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Summary

Federal policy governing indigenous peoples in Canada has been marked by repeated glances south and west (at Alaska) as it has been formed through parliamentary edict, case law and Constitutional entrenchment. Although rooted in a common Crown policy, the discrete history of Canadian policy has diverged from American practice even as the country's historical and its political development have diverged. Unlike United States policy, the underpinnings of Canadian Indian law as it related to aboriginal title land rights and the limits and potential of tribal sovereignty are only now coming into focus. This belated articulation of Indian rights parallels similar developments in Alaska where land rights and tribal rights are only now being defined. In both Alaska and Canada, hunting and fishing rights and tribal governance are political and legal matters whose impact on resource development and control by provinces and states make neat application of older Indian law concepts less predictable. Cases in either place offer guidance to federal courts in either country within a modern debate over public land rights. The author suggests that attorneys in each place monitor case law and legislation only now emerging.

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Why Canadian Indian Law is Important to Alaskans:

Why Indian Law in Alaska is Important to Canada

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This paper is dedicated to Phyl Booth who made this research possible.
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Why Canadian Indian Law is Important to Alaskans: Why Indian Law in Alaska is Important to Canada

Federal policy governing indigenous peoples in Canada has been marked by repeated glances south and west (at Alaska) as it has been formed through parliamentary edict, case law and Constitutional entrenchment. Although rooted in a common Crown policy, the discrete history of Canadian policy has diverged from American practice even as the country's historical and its political development have diverged. Unlike United States policy, the underpinnings of Canadian Indian law as it related to aboriginal title land rights and the limits and potential of tribal sovereignty are only now coming into focus. This belated articulation of Indian rights parallels similar developments in Alaska where land rights and tribal rights are only now being defined.

In both Alaska and Canada, hunting and fishing rights and tribal governance are political and legal matters whose impact on resource development and control by provinces and states make neat application of older Indian law concepts less predictable. Cases in either place offer guidance to federal courts in either country within a modern debate over public land rights. The author suggests that attorneys in each place monitor case law and legislation only now emerging.

For indigenous peoples of Alaska and Canada, more than similar physical environments predispose them to study the ever changing legal environment in their respective countries. Each group struggles within the context of a modern federal system to seek explicit governmental validation of group rights long considered to be at the heart of their ways of life.

Each seeks firm commitments from its national government that its traditional uses of land will continue into the future and that the group will have a meaningful role in management of the land and resources and of its own affairs. For each group the legal basis for negotiation is only now becoming clear. For each group fundamental questions of ownership and governmental authority over traditional lands have been left long unresolved. This is in sharp contrast to Indians in the rest of the United States where both statute and court decisions have long ago formed a frame of reference which set the potential as well as the outer limits to land and governmental control by tribes.

Historically, Alaska Indians, Eskimo and Aleut peoples and Canadian Indian, Inuit, and Metis appear to have been left behind when their situations are compared with the legal results of Indian policy in the southern continental United States (or the "lower 48"). That policy which flowed from the early Crown colonial policy developed for North America to secure land and trade monopolies and to remove original occupants from new frontiers when their land became more important than their roles as traders. That Indian policy carried forward in the United States as an attribute of federal policy an ultimate Constitutionally-grounded national monopoly over Native lands and Native communities. Rooted in early decisions of the United States Supreme Court, Congress was said to have plenary authority over extinguishment of aboriginal rights to use and occupancy of land. As an attribute of that same process, a process that masked a continuing struggle over resources,

chiefly public land and water, between national and territorial or state authorities, American Indian groups were deemed to a have continuing dependent sovereignty over their people, subject to a process of removal and reallocation of that authority to the federal and state governments by the Congress (Wilkinson, 1982).

The impetus of Indian policy in the "lower 48" was initially an effort to control pressures along the national frontier. Indians were protected until they could be assimilated into the national citizenry. Placed on lands reserved for them, lands which replaced vast areas used for hunting and gathering activities held under aboriginal title, they were clustered into reservation"home lands." While judicial lip service and relative legislative indifference allowed tribal governments to use their residual sovereignty, what was actually implemented was a loosely camouflaged American version of British colonial policy. Overtly, this policy stressed in its every permutation a formula of "doing right" for indigenous peoples. In fact, Indians were used as pawns to hold vast federal acreages off the private market and out of territorial and state hands. This use of Indians to hold in place federal land acreage, a policy that preceded development of a strong national parks policy, was joined with a federal effort to limit introduction of a state legal presence on these same lands by supporting tribal sovereignty. Periodic breakup of the tribal land mass, the 19th century allotment period being the best example, or reassertion of federal authority as tribal authority under the guise of the Indian Reorganization Act (United States Congress, 1934), with repurchase under the same act of some lands lost during the allotment period, are best understood as ebbs and flows in the continuing struggle between states and the national government over public lands. The legal status of Indians and their residual tribal sovereignty are then a matter of rather secondary interest and effect to these powerful players but an ever important tool in the struggle.

The obligation of *some* government to provide for indigenous peoples, when stripped of their own economic sustenance and transformed into welfare societies, was often a strong motivator for state governments to defer to federal-tribal arrangements. So were generous private leasing programs of tribal lands. When Congress, during the termination era, offered the option to many states to take up criminal and civil law jurisdiction without reduction of the tribal land base, many states determined that the net outflow of tax revenues did not warrant the assumption of legal jurisdiction.[1] These same states may well have had second thoughts about the trade-off implicit in delivery of state services when they were barred from taxation of natural resources found on Indian lands in the 1960s. American Indian law advocates had by the late 1960s staked out and confirmed Congressional preemptive authority and tribal authority to tax and regulate tribal land in that new policy era of "self-determination without termination."

