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Shaping the Future or Meeting the Challenge? The Federal Constitutional Proposals and Global Warming

*by Nigel Bankes**

INTRODUCTION

In administering the death blow to the Meech Lake Accord, Elijah Harper had the support of a loose and diverse coalition of Canadians who found different elements of that package (or the procedure by which it was adopted) to be sufficiently objectionable that they were content to oppose its ratification. Northerners, westerners, aboriginal Canadians, and women's groups all found themselves rejecting the deal. Environmental groups and environmental lawyers saw little need to get involved in the debate.

Six weeks after the tabling of the current federal proposal, *Shaping Canada's Future Together*, it is already clear that the debate will be more, rather than less, far ranging than was the debate on Meech, and clear also that environmental interests may play an important and perhaps critical part in the debate. The reasons for this are not hard to discern. The focus of the proposals is no longer Quebec. Rather, we are told, the aim is to design a federation to meet the needs of the 21st Century. This sounds like a quest for the Holy Grail, the sustainable constitution, which in turn invites the question, do the federal proposals satisfy the needs of the current generation of politicians at the expense of the long term future needs of Canadians?

THE PROCESS

For many, the debate on Meech became a debate on process. Many rejected on principle a deal that had been negotiated by

Résumé

Les récentes propositions constitutionnelles fédérales, intitulées *Bâtir ensemble l'avenir du Canada*, ont pour but d' établir les bases d'une fédération capable d'affronter les défis globaux économiques, de sécurité et environnementaux du 21e siècle. Les solutions globales à ces problèmes (par exemple le problème du réchauffement du globe) devront être appliquées par chaque pays. Les propositions sont évaluées du point de vue de l'appui qu'elle sont susceptibles de fournir au gouvernement fédéral dans la négociation et l'exécution d'un accord international sur les gaz à effet de serre. L'article conclut que, bien que, par rapport à d'autres fédérations, notre gouvernement fédéral soit particulièrement mal équipé pour s'acquitter d'une telle tâche eu égard à l'actuelle répartition des pouvoirs, les propositions n'aident aucunement à résoudre ce problème et pourraient même, à plusieurs égards, l'aggraver.

eleven men behind closed doors and which provincial legislatures were expected to rubber-stamp. For the dissenters, the process exhibited the worst excesses of executive federalism.

Despite these criticisms the federal government has chosen to reject the call for a constituent assembly and has continued with the old ways: federal proposal, review by a special joint parliamentary committee,[1] followed by .... Well actually, I'm not very sure, and I suspect I'm not alone in my uncertainty. The very lack of detail on the question of process seems remarkable given the concerns that Meech engendered.

Concerns over process are nothing new for the environmental movement (to the point that at times process seems to become an all-consuming goal), but there is a particular process concern that needs to be raised in the context of the present proposals. In the last round northerners discovered (through the *Peniket*[2] and *Sibbeston*[3] cases) that the Meech proposals were not themselves subject to review on constitutional grounds. In the present round the environmental lobby will no doubt discover that the current proposals are not subject to the federal environmental assessment and review process. That may or may not be good law[4] but it is certainly bad policy. An assessment of the environmental implications of this and other proposals ought to be relevant to the design of a constitution to meet the needs of the next century. Obviously, that task is beyond the scope of this brief note and instead I shall use this space to consider how *Shaping Canada's Future* would, if adopted, affect the ability of the federal government to implement elements of a possible greenhouse gas (GHG) convention and protocols. Before embarking on that I shall provide an abbreviated list of the federal proposals which might relate to the environment.

THE PROPOSALS

The proposals which seem to have the greatest potential impact for the environment are: the proposal to entrench property rights in the Charter; the reference to "sustainable development" in the Canada clause; the economic union provisions; the limitation on the peace, order and good government power and the proposed recognition of the exclusive jurisdiction of the provinces for *inter alia* forestry and mining; the proposals for legislative inter-delegation[5]; the limitations on the federal spending power and the proposal for a Council of the Federation. But perhaps the most important concern lies not so much in what is contained within the proposal but in what has been left out. If the proposal really does purport to provide a blueprint for a constitution that will carry Canada into the next century, is it not remarkable that the proposal contains precious little by way of reference to the environment, but is replete with concerns about trade and the economy?

ONE SCENARIO: A GREENHOUSE GAS CONVENTION

The next century is likely to see the domestic agendas of states increasingly being driven by global events and global negotiations. This will be as true of the environment as it is of trade. Indeed this trend is recognized in the federal proposal at several points, but most particularly in the introduction (at vii): "Pressures from within have been accompanied by increasing international pressures. Global forces are affecting the sovereignty of states and increasing their interdependence. Even the largest states are proving too small to cope alone with many of their economic, security and environmental problems."

The threat of global warming offers an obvious and important example of a problem which will require multilateral solutions and domestic implementation. Although states optimistically anticipate being able to sign a greenhouse gas agreement in Brazil in 1992, much of the hard negotiating on specific protocols will have to follow.

