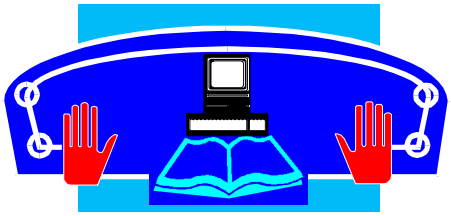

Partners Of The Future - A Selection Of Papers Telated To Constitutional Development On The Northwest Territories
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Partners for the future

a selection of papers related to constitutional development in the Western Northwest Territories

PARTNERS FOR THE FUTURE

A Collection of Papers Related to Constitutional Development in the Western Northwest Territories

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INTRODUCTION

The Western Constitutional Forum is an independent body established to develop in consultation with the public, a form of public government acceptable to the majority of residents in the western NW'T. As members of the Constitutional Alliance of the NWT, the Western and Nunavut Constitutional Forums have a mandate to negotiate a boundary for division of the NW'I'.

The membership of the Western Constitutional Forum includes the Presidents of the Dene Nation and the Metis Association of the Northwest Territories and their alternates, an MLA appointed by the Legislative Assembly of the NWT to represent the interests of non-aboriginal residents, and a second MLA appointed to represent the interests of the Legislative Assembly at large. The Committee for Original Peoples' Entitlement which represents the Inuvialuit of the Western Arctic currently sits with the WCF as an observer. Full membership in the WCF is available to COPE upon request and WCF continues to encourage the Inuvialuit to accept this open invitation.

All substantive decisions of the WCF on constitutional issues must be reached by consensus. Furthermore, all WCF decisions are tentative until they have been ratified by each Member's constituents.

The Western Constitutional Forum is currently attempting to develop a general proposal for a new constitution and government for the western territory to be created by the division of the present Northwest Territories into two distinct political jurisdictions. We have set December **1985** as a target date for completion of our proposal.

The primary objective of our deliberations is the creation of a " system of government which fulfills the aspirations of aboriginal peoples for self-government but which accomplishes this goal within the framework of a public government system; a framework which defines and protects the collective rights and interests of aboriginal peoples but at the same time protects the individual rights of all northern residents. The WCF will also be addressing the issues of the distribution of power among the territorial, regional and local levels of government, as well as the devolution of additional powers from Ottawa to the territorial government.

The papers included in this publication were prepared primarily to facilitate the WCF'S internal negotiations. However, I hope that other people with an interest in these topics will find them both useful and informative.

The first paper is a copy of a speech presented to the Standing Committee on Indian Affairs in Ottawa in March **1984** by Bob MacQuarrie, Vice-Chairman of the WCF and MLA for Yellowknife Centre. This speech is included in order to provide the reader with a more complete overview of the WCF, its mandate, its objectives and its method of operation.

The second paper, ",Several Ways to Interface Aboriginal Self-Government with Public Government in the Western Northwest Territories," was prepared by Steve Iveson, Executive Director of the Western Constitutional Forum's Secretariat. The author presents and discusses five different forms this interface might take. It places separate government, that is, exclusive aboriginal control of a quasi-provincial nature over an exclusive land base, at one end of the spectrum versus a completely integrated aboriginal/public government system within which aboriginal peoples would exchange exclusive authority over a relatively small area for guaranteed rights, participation, and influence in a public government which has jurisdiction over a much larger geographic area. The other three models are situated on points of a continuum between these two extremes.

The third paper, "The Relevance of Consociation to the Western Northwest Territories," was co-authored by Michael Asch and Gurston Dacks. Professor Asch is Dean of the Department of Anthropology at the University of Alberta and author of the book Home and Native Land: Aboriginal Rights and the Canadian Constitution.(1) Dr. Dacks is a professor in the Department of Political Science at the same University and author of the book A Choice of Futures: Politics in the Canadian North.(2)

Their paper argues that the collective rights of the several cultural communities in the western NWT can be recognized and protected through the entrenchment of various rights, structures and mechanisms without violating fundamental democratic principles. The authors recommend a partnership system which they call direct consociation. The critical features of this approach include the direct election of representatives to the Legislative Assembly by specific cultural communities, the supremacy of the Assembly over most matters of common concern to all residents, the entrenchment of certain cultural rights in a constitution which could only be amended with the approval of the appropriate cultural group, and the creation of separate cultural-councils with jurisdiction over issues of special concern to each cultural community.

Next is a three part paper written by Dick Spaulding entitled "Inuvialuit Self-Government in a Western Territory." Mr. Spaulding is a Yellowknife lawyer who has participated in the Dene/Metis comprehensive claims settlement process on behalf of both aboriginal organizations.

(1) Asch, Michael - **1984** Home and Native Land: Aboriginal Rights and The Canadian Constitution. Toronto: Metheun.

(2) Dacks, G. - **1981** A Choice of Future: Politics in the Canadian North. Toronto: Metheun.

His paper analyzes the Western Arctic Regional Municipality (W.A.R.M.) proposal sponsored by the Committee for Original Peoples' Entitlement and compares it to the regional councils currently operating in the NWT, to a set of preliminary principles regarding regional government prepared by the WCF last October, to the North Slope Borough in Alaska, and to the Kativak Regional Government in Northern Quebec.

In the process, the author proposes seven principles for accommodating the Inuvialuit in a western territory.

The fifth paper in this collection, "Municipal Government and Land Within Municipal Boundaries," was prepared by David Elliott. Mr. Elliott, an Edmonton based lawyer, is currently doing a major rewrite of Local Government Acts for the Government of the Northwest Territories.

Aboriginal peoples have always stressed how important land and the control over land-based activities are to cultural activity and self-determination. As Mr. Elliott says, "This paper examines how the traditional municipal form of government can contribute to self-determination and local control over land and activities, and in what ways it falls short."

Among other things the paper notes that simple ownership, especially if it does not include sub-surface title, may not provide the level of control aboriginal people may require. In addition to discussing the strengths and weaknesses of applying a conventional municipal approach to aboriginal objectives, the author does point out that the definition of municipal authority is subject to legislation and therefore its scope can be broadened or narrowed somewhat to suit the north's particular needs.

The last two papers discuss the status of aboriginal languages in a new territory.

The first paper, written by Steve Iveson and titled "Language Rights for a Western Territory" starts from the assumption that the objective is to ".. protect and enhance the language of all aboriginal peoples who might reside in a new western territory." It begins with a description; of the current status of aboriginal languages in the north, sets out a series of secondary assumptions, then discusses two complementary approaches which probably must be pursued if aboriginal languages are to thrive; one being conscious and intentional support for language development and use on the part of government, and the other being the entrenchment of specific aboriginal language rights in legislation and in a new northern constitution.

The question of entrenching language rights in legislation is pursued further in a paper entitled "Official Status for Languages in Canada: Development of Issues" prepared for the WCF by Anne Crawford. Ms. Crawford is a lawyer who until very recently lived in Yellowknife and worked extensively with the Metis Association of the NWT in the area of comprehensive claims and on the First Ministers' Conference process for the entrenchment of aboriginal rights in the Constitution Acts of Canada.

In her paper, the author states that the simple *assertion* of official status has a legal meaning in its own right, however, its meaning is somewhat ambiguous and therefore subject to interpretation by the courts. She also notes that there are a number of "...practical and applicable language rights which are not associated with 'official' status which might be considered desirable.

Official *status* plus a list of specified rights is the most common approach but with a detailed list of specified rights it is possible to protect aboriginal language rights without any reference to 'official' status. Given that the ".. ..bundle of rights," which accompany the designation official language may or may not be appropriate to some languages, this second approach may be more appropriate although some kind of a general provision, of which 'official' status is one example, may be required to provide the flexibility in interpretation required as circumstances change over time.

The second section of Ms. Crawford's report discusses the pros and cons of several approaches to the protection of language rights. These include land claims legislation, the Act creating the new western territory, and the possibility of aboriginal self-government provisions eventually being included in the Canadian Constitution.

These are not the only sources of reference available to the Western Constitutional Forum as its members attempt to create a new constitution for a western territory. Other works published previously by WCF include discussions on regional government, residency requirements, guaranteed representation of aboriginal peoples in government, and the protection of aboriginal rights. There have also been a number of very useful papers published by other organizations including COPE's WARM proposal, the Dene Nation's Denendeh proposal, and several publications by our eastern counterpart, the Nunavut Constitutional Forum. The ideas and opinions of northern residents obtained through numerous public meetings have also proved to be invaluable.

We have a unique opportunity here in the north to create a government which reflects the values and aspirations of all northern peoples. For " perhaps the first time in Canadian history aboriginal and non-aboriginal peoples are sitting down together to co-operatively design common institutions for the benefit of all.

I, and my colleagues on the Western Constitutional Forum look forward with great enthusiasm to a time early in the new year when we can present to the public a concrete proposal for a new government.

Steve Kakfwi
Chairman, Western Constitutional Forum
President, Dene Nation

ADDRESS TO THE

STANDING COMMITTEE ON INDIAN AFFAIRS

BY THE

WESTERN CONSTITUTIONAL FORUM

PRESENTED BY

BOB MACQUARRIE, MLA YELLOWKNIFE CENTRE,

VICE-CHAIRMAN, WCF

MARCH 21, 1984

Mr. Chairman, Members; the last and only time the Western constitutional Forum met with at least some of your members including the Chairman was in December 1982. At the time we were traveling with our sister Forum from the eastern Northwest Territories, the Nunavut Constitutional Forum, together with whom we constitute the Constitutional Alliance of the Northwest Territories.

The purposes for our trip to Ottawa on that occasion were threefold; to convince Ministers, Senators and Members of Parliament a) to support in principle the division of the Northwest *Territories* into two separate political jurisdictions and the development of a new constitution for each, b) to recognize the unique structure and mandate of the Alliance and the Forum to oversee this complex and challenging process, and c) to seek funds from the Government of Canada so we could get on with the job. As it turned out our first task was accomplished the Friday before we left Yellowknife when the Honourable John Munro, speaking before our ninth Legislative Assembly on behalf of the Government of Canada, indicated support in principle to division subject to four very important conditions which I shall discuss later.

Our trip to Ottawa was still necessary in order, both to seek clarification on the Government's position and to pursue our other two objectives. Fortunately we were successful in obtaining the Minister of Indian Affairs recognition of our mandate and a commitment to apply to Treasury Board for funds on our behalf. Members of this committee also supported our position and actually went beyond the commitment of the Minister and encouraged us to continue to pursue progress on the all important issue of land and non-renewable ownership and management beginning, in the short-run, with the concept of revenue-sharing. Your committee also requested that we keep it informed of our objectives, our program and our plans for the future. Therefore we were pleased to receive some twelve days ago *your* invitation to appear before you to bring you up to date on our activities . I believe a package of background information was quickly put together and forwarded to the Committee which I hope has been useful to you. First of all, as a result of a series of elections, there has been considerable change in the membership of the Western Constitutional Forum. Our new members are Mr. Stephen Kakfwi, President of the Dene Nation; Mr. Larry Tourangeau, President of the Metis Association of the NWT; and the Honorable Nick Sibbeston, Minister of Local Government and Associate Minister of Aboriginal Rights and Constitutional Development who was recently selected as our Chairman. Continuing

to serve are Mr. Bob MacQuarrie, MLA for Yellowknife Centre and now Vice-Chairman of the WCF, and Mr. James Wah-Shee, MLA for Rae-Lac La Martre and alternate for Mr. Sibbeston. The alternate for Mr. MacQuarrie is the Honorable Tom Butters, Minister of Finance.

As you may be aware the question of where the boundary for division will eventually be located is still very much up in the air. However the full Constitutional Alliance will be meeting in Yellowknife this weekend to wrestle with this very complicated issue and I am optimistic that the will is there to make some significant progress. It would appear that the boundary will ultimately be located somewhere between a point just west of Tuktoyaktuk and a Point just east of Cambridge Bay, although lines far enough west to include Aklavik and far enough east to include Pelly Bay have occasionally been suggested.

COPE, the regional association which has represented the Inuvialuit of the Western Arctic in the comprehensive claims process has the option to participate in both Forums. To date they have chosen to participate only in the NCF. The Inuit of the central Arctic or Kitikmeot region are represented in the claims process by Inuit Tapirisat (ITC) via the Tungavik Federation of Nunavut whose regional association is the Kitikmeot Inuit Association (KIA). The presidents of the ITC and TFN, Mr. John Amagoalik and Mr. Bob Kadlun are both members of the NCF.