In recent years Indians have been able to reach beyond reservation boundaries and reassert treaty rights to fish, water and even ownership of land traded away without federal approval. However, the legal advantages secured by "lower 48" Indians, their secure trust territory granted through treaties after extinguishment of their aboriginal title, territory with clearly demarcated geographic jurisdiction for invigorated (and funded) tribal governments, may have also set in place permanent constraints on the tribes' abilities to define social change on their own terms.

Alaska Natives and Canadian Aboriginal people entered the late twentieth century with much less legal groundwork established through case law or through legislation.

Alaska Natives had signed no treaties. Although they laid claim to virtually the entirety of Alaska through use and occupancy–subsistence activities which they vigorously pursued from traditional village staging areas, the Congress had not

taken upon itself to settle their land rights. In the treaty of purchase from Russia and in successive Organic Acts which created a civil governmental structure in the federal territory, the issue of confirmed Native land rights was held in abeyance (Case, 1984). In Canada the treaty process moved across the continent and replaced Native title with reserves.[2] It remained unclear whether aboriginal title existed among indigenous groups in the Western provinces until the 1970s. The territories remained much as Alaska. Furthermore, in Canada, even where aboriginal title was said to exist, it was viewed as something less than a legal right, characterized as a personal and usufructuary interest. Once this Indian interest was removed, Crown land would become provincial land in its entirety and not federally owned and governed land as in the United States.

In the matter of land rights, Indian policy, whether legal or political, provided few clues for Northern peoples of Canada or for Native Alaskans as to the level of control they would enjoy over the lands they used for survival and participation in the cash economy. In neither place did frontier pressures or prospects for statehood or provincial status create a determined early legal or political need by the national government to either protect Native land rights, by defining them or *use* Native land rights and governmental authority as a stalking horse in a state-federal battle for control. Belatedly, Canadian Eskimos were said to be legally "Indians." Belatedly, they were confirmed as capable of holding land by aboriginal title.

In Alaska, while aboriginal title settlements were politically delayed, some aboriginal rights were lost in court. In *Tee-Hit-Ton* (1955) the Supreme Court determined that those rights lost were not property rights of legal significance, subject to compensation under the Fifth Amendment but special claims snatched away "as every schoolboy knows" by conquering whites. Some areas within the vast Alaska domain were demarcated for Alaska Native use as special purpose reserves by

the Executive Branch, but only one classic congressionally-mandated Indian reservation was established by Congress, this for a group of Canadian Indians who were participants in a religious experiment.

The concept of inherent tribal sovereignty, employed by Justice Marshall in the earliest days of the United States as a weapon to avoid state legal assimilation of Indian communities and their lands, did not evolve from Indian-Canadian relations in Canada even when they were marked by treaty relations. Neither was the concept of federal trust responsibility a product of Canadian Indian policy, in the sense that aggrieved tribes could sue for violations of parliamentary policy when wrongly implemented, until trust responsibility was fleshed out by the the supreme court in this decade.[3] Only in the 1980s did an abuse of Indian property rights by the federal bureaucracy provide a glimmering of the historical American Indian law remedy against legislative commitments made but left unimplemented.

In Alaska as in Canada, inherent tribal sovereignty was made evident in tribal activity but remained unconfirmed by the courts as a secured tribal right and basis for negotiation. One can argue that the practice of legally recognizing tribal sovereignty had less utility for federal policymakers in Canada or in Alaska than elsewhere in North America. The Canadians employed Indian Act band governments as instruments of tutelage and as substitutes for traditional tribal government. The federal government in Alaska deployed teacher-missionaries to guide Native villages into Western civilization, employing village councils as neotribal governments. Neither national government was as concerned with using the concept of tribal sovereignty to create a barrier between Indian Country controlled by the federal government and tribe and settlers who would establish a state. In the Canadian North, other practices impacted tribal governments rooted in groups who lived off the land. Resettlement programs of the 1950s reorganized Native

communities to befit service requirements, especially education of the young. In both places it would appear that heavy-handed colonial policies assumed that traditional tribal authority was buried under developed plans for municipal style Native government equipped with minimal, delegated authority (Conn, 1985). Studies in Alaska demonstrate that traditional government simply assumed whatever shape was externally required and continued as an active force. This little concerned federal or even state administrators, however, because *de facto* use of tribal sovereignty challenged no other sovereign for governance of lands and resources.

States and Provinces

The developed tensions between states and Indian tribes so often viewed as the primary reason for ultimate federal initiatives in "lower 48" Indian affairs was not so evident in Alaska or in Canada although the reasons were different in each place. As a legal matter, the American doctrine that suggested state law of general application applied to Indian country only when expressly allowed by the Congress was turned on its head in Canada. Provincial law applied to Indians, even Indians on band reserves, unless a federal conflict arose or the law singled out Indians or Indian property. Alaska remained a federal territory until 1959. Before 1959 Congress had determined that state law would replace federal law as the single official expression of criminal law in Indian Country. What villagers chose to do among themselves governmentally was accepted by both territorial and state field representatives as a *de facto* matter and even encouraged, but never validated (See Conn and Hippler, 1975).

In short, the the legal situation of indigenous peoples in Alaska and Canada presented a bemusing picture for Indian law practitioners if schooled in the root American Marshellian notions that Indian law meant aboriginal title transformed

into land held in federal trust, peopled by persons with acknowledged (though limited) sovereignty and subject to (or protected by) a judicially enforceable federal trust relationship.

Little of this legal foundation material had been laid in Canada or in Alaska by the late twentieth century. In the main, land rights remained to be settled. Federal obligations (as opposed to federal charity) were unclear and tribal sovereignty uncertain and unacknowledged. At risk in both places were aboriginal ways of life guided by trapping and subsistence cultures that, more than an economic force, were for many Native communities the closest thing to a continuing community self-definition.