In order to focus the constitutional debate, consider a scenario in which Canada negotiates a convention and protocols[6] with the following key provisions: a limitation on greenhouse gas (GHG) emissions at 1990 levels by the year 2000,[7] a policy of no net loss of forests,[8] a small carbon tax to finance the transfer of energy efficient technology to developing countries, and finally a protocol which provides for a more equitable global allocation of the right to emit GHGs based upon a per capita entitlement formula[9] (to be achieved, along with, say, a 10% reduction in overall GHG emissions, between 2000 and 2015). These per capita rights would be tradeable. In light of the significant efficiency advantages associated with tradeable emission permits (rather than traditional techniques of regulation), assume that the federal government wishes to use this policy tool[10] to implement both the 2000 and the 2015 targets.

Conventional analysis suggests that, at the present time, the federal government would find it extremely difficult to implement many of the terms of such an agreement without the active co-operation of the provinces. For, with the exception of the old imperial treaties, the federal government has no general head of legislative jurisdiction which allows it to implement international agreements. Instead it must rely upon its proprietary rights, or a specific head of power, or the more general peace, order and good government power (POGG) in the preamble to s.91. While the latter has recently been given an expansive interpretation by the majority of the Supreme Court in the *Crown Zellerbach*[11] case, some find the dissenting judgement of La Forest J. to be more persuasive. In *Crown Zellerbach*, Le Dain J., supported by three members of the court, all of whom have since resigned, upheld the application of a section of the federal Ocean Dumping Control Act (which was designed to implement the Convention on the Prevention of Marine Pollution by the Dumping of Wastes and other Matters) to marine waters within the Province of British Columbia. The majority found support for the legislation in the national dimension or national concern doctrine and enunciated four conclusions as guides to the application of the doctrine. Two are relevant here:[12]

> 3. For a matter to qualify as a matter of national concern ... it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern **and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.**
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> 4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intraprovincial aspects of the matter.

If one accepts the reality of the challenge posed by global warming and the difficulties associated with the implementation of international obligations, it is pertinent to ask whether the federal government would be better placed both to negotiate and implement a GHG convention and protocols, in the event that *Shaping Canada's Future* were adopted. The answer must be "no".

Consider first the proposal to stabilize emissions or to impose cutbacks to be implemented through a scheme of marketable emission permits. What sort of problems would face the federal government? Where would it find the authority to allocate to each province a quota of permits (thus replacing or supplementing provincial pollution control legislation) and how might it subsequently reduce the emission level of these permits? The nub of the problem is that a scheme such as this would in effect create a new set of property and civil rights in the province.

There are perhaps two alternatives for the federal government. First, by analogy with the federal-provincial agricultural marketing arrangements,[13] it ought to be possible for the federal and provincial governments to agree upon a scheme and implement it through reciprocal legislation and the interdelegation of administrative powers. This solution is extremely cumbersome and the cases do not, in the main, support unilateral federal action based upon the power over interprovincial trade and commerce. The exceptions are limited to recent cases which have tentatively explored the boundaries of the federal power over general trade and commerce affecting Canada as a whole.[14] These cases have suggested that, in exceptional circumstances, the federal government might create a new civil cause of action but this is a far cry from the creation of a new national scheme of marketable emission permits.

The only other potential source of authority for unilateral federal action would be POGG on the basis that the scheme dealt with a problem of national dimensions or national concern, that could not be dealt with by the provinces. The argument would require a reliance upon the majority opinion in *Crown Zellerbach* but also an expansion of the federal authority contemplated in that case, for the implications of a national quota allocation scheme for GHG or carbon emissions would be far more pervasive than the specific problem at issue in that decision.

Without the support of that decision it is difficult to see how the federal government could meet the argument that such a scheme fell to the provinces as a matter in relation to property and civil rights. The possibility of extending *Crown Zellerbach* is reduced rather than enhanced by the federal proposals, which suggest that while Parliament will still have power to deal with matters of national dimensions and emergencies, it would lose its authority to legislate in relation to matters not specifically assigned

by the Constitution **or by virtue of court decisions**. Although it may be argued that this would preserve *Crown Zellerbach*, a subsequent court might well be reluctant to give POGG a broader interpretation than proposed by that case in light of an expressed legislative intent to limit its ambit.

But even if such a scheme could be implemented by the federal government, either unilaterally or by agreement of the provinces, would other elements of the new proposals present an obstacle? In my view, both the proposed property clause and the economic union power might present problems. In general, I do not believe that an entrenched property clause[15], although it will undoubtedly spawn much wasteful litigation, would ultimately present a serious obstacle to the operation of pollution control legislation. I do believe, however, that any potential problems will be exacerbated by market-based control schemes which, in effect, establish property rights by their allocation of a limited "right" to pollute. The problem will not be presented by the initial allocation of these rights but by subsequent attempts to reduce their "value", and the issue will be not so much whether it can be done but whether or not compensation should be payable.

My concern with the economic union clause is perhaps more speculative, but is there not a risk that the federal legislation allocating GHG quotas to different provinces would breach the proposed new s.121(1) & (2)[16], and could only be saved therefore by the appropriate declaration complying with the 2/3 and 50% rule?[17] In my view s.121, is probably the most far-reaching and serious of the federal proposals in relation to the environment. By striking at both federal and provincial legislation, it would effectively entrench a particular laissez-faire approach to economics, an approach which will not always serve the goal of environmental protection.

