentrates on issues of specific concern to managers. It is necessary, however, to make brief reference to some of the assumptions made here about the nature of the I.F.A. and the Settlement Act.

Firstly, it is assumed that the I.F.A. is a "land claims agreement", and therefore has, in some measure, the status of a constitutional instrument. Section 3(2) of the I.F.A. states the intention of the parties that the Agreement is a land claims agreement within the meaning of s.35(3) of the Constitution Act 1982. The main implication of such a status is that at least some of the Inuvialuit rights under the I.F.A. are protected from abrogation by inconsistent laws or government action. Rights under the I.F.A. that have this constitutional protection can be altered only by agreement of the parties (s.3(13)-(17)), or by constitutional amendmemt, in accordance with the formula contained in the Constitution Act.

Secondly, irrespective of the constitutional status of the I.F.A., it is assumed that by virtue of s.4 of the Settlement Act, the I.F.A overrides conflicting laws and legislation in force on July 25, 1984. Whether or not a particular provision in the I.F.A. prevails against legislation enacted <u>after</u> that date depends on the effect of one or more of the following factors:

* whether that provision has some constitutional protection, as discussed above;

* whether the I.F.A. and the Settlement Act, together, can be regarded as special legislation that forms an exception to the subsequent general legislation; or,

* whether the I.F.A. shows that the parties intended that a certain type of subsequent legislation is indeed to prevail over the I.F.A.'s own provisions. An example of this third factor is s.7(21) of the I.F.A., which provides that laws of general application relating to access to private lands may override certain access provisions of the I.F.A.

Thirdly, notwithstanding any constitutional status that the I.F.A. may have, the I.F.A. is assumed not to be a statute, even though it is "approved, given effect and declared valid" by the Settlement Act and prevails over inconsistent laws. The I.F.A. is therefore taken not to impose a positive duty on persons other than its signatories (the government and the Inuvialuit), except where the duty is imposed as a condition on some privilege obtained by such a person under the I.F.A.

It may also be useful to briefly examine the provisions of other North American aboriginal claims settlements as they pertain to the key land management issues of government or public access to, or acquisition of, native lands.

A brief comparison of selected provisions of the I.F.A. with those of the Alaska Native Claims Settlement Act and the James Bay and Northern Quebec Agreement is contained in Appendix "A" to this report.

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P A R T I I

1.0 A C C E S S T O I N U V I A L U I T L A N D S

1.1 Public Access

1.1.1 Overview

In s.7(14), the I.F.A. gives the public certain rights of access to unoccupied Inuvialuit lands. Without the grant of these rights in the I.F.A. they would not exist, for the reason that the Inuvialuit lands are, in general terms, lands in private ownership. For the same reason, it is of course always open to the Inuvialuit to agree to give access privileges on the terms that they think fit to any person or class of persons. The fact that the Inuvialuit have agreed to give certain access rights in the I.F.A. does not preclude them from giving more, and there may be many circumstances in which they will consider it desirable to do so. The possibility of negotiating access rights directly with the Inuvialuit should be kept in mind not only for public access to Inuvialuit lands, but also for commercial and government access.

The "public" that has rights of access under s.7(14) is not defined, but is clearly capable of covering any person or group of persons. "Agents or employees of governments", however, are in a different category as separate rules (in section 7(16) and (17)) are provided for them. "Commercial interests" are also in a different category as the procedures for them are set out in section 7(18). Similarly, separate procedures are set out for access for fishing (s.7(22)-(25)), and under s.14(6) the public has no right to hunt or trap on Inuvialuit lands. Thus the rights of access granted to the public under section 7(14) cannot be exercised for government, commercial, hunting, trapping or fishing purposes.

The public right of access is confined to "unoccupied" Inuvialuit lands. While "unoccupied" is not a precise term, and will require some discussion below, the lands that it embraces will usually be adequately clear.

A. Categories of Activity Covered

The public has rights of access to unoccupied Inuvialuit lands for four different purposes or types of activity. The exact nature of the right changes from one activity to the next.

(1) Emergency Purposes

For emergency purposes "the public may enter and stay on Inuvialuit lands without prior notice for a limited time": s.7(14)(a). One may assume that this right would extend not only to the victims of an accident or illness but also to their rescuers; and that it extends to emergencies that seriously threaten property as well as personal injury. The right is extended to staying on the land, but is restricted to a limited time.

(2) Crossing to Adjacent Lands

Under s.7(14)(b), "the public may cross Inuvialuit lands without prior notice to exercise a right on adjacent lands". Expressed in terms of "crossing", this authorization does not appear to contemplate any stay on the land longer than is needed for the purposes of transit. The words "to exercise a right" stand out as a peculiar usage. The better view seems to be that they are merely synonymous with "to obtain access" or "to reach" adjacent lands. There does not seem to be any justification for a view of them that authorizes the Inuvialuit to ascertain whether the person has a right, in the sense of some sort of licence, to exercise on the adjacent land. Nor does the word "adjacent" seem to impose a significant limitation on the right of access. It does not provide a strict test for which lands may be reached by crossing over Inuvialuit lands and which must be reached by some other route.

(3) Casual and Individual Recreation

Section 7(14)(c) allows the public to "enter on Inuvialuit lands for recreation, and prior notice is required only for recreational use that is more than casual and individual in nature". In effect two different categories of recreation are contemplated.

Where members of the public seek to enter and, it must be implied, to spend time on Inuvialuit lands for recreational activities that are no more than casual and individual, then they may do so as of right. While in many cases they will wish to make contact with the Inuvialuit as a matter of courtesy, they will not be legally obliged to give notice or seek permission. What is "casual and individual" recreation depends on construing words that, like many others used in the Agreement, carry no precise legal meaning. "Casual", however, cannot be used in the sense of accidental or careless; it must be taken in the sense of irregular and impermanent. Nor can "individual" be taken to mean that all recreational travellers must travel alone. In its context with "casual" its intention appears to be to set simpler recreational trips apart from more elaborate and organized ones.

(4) Other Recreation

Recreational visits that are more elaborate and organized, or more regular and permanent, must be notified in advance to the Inuvialuit who may grant or refuse permission to enter the Inuvialuit lands, or make that permission subject to conditions. Yet this category of access under s.7(14)(c) does not extend to commercial activities even though it contemplates recreational users who are a good deal more organized or permanent than other recreational users. The operator of a wildlife photography tour, for example, is offering a recreational opportunity to his customers, but his operation, in providing the service for a fee, is a commercial one and is not authorized by the Inuvialuit under s.7(14)(c).

B. Conditions on Public Access

The rights of public access described above are subject to conditions that are spread out through ss.7(15), 7(20) and 7(26). For the most part the conditions impose rules on the manner in which access rights may be used. If a member of the public breaks these rules then the Inuvialuit may respond in two ways. First, they may treat that person's right of access as terminated and require him to leave Inuvialuit lands. (In legal terms the person had a licence to enter, but when he breaks the terms of the licence, the licence is revoked and he becomes a trespasser.) The Agreement confirms this in s.7(20)(c): "the user who fails to comply with the access provisions may be removed from the land". Secondly, the Inuvialuit have a right to sue the person for damages for the loss suffered by them by reason of the wrongful acts committed.

It may also be noted that for the most part the conditions imposed in the Agreement are conditions that the courts would probably imply in any event, having regard to the limited purposes for which the rights of access are being granted.

(1) Damage to the Land

According to s.7(15)(a) there shall be "no significant damage to the lands" and in s.7(20)(b) "users of access rights are responsible for damages caused to the land". The overlap of the two stipulations reduces the importance of the qualifying adjective "significant". What is "significant" in s.7(15)(a) will of course depend on the facts of the individual case, but the qualification appears to be intended only to exclude damage that is trivial or insignificant. One example of insignificant damage could be the marks left by a campsite that has been carefully sited and properly cleaned up.

(2) Abuse or Extension of the Right

The condition that there be no abuse or extension of the right is in s.7(15)(b). An example would arise where a purportedly recreational user turned out to be engaged in a commercial enterprise; or where a person in transit to non-Inuvialuit lands stayed on the Inuvialuit lands for longer than was reasonably necessary.

(3) Mischief

Section 7(15)(c) provides that there shall be "no mischief committed on the lands", but without giving any specific meaning to the word. Its legal meaning could be influenced by the use of the word in s.387 of the Criminal Code:

> (1) Every one commits mischief who wilfully
> (a) destroys or damages property,
> (b) renders property dangerous, useless, inoperative or ineffective,
> (c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property, or
>
> (d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

(4) Interference with Inuvialuit Use and Enjoyment

Under s.7(15)(d), there shall be "no significant interference with Inuviauit use of and peaceable enjoyment of the lands". Coupled with the restriction of public access rights to "unoccupied" lands only, this condition makes it plain that even though the public has access to Inuvialuit lands, it has to stay out of the way of the Inuvialuit. For example, a person tampering with traps, disturbing game or otherwise interfering with hunting, trapping or fishing would be in breach of this condition (and, in some cases, of the preceding condition) and would therefore be liable to be removed from Inuvialuit lands and would also be liable to pay damages.

(5) No rights or liability against the Inuvialuit

While the above four conditions restrict the manner in which access rights may be used, other provisions seek to restrict the legal liability of the Inuvialuit that may derive from public access. One direction that this takes is to make it clear that the rights of access under the Agreement are confined to their specific terms and cannot be enlarged by prescription (i.e., the uninterrupted use of a right for an extended period) or otherwise to give a member of the public a legal interest in Inuvialuit lands. To this effect s.7(26) states (in part) that:

> The granting of the right of public entry shall not place the Inuvialuit under any legal or statutory duty to any person and, for greater certainty, the right of public entry shall not be construed to create any right in favour of any person or interfere with or affect the Inuvialuit rights and title to the land beyond the granting of such entry.

(Section 7(26) must apply to rights of public entry of any kind, even though it appears under a sub-heading concerning fishing rights.)

The other direction is an attempt to release the Inuvialuit from liability for losses suffered by members of the public exercising rights of access. Thus, s.7(26) continues by stating that:

> Persons using the right of entry do so at their own risk and have no right of action against the Inuvialuit for alleged loss or damage arising therefrom.

In similar vein, s.7(20)(a) provides that: "the granting of access by the Inuvialuit does not create responsibility on their part for damages suffered by the user". The most relevant kind of liability in this context is that of the occupier of property for injuries caused by the dangerous state of the property, including attempts to hold the landowner liable for wilderness hazards. The effect of these I.F.A. provisions on this liability is by no means clear, but it is possibly much less than it may appear at first sight.

C. The Role of the Government

It is evident from the foregoing that the I.F.A. does not call on any level of government to participate in the public use of access rights on Inuvialuit lands. It is between the I.L.A. and individual members of the public to resolve differences of opinion about access between themselves, with the courts as the last resort. There is no requirement for the federal government to establish any procedures or programs to implement the public access provisions. There may be sound reasons for government land managers to provide advice and assistance to the public about the rules that apply on Inuvialuit lands, particularly when someone is proposing to cross or use both Crown lands and Inuvialuit lands. The government may also wish to offer its assistance in resolving disputes. However, in neither case is it under any legal obligation to do so.

1.1.2 Discussion

The overview of public access rights, above, has sought to provide a clear general statement of the effect I.F.A. without dwelling on legal or interpretational problems. At this point it is desirable to widen the discussion to deal further with some of these problems, although not to the point of a comprehensive analysis of every possible legal question. The problems to be discussed are; the effect of s.7(13) on access to the 100 foot riparian strip, what Inuvialuit lands are "unoccupied", and the effect of laws of general application.

A. Access to the 100' Riparian Strip

Section 7(13) of the I.F.A. provides:

> Canada reserves a right of access on Inuvialuit lands to the extent of 100 feet of land in width measured from the edge of the water of the sea coast and navigable rivers and navigable lakes that can be entered from such rivers. The right is limited to the use of rivers, lakes, water bodies, sea coast and inlets for travel, recreation or emergency, and does not permit any person using it to engage in any development activity or to harvest wildlife.

"Navigable" is defined in s.2 of the I.F.A. to mean "capable of navigation in its natural state and ordinary volume by boats or other water craft used for public or commercial purposes in the Inuvialuit Settlement Region", which excludes waters navigable only by smaller craft.

In so providing, the I.F.A. echoes s.9 of the Territorial Lands Act which reserves a 100' strip of land from any Crown grant. However, the I.F.A. provision does not make the strip into Crown land. Nor does it identify the beneficiary of the right in express terms. The right cannot be reserved only for Canada, i.e., for the benefit of federal government personnel, because that would clash with the mention of recreation. The government, one might say, does not engage in recreation. The right must therefore have been reserved by Canada on behalf of the public. In that case it adds little to the rights of public access granted in more detailed terms in s.7(14). The one thing it does add is a wider range of circumstances in which access is available. In terms of public access, it makes entry for recreational purposes available as of right whether or not it is "casual and individual". However, it is important to bear in mind that when relying on s.7(13) the right of entry to the 100' strip of land must always be in connection with the use of water bodies.

In relation to access to the 100' riparian strip, the conditions on public access in ss.7(15) and (20) do not apply. Section 7(26), however, does apply. The result is little different from access under s.7(14), because the courts will probably imply that a person entering under s.7(13) has no right to cause damage, to abuse his rights, to commit mischief or to interfere with Inuvialuit land use.

A final point that can conveniently be raised here while s.7(13) is under close study is that it is very likely (though not absolutely clear) that the s.7(13) rights are also available to government and commercial users. They overlap with the specific government (s.7(16)) and commercial (s.7(14)) rights in just the same way that they overlap with the general public's rights. The express prohibition in s.7(13) of development activity and wildlife harvesting reinforces the argument that persons engaging in such activities have a right of access to riparian Inuvialuit lands in connection with the use of water bodies. For all that the matter cannot be said to be free from doubt. The prudent path would be to ensure that one complies with the specific government, commercial or public rights even in the riparian strip.

B. "Unoccupied" Inuvialuit Lands

The public has rights of access under s.7(14) to unoccupied Inuvialuit lands only. What lands, then, are "unoccupied"? "Occupy" is not a term of legal import apart from its ordinary and popular meaning.[1] Dictionary definitions often speak of taking or holding possession, but occupation is not the same as the legal concept of possession of land. More useful are the connotations of "take up or fill (space, time), reside or be in (place, position)" that are given in the Concise Oxford Dictionary. There seems to be an aspect of taking, or exerting some degree of control; and an aspect of presence or being in the place.

Also useful is the fact that occupation is not defined in terms of use or enjoyment. One may be a frequent user of a piece of land without possibly being in occupation of it.[2]

One must give meaning to the phrase by seeking the intention of the parties from the words that they used, bearing in mind the context in which they made their agreement. The place of the phrase in the agreement as a whole is very relevant, and so too are the consequences of adopting one interpretation or the other. One must avoid interpretations that would render the phrase meaningless; thus, we can eliminate the extreme positions of all Inuvialuit lands being occupied or unoccupied. The context of the Western Arctic must be considered as one that may allow a far lower standard of presence on, or control of, land to amount to occupation than would be acceptable in an urban area or a farming area. Land that would seem empty or idle in a southern context may be occupied by northern standards. In particular, a seasonal presence on the land may well be enough for it to be regarded as occupied in the north.

The context of the I.F.A. provides several useful clues to the interpretation that "unoccupied" should receive. The first lies in the fact that if the land is unoccupied, then the public (or the government, under s.7(88), for navigation aids) may enter without giving notice to the Inuvialuit. A serious practical problem would appear if occupation is to be taken so widely as to include land that the public cannot see is occupied. One must infer that the parties intended that occupation is, in this context, a kind that leaves some physical sign. Otherwise how is the public to know that the land is occupied so that it may avoid that land and stay on unoccupied land? Second, the classification of the land as "unoccupied" results in consequences that are only minor. The rights of the public to enter for emergency transit or recreational purposes are strictly constrained and of limited duration. The proper exercise of these rights (without damaging the land, interfering with property, etc.) out of the way of any Inuvialuk may well be so minor as to be undetectable. It seems reasonable to infer, then, that the parties contemplated that a wide range of lands would be open as unoccupied. Third, s.7(15)(d) enjoins the public in using its access rights that there be no significant interference with Inuvialuit use of and peaceable enjoyment of the lands. The fact that it is necessary to do so indicates that lands may be unoccupied and subject to Inuvialuit use and enjoyment. So, for example, land may be used and enjoyed for hunting, but it does not become occupied for that reason alone. Finally, one may note that the I.F.A. provides for rights to Inuvialuit lands being granted to non-Inuvialuit. "Occupation" cannot be restricted to Inuvialuit occupation.

To summarize, in the context of the access provisions of the I.F.A., land must be subject to the presence and control of some person in order to be regarded as occupied. The mere fact that land is Inuvialuit-owned does not make it occupied. There must be some physical sign of the occupation. But only slight acts will amount to land being occupied. Houses and structures are obviously signs of occupation, but so too, in this context, are campsites. Places used only seasonally may be regarded as occupied. Inuvialuit land can be occupied by non-Inuvialuit persons. On the other hand, activities that do not conflict with the public's rights of access are unlikely to amount to occupation, and in particular land is not occupied simply by virtue of being used for hunting, fishing or other purposes.

C. The Effect of Laws of General Application

Section 7(21) of the I.F.A. provides that:

> Except for subsection (17) and the provision for Participation Agreements in paragraphs 18(c) and (d), the foregoing provisions relating to access constitute an interim measure and shall cease to have force and effect when and to the extent that laws of general application relating to access to private lands are made applicable to lands in the Western Arctic Region.

This provision has long-term significance for public, governmental and commercial use of Inuvialuit lands. However, no jurisdiction in Canada has laws that give the general public rights of access across private property for transit, recreation or even emergency purposes. Rights of access are more commonly granted for commercial purposes, especially for mineral resources purposes. Section 7(21) is therefore dealt with at length in the discussion of commercial access to Inuvialuit lands, below. (Section 1.2.2.A of this Research Paper)

1.1.3 Implications

A. General

The provisions in the I.F.A. that grant rights of access to the public for emergency, transit and recreational purposes impose no obligations on the federal or territorial governments, and do not require the establishment of any government program or procedure.

B. New legislation of general application that gives rights of access to private lands

If the government ever contemplates drafting new legislation of general application that creates general public rights of access to private lands, it should ensure that the legislation's effects on the I.F.A.'s access provisions are unambiguous, clearly stated and compatible with the I.F.A.

FOOTNOTES

1. Bentley v. Peppard (1903) 33 S.C.R. 444 at 445. There are no decided courts cases of direct assistance in construing "unoccupied" in this context. Many cases deal with fire insurance or with taxation in an entirely urban environment, e.g., R. v. St. Pancras Assessment Committee (1877) 2 Q.B.D. 581. There is a group of cases on the rights of Indians to hunt on unoccupied Crown lands, but they are influenced by the constitutional question of provincial legislation trenching on federal jurisdiction and native treaty rights: e.g., R. v. Smith [1935] 2 W.W.R. 433 (Sask. C.A.); R. v. Strongquill [1953] 2 D.L.R. 264 (Sask. C.A.)

2. This view is supported by Buckland Rural Municipality v. Donaldson [1928] 1 D.L.R. 436 (Sask. C.A.).

1.2 Commercial Access

1.2.1 Overview

A. Categories of Activities Covered and Conditions to Which They are Subject

Just as with the rights of the public to enter on Inuvialuit lands, the rights of access of commercial interests under the Inuvialuit Final Agreement vary from one category of activity to another; but the pattern is a good deal more complex. The conditions to which they are subject vary more also. This section will carry out a general review of this pattern, following the categories in section 7(18) of the I.F.A. but with two additions. In doing so we will take various categories of activity in a progression from the most minor to the most significant. There are also a few peripheral rights of access for commercial purposes that will be noted. In section B, below, we will deal with the Participation Agreement, one of the most important features of the I.F.A. in respect of commercial access.

It should be noted at the outset that the I.F.A. does not define "commercial" in providing for access of a commercial nature or by commercial interests. In the vast majority of cases there will be little reason for doubt about what is commercial and what is not. Any activity carried on by a corporation, firm or individual with a view to generating revenue will be included, whether the activity is in the area of resource exploration or extraction, or in tourism, transport, or some other area of economic activity. The activities of Crown corporations will usually be included. The only exceptions from the general provisions for commercial access are forms of commercial activity that are provided for elsewhere in the I.F.A. Commercial fishing, for example, is dealt with under s.7(24).

(1) Access to the 100' Riparian Strip

It was noted earlier that it is likely that the rights of riparian access are available to commercial users because of the general language with which they are granted. Section 7(13) reads:

> Canada reserves a right of access on Inuvialuit lands to the extent of 100 feet of land in width measured from the edge of the water of the sea coast and navigable rivers and navigable lakes that can be entered from such rivers. The right is limited to the use of rivers, lakes, water bodies, sea coast and inlets for travel, recreation or emergency, and does not permit any person using it to engage in any development activity or to harvest wildlife.

The right that is of interest to commercial users is the right to use land in connection with travel on rivers, lakes, the sea and other bodies of water. It seems particularly adapted to the needs of a barging operation, which, if it had to seek access to the shore under some other provision, would fit uneasily under section 7(18)(a).

The only express conditions that the I.F.A. imposes on access under s.7(13) are those in s.7(26): that the Inuvialuit shall not be under any legal or statutory duty to any person, that no right is created in favour of any person beyond the right of entry, and that persons entering do so at their own risk. (See Public Access, 1.1.1B(5) above.) Other conditions, such as against causing damage, are likely to be implied.

(2) Transit to Exercise Casual Rights

The first three categories of activity set out in s.7(18) of the I.F.A. are all for access across Inuvialuit lands in order to reach non- Inuvialuit lands. The rights granted are no more than rights of way, or rights of transit. The first category is for access of minor significance. Section 7(18) begins by stating:

> Private access of a commercial nature to Inuvialuit lands shall be available as follows:
> (a) access by commercial interests in order to reach non-Inuvialuit lands to exercise rights of a casual nature relating to investigative and preliminary work on those lands; subject to the same conditions as set out in subsection (15);

The expressions used in clause (a) seem to have been chosen with a view to the oil and gas and mineral industries. In that context, "investigative and preliminary work" must include geological reconnaissance, surveying and geophysical work. The operations that fall within s.7(18)(a) can be gauged by referring to other clauses. Thus, as s.7(18)(b) covers "significant", though temporary, access, s.7(18)(a) can only cover access that is both temporary and less than significant. The degree of significance relates to impact on Inuvialuit lands. Relevant factors would be the amount of damage done, the amount of traffic to and fro, the nature of the vehicles required and the amount of overall disturbance involved. An exploratory oil and gas well, for example, is in a sense an investigative and preliminary piece of work, but the access requirements for it are likely to be seen as significant in terms of impact on the Inuvialuit lands crossed. Section 7(18)(b) would then apply. A major geophysical operation may have to be treated the same way.

It is not easy to make sense of the words "of a casual nature". By any ordinary grammatical reading of the clause, that expression qualifies the "rights ... relating to investigative and preliminary work". Read that way, it focusses on the nature of the rights held by the commercial interest on the non-Inuvialuit land, a subject that one would not expect the Inuvialuit to be as concerned about as the nature of the activities that are to take place, especially on Inuvialuit lands. What is a right? The context of s.7(18)(a), and of the I.F.A. as a whole, brings non-renewable resource extraction immediately to mind, in which case a right would be a permit, lease, exploration agreement or mining claim. Which of these are casual? Only the ones of short duration? Or are none of these casual, the reference being only to those types of preliminary work that can be carried out without any such permit, lease, etc.?

Two alternatives to these difficulties present themselves. The first is that a court attempting to construe this part of the I.F.A. may simply decline to give much emphasis to these peculiar words, on the basis that the overall intent of the parties was not to trigger a complex analysis of the nature of "rights" on non-Inuvialuit lands, but rather to allow access across Inuvialuit lands with controls appropriate to the nature of what would take place on these lands. This approach, avoiding any undue emphasis on the nature of rights on non-Inuvialuit lands, is the same as was suggested for public access under s.7(14)(b). The second is to read "of a casual nature" with "access" and not the rights on non-Inuvialuit lands. This possibility certainly focusses attention on the activities involved on the Inuvialuit lands, which seems more logical, and it makes the relationship between clause (a) and the other clauses of s.7(18) more coherent. Clause (a) is for casual, (i.e., occasional and insignificant) access for transit; (b) is for significant but temporary access; and (c) is for permanent access.

As was mentioned earlier, s.7(18)(a) is worded with the oil and gas and mineral exploration industries in mind. If other commercial interests require access across Inuvialuit lands, it is unlikely that they can use this section unless they can describe their activities as "investigative and preliminary work". Even though their access may not be "significant" they may have to negotiate a right of way agreement under s.7(18)(b). The explanation for this may lie in the preference given in the I.F.A. to non-renewable resource activities in ensuring that they are not denied necessary access. See s.10(1).

Access under s.7(18)(a) is subject to the following conditions:

(i) Prior notice must be given to the Inuvialuit.

(ii) The conditions against damage to the land, abuse of the right, mischief and interference with Inuvialuit use and enjoyment, and against Inuvialuit liability for loss or damage, apply: s.7(15) and s.7(20). These are the same as the conditions applying to public access, supra.

The right granted under s.7(18)(a) may be summarized as a restricted but readily available right of casual transit across Inuvialuit lands for investigative and preliminary work in resources exploration. There may be no damage done or interference with Inuvialuit activities. Notice must be given in advance but no agreement or consent is required from the Inuvialuit.

(3) Transit that is Significant but Temporary

Section 7(18)(b) provides for:

> access by commercial interests in order to reach non-Inuvialuit lands to exercise rights where the access would be significant, but temporary; subject to a right of way agreement being negotiated with the Inuvialuit that would provide for
> (i) a location least harmful to the Inuvialuit and suitable to the commercial interest, and
> (ii) matters relating to damage, mitigation, restoration and loss of use;

Compared to the previous clause, the scope of this clause is quite clear. What is significant will be determined in accordance with the impact of the access activities on Inuvialuit lands: factors such as the extent of damage, the amount of traffic, the type of vehicles, the need for a road, and the overall disturbance. Activities on non-Inuvialuit lands that would probably require access under s.7(18)(b) include major geophysical programs, exploratory oil and gas wells and (in the mineral sector) extensive diamond drilling or bulk sampling.

The most notable feature of this category of access is the obligation to negotiate a right of way agreement with the Inuvialuit. The obligation to obtain an agreement necessitates that the Inuvialuit may refuse to agree. That refusal does not appear to be subject to the jurisdiction of the Arbitration Board under its authority to arbitrate any difference "as to the meaning, interpretation, application or implementation" of the I.F.A. What is of concern here is a power to agree or disagree, specifically reserved by the I.F.A. The position is different with respect to Participation Agreements. In fact it is notable that s.7(18)(b) avoids the Participation Agreement process. The main reason may be that the procedures for Participation Agreements were thought to be too detailed and complex for a temporary right of way. The same reason may explain the absence of a right to go to arbitration.

It may also have been intended that right of way agreements under s.7(18)(b) would not include all the matters that s.10 contemplates for inclusion in a Participation Agreement. The mention in s.7(18)(b) of an agreement that would provide for location and for damage may have been intended (by Canada, anyway) to confine the right of way agreement to those subjects only, and to bar a company and the Inuvialuit from considering any other matter. However, the clause is obviously incapable of permitting any such draconian effect. Plain words, and not possible implications, would be needed to deny the parties the right to consider any matter in negotiating and making an agreement.

Access under s.7(18)(b) is subject to the following conditions:

(i) Prior notice must be given to the Inuvialuit.
(ii) The company must negotiate and secure the agreement of the Inuvialuit to a right of way agreement.
(iii) The conditions against damage to the land and against Inuvialuit liability for loss or damage apply; s.7(20). But these conditions could be modified by the express terms of the right of way agreement.

The rights granted under s.7(18)(b) may be summarized as a right to negotiate with the Inuvialuit to obtain a temporary right of transit with significant impacts across Inuvialuit lands to reach non-Inuvialuit lands. The terms of access are subject to negotiation.

(4) Permanent Right of Way

Section 7(18)(c) provides for

> access by commercial interests in order to reach non-Inuvialuit lands to exercise rights where the access would require a permanent right of way, subject to Participation Agreements as provided by section 10;

The scope of this clause is quite clear. The element of permanence is probably not to be taken too rigidly; a pipeline or access road that will be required for the life of an oil or gas reservoir is permanent in this context. The I.F.A. appears to intend that rights of way for commercial purposes (of which a pipeline right of way is the main example) are to be made available under this clause rather than under expropriation legislation or pipeline legislation.

Participation Agreements are reviewed in section B, below.

Access under s.7(18)(c) is subject to the following conditions:

(i) Prior notice must be given to the Inuvialuit.
(ii) The company must negotiate and secure the agreement of the Inuvialuit to a Participation Agreement, subject to arbitration in case of disagreement.
(iii) The conditions against damage to the land and against Inuvialuit liability for loss or damage apply; s.7(20). But those conditions could be modified by the express terms of the Participation Agreement.

The rights granted under s.7(18)(c) may be summarized as a right to obtain a permanent right of way across Inuvialuit lands to reach non-Inuvialuit lands, subject to making a Participation Agreement with the Inuvialuit, but subject to a right to go to arbitration in case of disagreement.