However the people living in these two regions do not appear to be as certain of where their future lies. In the NWT-wide plebiscite of April 14, 1982 in which 56.5 percent of the voters supported division and 43.5 percent opposed, the voter turnout in the communities east of Cambridge Bay was very high and a great majority voted in favour of division. However, in the seven predominantly Inuit communities from Cambridge Bay west voter turnout was much lower and the results in four communities as well as in the region as a whole were actually against division. The other two communities with significant Inuit population, Aklavik and Inuvik, also voted against division although one cannot infer from these results how any one group in either community actually voted.

In the fall of 1983 the NCF sponsored a tour of all communities in the Keewatin, Baffin and Kitikmeot regions to obtain a response from the people

to their proposal entitled Building Nunavut. It is fair to say, and I know that the members of the NCF would agree, that the response of the residents of Coppermine and Cambridge Bay were largely non-commital. The NCF'S tour of Western Arctic communities is scheduled for the week of March 26th so, other than the result of the plebiscite, little can be said about these communities at this time.

However, the people of Coppermine have been making a serious effort to come to grips with the issue of division and all it implications. On January 27 of this year, the Hamlet Council sponsored a phone-in show on its local radio station to solicit public opinions and concerns regarding division. The results of the program indicated that people were very concerned about the prospects of division and the effects it might have on their use of their traditional lands, employment, transportation, communication, language and the quality and source of public services. Without in any way suggesting that this is the final word from Coppermine it is worth noting that the results of the survey as published in the media indicated that of the seventeen people who phoned, thirteen preferred to "be in the west and four simply did not want division.

As a result of this program the Hamlet Council invited the Western Constitutional Forum to come to Coppermine to speak to the people at a public meeting. At a well attended public meeting in Coppermine on March 2, 1984 members of the WCF introduced themselves, provided background information on the Forum, constitutional development and division and answered any questions coming from the floor. The primary results of the meeting were: a) a commitment on the part of the WCF to return in the spring and generally to keep the people of Coppermine informed and, b) a decision on the part of the Hamlet to appoint an interim representative to the WCF to represent the interests of their community. This appointee will have all the rights of any other member initially except the right to vote. This will be an interim measure only until, we hope, a more permanent regional member or members can be selected.

We realize that the people in the western and central Arctic and caught in a dilemma over the issue of division. On the one hand we appreciate that solidarity amongst the Inuit is very important as it is with any other distinct cultural group. However we also realize that the actual day-to-day relationships of the people in these communities, social and economic, governmental services and political, are oriented towards the west.

We believe that the aspirations towards self-government, the desire of the Inuit to exercise a significant degree of self-determination within the framework of Canada can be addressed within the context of WCF negotiations leading up to the development of a proposed constitution for a western political jurisdiction coupled with the outcome of the comprehensive claims process. Being part of the west will also continue to provide a capital which is geographically accessible. At the same time the establishment of a political boundary does not constitute a barrier to continuing interaction between the Inuit of east and west.

The Western Constitutional Forum continues to support division but this support is conditional upon the selection of a fair and equitable boundary. We believe that there are a number of factors which must be taken into consideration in order to arrive at a solution. The overall objective of division from our perspective is the creation of two viable public government jurisdictions. Critical to this objective are the relatively even distribution of land and non-renewable resources. Also of importance are transportation, administration, communication and geography, each of which contributes to the efficient and effective delivery of government services and the accessibility of government to its citizens. Other important factors include wildlife movement, traditional land-use, environmental issues, language, culture and regional interests.

The WCF is currently sponsoring two research projects dealing with many of these issues. One will assess the impact of various boundary proposals on the distribution of known and potential non-renewable resource and the other will identify a number of overlapping issues which may occur around a boundary, assess each boundary alternative in light of these problems, and suggest mechanisms whereby the two jurisdictions could work together co-operatively and positively to address the issues of joint interest. Both these projects will be completed by spring, in-house research to fill in the gaps in our information is also underway.

In light of our approach to the boundary question we were very pleased with the statements made by the Honorable John Munro to the tenth Legislative Assembly of the Northwest Territories on February 17, 1984 and I quote:

> "The process of resolution will require accommodation of several factors. These include a sound economic base, equity between any new territories, recognition of a

community of interests which develop from geography, history, culture and a system of administration and transportation.

All these factors have legitimacy and no single one- not even culture - can override all the others. The solution will require that all these factors be given proper weight and an appropriate balance structure. "

We *were also* pleased that he reiterated the four conditions stated first on November **26, 1982** which must be met for the Government of Canada to continue to support division, these being:

"Northerners reach concensus among themselves and agreement with the federal government on the boundary;

Northerners reach consensus and agreement with the Federal *Government* in the distribution of powers to local, regional and territorial levels of governments;

All comprehensive land claims are settled;

A majority of NWT residents continue to support division."

Our understanding from the Minister regarding the clause on comprehensive claims is that significant progress on all claims would satisfy this condition. While total and complete resolution of claims would place an unreasonable burden on our project the requirement of significant progress is, in our view desirable, so that the interests of any of the aboriginal groups negotiating claims is not compromised by the fact that some of their traditional land has been transferred to a different political jurisdiction. There is not one conceivable boundary location which will not entail at least some overlapping use by adjacent communities although some would have less effect than others.

Of particular importance to us however, is the condition that a consensus on the location of the boundary must first be reached among northerners. The location of the border is of vital importance to all residents both present and future of both jurisdictions no matter how close or far they live from the line itself since the border will play *an* important part in determining both their economic and their political futures. Therefore it is only fitting that the people of the north retain the right to reach an initial agreement on its location.

The approach agreed upon by all members of the Constitutional Allinace on February 16, 1983 was that the Alliance would attempt to reach a consensus

on the location for the boundary and, if they succeeded, they would submit their recommendation to the people of the north for ratification via an NWT-wide plebiscite. Community consultation and appropriate research would occur as the negotiations proceeded. Since then some members of the NCF have gone on record as supporting a rigid community choice approach urging that all other criteria are irrelevant. However on other occasions some NCF Members have also stated that a number of factors are important although community preference remains an important criteria. The process and criteria for selecting the boundary are issues we are expecting to focus on during the Alliance meeting this weekend.

Probably more than enough has been said by all sides about the question of division. While that is the business of the Constitutional Alliance, the primary mandate of the Western Constitutional Forum is the development of a detailed proposal for political/constitutional development for a western territory. Earlier in this paper I described the membership of the WCF. At this point I would like to describe its structure and its decision-making process. The WCF is currently comprised of four parties, the Dene, represented by Mr. Kakfwi, the Metis, represented by Mr. Tourangeau, the non-native population represented by Mr. MacQuarrie and the Legislative Assembly at large represented by Mr. Sibbeston. Each party has one vote and a consensus of all members is required for a decision to be made. Even then, of course, all decisions reached by the WCF on substantive matters are only tentative until they have been ratified by the public.

The WCF is determined that all peoples who will be part of the western territory and their appropriate representatives be able to participate in all stages of the process leading to the ratification of the comprehensive constitutional proposal. Basically there are two reasons for our taking this approach. First the western half of the Northwest Territories is populated by several distinctly different peoples with their own histories, languages, culture and, in some respects, aspirations. It will take time and careful dialogue among all parties and their constituents, in the first instance to formulate and communicate clearly just what each group's concerns and aspirations are, then to negotiate an arrangement whereby all groups can work together without any one having to sacrifice its most fundamental objectives in the process.

Secondly, once division takes place, the non-native to native population ratio will be about even and the expectation would be that the non-native population would gradually begin to form a majority. Therefore, unlike the Inuit in the east who expect to be a majority in Nunavut for a number of years, the aboriginal people in the west stand to lose ground over time if they do not negotiate and implement from the day of division plus one the structures and practices in government necessary to protect and enhance their potential to function as self-determining peoples within a public government jurisdiction.

Consequently the WCF does not intend to develop a detailed proposal for political/constitutional development for a new public government jurisdiction as a first step and then carry this proposal to the public for their opinions. Our approach which is exactly the opposite flows as follows:

1. Undertake the independent research required to provide the information necessary to facilitate public discussion and consultation.
2. Based upon this research a series of information/education packages will be prepared for large-scale distribution to the public.
3. The WCF will undertake a series of informal public meetings, workshops and other events to maximize the participation of the general population in this process.
4. As the public consultation proceeds and with its help, WCF members will attempt to reach an agreement on principles for a new government for a western territory. The Forum's deliberations on these substantive issues will take place in public. This agreement on principles must be ratified in some manner by each WCF Member's constituents before negotiations on the detailed proposal will proceed.
5. Next the WCF will prepare and negotiate a detailed proposal for a political/constitutional development based upon the terms of the agreement on principles.
6. This proposal will then be carried to the public and, through a more official process of community hearings, residents will have an opportunity to respond.
7. The proposal will be amended based upon the results of the public hearings and then the final package will be submitted to the public for ratification.

8. If ratified then negotiations with the Federal Government would begin officially. However, the Government of Canada will be monitoring the activities of the WCF throughout the phases outlined above, and as events proceed the WCF will be receiving federal reactions to its proposals. In this way discrepancies between what the WCF proposes and what the Federal Government appears willing to accept will be reduced although they will not be eliminated entirely.

Although the WCF held its first meeting in September 1982, and it received political recognition from the Department of Indian Affairs in December 1982, it did not actually receive any funding until September 1983 and the staff required to operate its secretariat did not come on line until November. So in reality the WCF has only really been operational for less than five months. Add to that the fact that the Legislative Assembly held its elections in November and did not convene its first session until February one can see that the Forum has only been fully operational for one month.

Considering the above, the WCF has actually managed to accomplish quite a lot in its short active lifespan. With the support of the Legislative Assembly Special Committee on Constitutional Development and the Government of the Northwest Territories Aboriginal Rights and Constitutional Development Secretariat the WCF succeeded last summer in publishing seven pieces of research in five books dealing with guaranteed representation; residency requirements, protection of aboriginal rights, and the principles and practices of liberal democratic government. Members of this committee received copies of all five books last fall. In addition to the boundary and in-house research mentioned earlier, the WCF also has well underway a project which examines a traditional Dene model of government and its implications for constitutional development today. A workshop of Dene elders on this topic was completed in January and a report based on this event is currently being prepared for publication. Other research projects will be initiated from time to time as a need becomes apparent.

As I stated earlier, the WCF is in the process of preparing a series of information/education packages for large-scale public distribtuion. However we are not waiting for the publication of these packages before consultation with the public and their representatives begins. In December, representatives of the WCF attended a Dene Nation leadership meeting in Fort Smith and made

a general presentation. Later that month the WCF sponsored a meeting of thirteen MLAs to discuss division, constitional development and the work of the Forum. In January, as well as the workshop with Dene elders, the WCF funded and attended a constitutional conference which involved representatives from all Metis locals in the NWT. In the same month we ran two workshops with representatives of the public media, sent out two hundred information kits to northern organizations and met with various community groups such as the Yellowknife Moms and Tots.

In March as well as attending the meeting in Coppermine described earlier, WCF representatives met with the South Mackenzie Area Council, a group which represents the municipal councils of Fort Smith, Hay River, Pine point and Enterprise. We have received a proposal for independent research from this group and we expect it to be approved and in progress by April lst. This week we will be meeting with the Deh Cho Regional Council, a council which represents all the communities in the Fort Simpson Liard area of the NWT. Following that will be a public meeting in the town of Hay River. In addition we have a representative at the Kitikmeot Regional Council meeting which is currently underway in Cambridge Bay and we will be meeting with the Dogrib Tribal Council in the second week of April. A contest to select a name for the western territory has been approved by the WCF and will be underway by spring.

Finally the full membership of the WCF will be accompanying the NCF on its tour of Western Arctic communities next week after the Constitutional Alliance meeting this weekend. Clearly the public consultation process is already well underway although not of the formal variety. This is how we think it should be at this point in time. -The next step which will begin at our next meeting in April will be to develop a plan of action and a timetable for discussing and negotiating the substantive issues related to constitutional development in the western NWT.

When it comes to the preparation of a new constitution, the WCF and the Nunavut Constitutional Forum share the same objectives. First is the development of a structure and style of government which reflects the cultures and the values of each territory's unique population. Second is the conscious and active recognition and protection of aboriginal rights. Third is the establishment of an appropriate balance between individual and collective rights.

'Fourth is the development of an efficient and effective government service. Finally comes the steady transfer of powers and jurisdictions from the Government of Canada to the new territories as each evolves towards provincial status.

The issues which must be addressed in the short run at least, to fulfill these objectives are somewhat more complicated in the west than in the east. First there is the challenge and opportunity for the Dene, the Metis and the Inuit to negotiate a relationship amonst themselves. Coupled with this is the challenge and the opportunity for the aboriginal groups and the non-native population to negotiate their relationship as well. It is an uncommon event in Canadian history for these parties to attempt to reach an agreement on how they can live and work together co-operatively without using the Federal Government as a mediator. Finally there is the challenge and the opportunity for the people of the north together to negotiate their relationship with the Government of Canada.