Consider for example, the likely fate of provincial legislation which required the use of returnable containers or a particular percentage of re-cycled fibre. Unlike legislation violating Charter protections, it would be of no avail to argue that the scheme in question was, in the words of s.1 of the Charter, "demonstrably justified in a free and democratic society." The Australian experience here is instructive. The "free intercourse" provision of the Australian constitution (s.93)[18] has been much litigated and although the relevant jurisprudence has recently been placed on a firmer conceptual foundation,[19] the section has in the past been used to frustrate legitimate and desirable governmental intervention.

The imposition of a carbon tax might not pose the same sorts of legal[20] difficulties for the federal government (under either the present constitution or the current federal proposals) for there is little doubt as to federal authority to levy an appropriately framed tax on consumption, or indeed on severance, subject only to the s.125 immunity provision.[21]

Finally, consider the "no net loss policy". It has always been difficult for the federal government to justify interference in forestry management issues because of the provincial proprietary position and associated legislative powers. Nevertheless, the federal proposal to recognize the exclusive jurisdiction of the provinces for *inter alia* forestry and mining (ironically following hard on the heels of the creation of a federal department of forestry) would further constrain it at a time when forestry management practices are of increasing public and international concern.[22]

A no net loss policy would also raise the question of who might pay for the reforestation measures which would no doubt be required. The answer might well be tied to the question of who gets to impose and collect the carbon tax, but the question also raises the spending power issue. Once again, the federal government proposes to tie its hands in a way which would restrict its ability to encourage a reforestation policy. *Shaping Canada's Future* provides that "the Government of Canada commits itself not to introduce new Canada-wide shared-cost programs and conditional transfers in areas of exclusive provincial jurisdiction without the approval of at least seven provinces representing 50 percent of the population."

CONCLUSION

Unlike other federal unions such as Australia and the United States[23], our federal government has always been constrained in its ability to implement international agreements. The globalization of trade and environment suggests that such constraints will become more rather than less pressing in the next century. The federal proposal, although recognizing this problem, fails to propose a solution. Indeed, the analysis above suggests that, at least in the context of a GHG convention scenario, the proposal may have compounded the problem. In short, *Shaping Canada's Future* proposes a constitutional blueprint

which is less likely than the present constitution to meet the needs of future generations of Canadians. Whether it will even suffice to meet the needs of the present generation of politicians remains to be seen.[24]

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Notes

1. At the time of writing (mid-November, 1991) even this looks doubtful as the Castonguay-Dobbie Committee begins to self-destruct.

2. (1987), 45 D.L.R.(4th) 108 (Y.T.C.A.).

3. (1988), 48 D.L.R.(4th) 691 (N.W.T.C.A.).

4. *Angus* v. *Canada* (1990), 72 D.L.R.(4th) 672 (F.C.A.)

5. This proposal is not considered further here, but its implications may be very far-reaching. Consider, for example, the broad possible scope for the delegation of responsibilities for the environmental assessment of the federal aspects of projects located within provinces, projects which might include Great Whale, the Oldman Dam and Rafferty-Alameda.

6. In constitutional terms it may be equally important to keep in mind the possibility that international negotiations will fail but that the federal government might still deem it desirable to proceed unilaterally with those abatement measures which can be justified on other grounds: a "no regrets" policy. See Grubb, *The Greenhouse Effect: Negotiating Targets*, Royal Institute of International Affairs, 1990.

7. This is the goal found in *Canada's Green Plan*, 1990, at 100. The Plan notes that given projected increases, without this commitment, CO2 emissions would be 17% above their 1990 level by the year 2000.

8. William Nitze, *The Greenhouse Effect: Formulating a Convention*, Royal Institute of International Affairs, 1990 at 38.

9. An idea with radical implications (but which is in harmony with the equitable concerns which underlie the Brundtland Report) popularized by Michael Grubb, *supra* note 6.

10. In the *Green Plan*, at 54-55, the federal government endorsed the use of tradeable emission permits for smog control. Plans were to be implemented through federal-provincial agreements.

11. *R. v. Crown Zellerbach Canada Ltd* (1988), 49 D.L.R.(4th) 161 (S.C.C.).

12. *Id.*, at 184, emphasis supplied.

13. *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198. It should be noted that the analogy with the marketing arrangements would be less than precise in at least one important respect. Unlike the situation for agricultural products, at the outset, there is no interprovincial trade (as opposed to the interprovincial **effects** of GHGs) upon which the federal authority could fasten. It is true that ultimately such a scheme might create an interprovincial market in the permits.

14. *General Motors of Canada Ltd* v. *City National Leasing et al* (1989), 58 D.L.R.(4th) 255 (S.C.C.), *A.G. Canada* v. *Canadian National Transportation Ltd* (1983), 3 D.L.R. (4th) 16 (S.C.C.).

15. Much will obviously depend upon the actual formulation of such a provision. However, it seems likely the proposal would not go beyond the "deprivation" formulation (based upon a single right analysis) of s.7 as interpreted by the Supreme Court in *B.C. Motor Vehicle Reference*, [1985] 2 S.C.R. 486.

16. (1) Canada is an economic union within which persons, goods, services and capital may move freely without barriers or restrictions based upon provincial or territorial boundaries.