If the early 1980s are employed as a moment in time to stop the action and view significant events on the Alaskan and Canadian sides of the border, what parallels and shared concerns emerge?

Inuit Alaskans had responded to threats to bowhead whaling by linking their cause with Inuit in other circumpolar countries. Under the visionary leadership of Eben Hopson, they had created the Inuit Circumpolar Conference to view globally a range of shared political and social issues. Other Alaska Native leaders and many villagers had been lulled into one of two distinctly parochial assumptions about their present and futures as indigenous peoples.

One side viewed Alaska as uni que among American Indian legal cultures. The "Alaska is different" syndrome had as its cornerstone the landmark Alaska Native Claims Settlement Act (or ANCSA) of 1971. Spurred by a desire to construct the TransAlaska Pipeline over land to which Natives made aboriginal claims and by Alaska's desire to select from federal lands the state's share, oil companies and the state made common cause with Natives to secure a Congressional settlement of unrecognized claims. Congress extinguished all contested Native claims and, as an

ultimate irony, expressly extinguished aboriginal hunting and fishing rights that formed the basis of those claims. The difference between this settlement and historical treaty settlements is profound. Tribes were not party to the settlement. Natives then living were enrolled and made shareholders in village and regional corporations which received 44 million acres of land along with a cash settlement from the federal government and the state's oil wealth. A new village institution, a for-profit corporation established under state law, arose to receive surface estates surrounding the villages. The village core went to state chartered municipalities with individual homesites to current residents, Native and non-Native alike. Federal trust protections did not follow the land with this settlement. The conveyed land was immediately treated as a corporate asset. The stock was made subject to alienation in twenty years. Subsistence protection was left for later resolution by the Congress.

This profound experiment in self-determination set Alaska Natives apart from all other Indians in the United States. However, the Congress had used its Indian law authority to pass the act.

In the decades following the implementation of ANCSA, Congress has amended it many times. These amendments resulted in new protective constraints on settlement stock alienation, subject to removal by Native stockholders, and permanent protections for undeveloped land against taxation or other external attachment unless boards of directors of Native corporations put the land at risk. These "1991 amendments" made Alaska Natives the apparent masters of their own destiny, though in a corporate, not a tribal, context.

The fundamental premises of ANCSA were not redefined by Congress as it amended the act. A corporate settlement with land treated as non-trust real estate

remained at the heart of the arrangement. Village tribes, assuming they existed, were not parties to the arrangement.

Advocates of the corporate, "Alaska is different" model were joined in debates over Congressional amendments by a second faction who looked at "lower 48" tribal rights as a source of ultimate federal protection. They were motivated by corporate bankruptcy, selective examples of land loss, and also by coalitions of villages who saw traditional controls of community life, especially subsistence, slipping away. The act may or may not have been terminationist in intent. However, reductions in levels of federal programmatic support for Alaska Natives and an increased presence of state-guided governmental activities in rural Alaska suggested to some that village life controlled by Natives would be a victim of policy, if not direct Congressional edict.

Canadian jurist Thomas Berger found serious flaws at the heart of the act (Berger, 1985, 1988). Others noted that even federal monies earmarked for Alaska Natives as Indians passed through nontribal, non-profit regional corporations. Village Natives became increasingly disempowered and tribes were threatened by their lack of involvement in governmental activities around them as much as by their still uncertain legal status (Conn and Garber, 1981).

The heart of what Berger discovered in his many Alaska hearings was concern by residents that vast subsistence estates were no longer owned by villages. Berger understood, as many who had advocated the corporate model did not, that subsistence defined rural Native life. It gave purpose to Alaska villages and provided the inner logic of Native tribal identity. Now much of the land on which subsistence occurred was not Native land and governed by a blend of federal and state laws.

Congress had not ignored traditional and customary subsistence rights extinguished by ANCSA. Lengthy hearings had established its fundamental rationale as a source of the Native way of life (Conn and Garber, 1989). Yet it also

had not abandoned the logic of ANCSA, especially the substantial role of state involvement in government of rural Alaska.

In the Alaska National Interest Land and Conservation Act (ANILCA), a second piece of major legislation, Congress created a vast national park system (U.S. Congress, 1980). ANILCA offered the state of Alaska the opportunity to direct the management of fish and wildlife on federal and state lands so long as it gave a priority to traditional and customary subsistence among "rural Alaskans," subject only to conservation of the resources. Thus, Alaska Native villages not only lost their traditional land base for subsistence, but lost direct governmental control over it.

Tribal advocates sought renewed Congressional affirmation of village sovereignty. Proposed strategies ranged from legal control of the village core (Berger, 1985) to legal control of areas where subsistence took place (Anderson and Aschenbrenner, 1988). The state, sensing that it had eliminated a fundamental attribute for fixing the dimensions of sovereignty – geographical jurisdiction – by advocating a transfer of settlement land to corporations, fought tribal advocates at every turn. Even in matters where political logic would suggest that a partnership between village tribes and the state would insure availability of services and a continuing flow of federal dollars for Alaska Natives as American Indians, the state persisted. State lawyers directly challenged the historical reality of tribes, even in the face of federal court rulings that Congress must expressly terminate aboriginal sovereign rights (Miller, 1989).