There are a number of alternatives which will be considered in relation to making the structure and style of government more suitable. These include guaranteed representation for aboriginal people at the territorial, regional and local levels; in the bureaucracy, on boards and commissions and in the justice system, as well as on elected bodies. Likewise of great importance is the devolution of certain powers and jurisdictions from the territorial to the local and possibly regional levels of government. Distinct cultural groups and geographic areas tend to correlate in the western NWT. Thus regional and local governments should be able to vary from region to region in order to more accurately reflect the unique characteristics and aspirations of their populations.

This could include variations in the official languages which accompany English, it could include variations in the structures of government and the decision-making process form region to region, and it could include variations in the powers and jurisdictions exercised by government from region to region. Thus, local and regional governments could determine for themselves within the context of general guidelines the form of local governments which best suite them. One important aspect in this regard will be the special interest aboriginal people have in the use and management of land and renewable resources outside the bounds of the municipality.

Other items to be considered include the possible use of referenda on a more regular basis and the issue of whether a consensus model of government rather than party politics best suits the needs of northern society. Finally there is the matter of residency requirements, the length of time a person must reside in a region in order to be eligible to vote in elections or run for public office. The purpose he're is the protest the longterm interests of the permanent residents from the effects of wide fluctuations in the ebb and flow of transient workers resulting from the boom and bust model of economic development peculiar to the north.

Also important is the creation of a special mechanism in government whose sole purpose is the protection of legally defined aboriginal rights and interests from encroachments by either government or the public sector. It would be a body whose objective would be to identify and apprehend any such encroachment before it has had the opportunity to take effect, and suggest ways in which the encroachment can be avoided.

I have attempted to summarize some of the topics which our Forum will be addressing in the next year. We would like to take this opportunity to express our appreciation to the Special Committee on Indian Self-Government for their very positive advancement of the concept of aboriginal self-government. We were disappointed by the outcome of the First Ministers' Conference earlier this month but our members are still determined to pursue the entrenchment of the right to aboriginal self-government in the constitution of Canada.

Some individuals have suggested that aboriginal self-government is not relevant to the Northwest Territories because we are pursuing a system of public government. This simply is not the case. The aboriginal members of the WCF assert that their right to aboriginal self-government is an undeniable fact and that a part of what we are doing in the WCF as we develop a new constitution is creating certain mechanisms and practices in government which will entrench aboriginal self-government as a component of public government. The structures may not be the same as those suggested in the special committee report 'but there is no difference whatever in intent.

Finally there is the matter of the transfer of powers and jurisdictions from the Federal Government to the new political jursidcition, so long as so

much power and authority is wielded by Ottawa particularly in the areas of land and non-renewable resources, the benefits derived from changes to our structure and style of government will be minimal. We realize that we are not going to obtain provincial status overnight but it is reasonable to expect that considerable progress in this area can be made. There are a myriad of ways in which this can be accomplished as we move in regular stages towards provincehood.

I would like to thank you Mr. Chairman and Members for the opportunity you have given us to bring you up to date on our activities. The other Members of the Forum regret not being able to be here to meet with you in person and they look forward to other occasions in the future.

SEVERAL WAYS TO INTERFACE ABORIGINAL SELF-GOVERNMENT WITH PUBLIC GOVERNMENT IN THE WESTERN NORTHWEST TERRITORIES

Prepared for:

The Western Constitutional Forum

Prepared by:

Steve Iveson
Yellowknife, NWT

May 1985

This paper is for discussion purposes only. None of the views expressed herein knowingly represent the views of the WCF or any of its Members.

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INTRODUCTION

This paper presents five distinctly different approaches for the interface of aboriginal self-government with public government in the western Northwest Territories. They are presented on the assumption that the NWT will eventually be divided but the issues raised are relevant regardless .

The five models are situated on a continuum with exclusive aboriginal self-government of a quasi-provincial nature applied to lands titled to aboriginal peoples by way of claims at one end, versus a public government system over all territorial lands which features specific aboriginal rights clauses entrenched in a constitution with a heavy emphasis on guaranteed representation for aboriginal people at the other. Each concept is described as briefly as possible and the list is not intended to be exhaustive.

The objective of this paper is to facilitate discussions among Western Constitutional Forum Members as they attempt to reach agreement on a general approach to constitutional development for the western Northwest Territories. It assumes that it would be difficult and possibly even counter-productive to negotiate specific constitutional issues on an item by item basis without first situating them within the context of a general framework.

The reader should note that the focus of this paper is on aboriginal self-government/public government interaction. It discusses the transfer of power from the federal to a territorial government only peripherally. It does not investigate other problems or questions which have 'been raised regarding the structure and style of government but which do not relate directly to aboriginal rights issues, a charter of rights, the pros and cons of a political party system, the role if any for referenda, the possibility of a mechanism for the *recall* of MLAs, extended residency-requirements, and the possibility of a second chamber, are but a few examples.

Also this paper does not discuss specifically the rights of non-aboriginal people in a western territory. The conventional approach would be to assume that their rights are protected in the form of individual rights entrenched in the Canadian Charter of Rights, by their majority status in a western territory, and by the fact that the Government of Canada will never approve a constitution which is not based on fundamental democratic principles even though it includes special provisions relating to aboriginal peoples. It is possible, however, that WCF Members may want to consider entrenching some form of rights in a constitution which treat non-aboriginal people as a collective and which might counter-balance some of the aboriginal rights provisions in certain areas.

MODEL 1: Separate and Exclusive Aboriginal Government

GEOGRAPHICAL UNITS
- Aboriginal self-government over titled lands provided for by a settlement of claims.
- Lands not owned by aboriginal people would constitute a separate territory.

CENTRAL GOVERNMENT
- Both governments would begin with at least the same powers as the current GNWT and evolve toward provincial status.
- Each jurisdiction would have its own legislative assembly, executive, judiciary and bureaucracy.
- The two would relate to each other as separate governments and both would relate directly to the Government of Canada.

COMMUNITY GOVERNMENT
- Strong local government: standard municipal authority combined with community title over relatively large tracts of lands as provided by claims.

REGIONAL GOVERNMENT
- Regional institutions may or may not be necessary.

POLITICAL RIGHTS
- The right to vote or hold office in aboriginal jurisdictions would be restricted to aboriginal people.
- Aboriginal people resident in the other territory would have full political rights within that jurisdiction.

REVENUE
- Both jurisdictions would have the same sources of revenue as the current GNWT, would pursue non-renewable resource revenue-sharing in the shortrun and ownership of land and resources in the longer term.
- Would resource revenues generated by claims be viewed as public or private revenues?

ABORIGINAL RIGHTS CLAUSES
- Such clauses would be redundant within an exclusive aboriginal jurisdiction.

CONSTITUTIONAL ENTRENCHMENT
- To ensure that the federal government could not amend the constitutions unilaterally.

IMPLICATIONS FOR DIVISION
- Creates ethnic governments each corresponding to a particular claims group and their settlement region.
- This approach is not consistent with the concept of division or the current northern constitutional process.

IMPLICATIONS FOR CLAIMS
- Focus on obtaining title to as much land as possible (the base for the aboriginal government) including community lands, plus rights and interests in untitled lands.
- *Would the type of control over lands and government suggested by this model reduce the amount of lands available through claims?*

MODEL 2: Public Central and Community Governments plus Exclusive Aboriginal Municipalities

GEOGRAPHIC UNITS
- One western territory with public, central and local government institutions.
- Lands owned by aboriginal peoples as per claims agreements would constitute exclusive aboriginal municipalities.

CENTRAL GOVERNMENT
- Same powers as the current GNWT, evolving towards provincial status.
- Would include special features for aboriginal peoples.

COMMUNITY GOVERNMENT
- Conventional municipalities with regards to size, powers and jurisdictions.
- Structure and decision-making process might vary between communities.
- Would be affected by aboriginal rights provisions.

ABORIGINAL MUNICIPALITIES
- Exclusive aboriginal control of a municipal nature over lands titled via claims.

REGIONAL GOVERNMENT
- Not provided for in this model.

POLITICAL RIGHTS
- *Central and community government: the right* to vote and hold office open to all bona fide residents.
- Aboriginal municipalities: rights restricted to aboriginal people.

REVENUE
- *Central government: same as GNWT plus non-renewable resource revenue-sharing evolving toward provincial status.*
- Community government: usual conventional sources.
- Aboriginal municipality: less funds required, possible sources include own revenues, territorial and/or federal governments and maybe claims.

ABORIGINAL RIGHTS CLAUSES
- Rights entrenched in a constitution might include: the aboriginal municipalities, language and education rights, guaranteed representation in the central and maybe some local governments, a mechanism to protect aboriginal rights, etc.

CONSTITUTIONAL ENTRENCHMENT
- Aboriginal clauses in the constitution could not be amended without aboriginal consent.

IMPLICATIONS FOR DIVISION
- This approach is compatible with all aboriginal claims and as such is consistent with the current approach to division.

IMPLICATIONS FOR CLAIMS
- Obtain title to as much land as possible but community lands not necessary.
- Obtain other controls over titled lands to compliment municipal powers.
- Pursue rights and interests in untitled lands throughout the claims region.
- Like Model 1 might this approach prejudice the amount of titled land available to claimants?

MODEL 3: Model 2 Plus Public Regional Structures

GEOGRAPHIC UNITS
- A strict legal definition of a region would not be necessary.
- Communities would unite together as a region primarily according to their own needs.

REGIONAL COUNCIL
Its role could include:
- Lobbying on behalf of communities.
- Exercising primary responsibility for issues which are more of a regional than local concern.
- Management and delivery of some programs.
- Serve as the primary public body in a region.
- Have a direct relationship to the regional administration.
- NO POWERS to legislate, tax or issue licenses.

RELATION TO CENTRAL GOVERNMENT
- Most authority of a regional council would be delegated from the central government.
- However, it should have flexibility and autonomy in exercising its mandate.

RELATION TO COMMUNITY GOVERNMENT
- Each community decides what power, if any, it wants to delegate to a regional council.

RELATION TO ABORIGINAL MUNICIPALITY
- No delegation of authority from an exclusive institution to a public one but would work co-operatively.

POLITICAL RIGHTS
- Members of a regional council would be appointed by each community.
- Appointments from aboriginal municipalities guarantee aboriginal representation.

REVENUE
- Same as Model 2.
- Aboriginal rights clauses would focus on the central and local levels.
- They would impact on the regional council (guaranteed representation, language, etc.) but would not be directed at the region per se.

CONSTITUTIONAL ENTRENCHMENT
- Because there is no NEED to entrench aboriginal rights at the regional level, regional councils can remain flexible institutions to the point that aboriginal rights would still be fully protected even if a regional council ceases to exist.

IMPLICATIONS FOR DIVISION
- In combination with Model 2, this approach probably comes closest to offering a single system of *government which might be attractive to all* aboriginal groups.

IMPLICATIONS FOR CLAIMS
- Same as Model 2.
- The Inuvialuit Claim includes regional institutions and the Dene/Metis are considering it too. Therefore Model 3 has the potential of being very compatible with claims.

MODEL 4: Strong Public Regional Government with Strategically Defined Borders

GEOGRAPHIC UNITS
- A strict legal definition of a region would be required.
- Boundaries would be drawn to include all/most members of an aboriginal group but would avoid large centres having a non-aboriginal majority.

REGIONAL GOVERNMENT
Using the WARM proposal as an example:
- Legislative authority in a number of areas.
- Regional legislation would supercede territorial legislation unless disallowed by the Commissioner.
- The right to negotiate directly with the federal *government for additional, possibly legislative* authorities in other areas.
- Administrative control over all programs delivered in the region which fall within its legislative authority and possibly other topics or programs as well.

RELATION TO CENTRAL GOVERNMENT
- While technically it is within the jurisdiction of a larger territory, functionally it is nearly independent.
- This depends to some degree on the parameters of its legislative authority.

RELATION TO COMMUNITY GOVERNMENT
- The regional government's authority would not be subject to community control.
- Its authority over communities depends upon the scope of its legislative authority.

POLITICAL RIGHTS
- *All bona fide residents* could vote or hold office.
- The mayor would be elected region-wide, councillors elected by each community.

REVENUE
- Can levy taxes on real property for various purposes including education.
- Can sell business licenses.
- Other incomes would come from the central or federal government.
- A particularly wealthy region might become financially independent.

ABORIGINAL RIGHTS CLAUSES
- This form of regional government would constitute aboriginal self-government for a particular aboriginal group even though it is a public government.
- If it is strong enough other rights provisions may not be required.

CONSTITUTIONAL ENTRENCHMENT
- Legislation creating a regional government could not be amended by the central government without regional consent.