    (2) Neither the Parliament or Government of Canada, nor the legislatures or governments of the provinces shall by law or practice contravene the principle expressed in subsection (1).

17. Section 121 (1) & (2) will not invalidate a law of a province or of Canada that "has been declared by Parliament to be in the national interest." Such a declaration will only be effective if approved by **governments** (not legislatures) "of at least two-thirds of the provinces that have, in the aggregate ... at least 50 percent of the population of all the provinces."

18. " ...(T)rade, commerce, and intercourse among the States ... shall be absolutely free." For a recent environmental case under this section striking down state beverage container legislation see *Castlemaine Tooheys Ltd and Ors* v. *State of South Australia* (1990), 65 A.L.J.R. 145 (H.C.) and comment at (1991), 65 A.L.J.R. 266 (Taberner and Lee). The Australian experience suggests that it is the concept of discrimination and not the concept of freedom which should form the foundation stone for an economic union provision. Other commentators have suggested that the EC experience is useful here and that the partial success of the Government of Denmark in the *Danish Bottles Case*, [1988] E.C.R. 4607 confirms that free trade provisions will not preclude some recycling or reuse schemes. However, it can be argued that Denmark only succeeded in that case on the basis of the environmental provisions of the Single European Act which limited the application of Art. 30 of the Treaty of Rome. With the exception of the recognition of sustainable development in the "Canada clause" there are no similar counterbalancing provisions in the federal proposal or in the Australian constitution. The Australian experience may therefore offer a better guide. I discount the value of the sustainable development clause in this context because it is itself counterbalanced by the "free flow" provision of the Canada clause.

19. *Cole* v. *Whitfield* (1988), 165 C.L.R. 360.

20. There would be considerable political argument as to whether the tax **ought** to be imposed by the federal government or by producing or consuming provinces. It is not

difficult to imagine a re-run of the energy wars of the 1980s should the carbon tax proposal become a reality. The Western Accord, like the earlier pricing agreements, constitutes a political commitment on the sharing of resource rents (recovered through taxes or royalties) between the federal government and the western provinces.

21. Section 125 provides that "No Lands or Property belonging to Canada or any Province shall be liable to Taxation." The section would not pose any difficulties if the proposed tax were to be imposed upon the ultimate consumers. However, this would be administratively cumbersome and it would be easier to impose the tax on those utilities burning fossil fuels to produce electricity. With the exception of Alberta the Canadian utility industry is dominated by Crown corporations. In practice, however, a federal draftsperson should be able to finesse this problem and the decision of the Supreme Court of Canada in *Natural Gas and Gas Liquids Reference* (1982), 136 D.L.R. (3d) 48 and find an entity in the chain of transactions from production to power station upon whom the tax could be levied.

22. The degree of constraint would depend upon the actual language of the implementing section. *Shaping Canada's Future*, at 37, does refer to some limits imposed upon provincial exclusive jurisdiction by the federal responsibility for international affairs, but the precise intention of this phrase is not clear.

23. It is surely hardly a co-incidence that the leading cases in each jurisdiction are environmental cases: in the United States, *Missouri* v. *Holland* (1920), 252 U.S. 416, in Australia *Commonwealth* v. *Tasmania (the Tasmanian Dam Case)* (1983), 158 C.L.R. 1 and *Richardson* v. *The Forestry Commission* (1988), 164 C.L.R. 261.

24. I would like to thank Janet Keeping, Keith Archer, Owen Saunders, Al Lucas, Stephen Hazell and François Bregha for their comments.

The Gwich'in Final Agreement

*by Letha MacLachlan**

INTRODUCTION

On September 20, 1991, one of the groups of aboriginal peoples indigenous to the MacKenzie Delta in the NWT and Yukon, entered into a Final Agreement for a comprehensive land claim settlement[1] with the Government of Canada. The Gwich'in (formerly known as "Loucheux") are Indian peoples who reside primarily in the communities of Inuvik, Aklavik, Arctic Red River and Fort McPherson, NWT, and who have traditionally used the lands and waters surrounding these communities as well as the north slope of the Yukon.

Although the Gwich'in had been one of five regions participating in the Dene-Metis comprehensive claim negotiations, that relationship was severed in July, 1990 when the Joint Assembly of the Dene Nation and the Metis Association of the NWT passed a resolution which rejected, among other things, both the clause extinguishing aboriginal rights and the March 31, 1991 deadline set for ratification of the Final Agreement between Canada and the Dene-Metis.

Eager to settle their claim in light of the strides made by the Inuvialuit[2], their neighbours to the north, the Gwich'in voted against the resolution and later approached the Minister of Indian Affairs and Northern Development about settling their outstanding claim on a regional basis.

In October of that year, the Canadian Government responded by accepting the request of the Gwich'in Tribal Council to negotiate a regional claim and rejected any further negotiations

Résumé

Cet article examine certaines provisions-clés de l'entente sur les revendications territoriales conclue récemment entre le gouvernement fédéral et les Gwich'in, Indiens résidant principalement dans les communautés de Inuvik, Aklavik, Arctic Red River et Fort McPherson dans les Territoires du Nord-Ouest. L'auteur se penche notamment sur les dispositions de l'Entente finale des Gwich'in décrivant les avantages accordés aux Gwich'in en échange de leur renonciation à leurs revendications territoriales portant sur certains territoires canadiens. Ces avantages comprennent le droit de propriété sur certains territoires situés dans les Territoires du Nord-Ouest et au Yukon, des versements en espèces répartis sur une période de 15 ans, des droits de redevances dans la vallée du MacKenzie et une compensation pour les pertes de récolte de la faune. L'article décrit également les divers régimes de gestion des ressources institués par l'entente, au sein desquels les Gwich'in bénéficient d'une importante représentation.