What Alaskans Discovered

In *Northern Frontier, Northern Homeland* (1977), Thomas Berger had presented Canadians with a vision of Native self-determination which well stated aspirations of

Dene and Inuit peoples (among others) on both sides of the border. Because he addressed the situation of aboriginal peoples in a territory who had some leverage over the political process because of the anticipated natural gas pipeline, unresolved aboriginal claims and treaty rights and the absence of direct provincial involvement, he could project a visionary settlement which met the full spectrum of aboriginal needs. That vision, a recapitulation of the testimony of territorial residents, foreshadowed the testimony of Native Alaskans about ANCSA several years later. What was desired, he suggested, was more than a settlement for a corporate land base and compensation (as in Alaska) and more than delegated governmental authority. Berger explicitly rejected both the ANCSA-style settlement and that of the James Bay and Northern Quebec Agreement (1975). His informants desired governmental control over their resource base, guided by their own political institutions, centered on a hunting, fishing and trapping economy. He envisioned that such a settlement would place in Native hands collective control of the land and at least partial control over exploitation of non-renewable resources (Berger, 1977:178).

> Not only will such ownership give them the legal basis from which they can negotiate with government and industry to ensure that any proposed developments are environmentally acceptable, it will also enable them to share in the benefits of economic development. Royalties from the development of non-renewable resources could be used to modernize the native economy and to promote development of renewable resources. (Berger, 1977:179)

ANCSA had robbed Natives of political control. It was, he wrote, irremediably assimilationist, transforming hunters and gatherers into capitalists by destroying their land base (*Id.*:177). The James Bay Agreement failed to offer Cree or Inuit sufficient political control or veto power over non-renewable resource development that threatened subsistence.[4]

Berger assumed that political control of the territory could be retained as development and inmigration occurred, this through durational residency requirements (Berger, 1977:193).

Berger's critique of indigenous needs both in Canada and in Alaska and his assessment of indigenous aspirations were accurate. In both places the local populations placed a primary value on their relationships with the land and its resources. Both village constituencies viewed with skepticism treaties (in the case of Canada) or settlements (in the case of Alaska) which purported to diminish their control over the land. Both the Northwest Territory and rural Alaska feared not only an increase in layers of government which they did not control but a systematic influx of non-Natives attracted by that same heightened governmental activity.

Each side of the border has aboriginal peoples whose isolated lives have been little affected by reserves and formalized Indian governments. Each group was threatened by population explosions, exploitation of non-renewable resources and increased control by non-indigenous governments.

Given this clear and well-publicized articulation of aboriginal vision, coupled with detailed critiques of modern as well as historical attempts to deal with Northern peoples, one may ask what are the present circumstances of these same groups? To what extent do parallel opportunities and problems persist?

By 1983, aboriginal peoples of Canada had secured what appeared on its face to be the dream of all aboriginal peoples – entrenchment of existing aboriginal rights, treaty rights and even prospectively negotiated land claims agreements into the repatriated constitution (Pentney, 1987).[5] Thus, in Canada, Indian affairs departed from a pattern established in North America of legal arrangements capable of being unilaterally altered by the federal government without negotiated consent by affected tribes. Alaska Native tribal rights advocates looked with envy at such an

arrangement. Yet the dark shadow of prior government acts over newly achieved constitutional arrangements suggest that there is less apparent strength in the constitutional mandate than meets the eye.

Overshadowing the new arrangement is the spectre that many rights have already been extinguished. The famous *Calder* case had predicted this. When a divided Canadian Supreme Court found in 1973 that Indian historic occupation and possession established Indian title as an independent legal right recognized, but not created by the Royal Proclamation of 1763, three members suggested that later governmental acts had extinguished such title.

Within the realm of treaty rights, the federal government's long established duty to deal with Indians and lands reserved for Indians, confirmed in section 91(24) of the British North America Act, had been seriously affected by natural resource transfer agreements signed with the western provinces. These acts had arguably given provinces a direct role in selection of lands for the benefit of Indian bands, powerful leverage on the process.

Indian tribal sovereignty had been seriously eroded by replacement of tribal authority with delegated authority by the often-amended Indian Act and by already implemented constitutional authority to apply provincial laws of general application in education, criminal and civil law and many other areas to Indians on and off reserves (Hogg, 1985).

That both federal and provincial ministers were aware of the strength of their bargaining positions was evident in the series of constitutionally mandated First Minister Conferences when First Ministers refused to graft more detailed proposals of aboriginal groups into the constitution, especially judicially enforceable aboriginal

rights to self-government. The federal government retreated from its desired role as advocate for the Indian positions and sought to broker a compromise.

Some Canadian authorities argue that a federal political and judicial pattern had already been established to encourage provincial assumption of responsibility for Native services. Little room had been left for Indian governmental activity based on "inherent jurisdiction" (See Long and Boldt, 1988:6-7)

> Federal government has not yet developed a coherent policy on provincial responsibility for services to Indians; however, it is now adhering to the basic principle that it should cease to create special services of its own for Indians and, wherever feasible, should integrate Indians into the provincial framework of services. (*Id.*, 9.)

This arrangement very well typifies the direction of federal policy in Alaska in the post-ANCSA era. Direct Bureau of Indian Affairs involvement in Native schooling gave way to a regionally-based state system of schools. Area offices of the Bureau closed. State organized boroughs and nonprofit regional corporations absorbed the responsibilities for delivering what had been (and were still on lower 48 reservations) Indian programs.

ANILCA's condition for state management of fish and game that it impose a preference for traditional and customary subsistence for rural residents left Alaska in the ironic position of having to discover and enforce village-defined tribal law (See Conn and Garber, 1989). The state supreme court ruled even this strange compromise to be unconstitutional (see below). In Canada unfettered off-reserve rights to hunt and fish set forth in treaties while not unilaterally restricted by provincial laws of general application because they affected Indians as Indians, were still affected by those same laws as incorporated through of section 88 of the Indian Act (*R. v. Dick*, 1985). In both places, Natives confronted restrictions on their

activities rooted in conservation practices as well as individual game limits often inappropriate to the underlying sharing and distributive ethic of subsistence.