IMPLICATIONS FOR DIVISION
- It might work for the Inuvialuit.
- It would not for most Dene/Metis regions for geographic and demographic reasons.
- Can a rational system of government be created which accommodates different approaches to self-government?

IMPLICATIONS FOR CLAIMS
If the regional government,
- *Includes all of the settlement region.*
- Wields considerable power.
- Maintains an aboriginal majority.

Then claims can focus on non-political issues like land ownership, traditional land-use, and economic development opportunities.

MODEL 5: Public Government: Guaranteed Aboriginal Influence but not Control

GEOGRAPHIC UNITS
- Aboriginal participation in a public government having jurisdiction over the entire territory.
- This model foregoes the security offered by exclusive jurisdiction over some lands in exchange for the opportunity to maximize aboriginal influence *in (without control) and benefit from government*, the land and the economy throughout the entire territory.
- Begin with at least the same powers as the current GNWT and evolve toward provincial status.

COMMUNITY GOVERNMENT
- Flexibility in the areas of structure and decision making, and powers and jurisdictions in order to reflect the historical differences in the roles of community government as perceived by different cultures.
- Aboriginal rights provisions would be important.

REGIONAL COUNCIL
- Same as Model 3.
- A greater focus on the application of aboriginal rights provisions.

POLITICAL RIGHTS
- All bona fide residents would have the right to vote or hold office subject to a longer residency requirement.
- Guaranteed representation for aboriginal peoples at all three levels.

REVENUE
- Same as now for all three levels of government except for revenue-sharing on non-renewable resources between the central and federal government initially; territorial ownership of resources eventually.

ABORIGINAL RIGHTS CLAUSES
- A number of aboriginal rights provisions would be required.
- A special focus on guaranteed representation for aboriginal peoples at all levels and in all areas of government.
- Also guaranteeing a significant role in the management of land and water in addition to claims provisions.

CONSTITUTIONAL ENTRENCHMENT
- Aboriginal clauses in the constitution could not be amended without aboriginal consent.

IMPLICATIONS FOR DIVISION
- This model is consistent with the current approach to division.
- The question of flexibility arises once again should some groups adopt this approach while another pursues Model 4.

IMPLICATION FOR CLAIMS
- In this model the logical approach to a claims settlement might be to forego exclusive ownership of parcels of land *in favour of extending the claimant groups' ability to affect or control and to benefit from decision making on land use and the management and utilization of wildlife throughout their settlement regions.*

SEPARATE AND EXCLUSIVE ABORIGINAL GOVERNMENT

This model approaches the AFN's preferred concept of aboriginal self-government in a region where its creation is still possible. Essentially it proposes separate development and ethnic government.

CHARACTERISTICS AND COMMENTS

A. Geographic Limits to Each Jurisdiction - There would be two or more separate political jurisdictions in the west, an aboriginal jurisdiction(s) and a general jurisdiction. The land owned by Dene/Metis and/or Inuit/Inuvialuit as determined by claims legislation would constitute the aboriginal jurisdiction(s). This model assumes exclusive political control on an exclusive land base.

Obviously the amount of land secured through claims, both in the sense of size and value, would be a critical factor.

The Inuvialuit obtained roughtly 15 square miles per person (1.5 including sub surface -- 13.5 surface title only) and they would have jurisdiction over all of it. If the Dene/Metis secured even half of that for its 13,000 eligible members it would be a significant land base (roughly 100,000 square miles). Even so it would still be less than 20% of the claim area if we include areas covered by water. Could the Dene/Metis expect to secure even this much land given that the control they would be seeking is much greater than what is being offered within the current parameters of claims? There are other factors which might weigh against, such as the "value" of lands selected.

Are the Dene/Metis prepared to relinquish their interests in the other 80% of the region with the exception of those rights secured in the claim?

Other questions which need to be addressed include:

a) Would the land selection include all or most of the unalienated land in communities? Obviously, if self-government is the issue, a group must control the land upon which most of its members live. The Inuvialuit " settlement does not include ownership of community lands.
b) Would the Feds insist on supporting this approach by the Dene only as it relates to Treaties 8 and 11? That is;
   i) Would the land allotment be reduced to one square mile per family of five?
   ii) Would Metis and non-status be eligible?

B. Powers of Central Government - same powers as the current GNWT with the intention of evolving towards province-like status in the future through the staged transfers of federal authority.

Would the Federal Government accept this separate government approach? They might be obliged to if the Dene/Metis support it, but, how far would they be willing to go?

a) Would they define self-government as including at least the powers of the current GNWT plus evolution towards province-like status or would they attempt to define self-government in terms of municipal government only?

b) What about the taxed-based municipalities? In the Dene/Metis eligibility agreement Yellowknife and Hay River Dene/Metis are distinct from the land based Dene of the Yellowknife and Hay River bands. What would be the land base in any of these "urban" communities? If they don't have one, what is the meaning of self-government for them?

c) If the objective is eventual province-like status, the implication is the eventual turnover of subsurface rights. Might not even the possibility of this happening in the future reduce even further the amount of land the Dene/Metis could secure in a claim? The fact that their claim is already settled reduces for Inuvialuit some of the threats this approach implies.

c. Political Rights - The right to vote and hold office in aboriginal jurisdictions would be restricted to Dene/Metis and/or Inuit/Inuvialuit.

The assumption here is that the Dene/Metis or Inuit/Inuvialuit would have exclusive political rights within their jurisdiction. Coupling these rights with title to all the land as well as other rights possibly entrenched in a claim ensure a great deal of control over immigration of non-natives onto aboriginal lands even without the ownership and complete control of the subsurface.

The second assumption, following normal practice in the south, is that an aboriginal person choosing to live outside the aboriginal jurisdiction would be able to enjoy the same political rights as other Canadians.

D. Local Government – Community control combined with community ownership of land.

This system would suggest strong local government; community ownership of and jurisdiction in a municipal sense over a relatively large tract of land including a significant portion of lands used for traditional purposes. This assumes that the community owns the lands recognized in claims which is not the case in the Inuvialuit settlement.

Regional council/government may or may not be necessary.

E. Central Government - A Dene/Metis and/or Inuit/Inuvialuit central government with law-making powers and its own Executive, bureaucracy, etc. would be required. It might be structurally different from the government of the other western jurisdiction.

F. Line of Authority - The central government of each jurisdiction would relate directly to the Government of Canada.

G. Relationship Between Aboriginal and Conventional Territories - This would be a government to government relationship and would focus on transborder concerns such as water. Separate but related factors include the rights of aboriginal peoples to the use and management of lands and wildlife outside exclusively owned lands as determined through claims. (If Dene/Metis owned and administered land along the shore of Slave and Bear Lakes and the Mackenzie River, what would be their jurisdictional interest in these waterways?)

The governments might choose to share services and facilities, hospitals or institutions of higher learning for example, but one would not cede jurisdiction to the other.

H. Revenue - Same sources as the current GNWT; grants from Ottawa plus local revenues.

What would be the potential for generating government revenues locally, both in the short and long term? If the Dene/Metis succeed in obtaining some royalties from the entire claim area (not just under lands they have title to), would these monies be considered as Dene/Metis government revenue or do they see these royalties going to non-governmental development corporations? Revenues from subsurface resources owned by the Inuvialuit, if there are any, will go to development corporations.

Other sources would be personal income taxes, revenues from leasing land, taxes on building and improvements, licensing, liquor, tobacco, etc.

1. Aboriginal Rights Clauses - Clauses to protect the rights of aboriginal peoples would be redundant within an exclusive aboriginal jurisdiction unless they were guarantees of funds for certain programs.

J. Constitutional Entrenchment - Certainly the constitution of the aboriginal jurisdiction(s) could not be amended by a non-native majority since it is an exclusive government. The only question is protection against changes by the Government of Canada.

K. Implications of this Approach for Division -This proposal clearly represents ethnic government. As such it is unlikely that Inuit/Inuvialuit and Dene/Metis would want to share the same government. This model throws into question the current approach to division, selection of a boundary, and constitutional development. It also throws in question the continued relevance of the WCF.

L. Implications for Claims - Using this approach a claim should focus on securing title to as much land (plus interests in waterways) as possible including land within communities. It might also focus on potential revenues from non-renewable resources in the entire western NWT particularly if those revenues were seen as government rather than private. It would not need to focus on control over lands it owned since that control would be automatic (the real issue would be the rate of evolution towards province-like status). It would concern itself more with land and wildlife use and management rights on land outside the aboriginal government's jurisdiction.

PUBLIC CENTRAL AND COMMUNITY GOVERNMENTS PLUS EXCLUSIVE ABORIGINAL MUNICIPALITIES

This model suggests one central government for the entire Western Northwest Territories and public municipal government in communities coupled with exclusive aboriginal jurisdiction over aboriginal lands as determined by the claims. The exclusive jurisdiction would be municipal in nature but this power would be significant given the size of these municipalities combined with the additional controls spelled out in each claim.

CHARACTERISTICS AND COMMENTS

A. Geographic Units - There would be one western territory with a central and local governments. Lands owned by aboriginal peoples as per claims agreements would constitute exclusive aboriginal municipalities.

Once again the amount of land secured through claims, both in the sense of size and value, would be a critical factor. Inuvialuit lands have already been defined. It remains to be seen how much titled land will reside with the Dene, Metis and Inuit.

Will federal anticipation of aboriginal municipalities reduce the amount of land it will concede to Dene/Metis and Inuit ownership in their claims negotiations?

The other issues related to land differ somewhat from Model 1 primarily because the lands outside of aboriginal lands would not be part of a separate territorial jurisdiction. That is they would be administered by a central government of which native people are a part and in which they could be guaranteed certain rights including representation. Therefore rights to manage and use these lands would not be threatened to the same degree as they would be were they contained in a separate territory. Also it would not be necessary for Dene/Metis and Inuit to claim substantial amounts of land within communities. Regular municipalities and aboriginal municipalities could exist and be administered separately. Only the very small communities like Trout Lake might want the two to coincide and might have fewer factors standing in the way of this approach.

B. Powers of Central Governments - Same powers as the current GNWT with the intention of evolving towards provincial status in the future through the staged transfer of federal authority. Would be obliged to respect any aboriginal rights clauses entrenched in claims and in its or the Canadian Constitution including the existence and the jurisdictions of the aboriginal municipalities.

C. Political Rights

a) Aboriginal Municipalities: The right to vote and hold office would be restricted to Dene/Metis, Inuvialuit, and Inuit.
b) Central and Community Governments: The right to vote and hold office would be open to all citizens of the territory subject possibly to an extended residency requirement as well as the standard regulations for elections.

D. Aboriginal Municipalities - This approach would suggest a strong as well as exclusive aboriginal government; local ownership of and jurisdiction in a municipal sense over a relatively large tract of land including a significant portion of lands used for traditional purposes coupled with other rights defined in claims. (n.b. Inuvialuit lands are not owned by each community.)

E. Community Government - The powers and jurisdictions would be typical of municipal governments as would their size. The structures and decision-making processes might vary between communities so long as they were based upon "democratic principles." Guaranteed representation for aboriginal peoples could be a factor in some communities. Other entrenched aboriginal rights, language rights or rights to bilingual education for example, might come into play as might a residency clause.

F. Central Government - Given that the exclusive aboriginal jurisdictions would be limited to municipal powers and given that most native people would live and receive most government services in communities outside the aboriginal municipality, the central government will continue to play an important role in their lives. Therefore entrenchment of aboriginal rights clauses including guaranteed representation in a central government is a component of this model. Some of the commonly mentioned features are language and education rights, a mechanism to protect aboriginal rights, residency and guaranteed representation. Guaranteed representation could be applied narrowly, limited to a certain percentage of seats in the Assembly for example, or more broadly to include all components of the central government.

G. Revenue

a) Aboriginal Municipalities: The same powers to generate revenue as a regular municipality including taxes on buildings and improvements. Obviously there would be no sale of lands but there could be revenue from leases. There are other possible sources as well

i) Grants from senior levels of government. The question here is would these grants come from the territorial government or would they come directly from the Federal Government as part of the "special" relationship between the federal government and aboriginal peoples?

ii) A second possible source is money generated by claims. However, this is unlikely as the Inuvialuit claim does not provide for it and the Dene/Metis proposed claims intentionally avoids including funding for social programs in the claim.

One obvious question is just how much funding may be required, that is, what kind of services would an aboriginal municipality be called upon to provide. Assuming that the municipality does not include a community then the primary service is really environmental protection, land use management and control. Those who might require services on the land (eg. a trapper's cabin, a tourist lodge, hydrocarbon explorations, logging outfit, or a mine) would be obliged by agreement and according to certain conditions to provide services for themselves. Land development for agricultural purposes might be a different matter.

b) Community Government: Same as now.

c) Central Government: At least the same as the present GNWT, hopefully with non-renewable resource revenue-sharing for now, then eventual provincial status.