Enfin l'auteur examine comment l'Entente finale des Gwich'in a pris racine dans l'Entente de principe des Denes et des Métis (qui elle, a échoué), et analyse l'Entente finale dans le contexte du programme politique des autochtones, et notamment des efforts récents vers l'auto-détermination.

of a comprehensive claim on behalf of all Dene and Metis of the MacKenzie River Basin. The Gwich'in proceeded to negotiate a claim based on the main elements of the Dene-Metis Final Agreement[3] and during the week of September 16, 1991 received overwhelming ratification by the claimants in favour of the Gwich'in Final Agreement ("GFA"). Now the federal cabinet must ratify the agreement and recommend passage of settlement legislation to Parliament.

LAND TITLE

In exchange for agreeing to give up any aboriginal claim, right, title or interest the Gwich'in may have now or in the future to any lands and water anywhere within Canada, the GFA confirms title to 8,640 square miles of land in the NWT, of which 2,360 square miles will include title to subsurface minerals. In addition, the Gwich'in will gain title in fee simple to the surface only of 600 square miles of land in the Yukon.

Lands owned by the Gwich'in will be held collectively, not individually. Title will be held by the Gwich'in Tribal Council. These lands can never be sold or conveyed unless to individual claimants or corporations owned by either the claimants or the Crown. They are not considered to be lands reserved for Indians under the *Indian Act*, - neither can they be mortgaged, charged, given as security or subjected to seizure or sale under court order or any other judicial process.

Title to these lands also includes title to the portion of beds of lakes, rivers and other water bodies contained within Gwich'in lands. Such riparian type rights provide the Gwich'in with potentially significant powers to affect upstream developments which might have a negative impact on rate of flow, quantity and quality of waters which are on, flowing through or adjacent to Gwich'in lands.

ECONOMIC MEASURES

a. Financial Compensation for Lands Relinquished

The Gwich'in will receive a financial compensation package in exchange for traditional lands to which they have relinquished aboriginal title. This includes a non-taxable payment of $75 million (in 1990 dollars) to be paid out over a fifteen year period.

b. Royalties

The Gwich'in will be free to negotiate arrangements with developers regarding exploration, development and production from subsurface lands owned by the Gwich'in. They will also receive royalties received by Government from extraction of mines, minerals and petroleum from all lands within, not just their settlement area, but the entire MacKenzie Valley. The Gwich'in will be entitled to 7.5% annually of the first $2 million and 1.5% annually of additional royalties.[4]

c. Compensation for Future Damages

The GFA also provides the Gwich'in with the right to be compensated for any actual wildlife loss or future harvest loss caused by development to lands or water in the Settlement Area. This specifically includes loss or damage to property or equipment used in wildlife harvesting or to wildlife harvested or reduced into possession, present and future loss of income from wildlife harvesting and of wildlife harvested for personal use by claimants.

The liability of the developer for these damages is absolute - they are liable without proof of fault or negligence. The obligation to compensate the Gwich'in extends to all lands in the Settlement Area (not just Gwich'in or Crown owned lands).

d. Benefits Agreements

Benefits agreements are private agreements which may be negotiated between a developer and the Gwich'in prior to the developer exercising any subsurface rights he might otherwise hold in lands owned by the aboriginal group.

Although there is no requirement that a private developer have a benefit agreement in place with the Gwich'in prior to exercising its rights to develop subsurface resources, a developer is obliged to consult with the Gwich'in Tribal Council before exploration takes place.[5] There are provisions in the Final Agreement which commit government to following preferential contracting and hiring policies in its own projects, and which oblige government to consult with the Gwich'in Tribal Council in developing and implementing programs and policies related to economic development.

There is also a commitment by government to involve the Gwich'in in the development and implementation of any northern accord on oil and gas development in the NWT. A northern accord would address the devolution of responsibility for administering the disposition of subsurface rights and regulation of subsurface exploration, production and development from the federal government to the Government of the Northwest Territories.

e. Government Commitment

An entire chapter of the GFA sets out the commitment of both the federal and territorial governments to provide, through their programs and policies, preferential support to the Gwich'in in relation to commercial activities in their settlement area. Government economic development programs are to "take into account" the following objectives:

(i) That the traditional Gwich'in economy should be maintained and strengthened; and

(ii) That the Gwich'in should be economically self- sufficient.

Government must consult the Gwich'in Tribal Council when proposing programs "related" to these objectives and must review their effectiveness every two years.

f. Settlement Corporations

Although capital transfers, royalty payments and title to Gwich'in lands are to be transferred to the Gwich'in Tribal Council, the GFA allows for the creation of other corporate entities entitled "settlement corporations", to deliver social benefits which are, in effect, programs which government currently delivers. In exchange for being able to receive and disperse monies on a tax-free (or tax-reduced) basis, these settlement corporations are restricted to carrying out only those activities permitted under the GFA. If a settlement corporation strays from the list of permitted activities, the financial consequences are harsh.