While the federal government of Canada appears to agree that subsurface rights should be included in land settlements, the provincial position is colored by its desire to do little or nothing to curb resource exploitation in order to recoup revenues it spends on services to aboriginal peoples. The federal government has the principal obligation to fulfill indigenous expectations. But because the provinces possess the unoccupied Crown land, provincial ability to influence the negotiations is persistent.

In Alaska, ANCSA has been structured to assure that natural resources would be taxed by the state when developed as in Canada. Lands selected were placed in grids which assured access to non-Native lands for development as in Canada. Native corporations have control over development of their own lands. But as pressures mounted for corporate profits, pressures also mounted to exploit resources known to exist. State and federal decisions decried by Berger became "Native decisions." Useful institutional buffers to retard development which existed at the inception of ANCSA with Congressional distribution of surface estates to villages and subsurface estates to regional corporations dropped away when many regions merged the village and regional corporations in order to protect the former from bankruptcy. The Alaska lesson appears to be that even with confirmed Native control over resource exploitation, exploitation which may impair subsistence activity, Native corporations are likely to be guided by the economic imperatives of hard times in the villages and diminished federal and state spending in rural Alaska[6] (See Conn, 1988).

The Territorial and Developmental Imperative

A thesis of this paper has been that Indian policy in all countries is much affected by its political and historical context. This was true in "lower 48" developments and remains true in Canada and in Alaska.

Two factors appear to be motivators. The first is the state/provincial desire to control land and resources. In Alaska, the claims settlement act was a necessary prerequisite to state land selection and the further division of state and federal land ownershp and managerial responsibilities. In Canada, the modern Indian law era was heavily influenced by more than recent court determinations that there were, in fact, aboriginal claims to settle. Despite a strong federal commitment to open negotiations on comprehensive claims by the Task Force to Review Comprehensive Claims Policy (See DIAND, 1985), the absence of large amounts of federally owned land slowed such negotiations except where a second factor came into play. That factor was the prospect that a large developmental project would be delayed by judicial proceedings. It had resulted in Quebec in the James Bay and Northern Quebec Agreement of 1975 and implementing legislation.[7]

A strong developmental objective and a stock of land under federal control seemed to be twin prerequisites for positive national movement in Indian affairs. In Canada they are available only in the territories. With the exception of James Bay in the provinces, aboriginal advocates found cause for hope only in the territories because negotiations were perceived to be largely bilateral and not tripartite. It was hoped that federal interest in development and federal ownership of land plus the relatively small non-Native populations would result in claims agreements that connected political control and land control in ways distinctly superior to that of the Alaska settlement or the James Bay agreement.

Tribal Models Compared

Alaska Natives, Canadian Inuit and Dene have developed several sophisticated models of indigenous government as alternatives to mere participation in a federal territorial government, transformed into a province by devolution. For Inuit, division of the geographic territory to retain their plurality is the preferred route with involvement in what is termed a consociational association of cultural communities, a second choice (Dacks, 1988:228-29). Alaska Natives who seek a reassertion of tribal rights have focused upon development of loose coalitions of villages, chief among these the Yupik Nation in Southwestern Alaska and the Tanana Chiefs of the Interior. Much political activity is village-centered. Yet until tensions and competition between non-profit Native regional corporations who receive funds and deliver services and villages who desire to control these decisions is resolved, Alaska, the state, will not confront serious tribal competitors to its centralized government. The differences in models between the NWT and Alaska exist in part because the core of Native legal sovereignty is village Alaska. Each village is a potential federal Indian tribe. However inefficient is the prospect of 200 plus tribes, within Alaska many villages are endeavoring to prove their sovereignty both to outsiders through the courts and to residents by taking on increasing levels of governmental responsibilities. Many are actively seeking confirmation of their legal status as Indian tribes in federal courts as a prelude to further political definition of their powers as tribes (Miller, 1989). However, in *Native Village of Stevens v. Alaska Management and Planning*, the state supreme court has questioned whether Alaska Native villages are federally recognized tribes (Alaska State Supreme Court, 1988). This decision has serious short-term implications for business and political initiatives of Alaska Native villages since it strips tribal officials of immunities from

suit. However, village goverments continue to function. Further, the federal courts have in two important cases found proof of Congressional acknowledgment of Alaska village tribal status through its application of the Indian Reorganization Act, the claims process and other legislation (Miller, 1989:20-25). The pertinent point for a comparative analysis is that Alaska villages may one day be able to employ their original status as leverage in negotiations with state and federal governments. However, they may be forced to seek further political delegation (or devolution) of authority from the federal and state governments in a manner similar to Canadian Indian bands when questions of the scope of tribal authority are considered. This is true because the state, like many Canadian provinces, has a very significant role in daily village life.

The Berger model, articulated in *Northern Frontier, Northern Homeland*, stresses that comprehensive land claims should include development of a third order of government - a Denendeh Nation or Nunavuk Nation - controlled by the aboriginal population. But can it be wrested from federal negotiators even in the Northwest Territory?

That vision of the future apparently has passed in 1989. A review of the Dene/Metis Comprehensive Land Claim Agreement in Principle (1988) suggests a more modest return to categories of land ownership and co-management of wildlife resources as first defined in the James Bay Agreement.[8]

On the broad front of self-government, recent accords in British Columbia and Alberta are modeled on municipal governments, the same devolutionary model once criticized as an insufficient substitute for a tribal model based on principles of inherent sovereignty.