H. Aboriginal Rights Clauses

This particular model assumes the exclusive aboriginal municipalities to be one component of a public government system. There would be a need to have specific aboriginal rights clauses in a constitution for a western territory. These might include

1. 'Clauses to protect the existence and jurisdictions of the aboriginal municipalities.
2. Language rights.
3. Bilingual education rights.
4. Guaranteed representation in the central government. (It is assumed that the existence of exclusive municipalities might lessen somewhat the extent to which guaranteed representation in the central government is required.)
5. A mechanism to protect aboriginal rights.
6. Residency requirements (this is not necessarily an aboriginal issue per se).
7. Double majority clauses for amending sections of the constitution dealing with aboriginal rights.
8. Others; this list is not intended to be exhaustive.

I. Constitutional Entrenchment

In this model aboriginal people would require protection from the possibility of a future non-native majority amending or deleting aboriginal rights clauses from the western territory's constitution as well as protection from the Government of Canada. Double or even triple majority mechanisms might be appropriate.

J. Implication of this Approach for Division

This approach could apply equally to Inuvialuit and Inuit as well as Dene and Metis. In fact it could be particularly attractive to the Inuvialuit given the size of the land base they own. This model is consistent with the current approach to division and the selection of a boundary.

K. Implications for Claims

Like Model 1, a claim should focus on securing title to as much land as possible plus interests in waterways, but it would not need to include land within communities. Revenues from non-renewable resources would not be necessary for the purposes of funding a government although they could still be desireable for private purposes. Since legislative control over aboriginal lands would only be municipal in nature, further rights to its use and management may need to be sought in the claim. The claim would still concern itself with land and wildlife usage and management rights in land outside the aboriginal municipalities but, at least in this model (unlike Model 1) the lands in question would all be part of the same territory.

L. Variations on Model 1 and 2

Multiple variations on these basic models are possible. Perhaps a more accurate definition of the AFN model is Model 2 plus some central aboriginal institutions with some province-like powers in specific areas, while for other purposes aboriginal lands are considered part of the province and subject to laws of general application. This again suggests some guarantees for aboriginal representation in the central public government although possibly less than Model 2.

MODEL 2 PLUS PUBLIC REGIONAL STRUCTURES

This model is a variation on Model 2: Public, Central and Community Government Plus Exclusive Aboriginal Municipalities. It argues that there are a number of issues in which communities (conventional and aboriginal) and regions have a direct interest but over which municipalities normally do not have any control. It argues that public regional structures which include guaranteed representation for aboriginal peoples could be appropriate vehicles for addressing these concerns. At the same time, by stressing and entrenching rights at the central and community level as Model 2 does, it allows some flexibility in the evolution of regional institutions and makes even their creation a matter of local choice rather than necessity.

RATIONALE FOR REGIONAL INSTITUTIONS

There are a number of reasons commonly given to justify regional councils;

a) to help communities to exercise more control over local affairs,
b) to serve as an effective lobby on behalf of communities (and possibly to facilitate central government consultation with them),
c) to address issues of a genuine regional nature,
d) to promote efficient and effective government in areas where devolution to communities is impractical but where differences between regions suggest that central control and administration is also unrealistic,
e) to serve as an umbrella organization for many of the independent regional public organizations presently in operation, and
f) to provide some political direction to current regional administrations.

CHARACTERISTICS OF REGIONAL INSTITUTIONS IN THIS MODEL

The principles for regional institutions outlined below include the eleven principles on regional government tentatively adopted by the WCF in October, 1984.

A. "NO" Power to Legislate, Tax, or Issue Licenses - Regional councils or governments as conceived in this model, do not require powers to pass legislation (by-laws), to tax real property, or to issue business and other licenses; all powers normally associated with an incorporated municipality.

B. Geographic Units - Because powers to tax, issue licenses and legislate are not required, a strict (legal) definition of regional boundaries should not be necessary. Initiatives for the creation of regional councils would come from the communities according to their own criteria. Communities would have the right to opt out of a regional council and a regional council the right to dissolve itself. The commonality of areas served by regional councils and regional administrations ought to be taken into account. Flexibility would be emphasized in defining regions.

C. Powers of Regional Governments - There are a number of roles and degrees of responsibility which could be disposed of by a regional council.

a) Political Lobby on behalf of communities toward the central government.

b) Primary responsibility for regional concerns - these could include land-use, water use, major economic development, game management, culture, language and

education. The nature of its authority might vary depending upon the issue; strictly advisory, concurrent jurisdiction with the central government, or complete responsibility as delegated by the centre.

c) It might be responsible for the management and delivery of programs within parameters broad enough to allow for differences between regions.

d) Primary public body in the region - it could take responsibility for other public regional organizations.

e) Direct relationship to the regional administration - it might have input (advisory or authority) regarding the hiring of senior staff, the preparation of annual budgets and the delivery of some services not being administered by the regional council directly.

f) Equality and flexibility - each region should have the opportunity for the same level of authority-as any other region but no region should be obliged to assume all the responsibilities available to it.

D. Political Rights - This model assumes that members of a regional council would be local officials appointed by each community, not elected directly (mayors, chiefs, etc.).

Guaranteed aboriginal representation could be provided by guaranteeing a seat for the head of each aboriginal municipality in the region.

E. Relation to Community Government - Each community would determine what powers if any it wants to delegate to a regional council. It is *not* anticipated that any community powers or authority will be diminished unless the community makes this choice.

F. Relation to Aboriginal Municipalities - Given that they are exclusive jurisdictions dealing primarily with land use and management, it is unlikely that they would want to delegate any of their authority to a regional council although they may want to cooperate in developing a regional approach to land-use. Aboriginal people would still have an interest and be involved in the regional council however, since many of their social programs and services might be controlled and managed at this level.

G. Relation to Central Government - It is assumed that most authority of a regional council would be delegated from the central government. One critical factor would be the amount of flexibility and autonomy the regional council would have in exercising its mandate. It must be able to make and implement decisions. otherwise the potential of it becoming merely one more bureaucratic step between citizens and the central government is greatly enhanced.

H. Revenue - Funding would come primarily from the central government. Flexibility and autonomy in the expenditure of funds is critical to the independence and relevance of a regional council. Community governments may be obliged to delegate funds to a regional council should they decide to delegate to it some of their authority. As a public institution, regional councils would not expect to obtain funds directly from aboriginal claims.

1. Aboriginal Rights Clauses - This model assumes that aboriginal rights clauses will be entrenched (See Model 2 – H. Aboriginal Rights Clauses) but that the entrenchment of rights and structures would focus on the central and local levels. While rights which relate to any regional council activity would still apply (eg language) and the appointment of officials from aboriginal municipalities could be a convenient way to guarantee aboriginal representation, this model does not require the entrenchment of aboriginal rights directed at the regional level per se.

J. Constitutional Entrenchment - Entrenchment implies casting fundamental rights and structures in stone, that is, making it very difficult to and therefore unlikely that they will be amended. However this model stresses flexibility and variation in regional institutions both within a region and between regions. Regions can vary in size and make up, in powers, in responsibilities and primary objectives, and can even choose not to constitute formally as regions at all. Therefore a significant characteristic of this model is the latitude it provides simply because there is no need for the entrenchment of constitutional provisions directed at the regional level.

K. Implications of this Approach for Division - This model is consistent with the current approach to division and the selection of a boundary. In fact, in combination with Model 2, this approach probably comes closest to offering a single system of government, albeit a somewhat flexible one, which might be attractive to all aboriginal groups. This does not mean to suggest that a singular approach to protecting the interests of each aboriginal group is a necessary objective.

L. Implications for Claims - These are the same as Model 2 - title to as much land as possible but not necessarily within communities, rights to use of and control over these lands other than traditional municipal authorities, revenues from non-renewable resources for private purposes, plus land and wildlife usage and management rights on lands outside the aboriginal municipalities. The Inuvialuit Claim includes both local and regional institutions and the Dene/Metis are considering the establishment of regional as well as community institutions too. Therefore, Model 3 has the potential of being very compatible with aboriginal claims contained within a western territory.

STRONG PUBLIC REGIONAL GOVERNMENT WITH STRATEGICALLY DEFINED BORDERS

This model proposes public governments at the local, regional and territorial levels. As an approach to aboriginal self-government it stresses the creation of strong regional governments whose geographic boundaries are carefully selected to ensure a large aboriginal majority. The result would be that the aboriginal group in the region would indirectly but effectively have control over most issues within their entire region rather than having exclusive control over titled aboriginal lands and specific aboriginal issues as Models 1 and 2 suggest. The risk is that the aboriginal group may not retain its population advantage indefinitely. The Western Arctic Regional Municipality or WARM proposal will be used as a prototype to illustrate this approach. (1)

CHARACTERISTICS AND COMMENTS

A. Geographic Units - This model assumes that the large majority of members of each aboriginal group or sub-group live within a distinct and defineable geographic area. A region's boundaries would 'be drawn so that all or most members of the aboriginal group would be included but would probably avoid large communities having a majority non-aboriginal population. Boundaries for the region would need to be accurately and legally defined since in this model regional governments would have legislative, licensing, and taxation authorities. It is possible that the geographic boundaries of a region could vary for different areas of authority.

B. Powers of Regional Government - The powers and jurisdictions proposed by WARM is unprecedented in Canada.

a) Legislative authority in the areas of education, local government, economic development, police services, game management, taxation and business licensing, and possibly zoning and land use control of a conventional municipal nature.
b) Regional legislation would supercede territorial legislation unless disallowed by the Commissioner who could do so only if it contradicted a territorial act.
c) The right to negotiate directly with the federal government for additional and possibly legislative authorities in areas yet to be transferred to the territories government, health for example.
d) Administrative control over all programs delivered in the region which fall within its legislative authority plus the possibility of entering into agreements with either the central or federal governments to manage programs in other areas.

C. Political Rights - The mayor would be elected region-wide and councillors elected by each community. All persons would have the right to vote or hold office subject to the usual restrictions of age, citizenship and length of residency.

D. Relation to Community Government - Community government would be entirely public government as well, aboriginal influence and control being assumed to flow from the existence of an aboriginal majority in each community. The regional governments's authority would not be subject to community control. The regional government's authority over communities depends upon the scope of regional government's legislative authority in each area. For example the regional government might have the legislative authority to determine for communities all or many of the characteristics and functions presently defined in a municipal ordinance or the extent of its legislative authority could be much narrower.

(1) "An Ordinance to Establish the Western Arctic Regional Municipality." A document tabled at the NWT Legislative Assembly by Nunakput MLA Nellie Cournoyea in September 198?.

E. Relation to the Central Government - As mentioned earlier, the powers proposed for this model of regional government are unprecedented when one considers the potential size of a region, the right to legislate in areas not usually delegated to municipal bodies, the fact that its legislation supersedes the central government's legislation, and its right to negotiate directly with the federal government. While technically it is within the political jurisdiction of a larger territory, functionally it is nearly independent. This depends to some degree of course on the parameters of its legislative authority.

F. Revenue - Political independence is directly related to fiscal independence as well. The right to levy taxes on real property for various purposes including education, and the right to licence businesses throughout the entire region could eventually lead to financial independence from the central government and possibly even to surpluses in some particularly economically advanced regions relative to other areas. Otherwise regional government would be dependent upon transfer payments from the central government which may be subject to conditions determined by the centre. As a public government it would not expect to obtain revenue directly from aboriginal claims, however, in the event of a surplus in revenue monies might be spent on public projects compatible with the objectives of the claimant group.

G. Aboriginal Rights Clauses - The regional government described "by this model is proposed as an expression of aboriginal self-government even though it does not include specific rights or mechanisms to protect aboriginal interests per se. There is nothing to say that this model could not be combined with features described in other models, such as guaranteed representation in a central government or a charter of aboriginal rights including language rights, etc. but, since this super-regional government approach is generally suggested as an alternative to these other options, this discussion treats it as such.

However, the regional government will be obliged to take into account the rights and management structures provided for by the aboriginal claims settlement operative in that region.

H. Constitutional Entrenchment - As an expression of aboriginal self-government, the powers and jurisdictions of this model would need to be entrenched. Rather than entrenching all regional government provisions in the actual constitution, it would probably be much simpler just to state in the constitution that the legislation creating a regional government could not be amended by the central government without some form of regional consent.

1. Implications of this Approach for Division - This approach is predicated on the existence of defineable geographic regions which contain a sizeable majority of aboriginal residents whose majority will very probably remain intact long into the future. While the situation varies from region to region in the Mackenzie Valley, generally speaking the Dene/Metis are less certain than the Inuvialuit appear to be about maintaining a population advantage and therefore are less likely to support public regional government as a cornerstone for aboriginal self-government.