(5) Activities On Inuvialuit Lands

Section 7(18)(d) provides for

> access by commercial interests in order to enter on Inuvialuit lands to exercise interests in or on those lands, subject to Participation Agreements as provided by section 10.

Again, the scope of this clause is quite clear. While the previous clauses only gave rights of way for transit across Inuvialuit lands, this clause gives rights to carry out activities on the Inuvialuit lands themselves. The one question that seems to arise is whether activities completely unconnected with non-renewable resources fall within this category. The question will be considered in the discussion below.

Participation Agreements are reviewed in section B, below.

Access under s.7(18)(d) is subject to the following conditions:

(i) Prior notice must be given to the Inuvialuit.
(ii) The company must negotiate and secure the agreement of the Inuvialuit to a Participation Agreement, subject to arbitration in case of disagreement.
(iii) The conditions against damage to the land and against Inuvialuit liability for loss or damage apply; s.7(20). But those conditions could be modified by the express terms of the Participation Agreement.

The rights granted under s.7(18)(d) may be summarized as a right to enter and use Inuvialuit lands for commercial purposes, subject to making a Participation Agreement with the Inuvialuit, but subject to arbitration in case of disagreement.

(6) Access for Subsurface Rights on Inuvialuit Lands

Section 10(1) confers rights of access even though it is found under the heading of Participation Agreements. It reads:

> For the purposes of exploration, development and production activities by holders of valid rights or interests issued by Canada on 7(1)(a) lands and holders of petroleum, coal or mineral rights or interests issued by Canada on 7(1)(b) lands, access on and across Inuvialuit lands shall be guaranteed by the Inuvialuit Land Administration (ILA), subject to the payment by the developer of fair compensation to the Inuvialuit for such access, for any damage to Inuvialuit lands and for any diminution of the value of their interests in their lands.

Section 10(2) proceeds to require a valid Participation Agreement to be concluded before exercising these rights. Judging by Appendices P, Q and R the only such rights remaining on s.7(1)(a) or s.7(1)(b) lands are subsurface rights, the surface interests in Appendix Q having expired.

The activities that come under s.10(1) also come under s.7(18)(d), the latter section possibly having a wider scope than the former. Whatever may be the origins of this overlap, it is important to note that anyone who qualifies under s.10(1) has a guaranteed right of access. The Inuvialuit may negotiate various terms and conditions, subject to arbitration, but they cannot withhold the right of access.

Participation Agreements are reviewed in section B, below.

Access under s.10(1) is subject to the following conditions:

(i) The company must negotiate and secure the agreement of the Inuvialuit to a Participation Agreement, subject to arbitration in case of disagreement.
(ii) The conditions in s.7(20) respecting damage to the land, etc., apply (as the activities are also covered by s.7(18)(d)), but are subject to modification by the Participation Agreement.
(iii) Where the Participation Agreement does not include compensation for access, damage and diminution of value, and land rent, those items must also be negotiated and paid: s10(1) and (3).

The rights granted under s.10(1) may be summarized as a guaranteed right for the holders of subsurface interests issued by Canada on Inuvialuit lands to enter and use Inuvialuit lands for exploration, development and production purposes, subject to making a Participation Agreement with the Inuvialuit, but subject to arbitration in case of disagreement.

(7) Incidental Provisions of Entry

There are a few minor provisions concerning commercial access in different parts of the I.F.A. They may be listed as follows:

- s.7(23)-(26): the provisions for entry for fishing cover commercial fishing

- s.7(65)-(69): development in a specified area adjacent to De Salis Bay is not to be impeded and is subject to special provisions

- s.8: development in a specified part of the Husky Lakes Cape Bathurst area is subject to special controls.

B. Participation Agreements

Participation Agreements are the central mechanism in the I.F.A. for regulating surface access to Inuvialuit lands for commercial purposes and for non-renewable resource purposes in particular. In holding this central position they carry out the functions that in Alberta would be carried out under the Surface Rights Act or in most other provinces under the surface/subsurface provisions for entry and compensation under the mining legislation or other resources legislation. Their centrality in the I.F.A. is also to be seen in the fact that they are intended to be permanent while others of the access provisions are interim measures only: s.7(21).

(1) Where Participation Agreements are Required

By way of recapitulation, it may be noted that an operator must conclude a Participation Agreement in the following situations:

(i) in order to obtain a permanent right of way to reach non-Inuvialuit lands: s.7(18)(c);

(ii) in order to obtain access to exercise interests in or on Inuvialuit lands: s.7(18)(d);

(iii) in order to exercise the guaranteed right of access held by operators who are the holders of rights granted by Canada on Inuvialuit lands: s.10(1).

The latter two situations overlap to a large extent.

(2) Contents of Participation Agreements

According to s.10(2), a Participation Agreement sets out "the rights and obligations of the parties respecting the activity for which the access is being granted". Section 10(3) goes on to say that a Participation Agreement

> . . . may include specific terms and conditions respecting the nature and magnitude of the land use for which the access is being sought. Without limiting their generality, the terms and conditions may also include:
> (a) costs associated with any ILA inspection of the development work sites and the nature and scope of such inspection;
> (b) wildlife compensation, restoration and mitigation;
> (c) employment, service and supply contracts;
> (d) education and training; and
> (e) equity participation or other similar types of participatory benefits.

The I.F.A. intends that a wide range of matters can be included in a Participation Agreement if the parties wish to do so. There are almost no restrictions on what can be included. A Participation Agreement is intended to embody the consensus reached between the parties on all aspects of their relationship as to activity concerned; it "set[s] out the rights and obligations of the parties respecting the activity for which the access is being granted". The matters mentioned in s.10(3) are mentioned by way of illustration only, and not by way of restriction, as the words "may" and "without limiting their generality" unequivocally indicate. Similarly, where s.10(4) states that the term of an Agreement may continue until the end of the mineral right issued by Canada, it appears to have been inserted out of an abundance of caution, and it does not prevent the parties from agreeing on some other date. The only apparent limitations on a Participation Agreement are those that restrict the area of its application to the area in which the activities take place and the area allowing access to it (s.10(5)), and that stipulate that the parties shall have the right to monitor and inspect the activities (s.10(6)). There is virtually nothing that is required to be included. This is significant in that the parties need not include terms on wildlife compensation, mitigation and restoration (see 6.1.3.A, below).

For all that, there is a wide range of matters that can be included in a Participation Agreement; there is no need for an Agreement to be a long document. Oil and gas industry experience has shown that once a voluntary co-operation agreement (s.16(12)) has been concluded, Participation Agreements can be simple, one-sheet documents, incorporating the government permit concerned to describe the land and activities that will be involved.

One difficulty about the contents of a Participation Agreement is whether the "fair compensation" and the "appropriate land rent" to be negotiated under s.10(1) and s.10(3) are terms of the Agreement, or whether the obligation to negotiate and pay them stands outside the Agreement. The wording of those sections certainly seems to show some intent to keep them separate. In ordinary transactions the question will be unimportant. Either way the compensation has to be negotiated and paid and it will not matter whether the Participation Agreement is drafted in a way that includes them.

The question could be important, however, in two situations concerning the negotiating procedures. Are the compensation and rent caught under the "procedures and timetables for concluding Participation Agreements" that are to be determined by Canada under s.10(7)? And are they subject to the jurisdiction of the Arbitration Board, along with Participation Agreements, in the event of disagreement? The better answer in both cases appears to be yes. The generality and comprehensiveness that s.10(2) contemplates for Participation Agreements may indicate that these matters are to be included. Secondly, compensation and rent are inextricably linked to the matters that are dealt with under a Participation Agreement, and it is inconceivable that they were intended to be resolved by different procedures. In particular, the nature and magnitude of the land use, concerning which a Participation Agreement may include specific terms or conditions, is directly related to the amount of compensation and rent that is properly payable. Both parties would want to negotiate both aspects at the same time. If the activity is going to be tightly controlled, then less compensation and rent is going to be needed. If its nature and magnitude are not going to be constrained by tight terms and conditions, then more compensation and more rent will be called for. Thirdly, with special reference to arbitration, the Board would have jurisdiction over the questions of what is "fair" compensation and "appropriate" land rent in any event, because of its jurisdiction (s.18(32)) over any difference as to the interpretation or application of the Agreement to the facts of the particular case.

(3) Procedures for Concluding Participation Agreements

On a general level, there is a procedural requirement in the I.F.A. for the negotiation of Participation Agreements in that a developer must conclude a valid Agreement before exercising his right of access, unless the Inuvialuit Land Administration agrees otherwise. There is another general constraint in that where the right of access is guaranteed, it must be granted by the Inuvialuit without such a delay that would make the guarantee meaningless.

The more specific procedural requirements are contemplated in s.10(7)-(9). Section 10(7) reads:

> Except where the Inuvialuit and industry have concluded a voluntary co-operation agreement referred to in subsection 16(12), Canada, after negotiating with the ILA, shall determine procedures and timetables for concluding Participation Agreements including the time period for the negotiation and arbitration phases. Such procedures and timetables shall be reasonable, shall reflect the size and nature of the different types of projects and shall generally accord with government approval schedules, including both statutory and administrative schedules. The fundamental objective is to conduct the negotiations in a fair and expeditious manner, ensuring that negotiations between the Inuvialuit and industry proceed concurrently with the government approval process.

The federal government thus has the power and the duty to determine the procedures and timetables for concluding Participation Agreements. Several comments can be made about this federal role. Its purpose is to lay down rules that will produce "fair and expeditious" negotiations that are coordinated with the government's own regulatory procedures for the same project. However, the government is not to become a party to the negotiations, or even to supervise them. It has a power to make the rules, but not a power to umpire the game. It must be taken to be able to amend the rules, especially when government approval procedures are changed. Before setting the rules, the government must negotiate with the Inuvialuit Land Administration. The obligation to negotiate must require that more weight be given to I.L.A. views than if the obligation was merely to consult. In any event, the procedures and timetables are subject to arbitration as to their reasonableness, which in effect gives the I.L.A. a right of appeal on the procedures to the Arbitration Board. Finally, any procedures that are determined this way do not apply where the Inuvialuit and "industry" have concluded a voluntary co-operation agreement under s.16(12).

The character of the procedures that the government may set is described in general terms in s.10(7). The procedures are to promote fair and expeditious negotiations, proceeding concurrently with the governmental approval process. The procedures are to be reasonable; they are to treat projects of different sizes and natures differently, presumably by setting expedient procedures for minor activities; and they are to accord generally with the statutory and administrative schedules of the government.

One component of the procedures and timetables that s.10(7) specifies is that the federal government may set is time periods for the negotiation and arbitration phases. As with the procedures generally, they must be reasonable time limits, and are subject to review by the Arbitration Board. It would be difficult for the government to justify time limits that move faster than the government's equivalent approval process. It is a moot point whether the government can set a "time period" and timetables for the arbitration phase that conflict with the express provisions as to time limits that are found in various parts of section 18, which deals with arbitration at length. On a tentative view it appears that it cannot.

The government has very limited powers to impose sanctions on either industry or the Inuvialuit for failure to keep to the timetables that it determines, since there is no express power in the I.F.A. to impose penalties in these circumstances. A failure to negotiate in due time must probably result in arbitration. A failure on the part of the industrial operator could probably result in the refusal to issue governmental approvals, either at the negotiation or the arbitration stages. However, the government cannot set procedures that would penalize the Inuvialuit for any delay on their part by giving the industrial operator a Participation Agreement (and rights of access) on the terms that the operator has suggested. That would fly in the face of the express terms of the I.F.A.

The final part of the procedures for concluding Participation Agreements is arbitration. While s.18 provides the main rules for arbitration proceedings, s.10(8) and (9) must be observed.

> 10.(8) Where the parties have not been able to agree on a Participation Agreement, the matter shall be referred to the Arbitration Board pursuant to section 18. The Arbitration Board shall have before it as the basis of its arbitration the last comprehensive proposal put forward by each of the parties. The parties shall promptly submit to the Arbitration Board the reasons for their positions.
>
> 10.(9) The Arbitration Board may select the proposal it considers the more reasonable or may, after consultation with the parties, make a compromise ruling.

The device of settling a dispute by endorsing the final position of one of the antagonists, without splitting the difference or compromising, is intended to discourage both parties from taking extreme positions. While this device is to be used by the Arbitration Board in finalizing Participation Agreements, it does not apply in its pure form; the Board may compromise.

1.2.2 Discussion

A. Laws of General Application Relating to Access to Private Lands

The significance of s.7(21) of the I.F.A. was noted earlier in respect of public access rights. It is even more significant in respect of commercial access, not only from the point of view of the money involved but also because laws for access to private lands are more commonly enacted for the purposes of commercial activity. The prime examples are statutory rights to enter and use land to explore for, win and work minerals and oil and gas. Significant though it is, s.7(21) is an unfortunately obscure provision.

Section 7(21), it will be recalled, provides that:

> Except for subsection (17) and the provision for Participation Agreements in paragraphs 18(c) and (d), the foregoing provisions relating to access constitute an interim measure and shall cease to have force and effect when and to the extent that laws of general application relating to access to private lands are made applicable to lands in the Western Arctic Region.

That section must be read in conjunction with s.7(97) which states that "Inuvialuit lands shall be subject to the laws of general application applicable to private lands from time to time in force", except as otherwise provided in the I.F.A. The consequences that this section may have are similarly obscure, but it seems to state that the ordinary rules of law apply, subject to the special regime of the I.F.A. It seems to be based on the assumption that the express provisions of the I.F.A. cannot be modified under the doctrine of implied repeal by a subsequent inconsistent enactment, on account (presumably) of the Agreement having an entrenched constitutional status or having the status of special-purpose legislation to which subsequent general legislation must yield. However, what s.7(21) signals is that certain laws do prevail over the I.F.A. and the Settlement Act, and do supersede the express provisions of the Agreement notwithstanding any special status that the Agreement may have.

The question then becomes, what laws are contemplated by s.7(21)? What are "laws of general application relating to access to private lands", and when and how are they "made applicable" to lands in the Western Arctic Region? As mentioned above, statutes that grant rights of access to private lands for mineral and oil and gas purposes seem to be examples of the type of law contemplated by s.7(21). Specific mention can be made of the surface rights granted to mineral and oil and gas operators by the Canada Mining Regulations (C.R.C. 1978 c.1516, ss.11(1)(h), 27(3) and 70-72) and the new Canada Petroleum Resources Act (S.C. 1986, c.45).

It is puzzling, however, that s.7(21) looks forward to a time when such legislation will apply to the Western Arctic, when in fact such legislation already exists. The Canada Mining Regulations and the Canada Petroleum Resources Act are both in force; they both apply to the Western Arctic; and they both apply to private lands. The words "made applicable" may be argued to connote some special sort of designation or proclamation of applicability for the purposes of the I.F.A., but it is impossible to see how some such procedure can be conjured up out of next to nothing. The only limitation that s.7(21) seems to impose is that that section refers solely to legislation passed after the coming into force of the Settlement Act. That section is clear in intending that the provisions in sections 7(13) to (20) are in force from the date that the I.F.A. took effect pursuant to the Settlement Act (July 25, 1984), and that those provisions could subsequently be displaced. From this analysis one must conclude that the Canada Mining Regulations surface rights provisions do not prevail against the I.F.A., but that those in the new Canadian Petroleum Resources Act do. Any future amendments to, or replacements of, such legislation will also displace sections 7(13) to (20) of the I.F.A. - except, of course, as to Participation Agreements.

Participation Agreements and s.7(17), relating to military exercises, are not intended by the I.F.A. to be merely interim measures. They are intended to have permanent force and effect whatever future legislation is enacted on surface rights or access rights. It appears that they are to override any inconsistent provisions in such legislation, and are to be read together with the provisions that are not inconsistent. To look at it another way in the context of commercial access, the provisions for Participation Agreements are grafted onto any future general legislation that confers surface rights or access rights over private lands.

Not only is the effect of s.7(21) somewhat obscure, but, if it is accepted that it has the ramifications suggested above, it also presents a risk that the situation could be made even more confused by the enactment of future legislation that is drafted without a very careful consideration of how it is to relate to the I.F.A. It could be made very uncertain whether new legislation replaces the "interim" measures for access in the I.F.A., and, if it does, to what extent, and in what relationship to Participation Agreements and other requirements of the I.F.A.

B. The Obligations of the Inuvialuit to Grant Access for Commercial Purposes

It is desirable to discuss briefly the circumstances in which the I.F.A. compels and does not compel the Inuvialuit to grant rights of access for commercial purposes. Under s.10(1) rights of access are expressly guaranteed to the holders of rights (basically subsurface rights) granted by Canada on Inuvialuit lands. This in fact confirms what the common law would otherwise imply. The negotiations with the holder of such rights must always result in a Participation Agreement and a right of entry; the negotiations only concern the terms. The guarantee would also bind the hands of the Arbitration Board.

For other commercial operators, there is no explicit guarantee. It is true that s.7(18) begins by stating that "Private access of a commercial nature to Inuvialuit lands shall be available as follows ..." but this is not the same as saying that the Inuvialuit shall grant access to commercial interests, and shall do so pursuant to the following procedures. Rather, the imperative "shall" simply seems to say that commercial access, if any, is to be obtained only by one of the four following procedures.

One situation that makes this clear is that of access to Inuvialuit lands to carry out operations on Inuvialuit lands, but not pursuant to a right (a subsurface right) granted by Canada. Can it be suggested for a moment that s.7(18) gives any commercial entity whatsoever a guaranteed right to use Inuvialuit lands for its own purposes? The suggestion is not a credible one. Subject to the limitations clearly imposed by the I.F.A., the Inuvialuit own their lands as private property and enjoy all the rights of any property owner. Apart from special cases, such as mineral access or rights of way, it is the property owner's right is to decide what commercial development can take place on his land.

Rights of access to Inuvialuit lands, and access across them by permanent rights of way, are subject to Participation Agreements and subject ultimately to arbitration. In both cases one can expect the Arbitration Board to evaluate the importance of the access to the commercial interest, but by balancing it with the importance to the Inuvialuit of their rights as private owners of land. A pipeline for which Inuvialuit lands present the only really feasible route is one thing, but the use of the I.F.A. as an expedient and underhanded way of securing the possession of valuable blocks of land near a community is another.

The rights for lesser forms of access under s.7(18)(a) and (b) are not subject to Participation Agreements or arbitration. However, access of a significant but temporary kind across Inuvialuit lands is plainly subject to the agreement of the Inuvialuit. On the other hand the right of casual access across Inuvialuit lands for investigative and preliminary work, and the right of access to the 100' riparian strip, both appear to be available without the approval of the Inuvialuit.

1.2.3 Implications

A. General

The provisions of the I.F.A. that grant rights of access to or across Inuvialuit lands for commercial purposes, including non-renewable resource purposes, impose few obligations on the federal and territorial governments. The obligations that do call for the establishment of government programs or procedures are noted below.

B. New Legislation of General Application that Gives Rights of Access to Private Lands for Commercial Purposes

The government should exercise special care in drafting new legislation (including amending legislation) that creates or changes rights of access to private lands for commercial purposes. The prime examples of such legislation are the surface rights sections of mineral and oil and gas legislation, whether in the form of statute or regulation. The government should take pains to avoid confusing the existing I.F.A. rules for access. It should make it clear whether or not the new legislation is intended to replace the "interim" measures for access in the I.F.A. Either way, the legislation should contain a simple declaration of intent. If the new legislation is to replace only a part of the I.F.A. measures, care should be taken to ensure that the new measures harmonize properly with the remaining I.F.A. measures. In particular, the legislation must be compatible with the Participation Agreement procedures.

C. Procedures and Timetables for Concluding Participation Agreements

The federal government has an obligation under s.10(7) to determine procedures and timetables under which the Inuvialuit and commercial operators will conclude Participation Agreements. The various constraints on the government in fixing these procedures and time limits are described in detail in the Overview, above.

The government role under s.10(7) is to determine reasonable (and fair and expeditious) procedures in negotiations with the Inuvialuit. The obligation of the government to negotiate with the Inuvialuit indicates that the government's responsibility is a co-operative one, with negotiations on the procedures being subject to arbitration only in the event of an impasse arising.

While the government is obliged to negotiate in setting the procedures, it is not obliged to take part in the negotiations under those procedures on the terms of a Participation Agreement. It is important to note that the two sets of negotiations are entirely separate. While the government takes an active part in the former negotiations on procedures, the I.F.A. contemplates that it will not have an active role in the latter negotiations, under those procedures. The I.F.A. contemplates that Participation Agreements will be negotiated between the applicant and the Inuvialuit.

Consequently, it is recommended that the government aim for the establishment of a set of procedures and timetables that will not call for continuing government involvement. For example, the procedures should not resort to the device of reserving numerous discretionary powers to the government to intervene in the process.

It is recommended that the establishment of procedures not be delayed by efforts to make them completely comprehensive. The procedures are informal; they are not statutes. Deficiencies can be dealt with by revisions, and if the procedures are not suitable in a particular case the negotiating parties may well choose to agree on an alternative procedure. It is also suggested that procedures for smaller commercial projects should be dealt with first. The proponents of large projects are more likely to have completed voluntary co-operation agreements, which avoid these procedures, or other long-term relationships with the Inuvialuit.

1.3 Government Access

1.3.1 Overview/Discussion

Several parts of the Inuvialuit Final Agreement provide for government personnel to have access to Invuialuit lands, but the main provision is section 7(16), which reads:

> 7(16) Agents or employees of governments shall have the right to enter on and cross Inuvialuit lands for legitimate government purposes relating to the management of their programs or enforcement of their laws, and such access, where applicable, shall be in accordance with appropriate laws or approved procedures.

Most of this overview will focus on this main provision. There are less general powers of entry in other parts of the I.F.A., and they will be dealt with in section F, below. As a matter of background to the whole issue of government access, it is useful to keep in mind that the Inuvialuit lands are private property, subject to the terms of the I.F.A.: s.7(101). However, private property everywhere is subject to the numerous rights of entry that legislation confers on a variety of government officials.

A. Who May Exercise Government Rights of Access

Section 7(16) confers the right of access on "agents or employees of governments", but one must note that it is to be used for "legitimate purposes" only. The qualification clarifies which governments can use these rights. The Government of Canada, the Government of the Northwest Territories and municipal governments obviously have a multitude of legitimate government purposes for which they may wish to enter Inuvialuit lands.

There will normally be no doubt about who is an employee of a government. The term will include any employee in any department of the government concerned, but it will not include a person supplying services to a government under a contract that is not of the character of a contract of employment.

The class of agents of a government is narrower than it may first appear. In general terms, an agent is a person who has authority, express or implied, to act on behalf of another person (the principal) and who consents so to act. An employee is not generally regarded as an agent, nor is an independent contractor. Thus a company providing goods or services is not usually an agent; nor is a consultant providing services or information to a government. The mere fact that a person or a company holds a licence or resource tenure from the government, or that its operations are approved by the government, does not make it an agent.

Crown corporations present a special problem. Some of them are referred to as agents of the Crown for the purposes of taking advantage of the immunities and privileges of the Crown, even though they may act on their own behalf rather than on behalf of the Crown. Many Crown corporations are expressly declared to be agents of the Crown in the statutes that establish them. Examples are Petro-Canada (S.C. 1974-75-76, c.61, s.14), Northern Canada Power Commission (R.S.C. 1970 c.N-21 s.4) and the CBC (R.S.C. 1970, c.B- 11, s.39(2)). Without an express provision, the corporation's status as an agent may not be clear. Where there is an express declaration, the Crown corporation must probably be considered as an agent of the government for the purposes of s.7(16) of the I.F.A. Nonetheless, a Crown corporation that requires access for purposes that are really commercial purposes, rather than "legitimate government purposes" of program management or law enforcement, will not be able to enter under s.7(16). The I.F.A. plainly intends that commercial activity be dealt with under s.7(18).

As with any access issue, the Inuvialuit may agree to make access available to any person or class of persons, such as persons providing services to government. This ordinary right of the landowner is not in any way restricted by the I.F.A.

B. The Nature of the Right of Entry

The right granted to governments is "the right to enter on and cross Inuvialuit lands". These words should not be construed too narrowly. The right to enter must include some right to be present or to remain on Inuvialuit lands; a narrower construction would be absurd. The right to enter cannot be restricted to entry in order to cross Inuvialuit lands. A mere right of transit is expressed in other parts of the I.F.A. by using different words, such as in s.7(14) dealing with public access and s.7(18) dealing with commercial access. Further, s.7(16) in a later phrase, s.7(17) and s.7(20), in referring to the rights granted in s.7(16), make it clear that those rights are rights of access. Section 7(17), in particular, makes it clear that the generality of the rights in s.7(16) is sufficient to allow access which would encompass the use of Inuvialuit lands. The I.F.A. contemplates that, aside from the specific provision for military exercises in s.7(17), Inuvialuit lands could be entered and used for those purposes under s.7(16).

While the right to enter and cross Inuvialuit lands must be construed broadly enough to allow government personnel to be present on those lands for some period, the right does not amount to a right to occupy lands. If the government wishes to install facilities for any length of time, the expropriation procedures or the various procedures dealing with specific activities must be followed.

C. Categories of Activities

The categories or purposes for which governments have access under s.7(16) are phrased in general terms, but we have already seen that they impose significant limitations. Government agents or employees may enter for "legitimate government purposes relating to the management of their programs or enforcement of their laws". The word "legitimate" does not refer to any special legal classification of government purposes. It simply emphasizes that the right cannot be used by government personnel for ulterior motives. For example a government employee could not use the right to gather information on behalf of a private company, or for personal recreation. Most legitimate government activities will fit into the description of program management or law enforcement, but commercial activity will not, nor will activity that cannot be described as relating to a program that calls for access to Inuvialuit lands.

D. Conditions on Government Access

The government right of entry to Inuvialuit lands is subject to the conditions in s.7(20):

(a) the granting of access by the Inuvialuit does not create responsibility on their part for damages suffered by the user;
(b) users of access rights are responsible for damages caused to the land; and
(c) the user who fails to comply with the access provisions may be removed from the land.

These conditions have already been discussed in the context of public access (part 1.1.1.B of this Report) and commercial access (part 1.2.1.A of this Report).

E. Appropriate Laws or Approved Procedures

After granting the government a right of access to Inuvialuit lands, section 7(16) of the I.F.A. goes on to state that "such access, where applicable, shall be in accordance with appropriate laws or approved procedures." It should be said right away that the drafting of this proviso makes it impossible to construe its meaning with any degree of certainty, even though significant limitations on the government right of access appear to be involved. Two types of situations can be observed; first, where there are laws concerning government access, and second, where there are no such laws.

"Appropriate laws" presumably signifies legislation that confers on government officials the power to enter private land and premises for various specified purposes. There are enormous numbers of such powers for purposes that range from firearms, drugs and other criminal law matters to land and natural resource management matters such as those under the Northern Inland Waters Act (R.S.C. 1970, c.28 (1st Supp.) s.30), Fisheries Act (R.S.C. 1970, c.F-14, s.35) or Canada Land Surveys Act (R.S.C. 1970, c.L-5, s.25). Where such statutory powers exist, it seems that the I.F.A. leaves them unchanged. It does not seem possible that the powers in s.7(16) of the I.F.A. can be taken to be an alternative to the statutory powers. That would contradict the apparent intention of s.7(16) and would also allow government officers to circumvent the careful restrictions that are often written into those statutory powers, a result that the I.F.A. could not have intended. Whether or not a government official exercising statutory powers of entry is also obliged to comply with the entry provisions of the I.F.A. is not clear, but in any event s.7(16) imposes no conditions of any significance that the official would have to observe.

In situations where there is no legislation concerning government access, then s.7(16) confers its own right of entry. If there are no "approved procedures" then the right is relatively untrammelled by terms, conditions and procedures. If "approved procedures" do exist, presumably the government official must comply with them.

What are "approved procedures", and whose approval is required? Neither the I.F.A. nor the Settlement Act give any clue. The approver may be the federal government; it may be each government in respect of its own activity; it may be the Inuvialuit Land Administration; or approval may require the agreement of all parties. The federal government may claim the right, arguing that as it enacts the "appropriate" laws then it logically should approve the corresponding procedures. But the I.L.A. could make just as good an argument on the basis of its rights as private landowner to regulate the use of its lands. No doubt other arguments could be put forward as well, but the plain fact is that there is no way of saying with any degree of confidence who is entitled to approve procedures under s.7(16).

F. Incidental Powers of Entry

A variety of minor powers of entry for government purposes are to be noted in other parts of the I.F.A. They are all more narrow and more specific than s.7(16) in the activities that they authorize. The specific activities, and the provisions that are made in some places for particular procedures and obligations to compensate, should be referred to in each case. These powers of entry may be listed as follows:

- s.7(17): military exercises
- s.7(67): occupation of land in De Salis Bay on a temporary basis
- s.7(85)(a): water management for fish and wildlife purposes, and fisheries research and management related activities
- s.7(85)(b): water management for navigation, transportation, flood control and similar matters
- s.7(85)(c): water management for the protection of community water supplies
- s.7(86): management of the Anderson River Bird Sanctuary and the Banks Island Bird Sanctuaries
- s.7(87): new meteorological and climatological stations. (Also see s.18(35)(e).)
- s.7(88): navigation aids and safety devices
- s.7(89): dredging operations

1.3.2 Implications

A. Persons Entitled to Use Government Access Rights

It is suggested that the Government of Canada take a cautious view of the class of persons entitled to use rights under s.7(16). The basic premise should be that the only persons normally entitled are members of the public service of the federal, territorial or relevant municipal governments. The right of access cannot be loaned out to others, even to persons doing work for the government. Other persons must find their own rights under other parts of the I.F.A. or must make their own arrangements with the Inuvialuit.