These settlement corporations are to be without share capital and, like all Gwich'in institutions created pursuant to the GFA, they must ensure that all participants have an equal and non-transferrable interest in the assets transferred at the time the claim was settled and must be owned and controlled by persons enrolled in the GFA.

RESOURCE MANAGEMENT REGIMES

As part of the exchange, both government and the Gwich'in have agreed to share equally in the administration and management of all lands within the Gwich'in settlement area - regardless of whether the land is owned by the Crown, the Gwich'in, or any other third party. Throughout the GFA, the term "government" is used to refer to either the Government of Canada or of the N.W.T. Whichever level of government has jurisdictional authority over the matter referred to at any given time will be the government responsible under the GFA. This allows flexibility in areas over which the GNWT is negotiating for greater jurisdiction either by way of delegation from Canada or constitutional reform.

The Gwich'in claim establishes a number of institutions of public government for the management and regulation of renewable and non-renewable resources in the Settlement Area. Those boards include:

- Renewable Resources Board
- (Land Use) Planning Board
- Environmental Impact Review Board
- Land and Water Board
- Surface Rights Board

These boards will be established and guided by public legislation, be paid for by government and have a mandate to serve the public interest.[6] Although both government and Gwich'in are guaranteed the right to equal representation, it is of interest to note the differing jurisdictional authorities of each in relation to the NWT. One should note too that in some cases the GFA reaches outside the Gwich'in settlement area to set the standards or the structure of institutions having authority for the entire MacKenzie Valley.

As noted above, the GFA creates a Renewable Resources Board for the Gwich'in settlement area. However, the GFA also provides that if another Renewable Resources Board is "established having jurisdiction in an area within the MacKenzie Valley which includes the Settlement Area", that MacKenzie Valley Board shall assume the powers and responsibilities of the Gwich'in Board, the two shall merge and the Gwich'in Board shall become a regional panel of the new Board. Where the Renewable Resources Board is either restricted to the Gwich'in Settlement Area or is a panel of the MacKenzie Valley Board, Gwich'in representation is 50%. However, once the MacKenzie Valley Board is faced with making a decision or recommendation that, in its opinion, would affect renewable resources in a part of the MacKenzie Valley outside the settlement area, then the GFA provides that Gwich'in representation is diluted to a minimum of one Gwich'in nominee.

This same pattern is repeated with respect to the Land and Water Board. The requirement of the Surface Rights Board however, is only that when dealing with Gwich'in lands, members of a panel must consist of at least one person who is a resident of the Gwich'in settlement area - not a Gwich'in nominee. There is no 50% requirement.

The terms establishing the Environmental Impact Review Board ("EIRB") are slightly different. The EIRB is established as "the main instrument for the conduct of environmental impact assessment and review in the MacKenzie Valley". It is composed of equal membership from nominees of aboriginal groups and of government. The term "aboriginal groups" is not defined. However, at least one member of the Board must be a nominee of the Gwich'in. Furthermore, whenever a review is conducted on a proposal, "the likely significant adverse impact or likely cause of significant public concern" of which is wholly or predominantly within the settlement area, the composition of the panel must be 50% Gwich'in nominees. All other proposals which have an impact partially within the settlement area must be conducted by a panel with at least one member nominated by the Gwich'in.

For those projects involving a joint review panel with the Federal Environmental Assessment Review Office ("FEARO"), where the development proposal "overlaps the MacKenzie Valley and an adjacent area subject to a comprehensive land claim agreement, nominees put forward by the relevant aboriginal groups, including the Gwich'in, shall be no less than 1/4 of the members of the panel".

The impact of the EIRB on the entire MacKenzie Valley will be significant because no license or approval that would have the effect of permitting a development proposal to proceed may be issued until it has conducted an initial assessment to determine "whether the proposed development will likely have a significant adverse impact on the environment or will likely be a cause of significant public concern". Until now this function has been conducted internally by Department of Indian Affairs and Northern Development officials. Once the mechanics of the GFA come into force, an environmental review and assessment procedure must be formally and publicly conducted by the EIRB or a joint FEARO/EIRB panel before an application for a development proposal can proceed.

a. Renewable Resource Management

Like other comprehensive claims agreements, the GFA devotes significant attention to the creation of detailed management regimes for wildlife harvesting and management[7]. In addition to setting out exclusive rights of the Gwich'in to harvest game on their own lands and furbearers throughout their settlement region, the GFA also sets up a Renewable Resources Board which is responsible for setting the total allowable harvest (based on principles of conservation) for game and other species for the entire settlement area, and for allocating the harvestable quotas to each community in that area.