What has occurred? At least one factor is that the special exclusive leverage that Northern peoples and the federal government once had over territorial land

rights and territorial destiny may be diminished by the proposed Meech Lake Accord of 1987. If adopted as an amendment to the Constitution it would require unanimous provincial consent for admission of any new territory as a new province. This provides enormous provincial leverage on ongoing negotiations over such matters as allocation of non-renewable resources between the new provinces and the nation. (See Erasmus, 1987.) At least as important is an increasing sense of pessimism among lawyers that jurists will discover and expand upon existing aboriginal constitutional rights in the provinces or the territory (Akhavan, ND).

At least one other circumstance deserves mention because it is perhaps more important to an Alaskan observer than to a Canadian. The land claims period of Alaska gave rise to indirect representation of Native villages by urban units such as the Alaska Federation of Natives and other for- or non-profit regional corporations. Federal and state representatives become accustomed to dealing with near-at-hand and urban (or regional) representatives. These organizations continued to serve as lobbyists and, ultimately, as passthrough agencies for delivery of services. In Canada an Alaskan observer was struck by this same phenomenon at the First Minister Conferences. Once formed to represent rural and far-flung Native communities, it is hard for such secondary organizations to disband. It is also hard for villages to displace them in the halls of Congress or at the negotiating tables. Recent Canadian land rights agreements in principle mirror Alaska and James Bay models in their allocation of future negotiating or managerial authority to land claims settlement corporations and wildlife management boards. They may reflect another dangerous trend in administrative detachment of power from Native communities. Certainly in Alaska villages, efforts to return the role of negotiator and program manager to villages from regional corporations have been slow to occur as both Native regional

representatives and state/federal agencies resist this change in the name of efficiency, cooperation or job entitlement.

So where do the parallels in Alaska and Canada persist? In neither place is the vision of Justice Thomas Berger and his constituents achieved. In both places state and provincial hostility to a formula of land claims that achieves sovereign control of land and resource management holds sway, aided by federal disinterest in both places in overly antagonizing provincial/state interests. In neither place is fear of a pending development project or federal ownership of public lands a sufficient prod for negotiations toward an amended or new settlement.[9] In both places tribal legal advocates will, in the next few years, attempt test cases to determine the scope of existing aboriginal rights to self-government, perhaps arguing that historical substitutes were never intended to extinguish inherent (and persistent) forms of community control. Other elements of the indigenous communities will settle into the business of land management and consultation. At this moment in time the positions of Alaska Natives and Canadian Aboriginal Peoples are similarly uncertain and favorable. Advocates and leaders on both sides of the border have much to do to protect their land and way of life. Learning about developments across the border is part of this process.

If Alaska Indian law advocates must learn of Canada and Canada learn of Alaska, how can they do so? The indigenous leaders and their professional advocates in each place must have an ever current source of information on foreign events which could have either a direct or persuasive impact on their problems. This information should include:

1. Legislation and case law which affect hunting and fishing rights on non-tribal land and the shared responsibility among state (provincial), federal and tribal (band) authorities for subsistence management.

2. Material on shared responsibility among state (provincial), tribal (band) and federal authorities for definition and delivery of governmental services to Indians and other indigenous peoples. Cost sharing arrangements should be detailed along with political arrangements.

3. Accounts of implementation of land claims arrangements with particular attention to implementation of arrangements which provide shared participation in resource exploration and resource governance.

These three areas of endeavor reflect special realities in both places. Hunting and fishing continues to shape the identity and economic survival of indigenous peoples in the North as in no other place in the world. Provincial influence as well as federal influence is continuous and is not likely to disappear. In both places the scope of tribal authority is not likely to be fully defined through court decisions, even decisions which rediscover or confirm unextinguished tribal authority. Negotiation with state and provincial authorities must follow. The federal role may be limited to bearing costs of responsibilities undertaken by the tribe (or band). Finally, exploration of natural resources with an eye toward protection of indigenous activities and subsidization of much other tribal activity involves complex indigenous-state (provincial) and federal negotiation. Even in the Canadian territories, it is likely that provincial influence on political aspirations of the territories will require compromise and sharing with the provinces.

If it is acknowledged that there is a critical need for an information flow between Canadian and Alaskan Native rights advocates and their constituent groups, how might that be achieved? Many approaches whet the appetite but do not serve this purpose.

When the Alaska Native Review Commission imported former British Columbia Justice Thomas Berger to study the impact of the Alaska Claims

Settlement Act, he used a process of hearings developed during his study of the MacKenzie Valley Pipeline in Anchorage and in Native villages. His Anchorage forums explicitly placed the Alaska situation within the context of transnational and international law and his invited guests included Native leadership and experts on Canada and elsewhere.

There is currently planned a state bar convention in Anchorage which will feature at least one panel of Soviet, Canadian and Alaska attorneys who will deal with Native issues in a comparative context.

Some University of Alaska faculty have used Canadian government faculty research grants to retrieve important information on Canadian aboriginal policy for use in research papers in classes. Some of these same faculty members (Conn, a lawyer and Langdon, an anthropologist) have held interdepartmental seminars on Alaska issues at the Department of Justice and Department of Indian and Northern Affairs. Such ventures do much to create baseline research collections and networks for further professional exchanges. Finally, the University library has acquired texts on Indian law and the best single compiled source of information on Canadian judicial activity in the field, the *Canadian Native Law Reporter*, published quarterly by the University of Saskatchewan, Native Law Centre.

From the Alaska side there are yearly compendia of Alaska Native Issues issued out by the Alaska Native Law section of the Alaska State Bar Association, but these are issued only to section members. The benchmark classic, *Alaska Natives and the Law*, by former professor David Case remains a useful frame of reference for understanding Alaska Native issues in their context. However, given the momentum of legal activity the book needs some updating to address current issues. While there is no equivalent in Alaska to the *Canadian Native Law Reporter*, there is at the national level the *Indian Law Reporter*, a regular publication which the

American Indian Lawyers training program produces for law libraries with monthly summaries of federal, state and tribal court cases.