B. Program Management or Law Enforcement

The requirement of a "legitimate government purpose" implies that government personnel should be quite clear, in their own minds, about what program, or what law enforcement activities, they are engaged in that necessitates access to Inuvialuit lands. The Government should consider establishing internal procedures to this end.

The Government should assume that activities that are essentially commercial or economic activities are not "legitimate government purposes", even when they are carried on by government departments or Crown corporations.

C. Compliance with Access Legislation

In circumstances where there is legislation (apart from the I.F.A. and the Settlement Act) that gives government officers rights to enter private land, the prudent course of action for government officers will be to comply with that legislation as well as the I.F.A.

D. Approved Procedures

In cases where there is no legislation granting rights of entry on private lands, there is a possibility that the Inuvialuit are entitled to be involved in fixing "approved procedures". For the time being, without such procedures, government rights of access are constrained only by the general words of s.7(16). There seems to be little immediate benefit for Canada in establishing "approved procedures" within the meaning of s.7(16).

E. Internal Procedures

Without raising the uncertainties that surround the term "approved procedures" mentioned in s.7(16), Canada could usefully establish internal procedures for the guidance of its own officials. Canada should encourage territorial and municipal governments to develop similar internal procedures for their personnel. Such procedures would include the matters discussed under Program Management, above, and would ensure that government access rights are used properly in accordance with the I.F.A. and in a manner that will minimize the impact on the Inuvialuit. Powers of access to private lands always require a sensitive appreciation of the rights and feelings of the landowners concerned.

2

P A R T I I

2.0 THE ENVIRONMENTAL IMPACT SCREENING AND REVIEW PROCESS

2.1 Overview

Section 11 of the Inuvialuit Final Agreement is entitled Environmental Impact Screening and Review Process. The objective of this section is self-evident from the title and is to prescribe a public environmental impact assessment and review function for all development projects which affect the Inuvialuit Settlement Region. In so doing, it contains provisions of three types:

* those which identify the type of development to which it applies;

* those which stipulate the structure and mode of operation of the screening and review process; and,

* those which outline the obligations of government with respect to the functioning of the process.

First, it is important to keep in mind the broad definition of "development" contained in s.2 of the I.F.A., when interpreting s.11. "Development" means:

(a) any commercial or industrial undertaking or venture, including support and transportation facilities relating to the extraction of non-renewable resources from the Beaufort Sea, other than commercial wildlife harvesting; or

(b) any government project, undertaking or construction whether federal, territorial, provincial, municipal, local or by any Crown agency or corporation, except government projects within the limits of communities not directly affecting wildlife resources outside those limits and except government wildlife enhancement projects.

Read in this context, s.11(1) stipulates the types of development to which this section applies, as follows:

(a) developments described in s.13(7);
(b) developments in the Yukon North Slope region described in s.12;
(c) developments in the Inuvialuit Settlement Region in respect of which the Inuvialuit request environmental impact screening; and
(d) subject to any agreement between the Inuvialuit and the Dene/Metis, developments in areas including the Aklavik land selections where the traditional harvest of the Dene/Metis may be adversely affected, on request by the Dene/Metis or by the Inuvialuit.

To further specify these provisions, s.12 of the I.F.A. identifies the Yukon North Slope as being of special interest, and spells out special provisions for land disposal, National and Territorial parks, wildlife harvesting rights, management arrangements and economic benefits.

Section 13(7) stipulates that any and all developments "of consequence to the Inuvialuit Settlement Region" which "could have significant negative impact on present or future wildlife harvesting" shall be screened.

Section 13(12) further stipulates that every such development "will be authorized only after due scrutiny of and attention to all environmental concerns and subject to reasonable mitigative and remedial provisions being imposed." This aspect is discussed further in Research Paper #6.

The desired end effect of section 11 is spelled out in s.11(31), which stipulates that "no licence or approval shall be issued . . . unless the provisions of this section have been complied with."

In s.11(2), there are located what appear to be rather important qualifications on the scope of the environmental screening and review process, as follows: "Except for screening and review for the purposes of wildlife compensation, the process described in this section applies only to on-shore development". The important feature of this qualification dealing with wildlife compensation is that it is open to a very wide range of possible interpretations, discussed further below.

The next major objective of s.11 is to stipulate, in detail, the structure, form and basic mode of operation of the two instruments through which this section is to be implemented: the Environmental Impact Screening Committee (EISC) and the Environmental Impact Review Board (EIRB).

The agreement establishes an Environmental Impact Screening Committee (EISC), composed of seven members; three appointed by the Inuvialuit, three by the Federal Government, "of the latter, one is designated by each Territorial Government", and a chairman is appointed by the Federal Government with the consent of the Inuvialiut. Aboriginal organizations in adjacent areas may appoint representatives to screening panels formed if they consider their interests may be affected by a proposed development, in which case, Government representation is increased accordingly.

It is the responsibility of the EISC to review all development proposals which may have adverse effects on the environment or on wildlife harvesting. It also reviews any development proposals referred to it by the Inuvialuit, or by either the Inuvialuit or the Dene/Metis in cases where traditional Dene/Metis harvesting may be affected. A development proposal is reviewed by a panel of the Committee which may decide that no further environmental review is needed. Alternatively, it may recommend to the appropriate authority that no further consideration be given to the proposal as submitted or it may decide that a total environmental assessment and review is required. In the former case, described as "rejection" in Figure 1, an applicant can redefine a proposal, (i.e.) by filling deficiencies, and resubmit it. In the latter case, it may either direct the proposal to a governmental review process (i.e. NEB, EARP), or to the Environmental Impact Review Board (EIRB) established by the agreement.

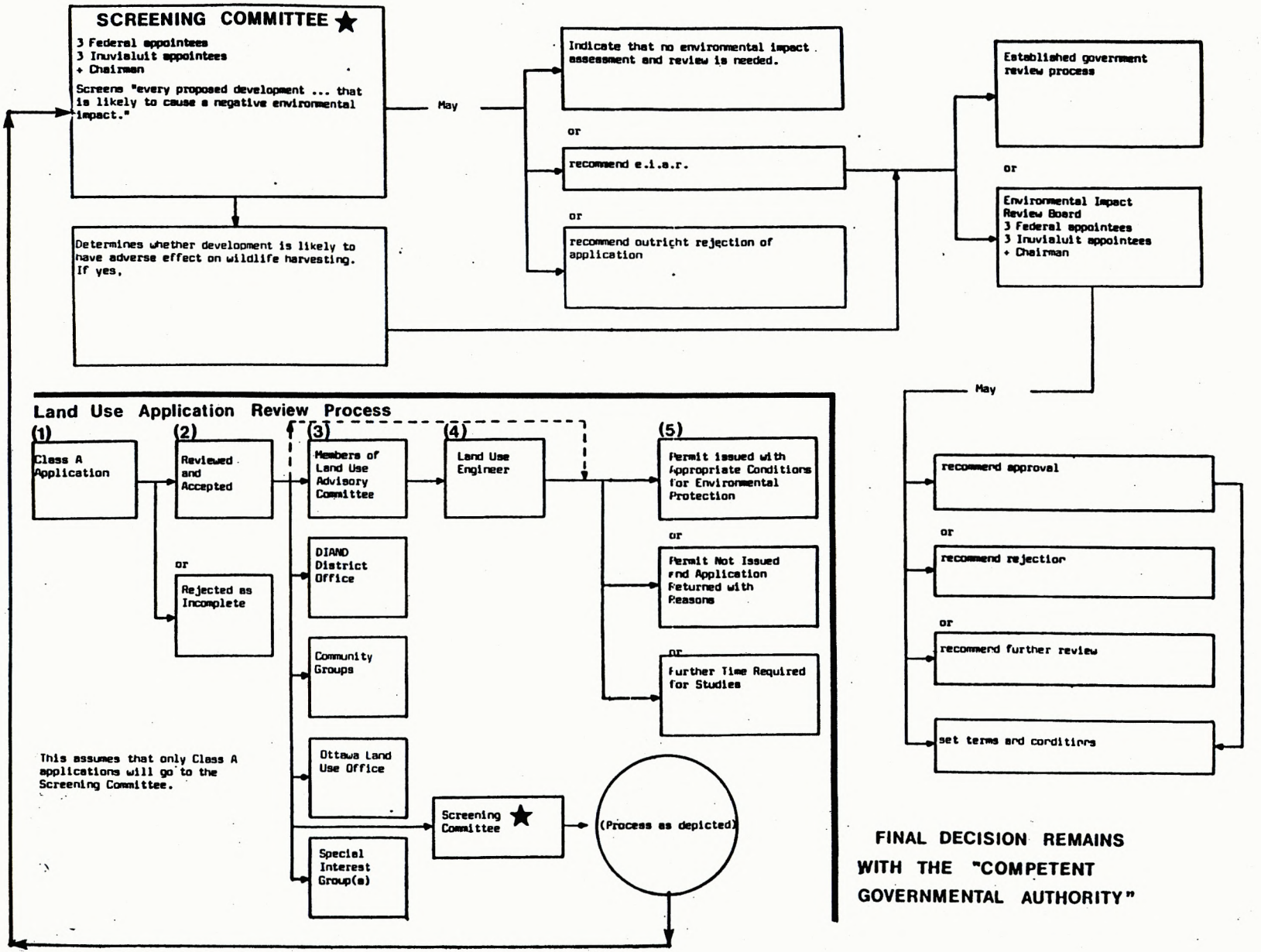
The composition of the EIRB is similar to that of the Screening Committee, subject to provision for altering Territorial Government representation according to the location of the proposed project. It is the responsibility of the Board to recommend whether or not the project should proceed, and if so, on what terms and conditions. It may also recommend further review and specify the additional information required. The responsible government authority need not accept the Board's recommendations, or it may, itself, require further review. It must give written reasons for non-acceptance or modification of the recommendations.

The enclosed Figure 1 presents our depiction of these provisions in flow-chart form and suggests one way, through the normal land use application process, in which proposals could be referred to the Screening Committee. In this example, a project would begin as a Class "A" application (lower left) and work its way through the normal system, one element of which would be a referral to the Screening Committee at the consultation stage. The Committee's deliberations are charted in the upper and right hand portions of the Figure and ultimately result in recommendations to Government, as depicted.

INUVIALUIT FINAL AGREEMENT

Advisory Bodies Include:

- Wildlife Management Advisory Council
- Fisheries Joint Management Committee
- Inuvialuit Game Council
- Inuvialuit Hunters and Trappers Committees
- Research Advisory Council



SOURCE: Developed by RMC from the Inuvialuit Final Agreement

Figure 1

Finally, s.11 also outlines government obligations with respect to the functioning of the process. Sub-sections 3, 4 and 18 deal with the appointment, by Canada, of members and chairmen of both the Screening Committee and the Review Board respectively. Sub-sections 14, 15 and 16 deal with the relationship of this process to other "governmental development or environmental review processes", with the obvious intention to ensure review coverage. Sub-section 23 points out Canada's obligation to "provide to the Review Board the staff required to enable it to fulfill its functions". Finally, Sub-sections 27 to 32 inclusive spell out the relationship of the process to decision-making powers of the "competent government authority", whose responsibility it is to regulate the proposed activity.

2.2 Discussion

The issues which arise out of s.11 can be grouped in four categories, each of which is discussed, in turn, below.

2.2.1 Referral to and Scope of the Process

The most fundamental question related to the process of referral or triggering of the Screening and Review process is a very practical matter of who is responsible for such a referral. Section 11 does not deal directly with this pre-screening, but some would suggest s.11(31), which requires "no license or approval shall be issued . . . unless the provisions of the Section have been complied with", imposes an obligation on the issuer of licenses and/or approvals to refer any proposed development that might apply. However, in our view, this requirement should be interpreted literally and therefore, the only obligation on government is to ensure compliance. Section 13(12) imposes a similar compliance monitoring requirement for impact assessment and mitigation, but is independent of the EISC or EIRB. The only pro-active provision is s.11(12) which clearly places the onus on the "proponents of a development" to "submit a project description to the Screening Committee during the preliminary planning stage".

The interpretation of these provisions of the I.F.A. relate not only to what constitutes initiation of the process, but also its scope. Section 13(7) contains the important qualifiers discussed earlier, such as "developments of consequence", "likely to cause negative impact" and "could have significant negative impact", which are all tied directly to effects on "present or future wildlife harvesting". This, taken together with the provision, discussed earlier, of s.11(2), which limits applicability of the Screening and Review process to on-shore development "except . . . for the purpose of wildlife compensation" has lead to a wide variance in opinion as to the scope of the issues under consideration in the process.

Not surprisingly, some development proponent sources feel these provisions should be interpreted narrowly, thus limiting deliberations to matters directly related to effects on wildlife harvesting and only to wildlife compensation on offshore matters.

Sources in government, and within the process itself, take a much more liberal interpretation. This view, with which we agree, is that s.11(2) is a meaningless limitation and that the scoping provisions must be interpreted broadly on the basis of the need to determine cause and effect relationships in any development proposal in order to adequately determine its effects on either present or future wildlife harvesting or compensation. One needs to understand both the technical aspects and socio-economic effects of the project, for example, in order to determine whether habitat or harvesting activity will be directly or indirectly impacted by the development activity. Therefore, virtually any line of questioning by the EISC or EIRB could be required and be interpreted as reasonable in an effort to determine potential wildlife impacts and compensation implications. However, this considerable variance in opinion clearly points to the need for some better definition of matters on which a proponent must submit information for screening and review.

After initiation of the process, the next step is the screening itself. As discussed earlier, the Screening Committee has the power to determine that no environmental impact assessment and review is needed, to recommend out-right rejection of an application, or to recommend an environmental impact assessment and review, and refer it to an established government process, or the Environmental Impact Review Board. The Agreement does not provide the Screening Committee with the power to impose terms and conditions on a proponent resulting from their screening decision. This much is straight-forward, but one aspect, namely the question of the scope of the referral, requires further consideration.

For example, can the Screening Committee make some determination as to which parts of a project should be referred (or in fact, as to what constitutes a project), or are they limited to making a decision on the totality of what the proponent chooses to describe as a project in the application? As an example, we could consider a hypothetical oil development where the Screening Committee assumes the responsibility of referring only part of the proposal (say the tanker transportation routing) on the grounds under s.11(14), that all other portions of the project were either adequately covered under a previous process (Beaufort EARP), or will be adequately reviewed by other government processes (on-loading and other technical or engineering elements).

The question raises two major legal issues: the scope of the powers given to the Screening Committee under s.11(13), and the scope of the powers given to the Review Board under s.11(24). As to the powers of the Screening Committee, there is nothing in the Agreement which would suggest that the Committee can, in effect, "hive off" certain aspects which it feels the Review Board should examine. The relevant section, s.11(13) clearly states that the Committee shall make a determination about whether "the development"--not part of the development--is subject to assessment and review under the Agreement. Certainly the existence of other possible review processes is contemplated in the Agreement. Under s.11(14), the Committee must take into account prior review processes that have "adequately encompassed the assessment and review function". Similarly, under s.11(15), where the proposed development is, or may be subject to another such adequate alternative process, the Committee shall refer the proposal to the body responsible for that process. However, there is no provision for the referral of only part of the proposal, and one could certainly take the view that insofar as developments are viewed as integrated projects, it will not be permissible, without clear and explicit authorization in the Agreement, to allow the review to be fragmented in this way.

Depending upon the nature of the specific project, it may, however, be possible to resolve the problem by structuring the development as two (or more) separate proposals. If indeed, one discrete part of the project were "hived off" as a separate development, with a formally separate proposal, then there would seem to be no objection to the possibility of the Committee referring one proposal to the Review Board and the "other" proposal to an alternative process or to rule that one of them has been adequately reviewed by another process. Certainly the definition of "development" in the Agreement as (with respect to the private sector) "any commercial or industrial undertaking or venture" would not seem to preclude this possibility, especially since the end result would be entirely consistent with the spirit of s.11--that, so far as possible, reliance should be made on other review processes (and indeed it is noteworthy that the language of s.11(14) and s.11(15) is mandatory in this respect).

Even if we were to assume that the Screening Committee must refer the proposed development as a whole to the Review Board, it might still be that, as a practical matter, part of the review process could be hived off for another body, such as FEARO. There are two possible means for the Board to accomplish this result, both of which arise in s.11(24), which provides, inter alia, that the Board, "on the basis of the evidence and information before it shall recommend whether or not the development should proceed, and if it should, on what terms and conditions".

Where another process has already dealt adequately with one aspect of the proposed development, it would be possible for the Board to rely on such "information and evidence" without necessarily rehearing the arguments and evidence. Clearly, however, the Board would have to address its mind to the adequacy of the information and not merely accept the result of the other review process as automatically conclusive. If the other review process were as yet prospective, it might still be possible for the Board to include satisfactory compliance with the other process as a term or condition of its recommendation that the project should proceed. This possibility is, however, subject to the objection that as a principle of administrative law, it is the Board that is entrusted with the power to recommend. Thus, to hive off part of the project for consideration by another agency, and to accept prospectively that agency's recommendations, would be to invalidly delegate the Review Board's discretion. This conclusion has some force, but might be overcome by the invocation of the Board's power to "recommend that the development should be subject to further assessment and review" (s.11(24)).

If that were to be carried out by means of an alternative process, the Review Board could then eventually convene at the conclusion of such a process and adopt its results as evidence and make a final decision accordingly. Again, the prospects for legal acceptability for such an approach would be improved by the demonstrable effort to conform to the emphasis in s.11 on avoiding overlap amongst different review processes.

There is a related question of whether the Agreement allows the Review Board to review anything other than what is referred to by the Screening Committee. In practical terms, if the Board were to consider that it needed to broaden its investigation of a particular proposal, in order to fully discharge its responsibilities for reasons similar to those outlined above with respect to scope of the entire process, it is difficult to see how their deliberations could be limited in scope.

Sections 22(2),(3),(B) and (11) in the Inuvialuit Land Administration Rules appear to allow direct referral to the Review Board of projects on s.7(1)(a) lands by the Inuvialuit through a screening by "the hunters and trappers committee most directly affected" rather than by the Screening Committee. These provisions seem in conflict with the I.F.A., which does not contemplate the Screening Committee being by-passed by a direct referral to the Board. This, of course, could affect government's role in the screening of some projects.

The final issue of this nature concerns the question of additional participation in either a screening or a review process. This additional representation could take place in response to s.11(8) which states "where an organization recognized for an adjacent comprehensive land claim settlement considers that development being screened is capable of having a negative environmental impact to the detriment of native persons using or occupying the Inuvialuit Settlement Region and the organization represents those native persons, it shall have the right, at its expense, to designate for the screening panel one additional member . . ." or more than one if agreed to by the Inuvialuit. In order to maintain the balance envisaged for the Screening Committee, Canada then has the right to designate additional members.

Section 11(19) makes the same provisions apply to the constitution of a Review Board. The question arises that although it was likely intended to apply to the Dene-Metis, TFN and Yukon claims areas, could it not also apply to Alaska? Section 11(9) may effectively eliminate this possibility, since it refers to the expiration of this right unless "like representation is available to the Inuvialuit on a like panel" once the adjacent claims are settled. The Alaska claim is settled and we are not aware of any provision which allows for the Inuvialuit to be represented on Alaskan review processes.

The more immediate concern is that the wording suggests an adjacent aboriginal organization can exercise this right at their complete discretion. Does this mean that every potentially relevant proposal should be referred to all adjacent aboriginal organizations for their "pre-screening"? Is any initiative on the part of the issuer (Canada), the Inuvialuit or the Screening Committee and Review Board required? At least with respect to the Screening Committee portion of the process, this potential for additional appointees, triggered under s.11(8) or s.11(6), which calls for the increase in Territorial Government representation "as their respective jurisdictions increase", are of questionable practicality.

This is so because it is far from clear under what conditions, how it would be done, or who, in fact, would be responsible for inviting the extra participants. More importantly, the fact that all appointees by Canada (which would include additional Territorial representatives or increased numbers to maintain the Canada-aboriginal balance) are required to be made only by Order-in-Council which may take several months' lead time. It appears that there is no way around the requirement for Order-in-Council appointment, and therefore, an amendment to s.11, which would have the effect of granting the Minister (rather than Canada) the right to designate these additional members, might be considered.

2.2.2 Duplication and Overlap of Existing Processes

This issue generated by far the most discussion during consultations with stakeholders. Interestingly, there was a high degree of agreement on the fact there was a potential problem, and a high level of confusion and disagreement as to the seriousness of the problem and what to do about it. Resource developers, and in particular, the oil and gas industry, have faced a complicated, uncertain and ad hoc decision-making process for the past 15 years in the North. There have been a number of initiatives announced, with little net effect so far, with the stated purpose of reviewing and streamlining the regulatory structure for resource development.

Although there is wide-spread recognition of the need for integration, no progress can be discerned. The inevitable effect will be a slowing-down of the process, making it more cumbersome and complex. It will also result in inconsistent standards for environmental and socio-economic impact assessment, protection and regulation between industries and jurisdictions. Linear projects, such as pipelines, could conceivably have greatly different terms and conditions on similar activity in adjacent areas, or even within the same area. It would seem reasonable to strive for either simplicity or certainty in a regulatory structure. The present trends suggest neither is likely, at least in the short-term.

Although in one sense much of this is not directly relevant to this assignment, which concerns the implementation of the I.F.A., it is important, as background, to understand why these provisions of the I.F.A. can raise so much discussion, particularly in the resource development industry, whose activities they are intended to regulate. At one level, industry likes the I.F.A. provisions, for at least it is relatively certain that the process has to be gone through--which cannot always be said of government processes. Apart from the obvious problem of duplication, then, the main concern is one of whether the process can respond adequately to the needs of the industry.

This question is most critical when it comes to timing. Time imperatives of the resource industry and its international market were understandably not recognized in the I.F.A. Aside from the requirement for "expeditious" treatment, there are no time limits or even guidelines in the I.F.A.'s screening and review process and there is little explicit recognition that it must relate in a logical and meaningful way to both the proponent's and the permit issuer's timetables. This problem could be resolved, in the industry's view, by a formal agreement on major project public review which would eliminate duplication, recognize and incorporate the need for regional or local input to decisions through a public review process and yet is administered by the competent government authority that is responsible for issuing licenses and approvals. The oil and gas industry preference for this so-called "single window" is the Federal Department of Energy, Mines and Resources.

For its part, the I.F.A. clearly anticipates the need for the elimination of overlap and duplication, and the practical benefits of integration, through the provisions of ss.11, (14-16), (24), (27), (28) and (32). The problem in administering the provisions is primarily one of trying to decide what other Government review processes will, in fact, adequately cover the issues, whether public reviews will, in fact, be required, and which of many alternative streams through the regulatory maze, a particular project might take.

A basic intent of the Inuvialuit screening and review provision seems to be the protection of Inuvialuit interests in light of this regulatory uncertainty. Who is to say when a project will be required to go through an EARP public hearing, for example (several mines have not been required to do so)? Even when it comes to the National Energy Board, whose requirements are very clear with respect to interprovincial pipelines, there is the question whether public reviews under the NEB process adequately deal with field development effects and other ancillary issues. There is always the possibility of integration on a case-by-case, or ad hoc basis. However, it did not happen in the pre-EARP days of the Mackenzie Valley Gas pipeline, which was subject to both special public reviews in Yukon and NWT and National Energy Board hearings; or with the more recent Norman Wells project, which was subject to both EARP hearings and NEB hearings.

In principle, it should be possible on a given project to establish some common ground to co-ordinate at least the public review aspects. However, this approach will inevitably add a considerable length of time to the process in order to negotiate those arrangements on a project basis. It also begs the question: what type of a project and what circumstances would trigger an attempt to achieve this level of integration? If these questions can be answered, then there appears to be no reason why some sort of formal arrangement for integration of these processes cannot be reached on a comprehensive basis.

We suggest they can be answered, since there are many existing terms of reference and related application guidelines for public review processes and therefore, no need to re-invent the wheel. The single-agency concept and the arguments behind it are far from new (it was argued extensively before both Berger and the NEB during the Mackenzie Valley pipeline debates).

Both the Environmental Impact Screening Committee and the Environmental Impact Review Board are currently working on detailed terms of reference and procedures which will include guidelines for screening and review, which may go some way to limiting or controlling overlap or duplication problems. These draft guidelines were not available to the study team, but their draft nature obviously provides an opportunity for further discussion and input on this issue. For the moment, both the Screening Committee and the Review Board are proceeding cautiously in order to gain practical experience to ensure the mandate is carried out.

The general effect is that virtually all activity in the Settlement Region is looked at by the Screening Committee, right down to individual land use permit applications. Practical interim guidelines for screening suggest they wish to consider any land use permit application which is part of a logical sequence of activity leading to the accomplishment of a larger development or activity objective, as well as any development application which proposes activity spread over more than one operating season.

The largest practical problems are, as mentioned previously, to determine what government is going to do when reviewing a particular type of activity, and the fact that a land use permit application is often the first indication of development activity which the Screening Committee sees, and this is often too late to consider broader or more fundamental implications of the application. At this point, circumstances dictate that they be conservative and refer anything with potential for significant impact to the Review Board and leave it to them to negotiate with Government as to whether Government-sponsored public review would be more appropriate.

2.2.3 Administrative Concerns

An administrative issue of considerable importance to many informants is the potential for conflict of interest affecting the deliberation of regulatory processes under the I.F.A. Some people maintain the Inuvialuit are, and will remain, easy to deal with in development matters, when some trust and experience has been established on both sides, because they also have a vested interest, as major landowners, in development proceeding. Others maintain while this may be true of their own lands (sub-surface rights to s.7(1)(a) and the requirement for benefit participation agreements on s.7(1)(b)), they are far less certain with respect to developments which do not directly impinge upon Inuvialuit lands or for linear developments, such as pipelines, which have very special land rights and regulatory needs.

Still others suggest that regardless of their basic approach to development regulation on a given project, there is an inherent conflict of interest, since the parties making the decisions are also those who can benefit from those decisions. We do not believe the conflict-of-interest argument is compelling with respect to the environmental screening and review process, since the institutions involved are mandated by the legislation and the Agreement to be totally independent. In any event, the basic conflict, on an institutional level, would be hardly different than that which currently faces government in general, or INAC in particular.

The question of individual conflict of interest is not so clear-cut, but it, too, is little different in the case of the Screening Committee and Review Board than it is for members of any public regulatory tribunal, commission, or board. As is the case with these bodies, a committee or board member must avoid any reasonable apprehension of bias. This would occur if they were not to act as independent individuals but rather take instructions from their nominating organization, or become involved in sensitive situations which would include current or past employment by, or contracting with, an applicant or intervenor in an application, and having a financial interest in an application or an intervenor.

These normal conflict of interest provisions could pose a problem with respect to the functioning of the Screening Committee and Review Board for two reasons. First, the total number of Inuvialuit with appropriate skills and experience to sit on the EISC or EIRB is relatively small, and of course, it is this same pool of talent which is drawn upon to fulfill a very large demand for political and economic decision-making in the Inuvialuit Settlement Region. Any one individual has to wear a large number of hats, and the potential for intentional or unwitting conflict of interest is inherent.

Second, under these normal guidelines, virtually all Inuvialuit would be "biased" on any application by the IDC, for example, and anyone who has been employed or contracted by the oil and gas industry (and this includes a very large number of people) could be "biased" on any industry application. The need for some internal rules in this regard is obvious, but the task is daunting.

Another significant administrative issue appears to relate to the question of staff or secretariat support for the screening and review function. No mention is made in the I.F.A. of the need for support for the EISC, although s.11(23) states "Canada shall provide to the Review Board the staff required to enable it to fulfill its functions". We were given to understand that the whole question of staff support or a secretariat for the many boards and agencies established under the I.F.A. and the financial arrangements related thereto has been the cause of considerable confusion and administrative difficulty in the early stages of implementation of the Agreement.

A joint secretariat in support of these institutions, which include the Screening Committee and Review Board, is now being set up and the problem may rectify itself in functional terms. It is not part of our mandate to investigate the financial arrangements of implementation (in fact, at least one other study appears to be underway), but s.11(23) appears to be rather unrestricted, at least with respect to the costs that could be incurred by Canada in assisting the Review Board with its mandate.

From a practical perspective, it would appear that both the Screening Committee and the Review Board need some routine administrative secretariat support in order to expedite, standardize and formally record their deliberations. The Screening Committee will need to develop guidelines over time, which will have the effect of designating a more or less routine process for certain non-controversial applications. Many of these functions could be delegated to a secretariat; otherwise the whole process becomes far too cumbersome.