Assuming that the Inuvialuit continue to feel that their interests can only be protected by a strong regional government, the question then becomes can a flexible system of government for a western territory be developed which can incorporate different approaches to aboriginal self-government, treat all groups equally, and yet be rational and effective.

J. Implications for Claims - A claimant group generally begins by defining a settlement region corresponding roughly to the area that the group has traditionally occupied and used. The ideal claim from the aboriginal groups point of view would be control over the entire region. However this is never possible given the interests of the federal government and the people of Canada, non-aboriginal settlers, and large corporations dealing in non-renewable resources. The question then is what is the best method to protect those interests which are critically important to the survival and prosperity of a people and its culture given the limitations imposed by these external factors? This is further complicated by the fact that most political aspects of aboriginal rights must be negotiated separately from the claims process.

The WARM proposal attempts to address this objective by:

a) including the entire Inuvialuit Settlement Region within its boundaries,
b) proposing that the regional government wield as much power as possible particularly over social and economic issues even though this power could never be complete.
c) counting on the Inuvialuit retaining their majority status.

If they succeed in all three areas then the claim can focus on other less political issues such as traditional land-use and economic development opportunities. It would appear that the Inuvialuit approach to claims has done just that. Rights to hunt, trap and fish have been stressed. Large tracts of land were selected for ownership as well. The primary criteria for the selection of land seems to "be lands currently used for traditional purposes as well as the use of title to protect communities from some of the impacts of development. For example lands with sub-surface title were selected close to communities primarily as a buffer against development rather than as the best potential areas for oil and gas.

However significant economic opportunities are afforded by the claim. These include, as well as the sub-surface title, the ownership of nearly all accessible gravel in the region, the right to negotiate participation agreements with companies wishing to develop Inuvialuit lands, considerable cash compensation, and the creation of community and regional development corporations. Wildlife and land-use management structures were created but by-and-large the Inuvialuit were satisfied with essentially advisory status in these areas.

The Dene/Metis account for only 40 - 45% of the population within their settlement region. Also their region would contain roughly 90% of the population of a western territory should division occur. For both these reasons a strong regional government covering the entire Dene/Metis Settlement Region makes little sense. However if the NWT did not divide and if the larger predominantly non-native communities in the west were willing to establish a geographically discontinuous region of their own, then the strong regional government approach might seem more attractive to Dene/Metis. In a sense it would be the 1977 Metro Model revisited.

PUBLIC GOVERNMENT: GUARANTEED ABORIGINAL INFLUENCE BUT NOT CONTROL

This paper assumes that the objective of aboriginal self-government is for the aboriginal group to maximize its collective control over its members' lives and traditional lands by maximizing its control or influence over government, and securing this arrangement for the future. This paper also assumes that aboriginal people will be a clear minority in a western territory and that the gap will widen over time. There appears to be two basic approaches to the self-government objective which this report places at opposite ends on a continuum; exclusive aboriginal control over as many jurisdictions as possible at one end, and a guaranteed aboriginal influence without a guarantee of control at the other. The trade-off between the two approaches appears to be geographic area, the more exclusive power one pursues the smaller the area over which that authority can be exercised.

Model 1 represents one extreme, exclusive aboriginal control of a quasi-provincial nature over a separate land base and no control over the remainder of the settlement region except for provisions in the claims agreement. Models 2 and 3 attempt to combine the two approaches, exclusive control of a municipal nature on aboriginal lands plus a guaranteed influence in a central government which administers the remainder of the claims settlement region. Model 4 uses a public government approach, a strong regional government over an area which corresponds to the claims settlement region and relies upon the aboriginal group maintaining its population majority within that region.

Model 5 foregoes the security offered "by exclusive jurisdiction over some lands in exchange for the opportunity to maximize aboriginal influence in and benefit from government and the economy throughout the entire territory. It also represents an attempt to maintain an interest and some control over the entire settlement region. The avenues open to this approach include a charter of aboriginal rights entrenched in a constitution which ones hopes will prove effective, coupled with a heavy emphasis on guaranteed representation for aboriginal peoples in all areas of government. The positive potential is active participation in and benefit from northern society. The risk is that the guaranteed representation will not be enough to guarantee an influence on decision-making in the long-run and that the aboriginal group will have no alternative to fall back on.

CHARACTERISTICS AND COMMENTS

A. Geographic Units - Basically this model proposes participation in a public government structure which has jurisdiction over the entire territory. Provisions to reflect each aboriginal group's special interest in land would be limited to its claims settlement region.

B. Central Government - There would be a strong central government having at least the same powers as the current GNWT with the intention of evolving towards provincial status in the future through the staged transfer of federal authority. It would be obliged to respect any aboriginal rights clauses entrenched in claims and its own or the Canadian Constitution. Aboriginal self-government clauses would focus on entrenched rights, a commitment to funding by governments so that rights can be put into practice, and guaranteed representation in all areas and at all levels of government.

c. Community Government - Community governments proposed by this model would need to address all the questions currently being wrestled with by the people trying to draft a new local government ordinance. These issues can be broken into two categories, structure and decision-making process, and powers and jurisdictions. For historical reasons native and non-native people tend to have different views on the role of local governments. Flexibility would be a critical factor.

The drafters of the proposed local government ordinance have been fairly successful in allowing for variations in structures and style of government to meet community needs given current limitations. The addition of aboriginal rights clauses including language, education, guaranteed representation, etc., would make this task much *easier.* The drafters have not done as well in the area of powers and jurisdictions. First they have been unable to address the issue of local interests particularly aboriginal peoples' interests in traditional lands beyond the conventional municipal boundaries. Also they have proposed little to facilitate the community government becoming the primary or umbrella public institution in those communities where residents view local government from this perspective.

D. Regional Government - This model is compatible with the flexible approach to regional government evolving in the NWT today or the proposal outlined in Model 3 It might stress guaranteed representation and the application of aboriginal rights clause more than 3to compensate for the absence of the exclusive aboriginal municipalities.

E. Political Rights - In general all persons would have the right to vote or hold office subject to the usual restrictions of age and citizenship and possibly a longer than usual requirement for residency. However there would be a certain percentage of seats at the territorial level and in some municipalities reserved for aboriginal representatives elected by aboriginal peoples. This could be accomplished using the indirect method, giving everyone the right to vote but geographically defining some constituencies to ensure a large native majority. However, this report suggests that a direct method is more appropriate, allowing only aboriginal people to vote or hold office in these additional regional constituencies, the right to vote being determined by ones eligibility for or membership in a claims settlement north of **60°.** Representatives to regional councils would be appointed rather than elected but the concept of guaranteed representation would still apply.

F. Revenue - The sources of revenue would "be the same for this model as they are presently in the NWT; local government would raise some of its own revenue from a tax base and receive the remainder from the central government, a regional council would operate on funds provided by the central government and possibly by communities, and the central government would depend on formula financing from the federal government, plus revenue-sharing from non-renewable resource development in the short term while looking to provincial status in the future.

G. Aboriginal Rights Clauses - This model would require the entrenchment of specific aboriginal rights including political rights in a constitution for a western territory. Like Model 2 these might include language rights, bilingual education rights, a mechanism to protect aboriginal rights, extended residency requirements (not necessarily an aboriginal rights issue), double majority clauses for amending sections of the constitution dealing with aboriginal issues, and possibly others. The most distinctive feature of this model, however, would be a much greater focus on guaranteed representation as the primary expression of aboriginal self-government.

There are a number of sectors involved in the exercise of power within government. In addition to a legislative assembly these include, the executive, the bureaucracy at territorial, regional and local levels, municipal and regional councils, quasi-independent management boards, commissions and other regulatory agencies, and the judiciary. Added to this is power in the private sector, the ability to play a significant role in the economy.

Guaranteeing representation in the legislative assembly alone, even if the consequence is an overall aboriginal majority in the house in the shortrun, does not necessarily mean that the representatives of aboriginal peoples will be able to exercise a significant influence over government -- especially in the longrun as the non-renewable resource economy advances and the population gap between natives and non-natives widens. A model which bases it success upon guaranteed representation would need to look seriously at guaranteeing representation in all other spheres of government as well. In this case guaranteed representation in the bureaucracy would be defined as a collective right not as temporary affirmative action for a disadvantaged group. Of special importance above and beyond provisions in a claims settlement would be guaranteeing a significant role in the management of land and water.

H. Constitutional Entrenchment - In this model, like Model 2 and, in a different way perhaps Model 4, aboriginal people would require protection from the possibility of a future non-native majority amending or deleting aboriginal rights clauses from the western territory's constitution as well as protection from the Government of Canada. Double or even triple majority mechanisms might be appropriate.

1. Implications for Division - Generally speaking this model inconsistent with the Alliance approach to division, only, like Models 2 and 4, it is importantthat the new constitution for the western territory be ready for implementation before division occurs. As Model 4 suggests the only serious question which might arise is can a flexible system of government, one which can incorporate different approaches to aboriginal self-government, treat all groups equally, and still be rational and effective be developed should the Dene, Metis and non-native population choose to pursue this approach but the Inuvialuit continue to feel that their interests can only be protected by a strong regional government.

J. Implications for Claims - A major characteristic of this model is the exchange of exclusive control over some lands and specific aboriginal concerns for entrenched rights and guaranteed representation in a public government having jurisdiction over a considerably larger area and a broader range of issues; the confidence on the part of the aboriginal groups that they will be able to exercise and sustain a significant influence over decision-making at all levels of public government being the critical factor. Logically it might follow that the appropriate approach to a claims settlement might be to forego exclusive ownership of parcels of land in favour of extending the claimant groups' ability to effect or control decision-making on land-use and the management and utilization of wildlife throughout their settlement regions.

This approach to claims was seriously considered by the Inuit in the Eastern Arctic but ultimately it was rejected in favour of some land selection. It would seem that even in the east, Inuit are not completely confident that the public government system will protect their interests in the future in all important respects. Simply creating a new territory with a large majority of Inuit and maximizing the transfer of power from the federal government to Nunavut will not provide the security the Inuit require.

In the west the Inuvialuit made land ownership a major element of their settlement and, while feelings vary from region to region in the Mackenzie Valley, one might expect the Dene and Metis claim to feature land ownership along with land use and management rights throughout the settlement region. They might also feel more comfortable focussing on economic opportunities through the claim if they were satisfied that their political needs were being met in another forum.

THE RELEVANCE OF CONSOCIATION TO THE WESTERN NORTHWEST TERRITORIES

prepared for:

The Western Constitutional Forum

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This paper is for discussion pruposes only. None of the views expressed herein knowingly represent the views of the WCF or any of its Members.

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1. INTRODUCTION

The Western Constitutional Forum is seeking information on whether the concerns of the various cultural communities within the western part of the Northwest Territories can be accommodated in a way which does not violate democratic principles. To accomplish this, as will be detailed below, it will be necessary to break some new ground for no Canadian jurisdiction at present is organized in such a way. Yet, as we intend to show in this paper, such a solution is possible through the application of consociational principles.

Consociation, as we are using the term, provides mechanisms to overcome the inevitable conflict that can arise when unbridled majority rule comes into contact with significant cultural communities within a jurisdiction. In brief, the mechanism accomplishes accommodation through dividing the powers of government in such a way that, while most matters are decided by traditional parliamentary means, others that relate directly to the integrity of the cultural communities are decided in a manner that ensures the communities take responsibility for their own affairs and that they can veto changes in such arrangements. Such systems exist in the nation-states of Switzerland and Belgium and, to a much lesser extent, with respect to the French fact within the Canadian context. It is a solution that, in our view, offers both adherence to liberal-democratic values and the maintenance of the political integrity of minority cultural communities.

We wish to make it clear at the outset that the notion of consociation is not presented as a blue-print for constitutional development in the Western region of the Northwest Territories. It is intended, rather, to place the situation that exists in that region within the context of similar cases that occur elsewhere. With this purpose in mind, and to maintain the forms on the basic concepts of consociation, we have not attempted to comprehensively treat practical issues of implementation. Some specifics have been offered in way of example, but a fuller elaboration is best delayed until public reaction to the consociational model itself is known.

The paper that follows, then, is based on the assumption that there is a willingness to find an accommodation for the concerns of the various cultural communities so long as this does not violate democratic values and does not create totally separate provincial-type jurisdictions for each cultural community within the region. It is furthermore assumed that, at present, the ideas put forward do not match precisely the viewpoint now on the table presented by any party to the discussions. Rather, they are brought forward in the spirit that these are possibilities that might be worth addressing. Finally, the ideas do not presume the existence of any specific form of legislative operation. That is, they could operate either in a consensus or government-opposition form, a matter that will be discussed further below.