What is needed is an entirely new component of a regularly received legal policy journal that addresses developments in each effective arena where policy is debated and generated:

1. in federal and state courts;

2. in federal and state legislative process;

3. through executive branch activity; and

4. through political meetings and negotiations of constituent tribal groups.

For American Indian law practitioners, the Alaska situation has already proven to be a singular departure from the way they were trained in law school or even their professional experience with "lower 48" tribes. Rather than focusing exclusively upon litigation in federal court, advocates find that they must engage in several arenas at once. They must secure gains in federal court through negotiation with state officials before those gains are obliterated by reversals in the nation's highest court. At the same time, Alaska Native groups with entirely different perspectives on their legal and political situation must draw together into positions with sufficient commonality to present a united front in negotiations at the state and federal legislative and executive levels.

Indian law in Alaska, in a word, has become more Canadian in its operative political premises in Alaska and less reminiscent of practice in the "lower 48." How is Indian law more strategically Canadian? First, as in Canada, Alaska Natives are confronted with a strong state presence in the definition of Indian policy. This state presence manifests itself in a persistent and hostile state court activism and a persistent willingness to litigate in state and federal courts against all legal premises

which favor tribes. It effectively makes political negotiations with the state difficult or impossible, even in realms where Indian law issues are not at the center of the discussion.

Subsistence

The carefully crafted compromise between state leaders, Natives and the Congress which provided for long-desired state management of fish and game on all public lands in exchange for a commitment to provide a subsistence preference for "rural residents," was undone by a 1989 state supreme court decision (*McDowell et al. v. Alaska et al.*) which found it violative of the state constitution. To override this decision, the state must either amend its constitution by popular referendum or the Congress must order the state to apply the preference as an attribute of federal Indian law. Neither option would be easy to accomplish. The result of this broken compromise could mean a return to federal managment. Or, conversely, it could mean an attempt by anti-Native forces to have Congress eliminate the preference or attach it to a needs-based test. In any event, it has thrown the matter of subsistence rights into turmoil. There are no American models for brokering another compromise although there may well be Canadian models which could be followed where off-reserve treaty rights are subject to provincial fish and game laws.

Government Services

What had been a continuous trend of seeking to improve the basic governmental services in Alaska's rural villages through a partial allocation of authority among state, village and regional Native groups is now clouded with doubt as state attorneys monitor such arrangements because allocation to villages could be viewed in court

cases as evidence of trial activity. Negotiations on such non-tribal matters as service to children in need of foster placement or family support have broken down over their "Indian law implications."

In Canada where the provincial presence on Indian reserves is well established, models of delegated municipal authority or power sharing between provinces and Indian bands, based on relative capacity to serve constituent groups, have emerged in British Columbia and in other western provinces. These arrangements are nearly always reached with a mutual understanding that they will not abridge any discovered and unextinguished aboriginal rights established in later court decisions. Their advantage is that they allow basic needs for governmental services to be met without the near paralysis of activity now found in Alaska.

Canada also has needs for Alaska models. When the Northern Quebec Cree desired to improve court services in lands afforded them in the James Bay Settlement, they looked to Alaska where, as there, state courts and not tribal courts handled the lion's share of local activity. They sought rearrangement of provincial allocations of jurisdictional authority and an increased role for Cree participants. Yet tribal court models founded on American Indian reservations were inappropriate.

So how can communication be established which provides a steady flow of information in the many forums in which Indian law activity is played out, the multi-leveled forums of Canada and Alaska?

The author suggests, for a start, that a special section on comparative Alaska-Canada Indian law activity be presented in *both* the *Indian Law Reporter* and *Canadian Native Law Reporter*, a section which contains analysis of court decisions, provincial and federal initiatives and ongoing negotiations of interest to both indigenous groups. These legal analyses would link events in both countries and

would offer readers the names, addresses and telephone numbers of key participants for further discussion and elaboration. The advantage of this approach over academic forums or sporadic briefing sections would be their efficient distribution by the periodicals already found in most major university and law libraries. Current information would allow for immediate application to current problems in each place and efficient networking.

Who could author this special comparative law section? Scholars and Indian law practitioners grounded in the Indian law systems in both countries (as most Indian law practitioners are not) would undertake the responsibility for this work.

Along with this current update on the multi-leveled Indian law activity, the authors would suggest a basic library of books on the context in which Indian law occurs in each country. This basic bookshelf on the historical and political evolution of the tripartite Indian law relations in each place could be introduced through professional seminars at the Federal Indian Bar Association in the United States and in similar forums in Canada.

Shared Concerns

Advocates in both countries are concerned by an increasing number of international accords which affect hunters and wildlife in both countries. Indigenous rights advocates must negotiate in new international forums and with host countries to assure that ratification of these accords does not destroy already negotiated arrangements with federal and state authorities.

From this constant exchange of information should emerge a network of practitioners who can share information on the process and technique of negotiation in each place.

The irony of this proposal is that it follows by many years initiatives undertaken by Northern people to explore models for subsistence management, education and governance in other northern countries. Tribal rights advocates have been more parochial than their clients in recognizing that there is a body of legal and political information nearby which can enhance their activities at home. This parochialism by professionals must end if Indian policy in Alaska and Canada is to advance on different but parallel tracks.

Footnotes

1. During the termination era Congress unilaterally terminated federal relations with many tribes, leaving them at the mercy of state governments. Its counterpart, the 1969 white paper in Canada, is said to have sparked the entire belated reevaluation of Canadian Indian policy.

2. This is not to say that Canadian Indian policy was uniform. As Sanders notes, "Half of the country was covered by treaties and half was not. The federal government for many years asserted a national policy by dismissing the significance of the treaties and rejecting claims to aboriginal rights on the others." (Sanders, 1988:173 *in* Long and Boldt *eds.*, 1988).