The Screening Committee, but especially the Review Board, from time to time will require very specific technical help to consider adequately the implications of a project. This, in fact, may be what was envisaged under Section 11(23), and this is entirely appropriate. However, the question arises as to whether this technical assistance should be contracted for directly by the Screening Committee or Review Board, thus fulfilling the independence requirements, or seconded from government on an as-needed basis. It would appear obvious that it is not practical to try to retain, as part of a permanent secretariat, the broad set of technical capabilities that might be required.

Two further questions arise. One is the ability, or lack thereof, of seconded government staff to become formal technical witnesses, if required. There was a considerable problem in this respect during the Beaufort EARP hearings regarding the technical specialists of some Federal Government agencies. The final question is whether or not there should be a distinction between technical experts retained by the Review Board to assist in their deliberations, and those retained to examine a given issue in isolation from the Board and present formal testimony on the matter.

The final administrative issue which we have identified has to do with the role of the general public or public interest groups as intervenors in, or parties to, a public review process. In virtually every Northern inquiry into a major project that has taken place to date, the availability of funding for such intervenors to adequately prepare for the process or participate in it, has been a major issue. We can find no evidence that this has been considered and dealt with, as yet, in the context of the Inuvialuit Environmental Impact Review Board, but there is no question that it will arise during the first formal public review.

The I.F.A. makes no provisions of this nature, with the exception of stating in Section 11(8) and (19), pertaining to the participation of other aboriginal organizations in screening or review panels that they must do so at their own expense. These groups, of course, may also wish to be intervenors in a given review. Criteria for intervenor funding are extremely difficult to develop and implement. Once intervenor funding is granted to one group, it is hard to say no to any others. This, in turn, begs the question of overall EIRB funding arrangements and their need to be responsive to very unpredictable demands on short notice.

2.2.4 Decision-Making Powers

Questions to be considered under this issue range from the fundamental to the routine. On a routine level, there has been some discussion whether or not the absence of either an Inuvialuit, a Territorial Government or a Federal Government appointee to a screening panel affects the ability of that panel to make any decision at all. The issue of quorum was first raised in respect to the absenteeism of a Territorial representative when he had resigned his position from the Territorial Government and moved away.

Under s.11(6), each screening shall be carried out by a panel that shall include on it a member designated by the territorial government in whose jurisdiction the development under consideration is being carried out. This appears to make a territorial representative a required nominee to virtually all panels. Moreover, s.11(17) requires that decisions of the Screening Committee "shall be made by a majority vote of the panel appointed . . . and shall be signed by all panel members".

The Agreement is silent as to the consequences of the failure of a nominee to actually attend sittings of the panel. However, it does provide (s.11(7)) that:

> Where any of the parties fails to nominate a sufficient number of persons within a reasonable time, the Committee may discharge its responsibilities with such members as have been appointed.

What are the implications of these provisions for the case where a designated member exists but chooses not to participate on the panel? In our view, one should distinguish initially between the situation where the member has announced prior to the particular development screening that he or she will not sit and the situation where this refusal emerges after the panel has begun its review of a project.

In the former case, it is questionable whether the Committee could validly enter on its review; clearly the appropriate step would be for the designator to seek the resignation of its nominee and select a replacement. However, it should be pointed out that even in this case, this could conceivably be impracticable. Section 11(5) says the term of office of permanent members shall be three years, with no procedure specified for removing a reluctant member. At the least, one could conceive of long procedural delays in initiating such a removal. In that case, the result may be more likely to approach that of the second scenario.

The second scenario is one where the member stops sitting during the course of a screening process. Does this suggest that the panel must start over again, waiting until a new nominee is appointed? In our view, this is an unlikely result.

There are a number of circumstances that might legitimately result in the failure of a "required" member to sit. Two obvious possibilities are illness and bias. Is it reasonable to assume, in the first case, that the review process must be indefinitely delayed; and in the latter, that the entire process must grind to a halt while the member is removed from the Committee and then replaced by a new one--and that this procedure must be repeated for every other instance where a conflict of interest arises? Surely if we are to read the Agreement so as to give effect to it as a workable mechanism, the answer must be in the negative.

This conclusion is buttressed by other clauses in the agreement. First, s.11(3) provides for only one nominee by each territorial government; if the presence of a territorial nominee on each panel had been crucial, surely the Agreement would have provided for the nomination by each territory of more than one permanent member to deal with the sort of situation outlined above. Secondly, s.11(7), referred to earlier, does contemplate situations where the Committee may act without a territorial nominee. Finally, and crucially, the Agreement emphasizes in s.11(13) "[o]n receipt of a project description, the Screening Committee shall (proceed with its determinations) expeditiously". Similar language is used in s.11(11).

In summary, it appears that the mandatory language of s.11(6), with respect to the composition of each panel, is intended to protect the interests of the different parties in having a voice on the panel. If they choose not to exercise that voice, whether by not appointing a member (s. 11(7)) or by failing to nominate an effective member, these failures cannot, of themselves, be sufficient reason for delaying the screening and review process.

Another concern has to do with the effect on the process of a lack of co-operation on the part of a proponent or other witness. With respect to the Screening Committee, the proponents of a development are required, under s.11(12), to submit a project description containing certain information. The failure of the proponent to comply will have one of two results. If the proponent does not send any project description, the Screening Process will not be engaged, since under s.11(13) it is triggered by the "receipt of a project description". If, however, the description is inadequate because of the failure of the proponents to be forthcoming, it would appear that the process will move ahead. However, the wording of s.11(13) as to what the Committee shall decide is significant here. Assuming that the deficiencies are not so critical as to warrant an outright termination of consideration (certainly a possibility), the Committee must indicate either that the development "will have no . . . significant negative impact" or that it could have significant negative impact" (and thus be subject to review). Where there is doubt, then, the language clearly suggests referral for formal review. Thus, the consequence of a failure to co-operate, on the part of the proponent, is simply the increased likelihood of further review.

If the failure to co-operate exists on the part of government witnesses, this similarly would not halt the process. However, where that non-cooperation was, as a matter of government policy, the proponent (or other interested parties) might have remedial possibilities through the use of mandamus (obtaining a court order requiring, for example, the production of information to which the party had a legal right), though this is certainly not free from doubt. If the non-cooperation is not sanctioned by government, presumably internal disciplinary measures might be applied by the appropriate department.

Generally speaking, the same comments with respect to non-cooperation would also apply to the Review Board, with the exception that the triggering mechanism will be the Screening Committee's referral rather than the receipt of the project description.

Another issue of significance has to do with how the powers of the Screening Committee and Review Board fit in with decision-making of the "competent government authority". As discussed previously, s.11(31) and s.13(12) combine to clearly put the onus on government to ensure that regulatory aspects of the Inuvialuit Final Agreement have been complied with.

Sections 11(13) and 11(24) require the Screening Committee and Review Board respectively to "expeditiously" carry out their tasks. Section 11(24) further requires that this expeditious review be undertaken "on the basis of the evidence and information before it". While members of the Screening Committee and Review Board may be anxious to avoid regulatory duplication, they must also make sure impact concerns are fully addressed. Therefore, exercise of s.11(16), which enables the Screening Committee to refer a project for public review by the Review Board if normal government processes do not, or will not, adequately encompass the assessment and review function, or if the review body declines to carry out such functions, will have the effect of delaying the Screening Committee decision on any marginally-controversial project until they are certain how government review processes intend to deal with it.

Furthermore, what is the Screening Committee or Review Board to do if the development proposal is submitted to them, expeditiously dealt with, approved, and then altered in some way, when submitted to relevant government licensing or approval processes? What would constitute such a significant change that compliance with the provisions of Section 11 were called into question? These circumstances, which could easily arise on a major project that constantly evolves and changes as a result of progressively more detailed planning which takes place while regulatory consideration is underway, again provide a reason why the I.F.A. process may tend to act later rather than sooner, and reinforces the need to deal with this concern.

There are two possible tacks to deal with the problem of changes to a project subsequent to consideration under the I.F.A. process; one, involving the discretion of the Review Board, and the other, involving the role of the Screening Committee. First, with respect to the Review Board, it has been noted previously, that the Board, under s.11(24), may specify the "terms and conditions" under which the project may go ahead. Presumably it could spell out some range of acceptable modifications, although it is unlikely this could extend to wholesale anticipatory approval of major revisions. In the latter case, the Board would clearly be open to charges of improper delegation.

A more practical approach to dealing with the possibility of substantial and unforeseen revisions lies in an examination of the powers of the Screening Committee. If indeed we accept that re-submission is a possibility, the actual process need not be an onerous one. Since under s.11(14), the Committee can look at the results of prior review processes, it is quite possible that even major changes to the project that have been necessitated, or at least considered, by other regulatory processes could be taken into account with relatively little delay by the Committee, and further review would presumably be waived pursuant to a finding under s.11(13)(a). In the result, the possibility of a full-blown re-hearing before the Review Board is largely theoretical.

There is concern in the oil and gas industry that the Inuvialuit will require another public review process if they are unhappy with the outcome of a government-sponsored process or on the technicality that some detailed planning changes were made. There is also concern that for developments on s.7(1)(b) lands, they could use a requirement for a Participation Agreement to place unreasonable terms and conditions on a project otherwise approved to the point where this could be an effective veto of the government approvals. This concern seems unfounded, given that Participation Agreements are subject to arbitration.

The breadth of the Board's mandate to discuss issues which go beyond effects on wildlife harvesting and compensation was discussed earlier, but begs the question of what recourse the Board would have to an unco-operative applicant who may not agree with this broad interpretation. There are two reasons why the EIRB's power is significant, and these may have implications for their willingness to refer projects to other processes. One is simply the supremacy of the Act and the Agreement over other legislation. The second would be the ability of the Board to simply stop the proceedings and therefore, make s.11(31) relevant. The provisions of s. 11 will not have been complied with. Once they have submitted recommendations, the government can choose to ignore them, under ss. 11(29) and (32), but s.11(31) must be fulfilled.

2.3 Implications of Section 11 for the Government of Canada

Given the above review of issues and stakeholder positions with respect to the Environmental Impact Screening and Review Process under the I.F.A., the following points should be considered by Canada.

2.3.1 Screening Committee and Review Board Guidelines

A comprehensive set of terms of reference and detailed operating procedures are required for both the Screening Committee and Review Board, on an urgent basis. Draft terms of reference for both are apparently under active consideration. Sections 11(11) and 11(23) allow the Screening Committee and Review Board, respectively, to "establish and adopt by-laws and rules for its internal management and its procedures". This would appear to be the appropriate mechanism to address the following concerns:

* There is a need for required response times for various steps (a definition of "expeditious"). The only time requirements in s.11 deal with government's response (within 30 days) to modification, rejection or non-implementation of the Review Board's recommendations.

* There is a need to clarify what constitutes a quorum on a Screening Committee or Review Board panel. Since there is uncertainty about how the panels are to function with respect to precise membership, what is needed are rules relating operating authority to attendance/composition of panels. In the interests of administrative efficacy, the Screening Committee, in particular, must be able to function in the face of occasional absenteeism.

* There is a need to categorize applications/referrals by type or level of activity so that screening of routine proposals is facilitated (something similar to type A and B land use permits under the Territorial Land Use Regulations).

* There is a need for rules with respect to the provision of expert/technical support to the Screening Committee and Review Board. It should be noted that government is not obliged to provide support for the Screening Committee. Should there be a distinction between administrative or process advisors (who presumably could help in evaluation of evidence, deliberations and decision write-up) and panel-retained expert witnesses (who, having given testimony on an issue perhaps should not assist in weighing the evidence of others on the issue)? Furthermore, the question of secondment from government versus direct contracting should be considered, particularly with respect to the ability to give independent evidence/advice.

* Government needs to address implementation funding issues with respect to Screening Committee and Review Board activities. Financial issues are the subject of a separate study not available to the study team, but consideration should be given to appropriate criteria for the funding of the Screening Committee and Review Board (including staff and special purpose advisors) which are activity-based. A directly-related issue is the development of rules for the funding of legitimate intervenors to enable participation in Review Board deliberations.

* There is a need for conflict of interest rules for both Screening Committee and Review Board members, which take into account the special circumstances relating to the multiple roles forced on the limited number of Northerners with appropriate administrative capabilities/experience.

2.3.2 Project Description

Comprehensive guidelines for the preparation of a "project description" to be filed with the Screening Committee are also urgently required. It appears clear that s.11(12) anticipates direct dealing between the Screening Committee and the proponent. However, what are the precise information requirements of the Screening Committee, and how do these match with those of a government permitting agency to which a proponent must also apply?

Various other parallel processes call for an Initial Environmental Evaluation and there are many sets of such guidelines, all similar, in existence. This provides one small example of an opportunity to integrate regulatory requirements, and an attempt should be made to reach agreement with other agencies (INAC, COGLA, FEARO, NEB, GNWT) on what constitutes an acceptable I.E.E.

These guidelines should, among other things, address:

* details of the referral process;
* relevant timing requirements/considerations (see 2.3.1);
* co-ordination with other relevant processes;
* the appropriate scope of the "information and technical data" required under s.11(12)(d).

2.3.3 User Information

Concurrent with the development of detailed terms of reference and guidelines, addressed in 2.3.1 and 2.3.2, Canada should undertake or facilitate the production of a comprehensive User's Guide pertaining to all aspects of the Inuvialuit Environmental Screening and Review Process. The intended audience would include development proponents, government officials (as both a reference document and an operations manual) and the general public. Such a Guide should use plain language and graphic depictions of the process, and this should be kept in mind when finalizing the information it is intended to present.

2.3.4 Review Process Co-ordination

The final issue goes beyond the scope of this study, but it is the one on which there is the strongest stakeholder concern, particularly in the oil and gas industry. It involves the need for some systematic co-ordination, if not integration, of various major project regulatory review processes. At a minimum, it would be desirable to develop arrangements which would ensure elimination of duplication, at the public review stage, particularly where an "issuer" of a permit is required by legislation to hold public hearings, i.e. NEB, and for the issuance of terms and conditions of the approval. Both these are enabled by existing provisions of the I.F.A., and therefore, it should simply be a matter of developing appropriate procedures, including a clear and comprehensive framework for co-ordination of various government processes.

3

P A R T I I

3.0 SAND AND GRAVEL OPERATIONS

3.1 Overview

Section 7(27) to Section 7(42) of the Inuvialuit Final Agreement deal specifically with the management of sand and gravel on Inuvialuit lands. Priorities are set, types of levies are defined, licences and concessions are described, restraints are identified, and a process for arbitration is established.

The role of the Government of Canada is restricted to:

* jointly, with the Inuvialuit, preparing forecasts of community requirements and revising these forecasts at least every five years (s.7(27));

* jointly, with the Inuvialuit, identifying zones within the Western Arctic Region where removal of sand and gravel is prohibited, in total or during certain periods of the year (s.7(30));

* confirming for the Inuvialuit Land Administration that an applicant for gravel has his project approved by the appropriate level of government (s.7(36));

* having the Minister of DIAND revoke a gravel concession to the Inuvialuit Development Corporation if the Minister is satisfied that the IDC is providing sand and gravel in an unreliable or inefficient manner, or is charging excessive prices (s.7(41));

* aiding in the establishment of the arbitration process (s.18).

3.2 Discussion

Sand and gravel belong to the Inuvialuit on both s.7(1)(a) lands and s.7(1)(b) lands, since they are specifically excepted from the definition of "minerals" in Annex M. The starting point of a review must, therefore, be the fact of Inuvialuit ownership of the resource. However, this private ownership is very considerably constrained by the I.F.A., with the apparent objective of preventing the Inuvialuit from exercising monopoly powers to the detriment of the public interest. The operation of these constraints is subject, throughout, to the jurisdiction of the Arbitration Board to settle any differences that arise.

While the granting of licences and concessions is the key component of the sand and gravel system, the granting of these rights by the Inuvialuit is controlled by the procedures that set aside sand and gravel reserves for different priorities of users. In this overview, reserves will be considered first, followed by zoning, licences and concessions, pricing and Inuvialuit Development Corporation concessions.

3.2.1 Reserves of Sand and Gravel

The Inuvialuit are obliged to reserve supplies of sand and gravel for three different levels of priority:

(i) to meet public community needs in the Western Arctic Region and in Inuvik;
(ii) for the direct private and corporate needs of the Inuvialuit and not for sale; and
(iii) for any project approved by an appropriate government agency (s.7(27)-(29)).

The priorities are according to different needs, or purposes, and not according to whether the character of the operator is commercial, governmental or otherwise.

The first priority exists because the communities are surrounded by Inuvialuit lands, as shown by the map in Annex "C" of the I.F.A. The Inuvialuit own all the sand and gravel for many miles around most of the communities. Section 7(27) describes what sand and gravel must be set aside. It must be of appropriate quality; it must be within reasonable transport distances; and the reservation must be based on reasonable 20-year forecasts of the volumes required from Inuvialuit lands. The procedure for making these important forecasts is laid down. They are to be prepared jointly by the Inuvialuit and the appropriate levels of government. In this context, the involvement of federal, territorial and local governments is likely to be necessary. The forecasts are to be based on community estimates of requirements. They are to be revised as required, but at least every five years.

This co-operative forecasting process requires INAC to take an active role. The Inuvialuit can reasonably expect INAC to co-ordinate the government side of the discussions and to ensure at the outset that adequate information is available. Any delay in bringing that information forward would postpone the Inuvialuit's obligation to reserve supplies. A related point about the forecasting process is that the availability of other sources of supply is relevant. There is no general obligation on the Inuvialuit to supply all community and infrastructure needs for sand and gravel from their lands. The determining factor will, of course, be the reasonableness of the transport costs involved. Any dispute in fixing forecasts is, of course, subject to arbitration.

The second priority of reserves of sand and gravel is for the Inuvialuit's own needs. Similar 20-year forecasts are required, but the obligation to prepare them lies on the Inuvialuit Lands Administration alone, and not on the government. If dissatisfied with the forecasts and reserves set aside, the government and affected industrial users could challenge them in arbitration; but the quantities involved are unlikely to be large.

The third priority, being a residual category, requires no forecasts.

3.2.2 Zoning

Related to the creation of reserves is a power under s.7(30) to identify zones where sand and gravel are not be removed, or not to be removed at certain times of the year. Those zones may be set apart for environmental reasons or because of other land use conflicts. The power is to be exercised jointly by the Inuvialuit and the appropriate level of government, which will normally be INAC. The power applies to Inuvialuit lands but also to other lands in the Western Arctic region. The identification of such zones will most conveniently be done at the same time as the setting aside of sand and gravel reserves.

Conversely, in s.7(31), the I.F.A. identifies the Ya Ya Lakes eskers as a zone which is to be developed for sand and gravel purposes.

3.2.3 Licences and Concessions

As s.7(32) states, the right to remove sand and gravel from Inuvialuit lands requires a licence or concession obtained from the Inuvialuit Land Administration. It appears that the ILA is under a general obligation to make sand and gravel available, and will, therefore, not be able to refuse to supply it in the ordinary course of events, whether it does so under a licence or concession. Section 7(29) provides that the Inuvialuit "shall make available sand and gravel for any project" that has governmental approval. Section 7(35) provides that in granting a licence, the ILA "shall, to the extent of its legal capability, ensure that sand and gravel is made available to interested parties at reasonable prices". Possible exceptions to the general obligation may arise under some circumstances.

The ILA may issue either a licence or a concession. Section 7(33) defines each of them as follows:

(a) a licence is a non-exclusive right to remove a certain volume of sand and gravel for a specific purpose during a period not exceeding one year from a specific sand and gravel pit; and

(b) a concession is the exclusive right to explore, develop and produce sand and gravel from an area for a period specified in the concession.

It is reasonably clear which of these the ILA will choose to issue in various circumstances. A licence will be appropriate for a contractor or a government agency building a project, and knowing how much material it will need and from where . A licence is to be specific as to quantities, as to the purpose for which the material is required, and as to the place from which it is to be taken. It is to be for a short period and it does not give the licensee any control over a supply of the resource. It merely allows him to enter, dig and take the quantity agreed upon.

A concession is different in that it gives the holder exclusive rights to the use and control of the sand and gravel resource within the area of land that it covers. A concession need not be limited as to quantities or as to the end purpose to which the material is to be put, and it may have a term that runs for some years. A concession will be appropriate for a company in the business of supplying sand and gravel. However, licences and concessions need not be regarded as different from each other. Restrictive terms imposed in a concession could give it many of the characteristics intended for a licence.

Two points may be noted about the granting of licences. First, the ILA is obliged under s.7(37) to issue a licence to any person for up to 50 cubic yards of sand and gravel per annum for personal use. In this, the I.F.A. echoes the provisions of the Territorial Land Use Regulations, C.R.C. 1978 c. 1527, s.10. Second, s.7(36) requires an applicant for a licence to demonstrate that his project has been approved by the government and that a contract has been awarded. Presumably, this requirement only applies to projects that are themselves subject to government approval.

3.2.4 Pricing

Three provisions of the I.F.A. regulate the prices that the Inuvialuit may charge for sand and gravel. Section 7(35), mentioned earlier, requires the ILA, in granting a licence, to ensure that sand and gravel is made available to interested parties at reasonable prices. This general rule is confined to licences, probably on account of the fact that the pricing practices of concession-holders are out of the control of the Inuvialuit. Secondly, s.7(32) allows a licence or concession to impose a maximum royalty of 75 cents per cubic yard, adjusted for inflation since 1982. Thirdly, a licence or concession may impose payments "to cover reasonable administrative costs, and where they are applicable and justified, reasonable land reclamation costs": s.7(34).

The reasonableness of prices under s.7(35), the reasonableness of administrative costs and the applicability, justification and reasonableness of land reclamation costs are subject to arbitration. The right to charge a royalty up to 75 cents per yard, however, is not.

Gravel users are concerned about costs. Each component of the price is escalated annually to account for inflation in the Gross National Product since 1982. It now costs $1.77 per cubic yard for gravel at the source. Almost half of this cost is for "reasonable administrative costs" (33.9 cents), and "reasonable land reclamation costs" (39.3 cents). There is concern within industry that these are not reasonable charges and that the reclamation fund will be much larger than is necessary. These may or may not be valid points, but they only concern Canada if it is paying these charges. Any user can exercise the arbitration process defined in the Agreement to dispute these levies.

It should be clearly noted that the government does not possess any general power or responsibility to supervise sand and gravel prices. Nor does it possess any general power to inspect Inuvialuit financial records on the subject without Inuvialuit consent. The government has responsibility for reserves forecasting, and in respect of IDC concessions (see below), but it has no general regulatory powers outside those specific matters. Its only general remedy, if it considers that sand and gravel prices are unacceptable, is to initiate arbitration proceedings under one of the heads outlined above, and to put its case to the Arbitration Board.

3.2.5 Concessions to the Inuvialuit Development Corporation

The I.F.A. deals in some detail with the possibility of the Invuialuit Development Corporation taking up a sand and gravel concession. The sole concern of the Agreement is to ensure an IDC concession is efficient in its operation and reasonable in its prices. Section 7(38) requires that the concession shall require that the IDC will make sand and gravel available at reasonable prices to interested parties, bearing in mind the priorities set out in subsections 27 to 29. What are reasonable prices are then defined in some detail in s.7(38) and (39); and s.7(40) requires the IDC to maintain the necessary financial records and to allow the ILA and "the appropriate government officials" to inspect them.

Even though the requirement as to reasonable prices is stipulated for in the I.F.A., it has effect as a term of a concession contract between the ILA and the IDC. A third party, such as an industrial customer, would not have the status of a party to that contract and may face some difficulties in relying on s.7(38) to take the IDC to arbitration. It is also doubtful that the government can do so.

What the government does possess, under s.7(41), is an unusual power to take action where the Minister of Indian Affairs and Northern Development is of the opinion that the IDC is providing sand and gravel in an unreliable or inefficient manner or at excessive prices. He may notify the ILA, in writing, with the effect that the ILA must terminate the concession and offer it on a competitive bid basis.

The Minister's decision to take this step is not subject to challenge by arbitration (s.7(42)). The Inuvialuit could challenge it in the courts, however, on the basis of improper exercise of the power or a failure to comply with the rules of natural justice. Those rules imply additional procedural safeguards in exercising the power. The Minister would have to inform the Inuvialuit of his intention to terminate the concession, and his reasons for doing so, and would have to give them an opportunity to make representations to him why he should not do so.

It should be stressed that the provisions of ss.7(38)-(42) apply only to the special case of a sand and gravel concession granted to the Inuvialuit Development Corporation. In particular, the government right to inspect financial records in s.7(40) only applies to IDC records of its sand and gravel concession, and only if it has such a concession. If the IDC has no concession, then s.7(38)-(42) do not come into operation.

3.3 Implications for Canada

The Government of Canada must be concerned that it can adequately estimate the communities' needs, that the arbitration process is in place, and that sand and gravel is available within the Western Arctic Region to respond to industry's and its own needs.

There is certainly concern among industrial gravel users about the issue of cost; however, demand levels are not high at the moment. Should a major project come along, it may become more of a problem. The federal government need not be overly concerned about "auditing" or monitoring cost, and instead, should concentrate on the issue of adequate supplies. The cost issue should resolve itself through the economic pressures of the market place or through the arbitration procedure. Too broad an interpretation of Canada's monitoring responsibilities runs the risk of interfering without justification in the rights of the Inuvialuit to manage their own lands and resources.

At this time, no concessions have been granted by the Inuvialuit Land Administration to the Inuvialuit Development Corporation, so the Minister has no present responsibilities under s.7(41), which relates only to an IDC concession. The Minister's powers under s.7(41) should in any event be regarded as an option of last resort.

In light of the above, we make the following recommendations to the Government:

1. Complete a review of sand and gravel sources, community requirements and zones where there should be no sand and gravel extraction.

2. Update this review once every five years, or more often if unanticipated major projects are proposed.

3. Identify sand and gravel sources outside Inuvialuit Lands so that alternative sources of sand and gravel are readily available to developers.

4. Monitor industry's projected requirements so as to ensure that the priority given to community and government needs under the I.F.A. is in fact protected.

5. Develop an agreement with the Inuvialuit Land Administration with respect to precise data requirements (accounting and otherwise), and reporting procedures needed to exercise the monitoring function implicit in s.7(41). As long as this agreement is reached in advance of the awarding of a concession to the IDC, so that requirements can be passed on to IDC as a condition of the concession, there should be no need for the exercise of the special powers of the Minister in s.7(41).

4

P A R T I I

4.0 LANDS RESERVED FOR PRESENT AND FUTURE GOVERNMENT USE

4.1 Overview

Section 7(1) of the I.F.A. provides that certain lands are to be transferred to the Inuvialuit. Although three categories of land are created, only two are of present concern. These are:

1. The 7(1)(a)(i) lands, where the Inuvialuit hold title in fee simple absolute (i.e., including minerals);

2. The 7(1)(b) lands, where the Inuvialuit hold surface title (i.e., fee simple absolute less specified subsurface substances).

In regard to both categories of land, Inuvialuit title is "subject to" certain existing rights, including reservations for government purposes. The I.F.A. also provides for the future acquisition by government of lands for specified purposes.

4.1.1. Existing Migratory Bird Sanctuaries and Sites Reserved by Annex R

A. Sites Reserved by Annex R

Section 7(1)(a)(i) states that Inuvialuit title is "subject to subsurface alienation listed in Annex P and existing surface rights for limited terms listed in Annexes Q and R". Section 7(1)(b) states that Inuvialuit title is "subject to alienations for limited terms listed in Annexes Q and R". Of the three Annexes mentioned in these sections, only Annex R, entitled "Existing Government Reservations on Inuvialuit Lands", is discussed here.

The I.F.A. contains three other references to Annex R. First, s.7(4) states:

> Title to Inuvialuit lands shall be subject to easements, servitudes, and rights-of-way listed in Annex R.

Second, s.7(106), which is part of the I.F.A. provisions headed "Interim Land Regime", prohibits the creation of government reservations on Inuvialuit lands between the date of execution of the I.F.A. and the coming into force of the Settlement Legislation. It also provides:

> . . . If at any time in the future those reservations or any portions thereof described in Annex R are no longer needed for the purpose for which they are being used as of October 31, 1978, they shall be terminated and removed as an encumbrance against the title of the Inuvialuit lands received under the Settlement Legislation.

Third, s.7(9) requires Canada to make records available to the Inuvialuit Land Administration regarding resource information related to substances owned by the Inuvialuit on their lands; this requirement specifically applies to lands where there are existing alienations referred to in Annexes P, Q and R.

Annex R lists twenty-one sites reserved to government, specifying the government department and the purpose and location of the particular reservation. The purposes vary dramatically (for example, from "Navigational Aid" to "Dew Line Site"), and, with two exceptions, no reference is made to any legal instrument creating the reserved site.

The exceptions are Reservations #1, an airport on Holman Island, and #18, a buffer area surrounding a Department of National Defence receiver site. In both cases reference is made to an Order in Council. These Orders in Council have been examined and they appear to describe the specific location of the reserved areas. They do not contain, however, very much information concerning the use of the reserved area. In regard to Reservation #18, P.C. 1973-1924 states that the lands are set aside "for military purposes". P.C. 1979-3019 deals with an airport at Holman Island, the subject of Reservation #1; the Order in Council simply transfers the administration of the described lands to the Commissioner of the N.W.T.