The Renewable Resources Board (Gwich'in Region) must consult with the community based renewable resource councils in establishing the basic needs level for particular species or for particular communities according to criteria stated in the agreement. That level must be met before non-participants are allowed any harvesting rights. Non-participants, as well as commercial and sports hunters, may only be granted rights to harvest from the surplus, if any, and participants are to be given preference in the settlement region in relation to guiding, outfitting or other commercial activities related to wildlife. All hunting is subject to the claims agreements and laws of general application, such as open hunting season, prohibitions against hunting endangered species or migratory birds, etc.

b. Land Use Planning and Environmental Review

The GFA establishes procedures and institutions for conducting land use planning, environmental screening and environmental review prior to a development proposal being processed for a license or a permit from the Land and Water Board. Each such Board created by the GFA is an institution of public government and has a 50% representation from each of the Gwich'in and of government.

In order that a development proposal proceed, it must first comply with any land use plan approved by the Planning Board. All licensing authorities with jurisdiction within the settlement area are obliged to conduct their activities and operations in accordance with that plan. The principles guiding land use planning (which also include water use planning) in the settlement area are:

"(a) to protect and promote the existing and future well being of the residents and communities of the settlement area having regard to the interest of all Canadians;

(b) special attention shall be devoted to:

(i) protecting and promoting the existing and future social, cultural and economic well being of the Gwich'in;

(ii) lands used by the Gwich'in for harvesting and other uses of resources; and

(iii) the rights of the Gwich'in under this agreement."

Land use planning is to involve the Gwich'in communities and designated Gwich'in organizations and must provide for "the conservation, development and utilization of land, resources and waters".

The next step for a development proposal is submission to the screening function of the EIRB for determination of whether the proposed development is likely to have a significant adverse impact on the environment or be a cause of significant public concern. If the project is innocuous, it may go directly to the licensing agency. If the adverse impact will likely be significant, the project must then undergo environmental review under the terms of the GFA.

These reviews are public and must satisfy a number of criteria prescribed by the GFA. Ultimately, however, decisions about whether to proceed and, if so, upon which terms and conditions, are those of the Minister of Indian Affairs and Northern Development. If a development proposal triggers an environmental review by Canada, the GFA allows for a joint aboriginal/federal panel to be conducted by FEARO. A minimum of 25% of the members of that panel must be Gwich'in nominees.

c. Surface Rights Access

The Gwich'in cannot deny access across their lands to a subsurface rights holder. The GFA establishes a Surface Rights Board to resolve disputes related to entry and access and to determine compensation pursuant to factors which are discussed in the earlier section entitled "Compensation for Future Damages".

d. Licensing

The GFA establishes a licensing agency in the form of a single Land and Water Board. Initially this Board is established for just the Gwich'in settlement area. However, there is provision for that Board to become a panel of a territorial wide Land and Water Board in the future.

The scope of the Land and Water Board's licensing capability is restricted to surface land use activities (as opposed to subsurface which is still managed by the Federal Government) as well as municipal/industrial water consumption and deposit of waste into inland waters. All are subject to the environmental screening and review process established elsewhere in the claim. The decisions of this Board are subject to approval of the Minister of Indian Affairs and Northern Development in relation to terms and conditions, if any, to be inserted or withheld from a license.

The GFA also contemplates a function which will monitor the overall impact of development in the Gwich'in settlement area. It calls for a method of monitoring cumulative impact, for periodic environmental audits which will be made public, and for 50% Gwich'in representation on any board which might be established in the future to fulfil this function.

e. National Parks and Protected Areas

Like other northern claim agreements, the GFA specifically addresses the creation of new parks within the settlement area and the procedures and provisions which must be addressed to ensure meaningful participation of the Gwich'in in relation to the planning, establishment and management of National Parks, Territorial Parks and other conservation and protected areas. The objective of these provisions is to ensure aboriginal peoples may be able to continue their wildlife harvesting practices[8] and benefit from any employment, training or economic opportunities associated with park development and operation.

POLITICAL DEVELOPMENT

Aboriginal self-government is a topic which has been actively discussed since the Canadian Constitution was repatriated in 1982. Native leaders have sought to have self-government recognized as a right given effect and protection within the Constitution. After centuries of administrative repression under the *Indian Act*[9], native people are expressing the need to regain control over matters which directly affect them and to protect their cultural identities. However, within the Canadian democratic system, there are many forms self-government might take.

In the case of the Gwich'in, the federal government has negotiated a self-government framework agreement which outlines the overall scope of self-government and the process for negotiating details of such an agreement on a community-by-community basis at a later date. This Framework Agreement has been attached as a schedule to the Final Agreement but will not receive constitutional protection when the Agreement does. That status may change when, and if, the *Constitution Act, 1982* itself is changed.[10]

The objectives of these community self-government agreements must be

"to describe the nature, character and extent of self government, the

relationship between government and Gwich'in institutions and to accommodate Gwich'in self government within the framework of public government institutions."

Once concluded, these self-government agreements will be given effect through separate legislation of either the federal Parliament or the Legislature of the NWT.

SUMMARY

The GFA clarifies the ownership of lands within the Gwich'in settlement area for both the Gwich'in and the government. Each has fee simple title to both surface and subsurface lands. However, rather than either party having exclusive jurisdiction over the management and administration of activities taking place on those lands, the GFA sets out the principles and terms by which that jurisdiction will be shared.