3. *Guerin v. R* (1985) 13 DLR (4th) 390, 400. Sanders (1987) writes on *Guerin* (at 186):

> The fiduciary obligation of the Government of Canada arose because of the pre-existing Indian rights. Indian rights and the Crown's fiduciary obligation were confirmed, not created, by the provisions of the Royal Proclamation of 1763 and the Indian Act.
>
> Remarkable as it may seem, the *Guerin* decision is the first clear Canadian decision that Indian rights arise out of the pre-existing indigenous legal order, and not from some common law doctrine of aboriginal title or by virtue of an affirming action by the colonial legal system.

4. Berger's analysis is important:

> The James Bay Agreement, for example, requires, even in the case of Category 1 lands [land around villages], the Native people to permit subsurface owners to use the surface in the exercise of their rights. Indeed, they must permit surface use even to owners of subsurface rights adjacent to Category 1 lands.
>
> The subservience of the surface owner is often economic as well as legal, particularly in the North, because the short-term value in dollars of oil, gas or minerals lying beneath a tract of land usually exceeds its short-term value for hunting, fishing and trapping. (Berger, 1977:179)
>
> The James Bay Agreement includes guarantees to protect hunting, fishing and trapping rights. Are they not adequate? In the Agreement, the native people have exclusive hunting, fishing and trapping rights in

> Category 2 lands, and the Cree may select 25,000 square miles of such lands, but they have no special right of occupancy: the Government of Quebec may designate these lands for development purposes at any time, so long as the land used for development is replaced or compensation paid. Mining, seismic exploration and technical surveys are not, however, classified as development, so these activities may be carried out freely on Category 2 lands, without compensation or replacement of land, even though such activity may interfere with the native people's hunting, fishing and trapping. Category 3 lands are included in the public lands of the Province of Quebec: the native people have the right to hunt, fish and trap on them, and certain species of animals and birds may be reserved for their exclusive use. However, development of these lands may take place at any time without compensation in any form to native people.
>
> The land regime of the Agreement is buttressed by provisions for sustained levels of harvesting, a guaranteed minimum annual income for hunters and trappers, and an elaborate scheme for the participation of native people in game management and environmental protection. However, in nearly every case, their participation in this scheme is advisory and consultative. (Berger, 1977:178)

5. Section 35(1) of the Constitution Act, 1982, provides that "the existing aboriginal and treaty rights are hereby recognized and affirmed. Aboriginal peoples are specifically identified as 'Indian, Inuit and Metis peoples of Canada.'"

To this was added "(3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land rights agreements or may be so acquired."

Section 25 of the Constitution Act provides that the "guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:

a. any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

b. any rights or freedoms that (may have been acquired by the original peoples by way of land claims settlements) 'that now exist by way of land claims agreements or may be so acquired.'"

6. There are exceptions to this picture in Alaska. In cases where rural villages chose to take their executive order reserves in fee simple rather than participate further in the settlement act, villages have voted to retribalize the land by passing it into the hands of their tribal government. However, their further attempts to place it into a trust relationship with the Secretary of the Interior have been rejected.

7. Even in this single example of provincial success one can argue that lingering responsibilities of the province of Quebec to expedite settlement of aboriginal claims left unsettled after boundary extensions of the province prompted the settlement reached. See Jeff Richstone, "Aboriginal Rights in Quebec," 170-175 in R. Kuppe Ed., 2 *Law and Anthropology* (1987) International Academy of Comparative Law, 12th Congress, Session A.1 "The Aborigine in Comparative Law," Wien, Austria: WWGO-Verlag.

8. While the Final Agreement does not affect the ability of participants to benefit in existing or future constitutional rights which may be applicable to them (3.1.3), it requires that they cede, release and surrender all their aboriginal claims to lands and waters as well as to Treaty 8 and Treaty 11 with respect to any matter provided in the agreement, as well as claims arising from any Imperial or Canadian legislation or Order-in-Council (3.1.9). Eligibility is based on descendency from designated Indian peoples who resided in the Mackenzie Basin on or before January 1, 1921 (4.1.1) as determined by a Central Enrollment Board (4.7.1). Canada will make a capital transfer payment to a designated Dene/Metis organization (8.1.1). Dene/Metis municipal lands within local government boundaries are assessable (2.1.1). Undeveloped land granted will not be taxed (11.4.1). Resource royalty sharing on a

per capita basis will be negotiated but shall be limited to annual payments of 50 per cent of the first two million dollars received by the government and 10 per cent of any additional resource royalties (10.1.2).

Dene/Metis have the right to harvest all species and populations of wildlife within the settlement area subject to limitations specified within the agreement (13.4.1). Local councils will govern harvesting by any person within the limits prescribed by laws affecting wildlife. Privately held lands and lands subject to military or national security is exempted. Claims participants will be consulted when uses conflicting with harvesting objectives emerge with a right to arbitration (13.4.14). While participants are expressly granted a right to give, trade, barter or sell all edible wildlife products harvested to other Dene/Metis and aboriginal persons, it may not be exercised for profit (13.4.17). Further, the government reserves the right to propose other legislation respecting human harvesting of wildlife with a right of consultation by the Dene/Metis (13.4.15). Harvest levels may be modified for conservation purposes by the Wildlife Management Board on which Dene/Metis participate (13.5.2).

New local governments on Dene/Metis lands shall be established after negotiation and agreement between the Territorial Government and "a designated Dene/Metis organization" (25.8.1).

9. It may be that the state's fear that it will lose managerial authority over fish and game on federal lands will prod it to give ground at least on its hostile position against village government. Native rights advocates will play this card.

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