With one exception (Reservation #18) the Annex does not set out the size of the reserved site; indeed, in the case of Reservation #17 (trailer facilities for Fisheries Resources Board at Eskimo Lakes), Annex R states that the size of the site is "to be determined".

Generally, the locations of the sites are cited only by map number references. One navigational aid and two buoy cache sites on the Mackenzie River (Reservations #5, 6 and 7) are referenced by a mile number on the river, and three sites located in the towns of Tuktoyaktuk and Inuvik are referenced in relation to lot numbers (Reservations #12, 13 and 18). In the case of two sites, the location is given in degrees of latitude and longitude (Reservation #14 and 19). An NCPC right of way is said to be located "Inuvik to Tuktoyaktuk", but there is no indication as to the width of the right of way (Reservation #8). As mentioned above, the precise location of two sites originally created by Order in Council appears to be given in the Orders in Council.

This brief review demonstrates that there is little uniformity in the descriptions of the various sites reserved by Annex R, and, for the most part, little information provided concerning their location, size and scope of use. The Study Team has been advised that, in the summer of 1986, a surveying program was undertaken in relation to all the Annex R reservations, and that plans of the reservations are being prepared for registration purposes. This program should help to clarify the size and location of the reserved sites.

In regard to the scope of use of the Annex "R" Reservations, INAC files in Yellowknife and Ottawa provide some useful information, which is summarized in Exhibit 1. This is a simple listing of information as to which government agency holds the reserve, its purpose, location, INAC file number, when it was applied for, and when it was established. In a few cases, some additional information (comments) is included. In all cases examined, the transaction in question is described as "reserve" on the INAC application form in a space which asks the applicant to specify type of request as lease or sale.

This review of INAC files produced the following information of particular interest with respect to several of the reserves. With respect to Reserve #1 - Holman Airport, the administration of the site was transferred to the Commissioner subsequent to October 31, 1978, pursuant to a Memorandum of Understanding between Transport Canada and the GNWT. The application for the transfer was dated July 26, 1979 and the Order in Council authorizing the transfer is dated November 8, 1979. There is a current concern about the right to use gravel located on the reserve for airport purposes, but this would appear to be allowed since gravel is part of the surface estate.

Reserve # 3, is the DEW line site at Cape Parry (PIN-M), which was established as a reserve in 1956. Its original use was as a Long Range Radar site, and current plans are for its continued use as such.

E X H I B I T 1

EXISTING GOVERNMENT RESERVATIONS ON INUVIALUIT LANDS

1. Department: GNWT
   Purpose: Airport
   Location: Holman Island 7 (1)(a) 87 F/15-1
   Reserve Established: May 13, 1977
   Comments: Land Transferred to Commissioner by Order-in-Council P.C. 1979-3019, November 8, 1979

2. Department: DOE
   Purpose: Arctic Seal Research Program
   Location: Brown's Harbour 7(1)(b) 97 F/1-2
   Application: August 4, 1975
   Reserve Established: September 22, 1976

3. Department: DND
   Purpose: DEW Line Site
   Location: Cape Parry 7(1)(b) 97 F/1-5
   Application: April 1, 1954
   Reserve Established: August 29, 1956

4. Department: DOE
   Purpose: Stream Gauging Station
   Location: South Shore Big River 7(1)(b) 98 A/5-1
   Application: April 12, 1976
   Reserve Established: June 8, 1976

5. Department: DOT (application by DPW)
   Purpose: Navigational Aid Site
   Location: Mile 993.3 Mackenzie River 7(1)(a) 107 B/6-1
   Application: March 10, 1981
   Reserve Established: July 15, 1982

6. Department: DOT (application by DPW)
   Purpose: Buoy Cache Site
   Location: Mile 1006 Mackenzie River 7(1)(a) 107 B/11-1
   Application: April 1, 1975
   Reserve Established: September 15, 1976
   Comments: Location slightly modified by survey

7. Department: DOT (application by DPW)
   Purpose: Buoy Cache Site
   Location: Mile 1025 Mackenzie River 7(1)(a) 107 B/14-3
   Application: April 1, 1975
   Reserve Established: August 30, 1977
   Comments: Location slightly modified by survey

8. Department: INAC
   Purpose: NCPC Right-of-Way
   Location: Inuvik to Tuktoyaktuk 7(1)(a) and (b) 107 B/15-3
   Application: March 12, 1971
   Reserve Established: September 27, 1971
   Comments: Reserve not currently needed for purpose established (telephone line)

9. Department: INAC
   Purpose: Inuvik Research Lab
   Location: YaYa Lake 7(1)(a) and (b) 107 C/3-9
   Reserve Established: June 26, 1970

10. Department: EMR
    Purpose: Test Site for Geophysics
    Location: Involuted Hill 7(1)(a) 107 C/8-1
    Application: October 31, 1975
    Reserve Established: May 12, 1977
    Comments: Co-ordinates of site amended January 8, 1976

11. Department: DOE
    Purpose: CWS Landing site and Laboratory
    Location: Anderson River Delta 7(1) (b) 107 D/9-2
    Reserve Established: November 8, 1978
    Application: April 11, 1973
    Comments: Site identified and used since 1950's. Traded property in Tuktoyaktuk for this site with INAC in 1967.

12. Department: DOT
    Purpose: Navigational Aid
    Location: Tuktoyaktuk 7(1)(a) Lot 6 Group 1455 107 C/9-4
    Application: April 11, 1973
    Reserve Established: September 26, 1973
    Comments: DPW reapplied for site in 1981 for DOT. Application withdrawn(?)

13. Department: DOT
    Purpose: Navigational Aids
    Location: Tuktoyaktuk 7(1)(a) Lots 2, 3, 4, 5, Group 1455 107 C/9
    Reserve Established: October 1, 1976

14. Department: DND
    Purpose: DEW Line Site
    Location: Malloch Hill 7(1)(a) 97 F/3-2
    Comments: Site no longer used
    Application: April 1, 1954
    Reserve Established: 1955

15. Department: DND
    Purpose: DEW Line Site
    Location: Nicholson Peninsula 7(1)(b) 107 D/16-2
    Application: April 1, 1954
    Reserve Established: August 29, 1956

16. Department: DOE
    Purpose: Stream Gauging Station
    Location: Anderson River 7(1)(b) 107 A/9-1
    Application: September 20, 1976
    Reserve Established: March 29, 1977

17. Department: DFO
    Purpose: Fisheries Reseach Camp
    Location: Eskimo Lakes 7(1)(b) 107 D/12-3
    Application: July 20, 1971
    Reserve Established: May 10, 1985
    Comments: Reserve size reduced from original application to a size acceptable to Inuvialuit

18. Department: DND
    Purpose: Buffer Zone Surrounding Receiver Site
    Location: Inuvik 7(1)(a) 2.2 mile radius centered on Lot 8 Plan 50540 LTO 252 107 B/7-95

19. Department: INAC
    Purpose: Research
    Location: Pearce Point 7(1)(b) 97 D/14-2
    Reserve Established: October 13, 1965

20. Department: DND
    Purpose: DEW Line Site
    Location: Clinton Point 7(1)(b) 97 D/9-1
    Application: April 1, 1954
    Reserve established: August 29, 1956

21. Department: INAC
    Purpose: Waste Metal Depot
    Location: Kittigazuit 7(1)(b) 107 C/7-52
    Application: October 20, 1975
    Reserve Established: September 20, 1976

Reserve #15 is the DEW line site at Nicholson Penninsula (BAR-4). It was established as a reserve in 1956, was an active auxiliary site, and current plans are for it to become a Short Range Radar site.

Reserve #20 is the DEW line site at Clinton Point (PIN-1). It was established as a reserve in 1956, was an active auxiliary site, and current plans call for its abandonment.

All DND sites to be utilized for the new North Warning System will have survey and site analysis work done this summer, after which precise land requirments should be capable of determination.

Reserve #5 is a navigational aid site on the Mackenzie River which was applied for on March 10, 1981 and established on July 15, 1982, subsequent to the Agreement in Principle.

Reserve #8 is the NCPC right-of-way between Inuvik and Tuktoyaktuk. The line is no longer in use and is being dismantled this winter.

Reserve #9 is the Inuvik Research Lab site at Ya Ya Lakes. It was applied for February on 19, 1971 for a five-year period. The reserve was cancelled on October 31, 1975.

Reserve #11 is a Canadian Wildlife Service Landing and Laboratory site at Krekovik Landing in the Anderson River Delta, within the Anderson River Migratory Bird Sanctuary (see 8. below). This site was occupied and has been used since the 1950's, but a reserve was not formally requested until June, 1978 and not granted until November 8, 1978. However, the Agreement in Principle specifically mentions this reserve.

Reserve #14 is a former DEW Line site at Malloch Hill and is also called Horton River (BAR-E). The reserve was established in April 1955 and was cancelled on October 13, 1965. Subsequently, it has been used as a Polar Continental Shelf research site, but we can find no record that a reserve was applied for for that purpose. It may be argued that in view of this history, it is not a legitimate reserve.

Reserve #18 is a DND Receiver site at Inuvik, which was applied for on February 28, 1959 and established on July 10, 1959 (modified by Order in Council P.C. 1973-1924). The question of its continued use arises, since DND has moved its telecommunications monitoring operation out of Inuvik. However, a January 1986 reference to discussions with DND indicates its status should be maintained.

Reserve #19 is a "northern co-ordination and research" site at Pearce Point, which was established on October 13, 1965, the same date that its status as a DEW line site was cancelled. There is no subsequent reference on file.

Finally, errors were discovered in the Annex "R" listing, concerning the referenced INAC-Yellowknife file numbers, which are also map references. The correct numbers are as follows:

RESERVE NUMBER	CORRECT FILE/MAP REFERENCES
7	107 B/14-3
11	107 D/9-2
13	Group 1455 107 C/9
14	97 F/3-2
18	107 B/7-95
19	97 D/14-2
20	97 D/9-1

B. Existing Migratory Bird Sanctuaries

In addition to the Annex R government reservations, s.7(86) states that

> Those parts of Inuvialuit lands that lie within the Anderson River Bird Sanctuary and the Banks Island Bird Sanctuaries shall continue to be subject to the right of management of Canada under the Migratory Bird Sanctuary Regulations.

Part X of these Regulations (C.R.C., c.1036, as am.) gives detailed legal descriptions of the Anderson River and the two Banks Island Sanctuaries, so there is certainty about their location. Although the language of s.7(86) does not leave the matter entirely free from doubt, it appears that the Regulations would take precedence over the I.F.A.'s provisions in the event of a conflict. For instance, the Regulations prohibit certain activities in the sanctuaries (such as bird hunting) and envisage a system of permits for the authorization of particular activities. Because of the specificity of s.7(86), the prohibitions in the Regulations would likely be paramount to other, more general rights granted to the Inuvialuit under the agreement.

Does s.7(86) mean that the Government of Canada can amend the Regulations so as to alter the size of the three bird sanctuaries or change the management regime which governs them? If a size change encroached upon Inuvialuit lands, the general expropriation provisions of the I.F.A. would have to be complied with; any other interpretation of s.7(86) would fly in the face of the intent of the I.F.A. It is less clear whether other changes to the Migratory Bird Sanctuary Regulations would be effective in relation to the three sanctuaries. In view of the likely legal status of the I.F.A., a cautious approach dictates the desirability of consulting the Inuvialuit before embarking upon any such alterations.

4.1.2 Lands Required for Meteorological, Climatological, Navigational and Safety Purposes

A later part of this Report deals with the general means by which Canada can acquire interests in Inuvialuit lands in the future (Research Paper #5). In addition, two sections of the I.F.A. contemplate the creation of areas for purposes akin to the Annex R reservations. Such areas may give rise to issues similar to ones relating to the Annex R reservations and thus these provisions are dealt with here.

First, s.7(87) provides:

> Canada reserves the right to establish and operate new meteorological and climatological stations on lands received by the Inuvialuit pursuant to paragraph (1)(b), subject to conditions, including the payment of compensation, to be negotiated by Canada and the Inuvialuit. In the event of disagreements the matter in question shall be referred to the Arbitration Board pursuant to section 18.

Second, s.7(88) enables Canada to "establish navigation aids and safety devices along the shorelines of navigable waters anywhere in unoccupied Inuvialuit (1)(b) lands except the Husky Lakes Areas ... without having to receive the prior consent of the Inuvialuit". If such devices remain at a site for more than a year, Canada must notify the Inuvialuit, who will then have the option of requiring expropriation of that site. The meaning to be attached to the term "unoccupied Inuvialuit lands" is discussed elsewhere in this Report (Research Paper #1); the term "navigable" is defined in s.2:

> "navigable" means, with respect to a river, lake or other body of water, capable of navigation in its natural state and ordinary volume by boats or other water craft used for public or commercial purposes in the Inuvialuit Settlement Region.

The Study Team has been advised that innumerable other government needs for land have been identified since October, 1978, but these needs have yet to be acted upon.

4.1.3 Other Provisions of the I.F.A. and the Settlement Legislation Applicable to Government Reservations

In addition to the specific sections described above, there are other parts of the I.F.A. and sections of the settlement legislation that may bear upon the rights of Canada in relation to its current and future land reservations. These include s.4 of the Western Arctic (Inuvialuit) Claims Settlement Act, S.C. 1984, c.24, which gives the Act and the I.F.A. paramountcy over inconsistent or conflicting laws; s.7(97) of the I.F.A. which makes Inuvialuit lands "subject to the laws of general application applicable to private lands from time to time in force", except as otherwise provided in the Agreement; s.7(101) of the I.F.A. which entitles the Inuvialuit to "continue to enjoy all the rights of any property owner under the laws of general application", subject to the Agreement; and s.7(109) of the I.F.A. which gives the Inuvialuit "the full rights of ownership as provided by the Settlement Legislation with respect to those [Inuvialuit] lands, subject to existing surface rights."

Future "developments" associated with the use of government land reservations could be subject to the environmental impact screening and review process set out in s.11 of the I.F.A. and described in Research Paper #2.

It will be recalled that the definition of "development" in s.2 is extremely broad and that the screening process applies to "every proposed development of consequence to the Inuvialuit Settlement Region that is likely to cause a negative environmental impact" (s.13(7)). Moreover, the review process applies to "developments in the Inuvialuit Settlement Region in respect of which the Inuvialuit request environmental impact screening" (s.11(1)(c)). Section 11(31) prohibits the issuance of any licence or approval that would have the effect of permitting any proposed development to proceed unless the provisions of s.11 have been complied with.

It should also be noted that s.14(6)(d) of the I.F.A. gives the Inuvialuit the exclusive right to harvest game on their lands. In the event that this or other general Inuvialuit rights conflict with the authorized use of Annex R reservations, it seems likely that the Government right would prevail on the general theory that the Inuvialuit ownership is "subject to" the reservations made by the Government, the legal nature of which are discussed below.

4.2 Discussion

Most of the legal and interpretational problems created by the I.F.A. in relation to land required by the Government for specific purposes pertain to the Annex R reservations. The provisions relating to bird sanctuaries and the siting of future climatological and meteorological stations and navigation aids and safety devices are relatively straightforward; where there are potential complexities in regard to such areas, they can be avoided by taking the steps outlined in Section 4.3, below.

The Annex R reservations pose potentially greater difficulties. Because the descriptions of these reservations in the I.F.A. are so vague, a host of issues exist. In regard to some of the sites, such questions include:

1. Exactly where is the reserved site located?

2. Exactly what is the size of the reserved site?

3. Exactly what is the scope of use of the reserved site?

4. How will disputes concerning these sites be resolved?

As mentioned above, a survey program is presently underway to identify the location and size of the Annex R reservations. Assuming that the Government's view as to size and location accords with that of the Inuvialuit, this program should answer the first two questions.

Answers to the third question turn in part upon the use to which an individual site was being put on Oct. 31, 1978, since s.7(106) states clearly that the reservation will be terminated if the Oct. 31, 1978 use ceases. Nor can the use be expanded beyond the Oct. 31, 1978 use, since general legal principles provide that where a landowner reserves a right to himself, he is limited in use to the purpose for which the reservation was originally created.

Some answers to "scope of use" problems may depend upon a determination of the legal relationship between the Inuvialuit as land owners and the Government of Canada as holder of rights protected by Annex R. Sections 7(101) and (109) of the I.F.A. tell us that the Inuvialuit are entitled to enjoy all the rights of any property owner under the laws of general application and that, with respect to Inuvialuit lands, they have full rights of ownership, subject to existing surface rights.

The I.F.A. is much less clear as to the nature of the Government rights protected by Annex R. Such rights are variously described as "existing surface rights for limited terms" (s.7(1)(a)(i)); "alienations for limited terms" (s.7(1)(b)); and "easements, servitudes, and rights-of-way" (s.7(4)). The first two references are neutral as to the legal category of the right protected by Annex R (i.e., is the reservation a licence, a lease, or something else?). Although the third reference is more specific, it will only be helpful if a particular reservation exhibits the legal characteristics of the stated interest. For example, not all of the twenty-one reservations can be described as "easements", because some lack the characteristics required by law for the creation of an easement.

The precise legal characterization of a particular reservation may be important in the event of a dispute between the Inuvialuit and Canada concerning the scope of use of the reservation or the rights that the Inuvialuit have in relation to that area. Because the I.F.A. is so vague concerning the quality of the right protected, it may be necessary to rely upon common law principles to determine what the rights of the two parties are. The diversity of the twenty-one reserved sites suggests that they also vary in legal character; thus, the documentation pertaining to each would have to be examined separately to determine the precise quality of the protected right.

Depending upon the legal characterization resulting from such an inquiry, certain common law principles might help to determine the parameters of the Government's rights. For example, if one of the reservations (such as a Dew Line site) could be characterized as a lease, the Government as lessee would be entitled to undisturbed occupation of the property. Reservations characterized as easements or licences would be governed by other legal rules. Thus, for example, whether or not the Inuvialuit Land Administration is entitled to inspect a particular Annex R site could turn upon the legal characterization (lease, license, easement, etc.) of the particular right that Canada has reserved in relation to that site.

An answer to the fourth question (how will disputes concerning these areas be resolved?) requires some discussion of s.18 of the I.F.A., entitled "Arbitration". Section 18 outlines how Arbitration Boards and Panels are to be appointed, how their proceedings are to be convened and conducted, and so on. Of concern here is the Board's jurisdiction. Section 18(32) provides:

> The Arbitration Board shall have jurisdiction to arbitrate <u>any difference</u> between the Inuvialuit and Industry or Canada <u>as to the meaning, interpretation, application or implementation of this Agreement</u>. (emphasis added)

This provision appears to be broad enough to give the Board jurisdiction to determine the rights of the Inuvialuit and Canada in a dispute concerning the use of, for instance, a Dew Line Site.

It is less obvious that the Board's jurisdiction over such a dispute is exclusive. Thus, it may be that a party could seek judicial resolution of a dispute concerning use of an Annex R reservation. However, if a matter <u>is</u> within the Board's jurisdiction <u>and</u> a party initiates arbitration under s.18(15), the Board's decision is binding on the parties and is as enforceable as a court order, subject only to review by the federal Court of Appeal pursuant to s.28 of the Federal Court Act. (ss.18(28)(29) and (31)).

4.3 Implications

4.3.1 Annex R Reservations

An audit should be taken of the use to which the twenty-one Annex R reservations were being put as of Oct. 31, 1978, in order to avoid future evidentiary problems concerning the possible termination of any of the reservations.

Some of the sites reserved to Canada by Annex R may be particularly significant to the Government, or the audit proposed above may reveal sites where conflicts have already emerged. Especially in regard to such sites, consideration should be given to negotiating individual site agreements with the Inuvialuit, thus forestalling future disputes. In the absence of individual site agreements that clearly define the rights of Canada and the Inuvialuit, reference can only be made to the I.F.A. itself (which, it has been suggested, only sets out the rights of the parties in skeletal terms) or to general legal principles pertaining to leases, easements, licences, etc., as appropriate. Rather than relying upon such relatively vague definitions of the rights, it would be preferable to embark upon discussions with the Inuvialuit now, in order to clarify issues such as the scope of use of the Annex R reservations.

In preparation for such negotiations, Canada should consult the background documentation concerning the site in question and form a view as to the legal character of the particular right that has been reserved.

Failing negotiations, any disputes concerning the Annex R reservations may be referred to the Arbitration Board or possibly to a court. However, this should be an option of last resort.

Canada's obligation to supply resource information pursuant to s.7(9) extends to lands covered by Annex R reservations.

4.3.2 Migratory Bird Sanctuaries

Although the three sanctuaries that are located partly upon Inuvialuit lands have a protected status, it is most unlikely that their size could be altered so as to further encroach upon Inuvialuit lands without resort to the I.F.A.'s general expropriation procedures. It is less clear whether or not Canada could amend the Regulations so as to affect the management of these sanctuaries. Given this uncertainty, it is suggested that desired amendments to the Regulations be made only after consultation with the Inuvialuit owners.

4.3.3 New Meteorological and Climatological Stations

If Canada desires to establish such stations on Inuvialuit lands, she should do so after having negotiated agreements with the Inuvialuit owners that clearly state the location, size, nature of the rights created, compensation, and other relevant terms and conditions. In other words, such future arrangements should anticipate and deal with the issues pertaining to the Annex R reservations that have been identified in this report.

4.3.4 New Navigational Aids and Safety Devices

Canada can establish such aids and devices within the terms set out in s.7(88) (i.e., to meet Canada's responsibilities for navigation and safety, aids and devices may be established along the shorelines of "navigable" waters in "unoccupied" 7(1)(b) lands except the Husky Lakes Areas Numbers 1 and 2). It should be remembered that no notice has to be given so long as the aids or devices do not remain at any particular site for more than a year. If they do, notice must be given to the Inuvialuit, who could require that the site be expropriated pursuant to the I.F.A.'s general expropriation provisions. Aids and devices of a more permanent nature should, at a minimum, be established pursuant to agreements with the Inuvialuit of the type outlined briefly in 4.3.3 above.

4.3.5 General

Once a land registration system has been devised for the Inuvialuit lands, the Government should register the Annex R reservations and the relevant parts of the three bird sanctuaries as encumbrances upon the Inuvialuit title. This will serve to protect the reservations from conflicting third party claims. The same procedure should be followed for any reservations created in the future.

It should be remembered that "developments" upon the Annex R reservations and similar areas may be subject to the environmental impact screening and review process of s.11 (see Research Paper #2). In particular, s.11(31) prohibits the issuance of any licence or approval unless s.11 has been complied with.

In the negotiation of individual site agreements for Annex R reservations (4.3.1 above) and of new areas (4.3.3 and 4.3.4 above), consideration should be given to INAC's role in relation to that of the departments that require use of the areas in question. There may be efficiency in INAC's playing a lead or co-ordinating role in such negotiations, since experience in relation to one site agreement may be beneficial in relation to another.


5

P A R T I I

5.0 EXPROPRIATION OF INUVIALUIT LANDS

5.1 Overview

Sections 7(50) to 7(81) of the Inuvialuit Final Agreement deal with the expropriation of Inuvialuit lands. They create two broad categories, the first being expropriation proper, and the second being "appropriation" of land for the provision of government services and public roads. There is another matter that needs to be addressed, and that is how far do the procedures under the National Energy Board Act for taking pipeline rights-of-way apply to Inuvialuit lands? The relationship of the various provisions raises some difficult questions.

Two points of a general nature should be made here before going into detail. The first is that the lands transferred to the Inuvialuit under the I.F.A. have a special status of their own. They are the major benefits obtained by the Inuvialuit in a land claims settlement, the basic goals of which are expressed in s.1 to be to preserve Inuvialuit cultural identity, to enable Inuvialuit to be equal and meaningful participants in the Northern and national economy and society, and to protect the Arctic environment. In various sections, the I.F.A. demonstrates the importance of preserving the Inuvialuit land base; s.7(51) is a prime example. Quite apart from the constitutional questions that surround the land provisions of the I.F.A., the Agreement itself indicates that the Inuvialuit lands are, in a sense, a homeland which should not be lightly jeopardized. The Agreement contains a number of safeguards that make expropriations of Inuvialuit lands very different from other expropriations. Moreover, a court obliged to construe difficult provisions of the I.F.A. or connected statues, is likely to recognize the same factors and is likely to avoid interpretations that would undermine the integrity of the Inuvialuit land base.

The second general point is that the courts frequently apply a long-established principle that a statute is not to be read as prejudicially affecting property rights unless the intention to do so is clearly expressed. The courts are inclined to give a strict construction to expropriation powers of all kinds. Combined with the special status of Inuvialuit lands, this principle applies with particular force in this context.

5.1.1 General Expropriation Procedure

A. Applicability of the Expropriation Act

The expropriation provisions of the I.F.A. in s. 7(50) to s. 7(59) are incomplete. First and foremost, they contain no actual power to take lands and vest them in the Crown. For reason of the principles mentioned above, no such power can be implied. Those provisions also contain no reference to notice of intention to expropriate, or to time intervals between various steps in the expropriation procedure; they lack detail regarding compensation, and the crucial issue of the time of transfer of the expropriated land to the Crown is not addressed.

It is plain that the federal Expropriation Act (R.S.C. 1970 1st Supp. c.16) applies, even though it is only mentioned in s.7(52). There are several reasons why this must be so. The main one is that while the I.F.A. plainly contemplates expropriation in making express provision for it, its provisions are (as just mentioned) incomplete. This incompleteness suggests that the I.F.A. provisions are intended to make specific changes to a more complete existing procedure. Second, the Expropriation Act seems to be the logical source of that procedure, not only because of its name, but also because of the express reference in s.7(52). Third, s.7(97) makes Inuvialuit lands subject to laws of general application applicable to private lands; and fourth, in a related point, there is nothing in the I.F.A. that states or implies that the Expropriation Act does not apply.

The federal Expropriation Act therefore applies to Inuvialuit lands, subject to the changes made by the I.F.A. As we shall see, these changes are very wide-ranging.

It appears possible that the Expropriation Act of the Northwest Territories (R.O. N.W.T. 1974 c.E-7) also applies to Inuvialuit lands in some circumstances. The issue is discussed below.

B. Procedure

Section 3 of the Expropriation Act gives the Minister of Public Works authority to expropriate any interest in land that, in his opinion, "is required by the Crown for a public work or other public purpose". Lands required by certain Crown corporations can also be expropriated (Schedule II to the Act). Lands or rights of way required by the Northern Canada Power Commission, for example, may be taken under the Expropriation Act: see s.7 of the NCPC Act, R.S.C. 1970 c.N-21, inserted by R.S.C. 1970 c.16 (1st Supp.) s.42. A notice of intent to expropriate is published and served on the landowner. Any person may object, and a hearing is held to consider the objections. If the expropriation is to proceed, a notice of confirmation is issued, and once it is registered, the land or interest in land becomes vested in the Crown in right of Canada. An offer of compensation is made, and if the figure for compensation cannot be agreed upon, it is settled by the Federal Court.

The I.F.A. makes major changes to these procedures which may be listed as follows:

(1) Authorization by the Governor-in-Council

Section 7(50) states that "No Inuvialuit lands may be expropriated except by order of the Governor in Council". The procedure cannot be initiated without the consent of the Federal Cabinet embodied in an Order-in-Council. No one minister has the power to expropriate Inuvialuit lands, with the result that extra protection is conferred. (Because of the principles of construction that govern, this protection must be read widely to include expropriations of all kinds, not only those under the Expropriation Act. The importance of this will be evident later.) As well as applying to expropriation of the ownership of land, s.7(50) must be read to apply to expropriation of any lesser interest in land such as a lease or easement.

(2) Replacement with Other Lands

In keeping with the importance placed on Inuvialuit lands, on an expropriation suitable alternative lands in the Western Arctic Region must be provided to the Inuvialuit to replace the expropriated lands where it is reasonably possible to do so (s.7(51)). "Western Arctic Region" is defined in s.2 as the Inuvialuit Settlement Region other than the Yukon Territory. The I.F.A. gives no guidance as to what might constitute "suitable alternative lands" except that they must be considered satisfactory by the Inuvialuit. (See discussion below.)

(3) Principles for Fixing Compensation

If suitable alternative lands cannot be provided, monetary compensation must be paid instead. Section 7(52) of the I.F.A. provides that it is to be payable, "together with interest, as contemplated by the Expropriation Act of Canada". However, the principles provided in that Act for fixing compensation are subject to the special modifications set out in s.7(53)-(55).

Such compensation is to reflect the fair market value of the expropriated lands taking into consideration the fact that fair market value is low compared to other areas in Canada and that the I.F.A. is supposed to be a fair exchange between the Inuvialuit and Canada (s.7(53)). Thus, it may be implied that the compensation offered should be somewhat higher than fair market value. If the Inuvialuit and Canada agree on the cost base of the land then the compensation paid is to be the higher of the fair market value and the cost base (s.7(53)).