In this paper, then, we will begin by describing in more detail the principle of consociational democracy and in particular how it differs from "racist" forms of state organization. Out of this will emerge the fact that there is a great variety of forms of institutional organization that can be derived from this principle. *Some* of these are suggested in Steve Iveson's paper "Several Ways to Interface Aboriginal Self-Government with Public Government in the Western Northwest Territories." This paper can be read

as an elaboration of Iveson's in that its basic focus is the institutions of public government for the whole of the western NWT, rather than the broader question of intergovernmental (central, regional, community, aboriginal) relations. The paper will develop in detail one possible model of a central government and will close with an evaluation of the model in terms of public administration criteria and the ways in which it relates to the motivations of the various cultural communities that could lend support to creating a consociational system of government in the region.

2. CONSOCIATION DEFINED

There are two fundamental ways in which liberal-democracies incorporate citizens into state institutions. The one most commonly used in North America is called "universalism" (M. G. Smith, "Some Developments in the Analytic Framework of Pluralism," in Leo Kuper and M. G. Smith (eds.), Pluralism in Africa (Berkeley: University of California Press, 1969), p. 435). In this system, the population is conceived to be organized solely on the basis of individualism and equality. In other words, it is seen as being composed of individuals who for all legal purposes are equal. Such a system features a one person, one vote orientation; it clearly does not violate the rules of liberal-democratic government. However, it can have negative consequences for minorities. In such jurisdictions, as Smith says (p. 435): "the regime is inherently assimilative in orientation and effect. By assimilating all its members uniformly as citizens, it fosters their assimilation in other spheres also, notably language, connubium, economy, education, and recreation." It is a concern over such assimilative drift that provides a main motivation for those aboriginal nations that seek an alternative to government based on universalist.

Consociation is a system of incorporation that strives to accommodate the concern about assimilation and the strong desire for autonomy. It is a system that organizes state institutions in a manner that protects the collective cultural rights of its population within a framework that promotes liberal-democratic ideals. Examples of such jurisdictions are the nation-states of Belgium and Switzerland. Canada, at least partially, conforms to this idea with respect to provisions in the constitution regarding the French fact and especially the division of powers that provides Quebec with much room to organize its government to promote the continuity of French language and culture.

One key to the consociational solution is the division of power between a *central* authority which operates on the basis of one person one vote and an authority that acts to protect and enhance matters of primary concern to cultural communities. The central authority has control over the vast majority of legislative matters. Matters constitutionalized as being of primary concern to cultural communities generally fall into areas such as education, the promotion and preservation of language, civil (and sometimes aspects of criminal) justice and some aspects of economic development (such as some powers of taxation). These are matters, for example, that were given to provinces in the Constitution Act, 1967 and thus were provided for the use of the francophone majority in Quebec. Their allocation to the cultural communities gives the communities a degree of what is termed segmental autonomy.

The second key component is called power sharing. Through power sharing, certain specific constitutional and legislative mechanisms can block the imposition of strict majority rule upon certain matters conceived to be of vital concern to the cultural communities. The mechanisms are themselves democratic in nature. Indeed, one of the primary factors that separates consociational solutions from both universalistic ones and those that relate to apartheid structures is the use of such mechanisms.

3. FORMS OF CONSOCIATION

There are two fundamental ways that consociational systems can be organized. The first is indirect. In this system, the jurisdiction is overtly universalistic for its constitution suggests that it conforms to the simple one person, one vote orientation of traditional majority rule. Yet, the state organizes itself in such a way that the powers deemed necessary to maintain and promote the values of the cultural communities remains in their hands. It is accomplished through the use of a "federal" principle to divide powers between a central and a regional level of government (such as exists between the federal and provincial governments in Canada) and the drawing of regional (or provincial) boundaries in a manner that ensures that a specific cultural community gains control over powers deemed essential to maintain its cultural identity through the application of majority-rule within the regional or provincial jurisdiction. Thus , for example, the francophones in Quebec gain power over matters set out in Sections 92 and 93 of the Constitution Act, 1867 not because they are francophones, but rather because they happen to form a majority within a recognized provincial jurisdiction. That is the essence of the indirect solution. It is an orientation that seems to infuse the proposal put forward by the Nunavut Constitutional Forum. It is a solution that can work best when the cultural community to be protected and enhanced is proportionately large and is concentrated in a particular geographic locality.

The second type of arrangement is called direct. Here the constitution of the jurisdiction acknowledges specifically that there are distinct cultural communities that have the right to control certain matters and then organizes the jurisdiction in a manner that promotes that possibility. There are indications of this orientation in the provision of minority official language education guarantees in Canada.

The primary jurisdiction that we are aware of within the liberal-democratic western world in which direct consociation has been institutionalized is Belgium. Let us use it as a brief example. Belgium recognizes explicitly in its constitution that it is composed of cultural communities. Two of these, the Flemish and the Walloons, are specifically named as having certain constitutional guarantees. Belgium is a unitary state. Therefore, all power is vested in a central parliament. However, the constitution creates councils belonging to each named community. These councils control the education, language and other matters generally assigned to "regional" governments under indirect consociation.

These councils operate on the basis of delegated authority. However, these delegations are constitutionalized and hence subject to a special formula for amendment. The key to this formula lies with the parliamentary representative. For most matters, members are seen to represent their ridings pure and simple. However, on proposals to make changes in constitutionalized provisions related to the cultural communities, the house divides itself into two caucuses: each representing its cultural community. Changes in these provisions, then, must be passed by a special majority (2/3 in most instances) that itself contains a majority of each of the two cultural communities ' representatives and only on condition that the majority of the members of each group is present for the vote. In other words, each cultural community must give its consent to constitutional amendments affecting its community. In addition, Belgium provides for protection through:

1. The use of a constitutionally recognized special type of legislation, called "alarm bell procedures," that enable legislators to signal that certain bills would adversely affect their cultural community. These procedures force negotiations between the affected cultural communities and the government;

2. the requirement that cabinet be composed of equal numbers from each of the two communities;

3. some constitutional mechanisms of indirect consociation such as regional economic development councils.

All of these provisions are similar to ones found in Canada that enable Quebec to have, by convention, some cabinet seats, a certain number of seats on the Supreme Court and, by constitutional guarantee, a certain number of seats in Parliament.

4. CONSOCIATION VS. APARTHEID

Because consociation addresses the question of rights for cultural communities, it can appear to be anti-democratic to persons who see liberal-democracy as necessarily tied to universalism and individualism. In fact, at first blush some Canadian politicians and editorial writers have labelled such solutions as "apartheid." Such a view does not stand up to careful examination. The fact is that a consociational solution has existed in Switzerland for over 100 years without undermining the inherent liberal-democratic values of that country. Indeed, as we suggested above, Canada has existed with specific protections for the French fact for over 100 years as well.

What, then, is the underlying difference between apartheid and consociation? One important matter is spirit. The objective of apartheid is to create the greatest degree of legal separation possible. Therefore, there is no attempt to find, either in governmental structures or private life, any means to bring the various segments together *for* economic, social, or political discourse. Consociation is different. Here, while an objective is to

entrench areas of separate jurisdiction, the overarching spirit is to promote a unity through diversity. Hence, most institutions, while acknowledging differences, are oriented toward finding common ground. Thus, the key elements of a consociational solution are:

1. to divide responsibility between areas of common interest and areas of special concern to particular cultural communities;

2. to provide a mechanism that enables the majority to proceed in an unencumbered manner on matters designated to be of common interest while allowing cultural communities to get on with matters in areas of special interest without fear that simple majority-rule legislation could at any time impose changes on them; and

3. to make certain that the areas of common concern are identified in a manner that promotes unity.

There is also a profound difference between consociation and apartheid with respect to political and legal structure. It is true that both consociational and apartheid types of state organizations are superficially similar in that each explicitly acknowledges the existence of separate segments. The key to the difference can be found in the method by which citizens are incorporated. Consociations are organized (Smith, p. 434): so that "although in such systems citizenship presumes identification with one or the other of the primary ethnonational collectivites, formally at least no difference in civil status in the common public domain attach to membership in any of them, since each bears coordinate status." In other words , there is a sense of equality that pervades both the domain of individual liberty and that pertaining to the rights of the cultural communities . Apartheid states are not organized consociationally, but rather by means of "differential incorporation" (Smith, p. 435). This is a system in which (while it may guarantee individual civil rights, at least to some segments) state institutions are structured in a manner that provides differential access to power and resources among the various cultural communities . Thus , unlike a consociation, a system based on differential incorporation entrenches inequality among the segments. For example, South Africa, unlike Switzerland or Belgium, manifests no attempt to create a power-sharing arrangement within a common parliamentary structure; no willingness to distribute power or material resources on an equitable basis; no agreement that segmental autonomy will exist for all segments; and, most crucially, only provision to insure that one segment in that plural society can block legislation perceived to be in conflict with its vital interests. Moreover, the structure is imposed by one cultural community on the others.

5. CONSOCIATION AND POLITICAL EVOLUTION IN THE WESTERN N.W.T.

it is self-evident that the western portion of the Northwest Territories comprises three fundamental and numerically numerous cultural communities: the Inuvialuit, the Dene/Metis, and the non-aboriginal. It is also self--evident that the extent of differences between cultures is greater in NWT that Belgium or Switzerland and therefore that the need for recognition of cultural communities may be even more acute.

It is, of course, possible to achieve democratic government through the use of a universalistic system and hence by the strict application of majority rule. This will likely lead ultimately to legislative control by the portion of the population that now forms (or at least may soon form) a distinct majority, the non-aboriginal. Under these conditions, there is concern that the assimilative tendencies inherent in universalist as well as other factors may undermine the ability of the Dene/Metis and the Inuvialuit to retain and strengthen their cultural communities. Thus, the western portion of the Northwest Territories seems a potential candidate for a constitution that conforms to the tenents of consociation.

In this section, we intend to detail one possible form a constitution based on consociation could take. It is based on the direct method outlined a hove. It was chosen because direct consociational structures of government can embody the social and political realities of the western NWT and also meet such criteria of good government as efficiency in decision-making, accountability, responsiveness and stability.

It was also developed because indirect consociation is not as practical for the western NWT. Indirect consociation would involve dividing the western NWT into separate territories each of whose governments would possess some of the powers currently exercised by the Government of the Northwest Territories. As noted above, the purpose of this form of government would be to create jurisdictions whose population would be overwhelmingly of one cultural community and whose boundaries would be drawn so as to include almost all the members of that cultural community. This model will not be explored here because of the very great difficulty of drawing boundaries which would produce in the NWT the relatively homogeneous "home territories" for the different cultural communities which the model requires. Any subdivision of the west into territories would have to accept the inclusion of large numbers of "cultural outsiders" in each of the territories and the rights of these outsiders would make it a very complex task to establish legislation and programs which promoted the interests of the dominant cultural community while also protecting the rights of the minorities. In the context of the western NWT, indirect consociation would not solve the problems of integration among cultural communities, but would rather move these problems to a number of smaller territories.

In thinking through our model we have considered that the most common consociational responses to ethnic cleavage in society are segmental autonomy and power sharing, both of which have been described above. The most extreme possible case of segmental autonomy in the context of the western NWT would be the development of an exclusive form of aboriginal self-government. This alternative would be a private form of government, thus would involve very little power sharing among communities. It may be that the native peoples of the NWT ultimately decide that this form of government best serves their needs, particularly if their experience in either pursuing or working through consociational government proves unsatisfactory. Because the focus of this paper is public governments, we will not incorporate this most thoroughgoing instance of segmental autonomy into our model.

However, we wish to note the possibility that the national constitutional negotiations on aboriginal rights may lead to the entrenchment of recognized powers of aboriginal self-government which may affect the form of public

government in place in the western NWT. We anticipate that for the most part these powers will parallel the kinds of powers developed through a consociational solution in the western region of the Northwest Territories. Other powers, such as aboriginal municipalities, may be quite compatible with it. Thus, we believe that the consociational solution may reduce the perceived need for or alter the mandate or form of other expressions of aboriginal self-government, hence require less revision of the existing form of public government. However, we also recognize the possibility that the national negotiations might develop a form of aboriginal self-government that appears incompatible with the consociational arrangements negotiated previously for the western NWT. If this prospect raises concern, it might be desirable for the original negotiation leading to a consociational form of government to specify certain safeguards to protect interests which may have been bargained away. For example, a constitutional understanding might stipulate that a more exclusive form of self-government would limit the participation of aboriginal communities that accept it in the public form of government in the western NWT or that a convention be held to discuss these matters either after specific entrenchments take place in the national constitution or after a certain date.