This approach, of establishing and entrenching aboriginal rights to models of shared jurisdiction and public government institutions, is a refreshing alternative to patterns of colonialization and dependency perpetuated under the *Indian Act*. However, there is a strong push from those aboriginal people who live on "reserves" south of the 60th parallel to develop exclusive jurisdictions of self-government which are distinct from and mutually exclusive of municipal, provincial and federal forms of government. For some aboriginal peoples, the fact that the public government model forecloses the possibility of exclusive aboriginal control over aboriginal lands is unacceptable. However, in the north, many aboriginal groups are hoping their majority will provide them with the power they feel they require for cultural and economic survival. As with any right, the degree to which aboriginal people will be able to exert the control they desire, will be a function of how their land claims agreements are implemented, and how they choose to exercise the legally protected rights contained within them.

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Notes

1. Pursuant to its constitutional responsibility for "Indians and Lands Reserved for the Indians", the Government of Canada has a Native Claims Policy to address issues of outstanding aboriginal rights or title. That portion of the policy devoted to specific claims deals with Canada's lawful obligations under existing treaties or under the *Indian Act*. That portion of the policy addressing comprehensive claims entails negotiation of modern day treaties which encompass fishing and trapping rights, financial compensation, economic and social benefits as well as title to land and money for lands ceded to Canada.

2. The Inuvialuit settled their comprehensive aboriginal claim with Canada in 1984. Their agreement was published by the federal government under the title "The Western Arctic Claim: The Inuvialuit Final Agreement".

3. [Editor's note: There is a brief article in *Resources*, No. 25, Winter 1989, on the Dene/Métis Agreement-in-Principle.]

4. This means that royalties will flow from the Norman Wells proven area, as well as all other lands within the Mackenzie Valley.

5. Section 21.1.3 of the GFA obliges a person proposing to explore for oil and gas to consult with the Gwich'in Tribal Council before any oil and gas exploration takes place. If a person has a right to develop or produce, he must likewise consult on the exercise of those rights with respect to the following matters:

   "(a) environmental impact of the activity and mitigative measures;
   (b) impact on wildlife harvesting and mitigative measures;
   (c) location of camps and facilities and other related sites specific planning concerns;
   (d) maintenance of public order including liquor and drug control;
   (e) local Gwich'in employment, business opportunities and contracts, training orientation and counselling for Gwich'in employees, working conditions and terms of employment;
   (f) expansion or termination of activities;
   (g) a process for future consultation; and
   (h) any other matter of importance to the Gwich'in or the person."

6. The term "public" refers to **all** the residents of the settlement area - Gwich'in and non-Gwich'in - and the institutions set up to represent and administer their interests.

7. Under the GFA the (regional) Renewable Resources Board is also responsible for forestry management and regulation of tree harvesting.

8. The *National Parks Act* prohibits hunting and trapping in National Parks.

9. Any rights conferred on the Gwich'in by Treaty 11 which are not otherwise extinguished by the Final Agreement continue to exist and are protected under section 35 of the *Constitution Act, 1982*. Any aboriginal or treaty right to self-government, education, medical benefits, hunting, trapping or fishing otherwise acquired continue to exist outside the Final Agreement. All federal, territorial and local government laws continue to apply to the Gwich'in and their lands and bands will still be able to maintain their status under the *Indian Act* and to access any programs or benefits available to Indian bands or band members.

10. S.35 of the *Constitution Act, 1982* states

   "(1) the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and confirmed.
   (2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Metis Peoples of Canada."

Institute News

• Owen Saunders participated in a SSHRC sponsored workshop on Interdisciplinary Research and the Environment in November.

• Owen Saunders participated in a two-day specialists workshop in November convened by Alberta Environment in Calgary as part of its comprehensive review of the province's water resources legislation.

• On October 25, the Institute presented a seminar by Tim McBride, Senior Lecturer in the Faculty of Law at the University of Auckland, New Zealand on "New Zealand's New *Resources Management Act, 1991*".

• On November 20, the Institute presented a seminar by Marcus Haward, Lecturer in Administration, Political Science Department, University of Tasmania, Australia on "Current Developments on Ecologically Sustainable Development in Australia".

New Publications

Managing Interjurisdictional Waters in Canada: A Constitutional Analysis, by Steven Kennett, 1991 238 pages. ISBN 0-919269-31-1 $26.00

Interjurisdictional water management in Canada raises particulary difficult problems, given the complexity of water policy issues and the federal system of government. This book explores three policy options for overcoming certain of these problems. The discussion focuses on constitutional questions related to water management in the context of divided jurisdiction and transboundary watersheds.

Resource Development and Aboriginal Land Rights, by Richard Bartlett, 1991 122 pages. ISBN 0-919269-33-8 $25.00

This book reflects research carried out by Professor Bartlett in the course of his tenure as the 1990 incumbent of the Chair of Natural Resources Law in the Faculty of Law at The University of Calgary. The two essays that constitute this volume - "Resource Development and Aboriginal Title in Canada" and "Resource Development and Treaty Land Entitlement in Western Canada" are the background papers prepared for a public seminar conducted by Professor Bartlett in May, 1990. Together the papers present an important discussion of the implications of aboriginal land rights for resource development in Canada, both where there is an unextinguished aboriginal title and where rights are defined by treaty.

To order publications please send a cheque payable to "The University of Calgary". Orders from within Canada, please add 7% GST. Orders from outside Canada, please add $2.00 per book. Please send orders to:
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