Compensation must also be made for loss of use of the land, including its "intrinsic value for wildlife" (s.7(54)). The I.F.A. is silent on how this value might be determined and what it means. A perusal of cases and dictionaries reveals the following as possible meanings for "intrinsic value": "the value embodied in the thing itself ... a value which does not depend upon exterior or surrounding circumstances"[1] and "the true, inherent and essential value of a thing ...".[2] This suggests that the potential of the land to support wildlife in its condition at the time of expropriation is the real value, whether or not it coincides with the actual wildlife population present. The compensation is not to include amounts for actual wildlife harvest loss since that will be payable under s.13 of the I.F.A. (discussed in Research Paper #6; s.7(55)).

Where Inuvialuit lands are expropriated, the exclusive right of the Inuvialuit to harvest game will continue on those lands, subject to public safety laws and conservation laws (ss.7(56), 14(6)(d)).

Finally, s.7(58) should be noted as ensuring that compensation, whether land or money, will be tax free to the Inuvialuit.

(4) Arbitration Board to Fix Compensation

The Arbitration Board, established by the Inuvialuit Final Agreement, has jurisdiction to settle disputes on an expropriation and to decide many of the matters that may prove controversial in the expropriation of Inuvaluit lands. Section 7(57) provides that certain matters must be referred to the Arbitration Board if a dispute arises, namely "whether it is reasonably possible for the Government to provide suitable alternative lands satisfactory to the Inuvialuit", "the compensation and interest payable in the event that suitable alternative lands are not available" and "any other matters arising on expropriation, including payment of the costs of any arbitration". These provisions are partly echoed in section 18(35)(f) which gives the Board jurisdiction over expropriation of Inuvialuit lands (subsections 7(50) to (58)), particularly, "whether alternative land exists", "valuation and compensation", and "other matters, including costs". Both these sections are broad enough to give the Board jurisdiction to settle any dispute that might arise between the parties to an expropriation.

The procedures laid down in the Expropriation Act for the resolution of disputes about compensation by the Federal Court must give way to the provisions of the I.F.A. that give jurisdiction to the Arbitration Board. See the discussion below for a more detailed consideration of this matter.

(5) Main Features of the Remaining Expropriation Act Procedure

Thus the Expropriation Act applies to Inuvialuit lands subject to the changes made to its rules by ss.7(50)-(58) of the I.F.A. The main features of the Act that survive this process may be noted briefly. Firstly, the Act can only be used when the land is required by "the Crown [in right of Canada] for a public work or other public purpose". There are certain powers to expropriate on behalf of the Crown corporations, but apart from that, the Act cannot be used to obtain land for any other reason. It cannot be used to obtain land required by a private company.

Secondly, the Act's mechanisms for the giving of notices and the taking of various other procedural steps apply, except where inconsistent with the I.F.A. One of the main such steps is the holding of a public hearing for the reception of objections lodged by members of the public; see ss.7-8 of the Act.

Thirdly, the Act (in ss.23-27 and s.33) makes detailed provision for the principles that govern the fixing of monetary compensation and the payment of interest on the amount due. These principles are surrounded by a great accumulation of interpretations in the case law, and they apply where a land exchange cannot be made, subject to the qualifying provisions of ss.7(53)-(55).

5.1.2. Appropriations for Specific Needs

Government land acquisitions for certain public purposes (referred to as "appropriations") are treated differently from expropriations. The intention in such cases appears to be that the Inuvialuit and the government will negotiate a sale, lease, land exchange or other disposition as appropriate in the specific circumstances. The Inuvialuit have implicitly agreed to cooperate and not to require a forced taking of the land.

For these appropriations the above described general expropriation procedures do not apply (s.7(59)). Among other things, this means that an order of the Governor in Council is not required. These procedures apply where land is being appropriated to satisfy specified governmental requirements or for a public road right of way (and for the De Salis Bay Land Selection, the Pingo Canadian Landmark and the Nelson Head Landmark which are not discussed in detail here).

It should be noted that many of the purposes for which appropriations of Inuvialuit lands may be made under ss.7(60)-(64) of the I.F.A. are also purposes for which the territorial Expropriation Act would apply. It is clear that that Act will not apply to Inuvialuit lands where the appropriation procedures of the I.F.A. apply. However, it is not entirely clear whether there may be other circumstances in which the territorial Act may apply. If it does, it would be subject to all the restrictions and alterations that would affect the federal Act.

A. Principles that Apply to All Appropriations for Specific Needs

If possible, equivalent alternative lands in the Western Arctic Region are to be provided to replace the Inuvialuit lands taken. The alternative lands must be suitable to the Inuvialuit (s.7(60)(a)). If the parties disagree over the equivalent lands, the matter must be referred to the Arbitration Board which will decide whether the lands offered are equivalent and whether payment should be made in land or money (s.7(60)(b)).

If monetary compensation is paid, the value of the lands must be based on their worth prior to being needed for government purposes. The land value is to include an amount for its intrinsic value for wildlife (see discussion above) but not compensation for actual wildlife harvesting loss since it is covered under I.F.A. s.13 (s.7(60)(c)). Any lands acquired by the I.L.A. by this means are to be deemed to be Inuvialuit lands and compensation, whether land or money, shall be tax-free for the Inuvialuit (s.7(60)(e)).

The Inuvialuit will continue to have the exclusive right to harvest game on appropriated lands, subject to laws respecting public safety and conservation (s.7(60)(f)).

Besides specific reference to the Arbitration Board in these sections, s.18(35) also states that the Arbitration Board shall have jurisdiction to arbitrate

> "disputes relating to the following land matters,
> (i) municipal needs (subsections 7(61) to (63))
> (ii) requirements for roads (subsection 7(64)),
> ..."

B. Particular Appropriations

(1) Municipal or Other Governmental Needs

For these purposes, the word "municipality" includes any settlement, hamlet, or town (s.7(61)). Where any government or municipality can demonstrate a need for Inuvialuit lands it may obtain these lands by negotiating a lease, sale or other disposition or arrangement with the I.L.A. provided certain conditions are met. The need must arise because of provision of government services. It must involve Inuvialuit lands located in or beside the area of municipal jurisdiction so as to meet public convenience and necessity. The government or municipality must investigate the alternatives to using Inuvialuit lands since Inuvialuit lands are only to be used if other lands cannot reasonably be obtained (s.7(61)).

When the government or municipality has determined that it needs Inuvialuit lands, it must notify the I.L.A. as to the area of land required and its location. Then the government or municipality must negotiate the terms and conditions upon which it may obtain the land from the I.L.A. The I.L.A. agrees to negotiate in good faith and the terms and conditions which are suitable for negotiation may include a nominal rent for the land (s.7(61)). If the negotiations are unsuccessful after at least 90 days from the receipt of notice by the I.L.A. then either party may (but is not required to) submit the matter to the Arbitration Board (s.7(62)). On going to arbitration, each party must submit its final offer to the arbitrator who may select the offer he considers more reasonable. Alternatively, the arbitrator may mediate the dispute and then make a compromise ruling. The arbitrator is to keep in mind the government's use for the land and the Inuvialuit's desire to retain their land (s.7(63)).

(2) Public Road Rights of Way

Although the procedure above can be used by any government, note that it is only the federal government that can use the following procedure for obtaining public road rights of way.

The federal government must consult with the I.L.A. on all matters which might interest or concern the Inuvialuit before it approves any road project (s.7(64)(a)). When approval for such a project has been given, the federal government must give notice to the I.L.A. of the amount and location of the land needed (s.7(64)(c)). Along with the notice, the government must offer the I.L.A. alternative land in the Western Arctic Region. The land should be of equivalent value to that being taken and will have to be suitable to the Inuvialuit. The land compensation is subject to negotiation between the government and the I.L.A. (s.7(64)(b)). If the parties are unable to reach agreement on the land compensation after 42 days from the date of the government's notice, the matter is to be referred to the Arbitration Board (s.7(64)(d)).

5.1.3 Applicability of the National Energy Board Act

The National Energy Board Act authorizes pipeline and utility companies to obtain the lands they need for their pipelines. Sections 75(26) to 75(28) allow a company to apply to the National Energy Board for an order allowing it to enter lands on terms and conditions specified by the Board. Under s. 75(28)(a), the order "shall be deemed to vest in the company such right, title and interest in the lands in respect of which the order is granted as is specified in the order."

The word "lands" is defined extremely broadly in s.2 of the Act as including "real property . . . and any easement, servitude, right, privilege, or interest in, to, upon, over or in respect of the same." Although the Act does not specifically refer to this as an expropriation, it does involve the compulsory taking of land or an interest in land and the law would be likely to recognize it as an expropriation.

Can these expropriation provisions apply to Inuvialuit lands in the face of the provisions of the I.F.A.? This question is a complex one and calls for more detailed consideration than we have been able to give it here. Nevertheless, the following reasons lead us to the conclusion that the expropriation provisions of the NEB Act do not apply to Inuvialuit lands.

First, if the NEB Act could be used and an expropriation take place at the initiative of a private company, the protection afforded Inuvialuit lands is lost. No lands would be available to replace the Inuvialuit lands taken. Note that this would require the co-operation of Canada because the company would first have to seek an order of the Governor in Council allowing the desired land to be expropriated.

Second, the IF.A. seems to assume that any and all expropriations will be handled by Canada since the expropriation provisions never refer to any possible parties other than Canada and the Inuvialuit. (See, for example, s.7(57).)

Third, and perhaps most important, the I.F.A. itself provides an alternative procedure which seems specifically designed to accommodate the needs of these companies, namely, the permanent right-of-way provided for by Participation Agreement (s.7(18)(c)).

Thus it appears at this stage that the I.F.A. has probably excluded the expropriation provisions of the NEB Act from operation in the case of Inuvialuit lands.

Even if the NEB Act were to apply to Inuvialuit lands for the taking of pipeline rights-of-way, its effect would be severely curtailed by the I.F.A. Section 7(50) of the I.F.A. must apply, as "expropriation" as used in that section must include the compulsory taking of interests in land that s.75(26) and s.75(28) of the NEB Act allow. The power of the pipeline company to proceed would still be subject to Cabinet approval. Further, ss.7(51)-(58) of the I.F.A. must apply, although they mesh badly with the NEB Act; the I.F.A Arbitration Board must have authority to fix compensation; and the Participation Agreement procedures of s.10 of the I.F.A., also giving jurisdiction to the I.F.A. Arbitration Board over compensation and the nature and extent of the operations allowed, must also apply.

It should be noted that this discussion of the inapplicability of the NEB Act only extends to the compulsory acquisition provisions of that Act. It does not concern the general authority of the NEB over pipelines.

5.2 Discussion

The provisions of the I.F.A. reviewed above give rise to several complex issues, the answers to which have practical implications for the Canadian Government's policies and procedures. Three of these issues are singled out for further discussion in this section: first, the federal Crown's involvement with expropriations of Inuvialuit lands; second, the jurisdiction of the Arbitration Board; and third, the tests used for deciding whether alternative lands to be provided as compensation are suitable or satisfactory to the Inuvialuit.

5.2.1 The Involvement of the Federal Crown in Expropriation of Inuvialuit Lands

Section 7(50) states that an order from the Governor in Council is required to expropriate Inuvialuit lands. Therefore, the federal Crown must always be involved. There are federal statutes which give private companies powers amounting to expropriation. For an example, see the National Energy Board Act, which provides a detailed procedure by which pipeline and utility companies may obtain land from private landowners. As discussed above, these companies probably cannot exercise this authority with respect to Inuvialuit lands. The I.F.A. provides another procedure seemingly tailored for this purpose, namely, the Participation Agreement.

This applies as well to other governments and municipalities which can appropriate Inuvialuit land for specified government purposes (ss.7(61)-7(63)). Even though these appropriations do not require an order of the Governor in Council, s.7(44) still applies and the I.L.A. can only convey title to the federal Crown. Thus, for any sale of Inuvialuit land to another government, the federal government must be involved. Dispositions of Inuvialuit lands otherwise than by outright sale (for example, through a lease), are not constrained in this way (see s.7(44)).

There is an additional reason why the federal Crown should handle these transactions: Compensation to the Inuvialuit must be in the form of land whenever possible. Because of the small amount of land that has been alienated in the North, such land will usually be Crown lands over which private companies and territorial and municipal governments have no control.

Although the Settlement Act and the I.F.A. clearly state that the provisions of the I.F.A. are to prevail over other inconsistent legislation, it would be useful to clarify this point by amending applicable legislation. This has already been done in other contexts. For example, s.67(1) of the National Energy Board Act states that "[n]o company shall take possession of or occupy lands in an Indian reserve without the consent of the Governor in Council".[3] Similarly, s.3 of the Expropriation Act was amended in 1984 by s.204 of the Cree-Naskapi (of Quebec) Act to state that certain Indian lands as defined in the latter Act cannot be expropriated without the consent of the Governor in Council. Amendments of this type to include Inuvialuit lands would alert companies and governments to the complexities of expropriating certain lands in the North.

5.2.2 Jurisdiction of the Arbitration Board

Sections 7(57), 7(60), 7(64), and 18(35)(f) all refer to the jurisdiction of the Board in matters relating to expropriations. Given the broad wording of ss.7(57)(c) and 18(35)(f), it is submitted that the Board's jurisdiction would include any matter that might be in dispute on an expropriation. The more difficult question is whether the Board's jurisdiction is exclusive on these matters, especially since the Expropriation Act gives the Federal Court jurisdiction to hear disputes regarding compensation. Does the Federal Court remain available to parties under the I.F.A.? The I.F.A. does not state that the Arbitration Board's jurisdiction is exclusive. Nevertheless, it consistently states that these matters "shall" be referred to the Arbitration Board.

Therefore, all disputes must go to the Arbitration Board regardless of whether they may also be referred to another forum. Section 7(97) provides an additional argument that the Board's jurisdiction is exclusive. All laws applicable to private lands are to apply to Inuvialuit lands unless "otherwise provided" in the I.F.A. The provisions relating to the Arbitration Board do "provide otherwise" - i.e., they provide a complete dispute settlement procedure to be used in expropriation matters, leaving nothing to be referred to the Federal Court at first instance.

Thus, the Arbitration Board's jurisdiction in matters relating to expropriation is intended to be exclusive. The involvement of another forum comes only on appeal in certain circumstances from the decision of the Arbitration Board (s.18(31)).

5.2.3 Lands Suitable or Satisfactory to the Inuvialuit

The I.F.A. states that alternative lands provided as compensation in an expropriation must be "considered satisfactory" by the Inuvialuit. However, for specified appropriations by governments the lands must be "suitable to" the Inuvialuit. Is this difference meaningful? Arguably, the first wording provides a subjective test while the second provides an objective test. That is, for the expropriations, it is the opinion of the Inuvialuit as to whether the lands are satisfactory which is important. For particular appropriations, the test may be what an objective, impartial observer would think to be suitable for the Inuvialuit. In the latter test, the Inuvialuit do not inject their own opinion. Ideally, the two tests should produce the same result. However, the latter test may open the way for a court to say that the lands are suitable in spite of objections by the Inuvialuit.

5.3 Implications

The expropriation provisions discussed in this section give rise to the following implications for government procedures.

5.3.1 It is recommended that the power of the Cabinet under s.7(50) of the I.F.A. to give or withhold consent to an expropriation of Inuvialuit lands, be regarded as a valuable power to restrict incursions on the Inuvialuit land base. Consent should not be given without a clear review of how the expropriation could affect Canada's obligations and responsibilities to the Inuvialuit. "Expropriation" in this context should be understood widely enough to include any power for the compulsory acquisition of any kind of right, title or interest to land, including any lesser interest in land such as a right-of-way, and any right to enter and make use of land.

5.3.2 It is recommended that the Expropriation Act of Canada be amended to state that no Inuvialuit lands may be expropriated without the consent of the Governor in Council. A similar amendment to the territorial Expropriation Act may also be desirable.

5.3.3 It is recommended that the National Energy Board Act be amended to provide that no interest in Inuvialuit lands may be taken under that Act. The amendment would simply express in a clear fashion what is in fact the current state of the law. Attempts to use the NEB Act would result in a confused legal situation, would produce complicated procedures by reason of the unsuitability of ss.7(51)-(58) of the I.F.A. to that Act, and would tend to detract from the protections and processes specially agreed with the Inuvialuit.

5.3.4 Pending an amendment as above to the National Energy Board Act, in the event that a pipeline company should take the position that the compulsory acquisition sections of that Act apply to Inuvialuit lands, it is recommended that the Cabinet refuse to allow rights to Inuvialuit lands to be acquired under that Act. The foundation for the refusal would simply be that the National Energy Board Act's compulsory acquisition procedures do not apply, having been superseded by the Participation Agreement procedures. The same position should be taken on other attempts to expropriate by private companies.

5.3.5 The Federal Government should consider reserving areas of Crown land in the Western Arctic Region from disposition, in order to ensure that it will have an adequate supply of lands available for exchange with the Inuvialuit at future dates. If a reserve of suitable lands can be set aside and protected, perhaps in consultation with the Inuvialuit, there will be fewer problems with future government land acquisition.

5.3.6 The Federal Government should ensure that devolution of responsibilities for roads and other services is carried out in a way that ensures that the territorial governments accept Canada's obligations under the I.F.A. If the obligations are not met by the territorial governments, Canada will remain liable for them; see s.20(2) and the discussion at 6.2.2 of this Report.

5.3.7 The best route to follow would be to avoid expropriation entirely and to negotiate a sale or exchange of land with the Inuvialuit. Proceeds of a sale would be tax-free for the Inuvialuit (s.7(45)) thus leaving them in the same position as they would be if they received monetary compensation for an expropriation.

In the event of an exchange of land however, Canada should expect the Inuvialuit to prefer expropriation for the following reason. There is a distinction between lands which may be owned by the Inuvialuit as any other landowner and lands which are provided through the I.F.A. The latter are singled out by the definition of Inuvialuit lands in s.2 as "lands to be provided to the Inuvialuit by or pursuant to this Agreement". Lands which do not fit the definition are not given the special tax-free status provided by s.7(47), nor are they subject to the restriction that they can only be conveyed to the Inuvialuit or the federal Crown. Lands received through an expropriation probably are Inuvialuit lands because they would be received "pursuant to" the I.F.A., i.e., - in a manner specifically provided for by the I.F.A. Lands received through a freely negotiated exchange would not be received "pursuant to" the I.F.A. and would not be Inuvialuit lands, thus not enjoying special status.

5.3.8 It is not clear in the general expropriation procedures just who is to represent the Inuvialuit in these matters. The Expropriation Act requires all notices to be given to the registered owner of the land. In this case the registered owner is the Inuvialuit Land Corporation, therefore, it is the correct party to receive notice. Nevertheless, although all notices must go to the Inuvialuit Land Corporation, the I.L.A. is probably the body which will speak for the Inuvialuit in expropriation matters since the lands are administered by the Inuvialuit Land Administration.[4]

5.3.9 As stated above, it is our belief that the procedures in the Expropriation Act will apply to Inuvialuit lands. This means that the federal Crown must give public notice as required by the Act and allow objections. If objections are received and they are not frivolous or vexatious, a hearing must be held. Section 7 of the Expropriation Act allows any interested person to object whether or not he has an interest in the land being expropriated. Therefore people other than Inuvialuit may become involved. Although this may not have been the intention of the parties to the I.F.A. these people have a right to object and be heard. If this is not what was intended then perhaps the scope of the Expropriation Act should be changed, for instance, by providing that s.7 will not apply to Inuvialuit lands.

5.3.10 The Federal Government should ensure that it consults with the I.L.A. on all matters that might interest or concern the Inuvialuit concerning road development. These consultations must take place before approval is given for the road project.

FOOTNOTES

1. R. v. Carslake Hotel Co. (1915), 16 Ex.C.R. 24; 34 D.L.R. 273 at 275 (aff'd. S.C.C. June 13, 1916).

2. Black's Law Dictionary, 5th Ed., West Publishing Co.: St. Paul, Minn., 1979 at p.739.

3. "Indian reserve" is defined in s.67(3) as "(a) a reserve, as defined in the Indian Act or (b) Category 1A land or Category 1A- N land, as defined in the Cree-Naskapi (of Quebec) Act".

4. See I.F.A. s.6(1) and Inuvialuit Land Administration Rules and Procedures (1986) s.1(1) p.4.

6

P A R T I I

6.0 THE GOVERNMENT OF CANADA'S RESPONSIBILITIES REGARDING WILDLIFE COMPENSATION

6.1 Overview

Section 13 of the I.F.A. is entitled "Wildlife Compensation". Its objectives are set out in s.13(1) and can be grouped around three headings:

(1) Preventative: To prevent damage to wildlife and wildlife habitat and avoid disruption of Inuvialuit harvesting;

(2) Restorative: Where there is damage from development, to restore wildlife and wildlife habitat to its original state as far as is practicable; and

(3) Compensatory: Where there is damage from development, to compensate the Inuvialuit for loss of subsistence or commercial harvesting opportunities.

Generally, s.13 pertains to development in the Inuvialuit Settlement Region (I.S.R.), the area outlined in Annex A of the I.F.A. As will be discussed later, in some circumstances s.13 also has implications for development outside the I.S.R. It is important to note, however, that s.13 does not apply to development activities on s.7(1)(a) lands, except as regards outstanding leases or other existing rights on such lands (s.13(5)). This seems to be a logical result since (aside from existing rights) it is the Inuvialuit themselves who are empowered to agree or not agree to development activities on the 7(1)(a) lands. Presumably, the 7(1)(b) lands have been treated differently under s.13 because, although the Inuvialuit own the surface rights on the 7(1)(b) lands, surface activity there may occur as a result of the Crown's ownership of mineral rights.

The broad definition of "development" contained in s.2 of the I.F.A. must be kept in mind in understanding the obligations for the Government of Canada which arise under s.13:

> "development" means:
> (a) any commercial or industrial undertaking or venture, including support and transportation facilities relating to the extraction of non-renewable resources from the Beaufort Sea, other than commercial wildlife harvesting; or

> (b) any government project, undertaking or construction whether federal, territorial, provincial, municipal, local or by any Crown agency or corporation, except government projects within the limits of communities not directly affecting wildlife resources outside those limits and except government wildlife enhancement projects. (emphasis added)

It should be noted that nearly all government "projects" are caught by this definition, with the exception of wildlife enhancement projects and activities within communities that do not affect wildlife.

Section 13 imposes three related obligations upon the Government of Canada. Each is described in turn.

6.1.1 The Obligation to Review Proposed Developments

Section 13(12) provides:

> The Government agrees that every proposed development of consequence to the Inuvialuit Settlement Region that is within its jurisdiction and that could have a significant negative impact on wildlife habitat or on present or future wildlife harvesting will be authorized only after due scrutiny of and attention to all environmental concerns and subject to reasonable mitigative and remedial provisions being imposed.

In some circumstances, advice and recommendations may flow to the Government by virtue of the activities of the Environmental Impact Screening Committee or the Environmental Impact Review Board, pursuant to ss.13(7)-(11). However, the Government's obligation under s.13(12) arises independently of actions taken by either of these two bodies. It is important to note that Canada's review obligation goes beyond development within the I.S.R., extending to every proposed development of consequence to the Inuvialuit Settlement Region that is within Canada's jurisdiction.

6.1.2 The Requirement for Proof of the Developer's Financial Responsibility

Section 13 (13) provides:

> Every developer, other than a government but including a Crown corporation, shall be required to prove financial responsibility before being authorized to undertake any development in the Inuvialuit Settlement Region. (emphasis added)

This section does not make it clear to whom financial responsibility must be proven, but s.13(14) suggests that, where government is involved in authorizing development, proof of the developer's financial responsibility should be made to the relevant government authority:

> The government authority empowered to permit the development and set the terms and conditions thereof may require a developer to provide for and ensure financial responsibility with respect to the obligations and undertakings provided in this section in the form of a letter of credit, guarantee or indemnity bond or any other form satisfactory to the government authority. (emphasis added)

While the matter is not entirely free from doubt, a reading of the two sections together moves one toward the conclusion that s.13(14) is concerned only with the form of the proof and is based on the assumption that an empowering government authority will require proof of financial responsibility. Note, moreover, that while the "government authority" is given discretion concerning the form of proof of financial responsibility, the proof is to relate to the developer's "obligations and undertakings" under s.13. Thus, where the Government of Canada is the empowering authority, it should require proof of developer's financial responsibility in regard to all the developer's obligations under s.13, including compensation and remedial and mitigative measures.

6.1.3 The Government of Canada's Own Liability

To understand the scope of Canada's own potential liability under s.13, an appreciation of the overall scheme of the section is necessary.

Liability of developers arises where it is established that "actual wildlife harvest loss" or "future harvest loss" was caused by development (s.13(15)). These terms are defined in s.13(2):

> "actual wildlife harvest loss" means provable loss or diminution of wildlife harvesting, or damage to property used in harvesting wildlife, or both;
>
> "future harvest loss" means provable damage to habitat or disruption of harvestable wildlife having a foreseeable negative impact on future wildlife harvesting.

It should be noted that the term "developer", defined in s.2, includes government where it owns, operates or causes to be operated "any development in whole or in part in the Inuvialuit Settlement Region."

Section 13(15) describes the developer's liability as being "absolute" and "without proof of fault or negligence". The I.F.A. contemplates liability falling upon one or more developers to whom the loss is attributable. Even where the loss is not attributable to any specific developer, but "was caused by development generally", liability is to attach to developers "whose activities were of such a nature and extent that they could be reasonably implicated" (s.13(15)(c)).

The I.F.A. distinguishes between compensation on the one hand, and mitigative and remedial measures on the other, although s.13(15) makes the developer responsible for both. Sections 13(18)(a) and (b) detail the types of compensable losses, while s.13(18)(c) deals with mitigation and remedial measures. Any claim against a developer must be made within three years from the time when the loss occurred or could reasonably be expected to have become known to those affected nearby (s.13(17)). Claims must be made in writing to the developer, and if a claim is not settled within sixty days, it is to be heard by an Arbitration Board (s.13(19)-(24)). Although the I.F.A. does not purport to close out other legal remedies, decisions of the Arbitration Board are final and binding (s.13(25)).

Given this overall scheme, what is the potential liability of the Government of Canada pursuant to s.13? It is suggested that the Government's liability could arise in three ways: pursuant to s.13(16) of the I.F.A. where a developer is unable or fails to meet its obligations; by virtue of the Government's failure to meet its obligations under ss.13(12) and (14), discussed above; or by virtue of damage caused by the government's own activities as a "developer". The first two are elaborated upon in the following section.

A. <u>Canada's Liability Under s.13(16)</u>

Section 13(16) of the I.F.A. provides:

> Subject to subsections (5) and (6), if any developer who has caused actual wildlife harvest loss or future harvest loss is unable or fails to meet his responsibilities therefor, Canada acknowledges that, where it was involved in establishing terms and conditions for the development, it has a responsibility to assume the developer's liability for mitigative and remedial measures to the extent practicable.

There are two exceptions to this liability. First, as discussed earlier, it does not pertain to development on 7(1)(a) lands, except as regards existing rights and outstanding leases (s.13(5)). Second, it does not arise if the Inuvialuit and the developer have entered into a Participation Agreement under s.10 of the I.F.A. that by voluntary agreement establishes mitigative and remedial obligations (s.13(6)). It will be recalled from Research Paper #1 (re: Commercial Access, 1.2.1.B) that a Participation Agreement must be entered into wherever a developer holds rights issued by Canada in relation to 7(1)(a) or 7(1)(b) lands (s.10(2)). However, while Participation Agreements may include terms relating to wildlife compensation, restoration and mitigation, it is not mandatory that they do so (s.10(3)(b)).

Canada's liability under s.13(16) for a defaulting developer is narrower than the developer's liability, as Canada only "has a responsibility to assume the developer's liability for mitigative and remedial measures to the extent practicable", where it was involved in establishing terms and conditions for the development. Since the I.F.A. distinguishes between "compensation" on the one hand and "mitigative and remedial measures" on the other, it seems clear that Canada would not be required under this section to pay compensation owed by a defaulting developer. Also, if a claim for remedial and mitigative measures was not made against a developer within the three year period described in s.13(17), presumably Canada could also rely upon the benefit of this limitation period.

The nature of the developer's liability for remedial and mitigative measures (in contrast to compensation) is elaborated upon in s.13(18)(c), which, in the case of future harvest losses, authorizes an affected Inuvialuit group or community to seek the recommendations of the Arbitration Board "with respect to remedial measures, to the extent reasonably practicable, including cleanup, habitat restoration and reclamation". The obligation of a developer for mitigative and remedial measures "is subject to any limits established by the authority empowered to approve the proposed development". Moreover, where there is a government authority having jurisdiction to enforce mitigative and remedial measures, the Arbitration Board is required to make its recommendations concerning remedial and mitigative measures to that body (s.13(24)). The authority is not obliged to comply with such recommendations, but must give its reasons for not doing so within sixty days.

These circuitous provisions mean that in most circumstances, the Government's responsibility under s.13(16) is very limited, for several reasons. First, the language of s.13(16)("Canada acknowledges that ... it has a responsibility"), in contrast to that of s.13(15) which describes the liability of the developer ("the liability of the developer shall be absolute and he shall be liable without proof of fault or negligence"), may impose a moral as opposed to a legal obligation on Canada. Second, this responsibility is only "to the extent practicable". Third, the responsibility only arises when Canada has been involved in establishing the terms and conditions for the development. Fourth, like the developer's obligations, Canada's responsibility would be subject to any limits established by the authority empowered to approve the proposed development. Fifth, if an Arbitration Board recommends pursuit of remedial and mitigative measures, the relevant government authority need not follow such recommendations.

These provisions may be easier to understand in the context of a concrete example. Consider a pipeline under the jurisdiction of the National Energy Board (NEB). If the NEB imposed conditions relating to mitigative and remedial measures, those conditions would set the parameters of the developer's responsibilities; on a complaint, an Arbitration Board could make recommendations to the NEB concerning appropriate remedial measures, which the NEB would not be obliged to follow. Failure of the developer to comply with remedial and mitigative obligations set by the NEB would be the responsibility of the Government of Canada, "to the extent practicable".

If no mitigative or remedial measures had been set by an empowering authority, recommendations could be made to such a body by an Arbitration Board. However, if the empowering authority chose not to impose the recommended conditions, the developer (and thus Canada) would have no liability. The main possibility of Canada's exposure under s.13(16) seems to arise if the authority has set no conditions or if no authority has jurisdiction to enforce mitigative and remedial measures. In such a case, it would appear that an Arbitration Board could impose a binding decision upon the developer, the responsibility for which would fall upon Canada in the event a developer failed to comply. As will be discussed below, one implication of this for the Government of Canada is the need to ensure that empowering authorities have the jurisdiction to set conditions concerning remedial and mitigative measures, and are encouraged to do so.

B. Canada's Liability for Failing to Conduct A Proper Review Under s.13(12) or Failing to Procure Proof of Developer's Financial Responsiblity Under s.13(14)

These provisions were discussed above. The question for consideration in this section is: what would be the implication of Canada's failure to meet its obligations under ss.13(12) or (14)? Specifically, could it be argued that such a failure would make Canada liable generally under s.13 in place of a defaulting developer? The case for such liability is stronger in relation to a failure to procure proof of the developer's financial responsibility, but might also be made in relation to failure to properly review.

In either case, the Inuvialuit would have to establish that the failure had caused them damage. In the first case, it might be more difficult to establish a causal link, since the developer's absolute, non-fault liability is independent of the Government's review. In the second case, however, a developer's failure to meet its obligations under s.13 could be causally linked to a lack of or inadequate proof of financial responsibility, since the very object of such proof is to ensure that the developer will be able to meet his financial responsibilities. Thus, as discussed under section 6.1.2 above, to the extent that ss.13(13) and (14), in combination, can be read as to require Canada to obtain proof of financial responsibility, its failure to do so could expose it to the defaulting developer's liability under s.13 for compensation and remedial and mitigative measures.

6.2 Discussion

6.2.1 Canada's Legislative Authority to Require Proof of Financial Responsibility from Developers and to Impose Remedial and Mitigative Conditions

The overview has highlighted the fact that, in certain circumstances, the I.F.A. seems to require the Government of Canada to obtain proof of financial responsibility from developers. Moreover, for a variety of reasons, authorizing bodies (such as the NEB) should be encouraged to impose conditions upon developers relating to mitigative and remedial measures.

These points give rise to two related questions:

1. To what extent does current law authorize Canada to require proof of financial responsibility from developers, in relation to the developer's potential liability under s.13?

2. To what extent does current law authorize the imposition upon developers of conditions relating to mitigative and remedial measures?

Various statutory provisions have been reviewed with these questions in mind. A few general points may be made concerning the summary of this review, which is found in Table I, located at the end of this section.

It should be noted that none of the provisions specifically addresses wildlife issues in the way such issues are addressed in the I.F.A. This is not surprising since most of the provisions in question predate the I.F.A. Nevertheless, there are some general provisions in the legislation that can be relied upon in order for the Government of Canada to meet its s.13 obligations, especially in regard to the imposition of mitigative and remedial measures. For example, although many of the mitigative and remedial provisions in current legislation appear to be aimed primarily at land reclamation or human safety, conditions imposed pursuant to such provisions will have some effect upon wildlife.

Requirements pertaining to proof of financial responsibility are more problematic. They are rare, and, where they do exist, are generally limited in amount. Moreover, such provisions tend to relate to security for "loss or damage", and this phrase may not be broad enough in all cases to embrace damage to Inuvialuit wildlife harvest or to include costs of mitigative and remedial measures with respect to future wildlife harvest loss.

In the remainder of this section, three examples will be used to illustrate the extent to which current laws specifically enable the Government of Canada to meet its s.13 obligations by imposing mitigative and remedial conditions upon developers and by requiring developers to provide proof of financial responsibility. The examples are: 1) an oil or gas well on Crown land in the Yukon or Northwest Territories, 2) a hydropower development on Crown land in either territory, and 3) a mining development on Crown lands in the Northwest Territories.

A. Oil or Gas Well on Crown Land in Either the Yukon or Northwest Territories

(1) Proof of Financial Responsibility

An oil or gas well can be drilled on Crown land only if a land use permit has been issued under the Territorial Land Use Regulations. Under s.36(1) of those regulations, a permittee may be required to make a security deposit in an amount not exceeding $100,000. Section 36(6) allows the Minister to use all or part of the security deposit for reclamation of land damaged by the permittee's activities. This provision is too specifically worded to allow any part of the security deposit to be used as compensation for Inuvialuit wildlife harvest loss.

The Oil and Gas Production and Conservation Act requires authorization from the Minister for all works or activities. Under s.3.2(1)(a), the Minister

> ... may authorize in writing each work or activity proposed to be carried on, subject to such approvals, requirements and deposits as he determines or as may be prescribed by the regulations, including
> (i) requirements relating to liability for loss, damage, costs, or expenses,
> (ii) requirements for the carrying out of environmental programs or studies, ...

This section gives the Minister considerable discretion and would enable him to require a deposit relating to liability for loss, damage, costs or expenses. This would be one means of proving financial responsibility. In addition, the term "requirements relating to liability" may allow the Minister to require proof of financial responsibility for I.F.A. purposes. The word "loss" is not qualified or limited so it could embrace Inuvialuit actual wildlife harvest loss. The term "costs" may allow the Minister to require proof of financial responsibility for costs of mitigative and remedial measures with respect to future wildlife harvest loss. The provision for environmental programs also may accommodate wildlife management programs. Thus, this section has good potential for allowing the Minister to require proof of financial responsibility for compensation for actual wildlife harvest loss and for costs of mitigative and remedial measures.

Under s.19.3 the Minister may require the person who obtained the authorization to produce proof of financial responsibilty for liability in the event of an oil spill. Such liability includes "all actual loss or damage incurred by any person" and costs incurred by government or any person in taking action in relation to the spill (s.19.2(1)). The word "actual" when used in a legal sense means "real" as opposed to "constructive, possible, hypothetical or speculative" (Mitchell v. Johnson [1918] 1 W.W.R. 785 at 792). Would "actual loss or damage" thus cover Inuvialuit "actual wildlife harvest loss"? The latter phrase is defined in the I.F.A. as "provable loss or diminution of wildlife harvesting". Since that which is provable is usually "real" and cannot be called "possible, hypothetical or speculative", Inuvialuit actual wildlife harvest loss would likely be covered by s.19.2(1). It would be surprising, however, if such a phrase could be construed to cover compensation for the highly speculative future wildlife harvest loss or the costs of mitigative and remedial measures to diminish future wildlife harvest loss.

The new Canada Petroleum Resources Act contains no specific reference to proof of financial responsibility.

(2) Mitigative and Remedial Provisions

Under s.31(1) of the Territorial Land Use Regulations, conditions may be imposed in the permit which would require, among other things, "the protection of wildlife and fisheries habitat", "the protection of objects and places of recreational, scenic and ecological value", and "such other matters ... as the Engineer thinks necessary for the protection of the biological or physical characteristics of the land management zone". These conditions and others deal with the permittee's methods of carrying out his works, with no reference to possible impact upon third parties. Conditions of this nature will help to protect wildlife populations and therefore will indirectly protect the Inuvialuit wildlife harvest. Nevertheless, a certain level of wildlife destruction may be acceptable from a biological standpoint and still cause wildlife harvest loss. Thus, this section may not be broad enough to allow the imposition of conditions that protect all the Inuvialuit's economic interests in wildlife harvesting.

Under s.3.2(1)(a) of the Oil and Gas Production and Conservation Act, the Minister may authorize each work or activity subject to such requirements as he determines. These words are probably broad enough to embrace mitigative and remedial measures pertaining to wildlife.

Section 24(1) of the new Canada Petroleum Resources Act provides that an exploration license shall contain "such terms and conditions as may be prescribed." This seems broad enough to authorize the imposition of conditions that mitigate wildlife harvest loss. Section 12(1) allows the Governor in Council prohibit an interest owner from commencing or continuing his work where there is an environmental or social problem of a serious nature. Responding to a serious environmental problem in this fashion would often have a remedial effect on wildlife harvest loss. However, the economic loss of the Inuvialuit is not necessarily the same in all cases as environmental damage.

B. Hydropower Development on Crown Lands in the Yukon or Northwest Territories

(1) Proof of Financial Responsibility

As in the oil and gas example, a hydropower development requires a permit issued under the Territorial Land Use Regulations. Again, note that the $100,000 security deposit could not be used to compensate the Inuvialuit for wildlife harvest loss.

A license to use water is also required under the Northern Inland Waters Act. Under s.11(3), the Territorial Waters Board may require an applicant to furnish security to compensate other licensees who may be adversely affected by issuance of the license. This is too restricted to embrace financial responsibility for damage to the wildlife harvest.

The Dominion Water Powers Act contains no provisions for security deposits or proof of financial responsibility for loss.

(2) Mitigative and Remedial Provisions

As in the oil and gas example, s.31(1) of the Territorial Land Use Regulations allows imposition of conditions in a permit which mitigate environmental damage and thus indirectly protect wildlife.

Under s.10(1)(b)(iii) of the Northern Inland Waters Act, an applicant must satisfy the Board that waste will be treated and disposed of properly. This will have a beneficial effect on wildlife but does not address the problem of mitigative and remedial measures as contemplated by the I.F.A.

The Dominion Water Powers Act and its Regulations are fundamental to hydropower development. Sections 8(3) and 25(4) of the Regulations provide that licenses for power development must specify the water used, the lands occupied and "such other terms and conditions" as may be imposed by the Minister. In addition, "[e]very interim or final licence shall" be subject to the regulations, be subject to amendments or changes and "be subject to such other stipulations, provisos and conditions, not inconsistent with these Regulations, as the Minister may impose ...". These sections are probably broad enough to require mitigative and remedial action with respect to wildlife harvest loss.

Section 37 (1) of the Regulations provides that a licensee must maintain the lands, works and property he holds or uses in a manner satisfactory to the Director. This includes "maintaining of ... flooded ... areas in a sanitary condition" and improving the landscape architecture of the lands. The licensee must also "do all in his power to protect the lands and the interests of the Crown therein against injury ...". This subsection appears to be aimed at safety and appearance of the lands rather than alteration of the environment or damage to economic interests. It also is limited to protection of Crown interests and therefore does not cover Inuvialuit interests in the wildlife. The Crown has an interest in the Inuvialuit wildlife harvest because of its potential liability for damage by developers, but this connection may be too tenuous to be embraced by this subsection.

Section 65 of the Dominion Water Powers Regulations requires the licensee to indemnify Canada against all claims arising against Canada because of anything done by the licensee in purported exercise of his rights under the license. Could this section be used by Canada in the event of liability for damage to the Inuvialuit wildlife harvest loss? From the earlier discussion, it is apparent that Canada's liability under the I.F.A. arises mainly from its own conduct and not from anything the developer did. Nevertheless, in the specific instances where Canada had to assume the developer's liability, this indemnity might prove useful.

C. Mining Development on Crown Lands in the Northwest Territories

The Territorial Land Use Regulations apply unless the development is "prospecting, staking or locating a mineral claim..." (s.6(b)). Note that the definition of "development" in s.2 of the I.F.A. is probably broad enough to include such activity so there is one important gap between Canada's obligations under s.13 and her powers pursuant to these regulations. However, these regulations apply to larger mining developments.

(1) Proof of Financial Responsibility

The $100,000 security deposit discussed above may be required pursuant to the Territorial Land Use Regulations.

For a coal mining development, s.6(1) of the Territorial Coal Regulations requires any person who wishes to stake a location to deposit security to compensate the surface owner for "any loss or damage which may result from staking" before he can stake (or consent from the surface owner in lieu of security). Because this section is limited to compensation for surface owners, the security deposit cannot be used to compensate the Inuvialuit for wildlife harvest loss where the surface owner is the Crown. The Crown's own liability to the Inuvialuit will usually not be compensable from this security deposit because its liability is not a loss which "may result from staking". Rather, the cause of the Crown's loss would normally be its failure to require proof of financial responsibility.

A permit or lease is required for actual mining. Section 18(2) of the Regulations requires a lessee to compensate the surface owner for any loss or damage he causes. The arguments discussed above apply here as well.

The Canada Mining Regulations, which deal with minerals other than coal, make no mention of financial responsibility for loss.

(2) Mitigative and Remedial Provisions

As with oil and gas and hydropower, the Territorial Land Use Regulations have potential for imposing conditions in permits which would require the permittee to take measures to protect the environment. As stated previously, this would also have a mitigative effect on wildlife harvest damage.

The Territorial Coal Regulations lack any provision which could be construed as including terms and conditions which might have a mitigative or remedial effect on wildlife harvest. For other minerals, the Canada Mining Regulations are likewise deficient.

D. Conclusion

The above examples reveal that there is an imperfect fit between the Government of Canada's obligations under s.13 of the I.F.A. and her powers under current laws to require proof of financial responsibility from developers and to impose mitigative and remedial measures upon developers. The main problems relate to hydropower and mining. While from a practical point of view regulators may be able to impose remedial and mitigative provisions, proof of financial responsibility can be addressed only through a $100,000 security deposit that is not designed to compensate the Inuvialuit for harvest losses. Moreover, there is a major problem in relation to the s.7(1)(b) lands: section 6(c) of the Territorial Land Use Regulations states that the Regulations do not apply to lands of which the surface rights have been disposed (such as the 7(1)(b) lands). Yet these Regulations provide the main source of authority for the imposition of environmentally-related conditions.

The fact that there are some gaps between Canada's legislative authority (especially in relation to proof of financial responsibility) and her s.13 obligations gives rise to another question: does s.13 itself give the Government the necessary authority to impose remedial and mitigative conditions upon the Crown and to require proof of financial responsibility? The answer to this question is complex and depends largely upon the view one takes as to the legal status of the I.F.A., discussed earlier in this Report. In light of the importance of Canada's s.13 obligations, it is suggested that this legal question should be explored further. If it is concluded that specific legislative authority is required, many of the laws outlined in Table I will require amendment. Alternatively, it may be possible to address the problem in an umbrella fashion by passing regulations pursuant to s.3(5) of the Western Arctic (Inuvialuit) Claims Settlement Act.

6.2.2 Canada's Responsibility for Activities Authorized by the Territorial Governments or Their Agencies

The preceding section has focussed upon the extent to which current federal laws enable Canada to carry out her obligations under s.13 of the I.F.A. Section 13 gives rise to another legal issue, namely, does the potential liability of Canada pursuant to s.13 extend to a situation where a territorial government or its agency is the authority empowered to permit a development upon Inuvialuit lands?

To put the issue another way, could Canada be held liable for the failure of a territorial authorizing body to obtain proof of a developer's responsibility pursuant to ss.13(13) and (14), could it be said that an activity authorized by a territorial government is "within Canada's jurisdiction" for the purposes of s.13(12), or could it be said that Canada "was involved in establishing terms and conditions" for a development for the purposes of s.13(16), when a territorial government has authorized a development?

It should first be noted that this issue is relevant only to the pre-devolution situation. Section 20(1) of the I.F.A. makes it clear that the Agreement is intended to neither prohibit nor advance devolution. Moreover, under s.20(2) Canada agrees that devolution will "not prejudicially affect the carrying out of its obligations". Thus, upon devolution Canada must ensure that the territorial governments accept Canada's obligations under the I.F.A., failing which the obligations will remain with Canada.

The result in a pre-devolution situation is less clear. The fact that the territorial governments signed the I.F.A. might suggest that, for purposes of the Agreement, they were intended to be viewed as separate entities for whose actions Canada would have no responsibility. On the other hand, it might be argued that the territorial governments signed the agreement in their own capacity only because they were given certain specific rights and obligations under it (for example, the right to appoint representatives on certain bodies created by the I.F.A.). Thus, the fact that they were signatories would not be determinative of the question raised here.

The question is beyond the scope of this study. However, it is an issue that the Department may wish to pursue with its legal advisers.

6.3 Implications

6.3.1 Given the broad definition of "development" in the I.F.A., and the fact that the Government's review obligations under s.13(12) extend beyond the I.S.R. itself, steps should be taken to ensure that existing procedures require the "due scrutiny of and attention to all environmental concerns" mandated by this subsection. It should be noted that this review obligation is in addition to the obligations for environmental screening and review that arise by virtue of s.11, although it will make sense in many instances for the two to be treated together.

6.3.2 Canada should encourage developers who enter into Participation Agreements with the Inuvialuit to include provisions relating to compensation and remedial and mitigative obligations in such Agreements. The existence of such Agreements will prevent the possibility of Canada's own liability under s.13(16).

6.3.3 Canada should encourage its employees and agencies to impose remedial and mitigative conditions where developments are authorized within the I.S.R. The existence of such conditions will impose an upper limit upon the developer's obligations in this regard, a limit upon which Canada could also rely should she inherit the developer's liability by virtue of s.13(16).

6.3.4 The Table I review reveals that, for the most part, current legislation is broad enough to enable Government "empowering authorities" to impose mitigative and remedial conditions upon developers. While there are a number of gaps in the legislation concerning the Government's power to require proof of financial responsibility, it is not certain whether such specific legislative authorization is required or whether Canada could rely upon the possible status of the I.F.A. itself as a legislative instrument for the necessary power. In view of this uncertainty and in view of the major legislative and regulation changes that would be required in order to broaden existing laws, it may be preferable for Canada to give itself the necessary authorization through regulations passed pursuant to s.3(5) of the Western Arctic (Inuvialuit) Claims Settlement Act.

6.3.5 The Table I review has reviewed two regulations that may require amendment to ensure a better "fit" with the provisions of the I.F.A.:

- Because of s.6(c) of the Territorial Land Use Regulations, the Regulations no longer apply to the 7(1)(b) lands. Yet these Regulations are Canada's main tool for imposing environmental conditions upon developers.

- The Territorial Dredging Regulations presently apply to the submerged bed of all rivers in the Northwest Territories. Yet river beds on Invuialuit lands should not be so included, since s.7(2) of the I.F.A. makes them the property of the Inuvialuit.

6.3.6 Consideration should be given to the question of whether the Government of Canada would be liable for the failure of the territorial governments to meet their obligations under s.13, in situations where those governments or their agencies possess the power to authorize development. If so, steps should be taken to ensure that the territorial governments comply with the requirements of s.13 when authorizing developments in the I.S.R.

6.3.7 When responsibility or jurisdiction is devolved by Canada upon the territorial government, it should be done in such a way that Canada's s.13 obligations are accepted by the territorial governments.

6.3.8 Thought must be given to the nature and level of proof of financial responsibility that Canada will require from developers. Experience in this regard may be derived from the Canada Oil and Gas Land Administration (COGLA), which has faced this issue in the context of the spill provisions of the Oil and Gas Production and Conservation Act.

A series of issues to be addressed concerning the level of the financial proof include:

- How will the extent of potential Inuvialuit losses be calculated for the purposes of s.13, and what role in such calculations should be played by risk analysis?

- What is the interplay between the liability imposed upon the developer by s.13, and liability arising under other statutes such as the Oil and Gas Production and Conservation Act, the Arctic Waters Pollution Prevention Act and the Canada Shipping Act? For example, s.4(1) of the I.F.A. protects the rights of the Inuvialuit as Canadian citizens, "and they shall continue to be entitled to all of the rights and benefits of other citizens under any legislation applicable to them from time to time". Would this entitle them to recover both under the I.F.A. and under other statutes in the appropriate case?

In regard to the nature of the proof, options include insurance policies, irrevocable letters of credit, guarantees, indemnity bonds, etc., each of which may impact differently on various private companies (small versus large operators, for example).

TABLE I

ACT	APPLICATION	PROVISIONS
Arctic Waters Pollution Prevention Act, R.S.C. 1970 (1st Supp.) c.2 as am. by S.C. 1983-84, c.40	Arctic waters out to a distance of 100 nautical miles from the coastline	S.10(1) - Governor in Council may require plans and specifications of works and (2) if he thinks deposit of waste is likely he may order alteration of the plans or prohibit the work.
Canada Petroleum Resources Act, S.C. 1986, c.45	Frontier lands	S.12(1) - Governor in Council may in case of ... (b) an environmental or social problem of a serious nature ... prohibit an interest owner from commencing or continuing work. S.24(1) - An exploration license shall contain such terms and conditions as may be prescribed. S.117(2) - Nothing in this Act affects any right, privilege or benefit set out in the I.F.A.
Dominion Water Power Act, R.S.C. 1970, c.W-6	- Dominion water powers, public lands and incidental matters	-
Dominion Water Power Regulations, C.R.C. 1978, vol. XVIII, c.1603	- All dominion water powers, all public lands needed for dominion water powers and all incidental matters	Ss.8(3) and 25(4) - Licenses may be subject to such terms and conditions as the Minister may impose. S.37(1) - Licensee is to care for lands, maintain them in a sanitary condition, improve the landscape architecture, protect the lands from injury. S.65 - Licensee is to indemnify Canada against claims.

ACT	APPLICATION	PROVISIONS
National Energy Board Act, R.S.C. 1970, c.N-6, as am. by R.S.C. 1970 (1st Supp.) cc.10, 27, 44; R.S.C. 1970 (2nd Supp.) c.10; S.C. 1973-74 c.52; S.C. 1974-75-76, c.33; S.C. 1977-78, c.20; S.C. 1978-79, c.9; S.C. 1980-81-82-83, cc.80, 84, 116; S.C. 1983-84, cc.18, 40	All lands, pipelines and international power lines	S.44 - In issuing certificates, Board shall take into account all matters that appear to it to be relevant including ... (d) the financial responsibility of the applicant, (e) any public interest that in the Board's opinion may be affected by the granting or refusal of the application.
Gas Pipeline Regulations, C.R.C. 1978, vol. XI, c.1052	All lands, gas pipelines	S.4 - Every company must do everything necessary to ensure pipeline will not interfere with quality of soil, water and air. Ss.7(6) and 8(4) - Company is to provide for passage of vehicles, pedestrians and wildlife. Ss.23-25 - Avoid, minimize disturbance of ground during construction Ss.26-31 - Conservation measures S.69 - Prevent pollution S.84(4) - Company must remove its abandoned pipeline.
Oil Pipeline Regulations, SOR/78-746 as am.	Oil pipelines	S.51 - Company is to minimize disturbance of terrain S.53 - Company shall ensure that (a) cutting trees and brush is carried out in accordance with good forest conservation practice, (b) precautions are taken to prevent fires, (c) wildlife is not unduly harassed, (d) fish channel is provided where stream is blocked, (e) spawning beds for economically important fish are protected, restored or replaced.

ACT	APPLICATION	PROVISIONS
Northern Inland Waters Act, R.S.C. 1970 (1st Supp.) c.28, am. by R.S.C. 1970 (2nd Supp.) c.10; S.C. 1977-78, c.20; S.C. 1985, c.26	All lands, water use	S.11(3) - Board may require applicant for license to furnish security to compensate those adversely affected by issue of the license. S.10(1)(b)(iii) - Applicant must satisfy Board waste will be treated and disposed of properly.
Ocean Dumping Control Act, S.C. 1974-75, c.55	The sea	S.10(2) - Permit to dump shall contain terms and conditions that Minister deems necessary in interests of human life, marine life or any legitimate uses of the sea.
Oil and Gas Production and Conservation Act, R.S.C. 1970 c.O-4 as am. by R.S.C. 1970 (1st. Supp.) c.30; R.S.C. 1970 (2nd Supp.) c.10; S.C. 1976-77, c.55; S.C. 1980-81-82-83, c.81; S.C. 1983-84, c.40	Land and marine oil and gas operations	S.3.2(1)(a) - Minister may authorize each work or activity subject to such requirements as he determines including (i) requirements re liability for loss, damage, (ii) requirements re environmental programs or studies S.19(2) - Spill or discharge of oil or gas - the person who obtained authorization is liable for (i) all actual loss or damage incurred by any person and (ii) costs incurred by government or any person in taking action in relation to the spill. S.19.3 - Minister must require person who obtained authorization to provide for financial responsibility in an amount satisfactory to the Minister.
Territorial Lands Act, R.S.C. 1970, c.T-6, as am. by R.S.C. 1970 (1st Supp.) c.48; S.C. 1972, c.17; S.C. 1974-75-76, c.52; S.C. 1980-81, c.47	Territorial lands	S.4 - The Governor in Council may make regulations authorizing the Minister to dispose of territorial lands subject to such limitations and conditions as the Governor in Council may prescribe.

ACT	APPLICATION	PROVISIONS
Canada Mining Regulations, C.R.C. 1978, vol. XVII, c.1516 as am. by SOR/78-813 and SOR/79-234	Territorial lands	S.48(1) - Mine operator may be directed to fill in, fence or otherwise make safe an abandoned mine.
Canada Oil and Gas Drilling and Production Regulations, C.R.C. 1978, vol. XVII, c.1517	Canada lands controlled by the Minister	—
Canada Oil and Gas Land Regulations, C.R.C. 1978, vol. XVII, c.1518 as am. by SOR/80-590, SOR/82-663	Canada lands controlled by the Minister	—
Territorial Coal Regulations, C.R.C. 1978, vol. XVIII, c.1522, as am. by SOR/81-328	Territorial lands	s.6(1)(2) - Staker must deposit security that will cover loss or damage due to staking S.18(2) - Lessee is liable to compensate surface owner for loss, damage
Territorial Dredging Regulations, C.R.C. 1978, vol. XVIII, c.1523.	Mineral dredging in submerged bed of any river in the Yukon or Northwest Territories	S.18(c) - Lessee must bridge or cover all ditches, pits, etc. ... where they may be crossed by a highway or trail.
Territorial Lands Regulations, C.R.C. 1978, vol. XVIII, c.1525	Territorial lands	—

ACT	APPLICATION	PROVISIONS
Territorial Land Use Regulations, C.R.C. 1978, vol. XVIII, c.1524, as am. by SOR/82-217	Crown lands, not 7(1)(b) lands	Ss.25, 27 - Land use permits are subject to terms and conditions. S.31(1) - Engineer may include terms and conditions in the permit respecting: ... (h) the protection of wildlife and fisheries habitat, (i) the protection of objects and places of recreational, scenic and ecological value, ... (m) such other matters ... as the Engineer thinks necessary for the protection of the biological or physical characteristics of the land management zone. S.36(1) - Permittee may be required to make a security deposit not over $100,000 ... (6) Minister may use all or part of the security deposit to repair or restore damaged land.
Territorial Quarrying Regulations, C.R.C. 1978, vol. XVIII, c.1527	Territorial lands, quarry minerals, sand and gravel, loam	—
Territorial Timber Regulations, C.R.C. 1978, vol. XVIII, c.1528 as am. by SOR/79-508	Timber cutting and removal on territorial lands	S.20 - Permittee is to remove all buildings
Yukon Placer Mining Act, R.S.C. 1970, c.Y-3 as am. by R.S.C. 1970 (1st Supp.) cc.28, 49; S.C. 1972, c.17; S.C. 1976-77, c.30	Yukon Territory	S.18 - No person may go on lands owned or lawfully occupied by another for mining purposes until he has given adequate security, to the satisfaction of the mining recorder, for any loss or damage that may be thereby caused.

ACT	APPLICATION	PROVISIONS
Yukon Quartz Mining Act, R.S.C. 1970, c.Y-4, as am. by R.S.C. 1970 (1st Supp.) c.28; S.C. 1972, c.17; S.C. 1976-77, cc.28, 30; S.C. 1983-84, c.10	Yukon Territory	S.14 - No person may go on land owned by another for mining until he has given adequate security for loss or damage S.72(1) - Mines and minerals are to be operated in an "efficient and minerlike" manner. S.120 - A drain or tunnel for drainage may be run through lands, upon security for damage first being deposited to the satisfaction of the mining recorder and on such other terms as the mining recorder thinks expedient.

P A R T I I

7.0 A LIST OF RECOMMENDED LEGISLATIVE CHANGES

The purpose of this section is to summarize the legislative implications of the previous six research papers. These are presented as a simple listing, including a reference to the relevant discussion, so that they may be placed in proper context by the reader.

7.1 New Legislation of General Application re: Access

The recommendation contained in Section 1.1.3 B, advises Canada to ensure that any new legislation dealing with public access to private lands states clearly its effect on the I.F.A.'s access provisions.

7.2 Legislation Concerning Access for Commercial Purposes

This recommendation, contained in Section 1.2.3 B, p. 49, advises that any new or amending legislation that creates or changes rights of access to private lands for commercial purposes should include a declaration of intent, (i.e. to replace part, or all, of the "interim" measures in the I.F.A.) should harmonize properly with any remaining I.F.A. measures, and in particular, be compatible with the Participation Agreement procedures.

7.3 Issues Relating to Expropriation

An amendment to the Expropriation Act is recommended in section 5.3 to make it clear and evident that the consent of the Governor in Council is necessary before any interest in Inuvialuit lands is expropriated under that Act.

Section 7 of the Expropriation Act allows any person to object to action under this Act, whether they have an interest in the land being expropriated or not. If Canada and the Inuvialuit did not intend this provision to apply to an expropriation of Inuvialuit lands, then the Expropriation Act should be changed by providing that s.7 will not apply to such lands.

An amendment to the National Energy Board Act is recommended in section 5.3 to put it beyond doubt that the provisions of the Act for the compulsory taking of rights of way and other interests in land do not apply to Inuvialuit lands.

7.4 Issues Relating to Wildlife Compensation

The findings of Research Paper #6 suggest that there are several legislative gaps with respect to Canada's power to require proof of financial responsibility under existing environmental and resource development legislation. The paper also points out that there is uncertainty as to whether specific legislative authorization is required in each act or whether Canada can rely upon s.13 of the I.F.A. for the necessary authority. Given the time and complexity of amending all the required Acts and Regulations listed in Table I, Section 6.3.4, suggests that it may be preferable for Canada to obtain the necessary authorization through regulations passed pursuant to s.3(5) of the Western Arctic (Inuvialuit) Claims Settlement Act.

Section 6.3.5 also points out that it may be desirable to amend the Territorial Land Use Regulations so that they can be used as an environmental management tool for the 7(1)(b) lands. In addition, at present the Territorial Dredging Regulations purport to apply to the submerged beds of all rivers in the NWT, even though the Inuvialuit own river beds on their lands.

APPENDIX "A"

A Comparison of Selected I.F.A. Provisions with Native Claims Arrangements in Alaska and James Bay/Northern Quebec

The object of this section of the report is to compare selected aspects of the I.F.A. with native claims arrangements elsewhere, specifically in Alaska and in James Bay and northern Quebec. This comparison is intended to help government negotiators develop ideas about alternative ways of approaching some of the issues raised by the I.F.A.

This part of the Study does not examine, comprehensively, the arrangements entered into in the two jurisdictions mentioned. Rather, it examines issues relating to government and its right of access to land in the settlement areas. Each of the jurisdictions is treated separately, and in each case, the analysis is restricted to the following broad questions:

* To what extent were lands reserved for "public purposes"?
* Through what means can future lands be acquired for "public purposes"?
* What arrangements were made for government access to native lands?

1.0 Alaska

In December 1971, the U.S. Congress enacted the Alaska Native Claims Settlement Act (ANCSA, P.L. 92-203), which was designed to resolve the claims of Alaskan natives upon assertions of aboriginal land rights.

Several background points about ANCSA are required in order to put the following discussion into context. First, this was a legislated, not a negotiated, settlement. While Alaskan natives were involved in lobbying Congress for the passage of ANCSA, the entire settlement took the form of a statute. In contrast, the I.F.A. was an agreement negotiated between the claimants and the federal and territorial governments.

Second, this arrangement was meant to assimilate Alaskan natives into mainstream American life. This view of ANCSA is broadly accepted and can be demonstrated by the following:

* Section 2(b) of ANCSA states a Congressional finding and declaration that "the settlement should be accomplished . . . without establishing any permanent racially-defined institutions, rights, privileges, or obligations, without creating a . . . lengthy wardship or trusteeship . . ."

* ANCSA makes no reference to goals of supporting native culture and lifestyle. Thus, for example, there are no special arrangements to protect a hunting and gathering lifestyle;

* The vehicles used for native land-holding (village and regional corporations) were to be bodies incorporated under normal state corporate law;

* After 1991, shares in the native corporations will be freely alienable; thus, lands owned by the corporations will be alienable to non-natives.

Thus, the philosophy underlying ANCSA is quite different than that of the I.F.A., which, among other things, is designed to support Inuvialuit culture.

Third, although the emphasis in this section is upon ANCSA itself, a true picture of the Alaskan situation must take some account of the many developments there since 1971. Importantly, ANCSA's integrationist policy has been resisted by much of the aboriginal community. Commentators have argued that notwithstanding s.2(b) of the Act, the federal government retains at least a limited trust responsibility in relation to Alaskan natives. Although ANCSA itself does not recognize subsistence rights, there have been efforts to obtain such protection through other mechanisms, such as the Alaska National Interest Lands Conservation Act (ANILCA P.L. No. 96-487, 94 Stat. 2371 (1980)) and changes to state law and policy. Moreover, efforts continue to extend the non-alienability restriction on native corporation shares beyond 1991. Attempts have been made by the study team to obtain an up-to-date picture of ANCSA through literature reviews, analysis of legislative amendments and litigation arising under ANCSA, and telephone interviews with interested parties.* Information derived from the latter source is, to some degree, impressionistic, and as one might expect, reflects a range of differing views.

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* Thanks are extended to the following people for sharing information on the Alaskan experience: David Case, Attorney, Ziontz, Pirtle, Moriaset, Chestnut, Ernstoff, Anchorage; Jack Allen, Regional Solicitor, Bureau of Land Management, Anchorage; Francis Neville and Martha Mills, Assistant Attornies General, Anchorage.

Finally, we have discovered that the issues of importance under ANCSA are not necessarily the same as the issues under review in this report. This can be explained partly by the fact that the social and cultural history of the Alaskan natives is not the same as that of the Inuvialuit. As well, American legal issues pertaining to natives are substantially different than those arising in Canada. Although we have attempted to address all issues concerning government and its right to land and access to land in the settlement area, it will be apparent that in relation to some of the topics, there is relatively little to say.

1.1 Land Reserved for Public Purposes

ANCSA provided for the transfer of some 44 million acres of Alaskan land to regional and village native corporations. "Public purpose" lands were protected primarily through three features of the rules governing the land selection process: the definition of public lands and the exclusion of certain lands from withdrawal; the requirement that native corporations convey certain kinds of land to governments; and the Secretary's power to reserve public easements. In addition, provision was made for the designation of park lands.

1.1.1 The Definition of Public Lands and Lands Excluded from Withdrawal

The Act required the Secretary of the Interior to withdraw certain "public lands" close to native villages from appropriation under public land laws and from selection under the Alaska Statehood Act. If the amount selected was insufficient, he was directed to withdraw certain nearby lands that were "unreserved, vacant and unappropriated" (s.1610(3)(a)).

The purpose of this withdrawal was to provide a pool of lands from which native land selections could be made. Certain categories of land, however, were not to be included in this withdrawal. First, lands used for federal purposes were protected from withdrawal by the definition of public lands, which excluded "the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation" (s.1602). Second, the State of Alaska's land selections, which had been patented or tentatively approved under the Alaska Statehood Act, were excluded from the definition of public lands.

In addition, the withdrawal did not pertain to lands in the National Park System and lands withdrawn or reserved for national defense purposes, other than Naval Petroleum Reserve No. 4.

Some problems were encountered in relation to land used in connection with federal installations. Since Alaska had been under federal control since 1860, numerous federal agencies had facilities throughout the state. Many, but by no means all, related to defense. Ideally, when these facilities were first put into place, they would have been surveyed and then withdrawn from disposition through the publication of a public land order. Because of the fact that so much of Alaska was "wilderness", often these formalities had not been followed. Moreover, some facilities had been abandoned without official steps being taken. Thus, a major purpose of s.1602 was to protect the federal interest in facilities in the absence of a comprehensive listing of such installations.

The general language of the "federal installation" exemption necessitated further definition through regulations. Unfortunately, it took several years for the regulations to be produced. In the meantime, individual agencies had to apply their own interpretation to the provision. Some agencies were not well enough organized to protect their interest and found that natives had selected lands that the agencies required for federal purposes.

Conflicts over specific applications of this section are still occurring, and at least one is expected to result in litigation.

1.1.2 Conveyances by Native Corporations to Government

On the public lands that were withdrawn, "valid existing rights" were protected (s.1610(a)(i)). Native corporations could select lands from the withdrawn lands, subject to certain restrictions. The village corporations were entitled to select approximately 22 million acres and the regional corporations 16 million, with additional lands being available to supply miscellaneous claims. The regional corporations received subsurface title to the village lands.

Following completion of the selection process, the Secretary of the Interior was required to issue patents for the selected land to the relevant native corporations. Other "public purpose" lands were protected by s.1613, which required the corporations to then make certain reconveyances. For present purposes, the important conveyances thus mandated included:

* Conveyance to the local municipal corporation, or to the state in trust for a municipality, of "title to the remaining surface estate of the improved land on which the Native village is located and as much additional lands as is necessary for community expansion, and appropriate rights-of-way for public use, and other foreseeable community needs". Under the original Act, the amount so transferred to a municipal corporation had to be at least 1,280 acres. An amendment to ANCSA altered this to read that the municipal transfer could not exceed 1,280 acres.

* Conveyance to the federal, state or municipal government, as appropriate, of "title to the surface estate for existing airport sites, airway beacons, and other navigation aids, together with such additional acreage and/or easements as are necessary to provide related services and to insure safe approaches to airport runways."

* Conveyance to any native or non-native occupant, without consideration, of title to the surface estate in a tract occupied as a subsistence campsite.

The reconveyance process is incomplete and is expected to take several more years. There has been some controversy over the Bureau of Land Management's position that reconveyance issues should be resolved before land patents are issued to village corporations. The latter take the view that patents should be issued whether or not all the reconveyance disputes have been sorted out.

Several problems have emerged in connection with the reconveyance of airport sites. These include:

* Did the ANCSA airport reconveyances relate only to airports in existence on the date of the Act?

* Could the airport land be included in the amount conveyed to the municipal corporation?

* Can village corporations veto subsurface activity upon land reconveyed for airports?

* Do village corporations have to pay for the use of sand and gravel from the reconveyed acreage?

1.1.3 Public Easements Reserved by the Secretary of the Interior

Section 1616 of ANCSA established a joint Federal-State Land Use Planning Commission for Alaska. One of the functions of the Commission was to "identify public easements across lands selected by Village Corporations and the Regional Corporations . . . which are reasonably necessary to guarantee international treaty obligations, a full right of public use and access for recreation, hunting, transportation, utilities, docks and such other public uses as the Planning Commission deems to be important" (s.1616(b)(1)). The Secretary of the Interior was directed to "reserve such public easements as he determines are necessary" prior to granting patents to the native corporations, and after consulting with the Commission (s.1616(b)(3)).

Section 1616(c) further provided that if the Secretary withdrew a utility and transportation corridor across public lands in Alaska, pursuant to his existing authority, such an area would not be available for native land selection. This facilitated the construction of the Trans Alaska oil pipeline, which was authorized by Congress in 1973.

The "public easement" provision in ANCSA proved controversial, since it had the potential to reduce considerably the amount of land actually received by the native corporations. Not surprisingly, it led to litigation.

In a 1977 case, several native corporations and the Alaska Public Easement Defence Fund challenged the way in which the Secretary of the Interior had exercised his easement power. The United States District Court, Alaska, held that the Secretary was not bound to choose only those easements recommended by the Land Use Planning Commission. However, in the court's view, the purpose of these provisions was to provide access to public lands that were <u>not</u> selected by the native corporations, and not to provide the public with a right to use native lands for recreational purposes. It was further held that the Secretary could make easement selections only for the purposes ennumerated in s.1616(b)(1), although the easements could relate to future use. He was not permitted to reserve what was, in effect, a "floating" or indefinite easement in order to take into account possible future needs (such as supply corridors) resulting from the energy crisis.

1.1.4 Designation of Park Lands

In addition to these three special strands in the land selection process for protecting "public purpose" lands, s.1616(d)(2) required the Secretary to withdraw 80 million acres of unreserved public lands, suitable for addition to, or creation as, units in national park, forest, wildlife refuge and wild and scenic river systems. Although these withdrawals were not to interfere with land selections by the native corporations, they facilitated the consolidation of park lands within Alaska, simultaneous with the establishment of native-owned lands. ANILCA, referred to earlier, was the mechanism eventually used for the establishment of park lands.

1.1.5 Summary

To a considerable extent, ANCSA finessed the kinds of problems we have identified in I.F.A. relating to public purpose lands. State lands, lands used for federal installations, National Park lands, and national defense lands were excluded from the selection process altogether.

In regard to lands used for federal installations, there was considerable discretion to determine how large an area was required. Municipal needs and airport and navigation needs were protected by the requirement that such areas be reconveyed to government by the native corporation, together with necessary easements for safety and service purposes. If possible under the land selection rules, native corporations would obviously have tried to avoid selecting such lands in the first place since the required conveyances would decrease the amount of land they owned. The Secretary's power to declare public easements, exercised in concert with a land use planning process, helped to identify future public needs before lands were transferred to the native corporation.

1.2 Acquisition of Future Lands Required for Public Purposes

No special expropriation arrangements were made by ANCSA. Thus, although s.1625 gave ANCSA priority over other federal laws applicable to Alaska, ANCSA's silence on the matter of expropriation means that federal and state "taking" powers are applicable to native lands to the same degree they apply to other privately-owned lands. This result is in harmony with ANCSA's overall integretionist philosophy.

Nevertheless, there are provisions in ANCSA that anticipate future public needs. One such provision contemplates the possibility of land exchanges between native corporations and federal officials "for the purpose of effecting land consolidations or to facilitate the management or development of the land" (s.1621(f)). Such exchanges are to be on the basis of equal value, with the possibility of cash payments to equalize the value of the exchanged properties. This provision was utilized in relation to Cape Krusenstern National Monument (P.L. 99-96, 1985). Another provision relates to the situation where a village corporation selected land within the National Wildlife Refuge System; in such a case, the patent was required to reserve a right of first refusal to the United States, so that the federal government could recover such lands if they were ever sold by the village corporation.

1.3 Government Access to Native Lands

ANCSA is also silent on the matter of government access to native lands. Again, general laws would apply. This approach may be more understandable if one considers that, by 1971, there was considerably more privately-held land in Alaska than was the case in the Western Arctic in 1983. Thus the system of laws governingt private land in Alaska was probably well-developed in comparison to the Yukon and Northwest Territories.

In relation to two categories of land, however, restrictions were placed upon use and management in order to accommodate government objectives. These categories were National Wildlife Refuge and national forest lands selected by native corporations. In relation to the first, any patent issued by the Secretary was to provide that "such lands remain subject to the laws and regulations governing use and development of such Refuge" (s.1621(g)). In relation to the second, the patent was required to contain such conditions that the Secretary deemed necessary to ensure that:

> "(1) The sale of any timber from such lands shall, for a period of five years, be subject to the same restrictions relating to the export of timber from the United States as are applicable to national forest lands in Alaska under rules and regulations of the Secretary of Agriculture; and
>
> (2) such lands are managed under the principle of sustained yield and under management practices for protection of environmental quality no less stringent than such management practices on adjacent national forest lands for a period of twelve years."

The passage of ANILCA in 1980 created another opportunity for government access to native lands, namely through the Land Bank program contemplated by s.907 of the Act. Under ANCSA, "undeveloped" native lands were protected from state and local taxation for a 23-year period. One purpose of the Land Bank program was to provide tax immunity for lands beyond 20 years. Another was to provide a mechanism for federal-native co-operation in land management and in protection of renewable resources.

This program, which is available to all private landowners, envisages an agreement between the federal government and the private landowner. If the private lands adjoin federal lands, they must be managed in a manner compatible with the management plan of the federal lands. Although the agreement is not necessarily to require the granting of public or recreational access to the private lands, it will give federal land managers access for the purpose of conserving fish and wildlife.

The program has not been heavily used to date by native landowners. Part of their reluctance to participate in the Land Bank program seems to have resulted from the inability of federal land managers and native owners to agree on easements over native lands for public and other purposes.

2.0 James Bay and Northern Quebec

The James Bay and Northern Quebec Agreement, Canada's first modern land claims settlement, was necessitated by Quebec's massive James Bay hydro-electric project. An interim court injunction obtained by the native people (though subsequently overturned), and pressure from the federal government were key factors in forcing the province to deal with native land claims. Intense negotiations over a one-year period produced the James Bay and Northern Quebec Agreement (JBNQA) in 1975.

It is obvious that the need to clear the way for the James Bay project was the driving force behind the negotiations because the provincial Crown corporations developing the project were parties to the agreement and much of the agreement deals specifically with aspects of the project. This strong development pressure is an important difference between the JBNQA and the I.F.A. Although development pressure existed in the Western Arctic in the early 1980's, it pales in comparison to the James Bay project of the 1970's. Another difference is the involvement of a provincial government. The greater power of provincial governments (as contrasted with those of the territories) means that the provincial government role in the JBNQA is much more evident than is the territorial government role in the I.F.A. Thus, most of the provisions dealing with government rights and obligations concern the provincial government.

Having outlined the differences, it should be noted that the JBNQA does not attempt to assimilate native people into the dominant culture. Rather, like the I.F.A., it provides a land base for the native people and supports their subsistence culture.

The JBNQA divides the land it covers into three categories, numbered I, II and III. Category I (CI) lands are lands over which the Cree or the Inuit have title or control of the surface, with subsurface title retained by the province. Category II (CII) lands are provincial lands over which Cree and Inuit have hunting, fishing and trapping rights. Category III (CIII) lands are the remaining lands in the claimed area over which the Cree and Inuit have no rights. The discussion here will deal only with CI lands since these are most comparable to Inuvialuit lands granted under the I.F.A.*

Cree CI lands are divided into IA, IB and special CIB lands. For CIA lands, "bare ownership" of the lands is retained by Quebec, with administration, management and control of these lands going to Canada (s.5.1.2). The federal government exercises this control through the Cree-Naskapi (of Quebec) Act (C-N Act). Cree CIB lands are owned by the Cree(s.5.1.3). Special CIB lands are distinguished because the province has greater rights with respect to these lands than other lands.

Inuit CI lands are divided into CI and special CI. The Inuit have surface title to the CI lands (s.7.1.3) and, as for Cree lands, Quebec has greater rights on special CI lands than it does on other CI lands.

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* This discussion draws on literature sources, relevant statues and primarily the JBNQA itself. Thanks are due to Mr. Sam Silverstone, lawyer with Makivik Corporation, for helpful discussion.

2.1 Lands Reserved for Public Purposes

2.1.1 General provision - s.2.13

The first and most important provision to consider in this context is s.2.13 which states:

> The rights of the Crown in right of Canada in respect to Federal properties and installations in the Territory and the rights of the Crown in right of Quebec in respect to provincial properties and installations in the Territory, which are now or hereafter owned by the Crown or used for the purposes of the Federal or Provincial Government, as the case may be, shall not be affected by the Agreement, except as otherwise specifically provided for herein.

Although it is possible to encounter problems concerning just what "properties and installations" are covered by this clause it affords blanket protection for most, if not all, existing government facilities. That is, it preserves their status at the time of the areement no matter what category of lands surrounds them. Any existing facilities owned outright by the federal govenment will remain as CIII lands because of this clause. However, where the government has a lesser interest in property, as for example, a lease, underlying title will transfer from the provincial crown to the native community if this property is included in CI lands. The federal Crown's leasehold interest will continue on the same terms as it did before.

The problem of existing government interests is evidently not easy to handle since all three agreements have taken a different approach. The I.F.A. goes into more detail concerning specific reservations and does not make this kind of blanket exception. ANCSA excluded such installations completely from selection by native corporations. One feature of both the JBNQA and ANCSA is that they create small government-owned enclaves within native-held lands. The JBNQA creates more such enclaves (owned either by government or third parties) in later provisions. This was not done in the I.F.A.

Section 2.13 also refers to government properties or installations "now or hereafter owned . . . or used . . .". The word "hereafter" suggests that this clause is, in some sense, forward-looking. It should be noted, however, that it gives no power to acquire lands for government purposes. What the clause appears to protect are those government interests, perhaps unsurveyed and perhaps never properly registered, which no doubt existed at the time of the JBNQA throughout northern Quebec. These are exactly the kind of interests dealt with by the "public lands" definition in ANCSA and the reservations in the I.F.A. The use of the word "hereafter" extends the protection of the clause not only to those government interests actually existing at the date of the agreement, but also government facilities which are being planned. Thus, in the case where a government, at the date of the JBNQA, has abandoned a building on a particular piece of property but has plans to replace it, it may proceed with its plans. As another example, reasonably foreseeable expansions of an existing airport may also be protected. Of course, there are problems of how definite the plans must be and how far in the future they can be set. The addition of the word "hereafter" introduces an element of uncertainty that may ultimately have to be resolved by a court. The CI lands are small in area and a native group may very well be interested in claiming one of these government enclaves.

The I.F.A. handled the same problem quite differently by listing each of the government interests to be protected. Presumably these interests were few enough so that this approach was practical. Also, the negotiations for the I.F.A. took much longer than those for the JBNQA so there was more time to determine what interests existed. Nevertheless, as noted elsewhere in this report, the I.F.A approach is not without problems itself.

2.1.2 Specific Provisions - ss.5.1.5, 7.1.9

The JBNQA makes specific provision for existing government facilities such as roads, airports and landing strips. Like ANCSA, it does not transfer ownership of these facilities to the Cree or Inuit. Existing roads (Inuit) and "regional and provincial roads and main arteries" (Cree) within CI lands are designated as CIII lands and thus remain with the province. Airport installations, hydroplane bases, landing strips and other similar facilities are CIII lands until they "are no longer required, as determined by Quebec", at which time "the ownership or the administration, management and control, . . . shall be transferred by Quebec . . ." to the native corporation involved. This may be contrasted to the I.F.A. which grants title underlying certain government reservations to the Inuvialuit. The effect of this clause is that, for example, if an airport is to be moved, the land for the old airport will be lost to the Quebec government. There is no provision for exchange of land in these circumstances in the JBNQA, therefore, the government would have to obtain the new airport land by expropriation of the land or a public servitude on the land. Compensation would have to be paid. Arguably, the government has no right to require a trade of the old airport as compensation for the new since that reversionary interest belongs to the native communities already. It may be possible to negotiate a land exchange with the community concerned but the government has no right to require compliance from the natives. If such compliance was not forthcoming, it would clearly be much cheaper to leave the airport in its place.

The JBNQA also reserves a 200 foot-wide strip of land around certain lakes and rivers within CI lands as CIII lands, although it provides that the strip is to be governed as if it was CI land. The main significance of keeping this strip as CII lands is that it may be expropriated later for development purposes. This is probably one provision that demonstrates the influence of the James Bay project. This provision also assures public access to the shores where the rivers concerned are navigable. Most importantly, from the native point of view, native communities do not have any riparian rights with respect to these water bodies.

There is no specific reference in the JBNQA to any other existing facilities.

2.2 Future Acquisition of Lands for Public Purposes

2.2.1 Public Servitudes - ss.5.1.7, 7.1.10

This refers to servitudes needed for infrastructure such as roads and bridges, local services such as water and sewer, public utilities, and other similar purposes. All public bodies, agencies and corporations are given authority to expropriate for these purposes, but gas or oil pipelines and transmission lines are constrained as to location (ss.5.1.7, 7.1.10, C-N Act s.120(2)). All expropriations must be compensated in land or in money (at the option of the natives), unless the servitude is of "direct benefit" to the Cree or Inuit community involved or to the CI lands (ss.5.1.7, 7.1.10, C-N Act s.122).

Servitudes which are of "direct benefit" to the Cree community include those "involving public services expressly requested by the Cree community, essential services for the Cree communities provided such services are used by the Cree residents of the community, and services designed to enhance the quality of life of the Cree inhabitants of the community". Similar provision is made for the Inuit.

The procedure for compensating with land involves the native community selecting possible replacement lands. If this is not acceptable to Quebec the province must offer alternative lands. There is a time limit of 120 days on the whole procedure, after which the compensation must be taken in money.

Under the I.F.A., the Inuvialuit are always compensated for the taking of Inuvialuit lands, even where their use directly benefits the Inuvialuit. Also, the Inuvialuit have greater control over replacement lands than the Cree and Inuit.

2.2.2 Other Future Government Occupation - ss.5.1.6(a), 7.1.12.(a)

Lots within CI lands are to be allocated by the Cree or Inuit commuity involved for schools, roads, hospitals and other like facilities. Allocation is to be by lease, servitude or other similar agreement and will be for a nominal fee.

This is not unlike the Inuvialuit position under I.F.A. s.7(63) which deals with appropriation of lands for municipal government purposes, except that the Inuvialuit may be entitled to more compensation. It is also similar to ANCSA, which requires reconveyance of land to municipalities without compensation.

2.2.3 Special CIB or CI Lands - ss.5.1.4, 7.1.6

In addition to the "public servitudes" which may be established on all CI lands, special CIB or CI lands are also subject to "servitudes for public purposes". These lands are located around rivers and lakes, and the provisions specify that "developments" shall be no larger than would require a permanent work force of ten people. Possibly such servitudes would relate to hydro-electric development for the benefit of the whole province as opposed to local communities. Thus these servitudes are distinguished from the "public servitudes" mentioned above. There is no mention of either expropriation or compensation with respect to these special CIB and CI lands.

This represents a significant derogation of control over CI lands for the Cree and Inuit. There is no equivalent section in the I.F.A.

2.2.4 CI Rivers - ss.5.5.2, 7.4.2

There is an interesting additional provision in the JBNQA which has no equivalent in the I.F.A.

> . . . Quebec, La Societe d'energie de la Baie James, Hydro-Quebec and all public bodies, agencies and corporations authorized by law may modify or regulate the flow of rivers of Categories II and III lands even if such rivers are flowing through or adjacent to Category I lands or have downstream effect on the part of such rivers included within Category I lands, . . .

This power is subject to some specifications as to the amount the flow can be altered and payment of damages to downstream insterests.

This is clearly another of the provisions put in the agreement especially to limit disputes over activities connected with the James Bay project. There is no reference to alteration of flow of rivers and their downstream effects in either the I.F.A. or ANCSA.

2.3 Government Access to Native Lands

2.3.1 CI Lands Generally - ss.5.1.12, 7.1.16

The general public has access to all "roads, arteries, airports, bridges, public sea-plane bases, wharves, harbours, rivers and principal lakes and public buildings and lands used for public purposes". In addition, access to all CI lands is given to specific persons, including "persons authorized to exercise a public function or engaged in technical surveys, the construction or operation of a public work or public utility".

This provision grants extensive rights of access to government agents as well as many other people. There is no need to obtain consent from the Cree or Inuit before entering on the lands. In comparison, the I.F.A. grants less freedom to the public in its provisions for public access generally. The government access section of the I.F.A. (s.7(16)) is much more detailed than the JBNQA. As stated above (Research Paper #1), the I.F.A. provision is restricted to "agents or employees" of governments and does not extend to independent contractors. The JBNQA clearly includes independent contractors, indeed, the words used are "persons authorized to exercise public function." There is no express connection with government at all. The "public function" is also potentially very broad, although it can be implied that it must be a legitimate function. The phrase in the I.F.A. is "legitimate government purposes". As before, since the "function" in the JBNQA is not tied to the government, it may encompass more activities than the I.F.A. provision. Again, the provincial James Bay project comes to mind, and it seems possible that persons employed on the project would have access to CI lands under this clause where they probably would not under the I.F.A. clause.

2.3.2 Special CIB or CI Lands - ss.5.1.4, 7.1.6

Quebec and its agents have access to special CIB and CI lands as if they were CII lands. Section 5.2.6 states with reference to access to Cree CII lands that "[s]ubject to the rights of the Native people, under the Hunting, Fishing and Trapping Section (24) of the Agreement, persons exercising a right compatible with such rights of the Native people as well as persons exercising some duty imposed by law shall have access to Category II Lands and may remain thereon, and erect constructions thereon, subject to the general restrictions of law . . ." The provision for Inuit CII lands is similar (s.7.2.6).

Again, it can be noted that the I.F.A. gives much more restricted access to Inuvialuit 7(1)(b) lands and usually requires notice to be given.

2.4 Implementation in General

No specific information is available on implementation of these provisions as yet because they have not been used. Nevertheless, comments from Makivik Corporation reflect strong displeasure with the potential power that governments and developers have with respect to taking the interests they need in native lands. Particular dissatisfaction concerns the ability of hydro-power developers to interfere with CI rivers and reservation of the 200-foot riparian strip as CII lands, thereby depriving Inuit of riparian rights. One might suspect that if and when these provisions are used, native co-operation will not be forthcoming.

3.0 Summary

The influence of the James Bay project is clear in the JBNQA, an influence and pressure which was not present in the I.F.A. and in ANCSA. Thus, the provisions relating to access to native lands are much more generous than those of the I.F.A. They are probably also more generous than the regime that would prevail under ANCSA since that Act left such matters to be dealt with by the general law applicable to private lands. The access provisions of the JBNQA are certainly more generous than what is allowed for privately-owned land in Canada.

Likewise, the provisions for obtaining land for government needs are more generous in the JBNQA than under the I.F.A. The I.F.A. requires more compensation in most cases and does not force the Inuvialuit to forfeit their chance to replace lands taken if the replacement procedure becomes too drawn out. Under ANCSA, these matters are handled by the general law of expropriation, which would not allow for compensation in the form of land.