The model we propose will be concerned with the question of power sharing because power sharing is an important consociational device. However, in reality, a great many different proportions of segmental autonomy and power sharing can exist. This is important in view of the large number of political situations to which consociation may be relevant. It is our view that there is no one model which represents a situation of "greater" or "purer" consociation than alternative models. The goal of consociation is to find the balance between power sharing and segmental autonomy which best meets the needs of particular societies and their cultural diversity. Segmental autonomy tends to minimize friction by reducing the need for inter-cultural accommodation, but it also tends to produce less efficient government when questions arise which affect all cultural groups and regarding which all cultural groups must jointly produce a single shared response.

6. DIRECT CONSOCIATION: A MODEL OF POWER SHARING IN THE GOVERNMENT OF THE NWT

In this section we will detail some ideas, alternatives and specific models that might be applicable to the western NWT. The discussion is divided into sections in which matters such as a charter of collective rights, segmental autonomy, the electoral system and the legislative process are each taken up in turn. Within each section we will provide some discussion, where relevant, of concerns and possible ways to solve or attend to them. However, we wish to emphasize that the detail provided is preliminary and for the purpose of exposition and illustration only. We believe strongly that the process of negotiations alone can provide the richness and specificity necessary to transform the idea of direct consociation into reality.

A Charter of Collective Rights

It is our view that, if at all possible, a charter of rights should be created that defines and entrenches the fundamental rights of the cultural communities in the new territory. The drafting of such a charter does involve the risk of bringing to the surface irreconcilable differences among the cultural communities of the Territories. Indeed, it might be thought prudent early in the life of the new territory, when its legitimacy is likely to be weak, to avoid these most contentious issues by relying on a vague and ad hoc approach to operationalizing the concept of collective rights. However, such an approach would perpetuate a vexing tendency in territorial politics to view otherwise straightforward issues such as the allocation and style of housing or the provision of municipal sanitation services, in the context of the fundamental intercultural differences. The result would be to make it much harder to reach agreement on the specific, narrow questions. To avoid this type of problem, to gain what will be essential communal confidence in the institutions of government, and to create the legal reference point which makes the following model function, the attempt to define the rights of the cultural communities must be made. Once the definition is successfully completed, the rights of the cultural communities become the core of the charter.

It is our view that the best time to do this is now; success in drafting a charter is most likely if the charter is negotiated as part of a total constitutional package in the development of which a variety of levers and tradeoffs are available to encourage compromise, than it would be to obtain in isolation.

Segmental Autonomy in the Western NWT

It is presumed that there will be three fundamental cultural communities: the Dene/Metis, the Inuvialuit and the non-native. It is also assumed that the Charter will stipulate that each cultural community will have its own decision-making body *or* council to legislate on those matters which are set out in the Charter or the basic constitutional document of the new territory as fundamental to its cultural interest. Likely categories of powers include education, social policy, language and special programs of health care delivery. The basic powers of all the councils will be the same. However, at the discretion of the aboriginal groups, land, funds and quasi-governmental authority obtained through claims settlements might be administered through a council, but such arrangements would not violate the fundamental symmetry among the councils in that they flowed from a claims settlement and not from the legislation which established the councils. Also, as discussed above, the national constitutional process concerning aboriginal self-government may well lead to arrangements whose impact on a consociational government in the western NWT -- or any other for that matter -- may require a renegotiation of the form of government.

The Legislative Assembly for the NWT will have legislative responsibility for all matters not explicitly allocated to the Councils. However it is likely that certain powers will be shared, with the precise terms of the sharing to be negotiated within the WCF process. In other words, the WCF must decide what aspects of the power are of common interest and what aspects are of

particular importance to the respective cultural communities. For example, regarding educational curriculum, concerns which might be entrenched as common include achievement in such areasas mathematics, reading, science and writing. Territorial-wide standards would be created and these could be changed by ordinary means to meet changing needs. However, curriculum with respect to matters such as history, social sciences and the promotion of the various languages of the cultural communities would likely be in the hands of the communities. Changes in the right of the communities to control these matters and how they are taught (and to have the funds to teach them) could, then, only be made through a process that prevented one cultural community from imposing its will on another.

Given such a division of powers, it is *clear* that disputes will arise as to jurisdiction. It is our view that these can be resolved by providing a mechanism for addressing them, such as through court referral, in the constitution.

Similarly it will probably be necessary to negotiate within the WCF the question of ministerial authority in land claims agreements. As these agreements now stand, Ministers through legislative act or even through the normal operation of their offices, can change certain fundamental provisions. For example, the relevant Minister can override the quotas for harvesting set by northern wildlife management boards. Hence these structures as developed in claims agreements could prove less than satisfactory in protecting the rights of aboriginal people in the long run. To reduce the fears of the aboriginal cultural communities regarding the ability of Ministers of the Government of the NWT to damage their interests in these matters, it may be desirable that actions specified in claims settlements as being matters of ministerial discretion be assigned to the category of actions which are identified in the charter as requiring the approval of each of the cultural communities affected as represented in the Assembly. In other words, should the Minister wish to override a decision of a wildlife board set up under the Dene/Metis claim, he must obtain the approval of a majority of all Dene/Metis members of the Assembly. If the Minister and the legislators cannot agree, the issues may have to be referred to an arbitration panel.

The Legislative Assembly will share its powers with local communities and perhaps regional governments in ways which are outside the scope of this discussion, but which undoubtedly will affect the degree of autonomy enjoyed by the various ethnic segments of the new territory's population. For a specific consideration of this question, consult Steve Iveson's "Several Ways to Interface Aboriginal Self-Government with Public Government in the Western Northwest Territories."

The Electoral System

An electoral system must be created which adequately represents each of the cultural communities and regions of the territory and which discourages the development of parties along strictly communal lines. There are two ways in which the electoral system might be constructed: a constituency approach and proportional representation. We begin with a detailed examination of how the former might work. Its structure for purposes of illustration might be as follows:

a. The territory could be divided into three constituencies *(assuming* division with the western Arctic participating in the western territory).

b. Within each constituency, voters will be placed on different electors lists, an Inuvialuit electors list, a Dene/Metis list and a non-aboriginal list, on the basis of the cultural community to which they belong. In most instances, this will be determined by an individuals' eligibility to benefit from claims settlements. However, it is also possible that other individuals may be accepted into a cultural community. In other words it is a membership in the cultural community and not the racial component which is fundamental in determining eligibility for a particular list. This means that a non-aboriginal person, if accepted by an aboriginal cultural community could become an elector on that communities' voters list.

In our view, it is very important to emphasize that the basis of these lists is not ethnic, but cultural (hence the use throughout this paper of the term "cultural community" rather than "ehtnic group"). This means that if a cultural community decides to accept as one of its own an individual who does not share the racial background of the group but who has demonstrated his or her commitment to sharing its lifestyle and values, then that individual as part of his or her membership in the group can participate in its politics, at least in regards to territorial elections. It is necessary to note this concept here so that voting eligibility will not be confined by eligibility rules negotiated as part of claims settlements, but rather will be determined by the cultural community itself. This power to define its membership is fundamental to the concept of what a cultural community is.

c. In the northernmost constituency, two seats will be contested by candidates from the Inuvialuit list and two further seats by candidates from the residual list. In each of the other two constituencies, two seats will be contested by and decided by electors from the Dene/Metis list and two will represent the non-native population. This will produce a basic house of twelve legislators.

d. To prevent any constituency being represented by a number of legislators grossly out of proportion to the size of its population, constituencies will receive additional seats until the number of voters represented by each seat is less than 125% of the territorial average. In other words, no constituency should have fewer than 80% of the members representing it than it would have if seats were distributed solely on the basis of representation by population.

Alternatively, it might be stipulated that constituencies will receive additional seats until the number of voters represented in each seat equals the territorial average before the addition of extra seats. In this instance no constituency would have fewer seats than it would have were seats distributed. solely on the basis of representation by population.

e. The seats will be filled from whatever cultural list in the constituency (or constituencies) is underrepresented within the constituency(ies), that is, the candiate in that cultural group's election who received the largest number of votes but was not elected will fill the seat thus created. Alternatively, it might be considered preferable to create separate ridings for each seat within each constituency rather than having all members elected at *large.*

f. If, after steps a. through e. have been taken, any cultural community has 20% fewer MLAs than it is entitled to on the basis of the number of electors on its list, it will receive an additional seat or seats, which will be filled by the candidate(s) of that cultural community who received the highest number of votes in any constituency yet were not elected through the operation of steps a. through e. This step will only be implemented if it does not bring the proportion of native legislators below a threshold entrenched in the constitution or Act establishing the new government of the NWT (assuming that it is the aboriginal cultural communities which will be challenged by future demographic pressures).

g. This demographic assumption also requires a further step in the process. If after steps a. through f. have been taken, the proportion of native legislators is less than the stipulated minimum, more will be added, using the same procedure as in f.

Although this procedure appears on first reading to be complex, it ought not to be difficult to operate and provides the benefit of ensuring regional representation for closer constituent-MLA contact and accountability while also allowing for cultural representation and proportionality of representation among regions and cultural groups. It also ought to produce a legislature no larger than the present Legislative Assembly. Examples of how the distribution could work out are included as Appendix A.

The alternative approach to elections is that of proportional representation. In this case, all of the territories is a single constituency with the same electoral lists as in the above model. Each cultural group receives a number of seats in the Assembly which represents its size in the total electorate, with the exception that aboriginal seats cannot fall below a specified minimum. Each party presents the electorate with three cultural lists of candidates, ranked in order of the party's priority. Each party receives the proportion of each cultural group's seats that best reflects the proportion of the votes which that group gave it. Thus, for example, if the Dene/Metis were entitled to eight seats and party A received 25% of the votes cast by Dene/Metis voters, it would receive two of the Dene/Metis seats and allocate these to the top two people on its Dene/Metis list,

This model is simpler to operate than is the first and, like it, encourages parties to seek to bridge cultural differences, although parties based in a single cultural community can certainly appear under it. However, it does not automatically guarantee a balance of regional representation because MLAs are elected from the whole territory. Parties would probably structure their lists so that the top few people, the ones likeliest to get elected, came from the various parts of the territory. However, they would not clearly owe their election nor necessarily feel responsible to their regions. Also, the second model assumes the existence of political parties, a development which has not yet appeared at the territorial level. This problem might be addressed by allowing independents who receive more votes than the party member who would otherwise be eligible for a seat to gain the seat in that member's place. In effect, the independent would be considered to be one-person party.

The model we developed here presumes that the Dene/Metis will relate to a future consociational government as a single cultural community. If this proves not to be the case, then presumably, distinct eligibility criteria wi 11 be established for each group. These will serve as the bases for separate electors lists for each of the two groups. In each of the two electoral areas in which the Dene and Metis live, there will thus be three lists, hence six representatives from each region. Proportional representation for the Inuvialuit would be obtained by the operation of step f. of the electoral process described above. This adjustment poses no conceptual problems for consociation. However, the increase in the number of aboriginal groups with veto power in the Assembly over matters affecting their basic rights as cultural communities is likely to lead the non-native population of the Territories to try to define these matters in the territorial charter more narrowly than might otherwise be the case.

Should division not come to pass, the electoral system proposed could easily be expanded to accommodate the people of the central and eastern Arctic . The details would involve negotiation, but the concepts outlined above would not need to be modified.

The Executive

Cabinet formation is a crucial political question because cabinets are the command centres of government today. Legislatures are too large and unwieldy actually to develop policies and oversee the implementation of programs, so these crucial tasks fall to cabinets. For this reason, a fundamental principle of consociational government is some degree of proportional representation of cultural communities within the cabinet. In the context of the western NWT, it is difficult to imagine that a consensus of support or at least acquiescence could be obtained for any proportion other than **50%** aboriginal and **50%** non-aboriginal. In this way, both sides of the fundamental cultural division in the territory could be assured of very strong representation in the most crucial decision-making body in the government. Indeed, it might be divided that certain decisions require the approval of a majority of members of the aboriginal and of the non-aboriginal components of the Executive. It might also prove desirable to provide that all aboriginal groups be guaranteed representation in the Executive according to a certain formula. For example, if the Inuvialuit were guaranteed 10% of seats in the Assembly and Dene/Metis 20%, then an 8 member Executive would include 4 non-natives, 2 Dene/Metis, 1 Inuvialuit, and one other native MLA chosen at large. Alternatively, all aboriginal communities might have equal representation in the Executive. The choice between these two formulas will prove very important for relations among the aboriginal communities and their support of the overall system of government.

How would a cabinet be constructed? In a responsible government model with political parties, the party with the largest number of seats would be invited to form the government. Clearly a problem will arise if this party has not elected both aboriginal and non-aboriginal members. However, part of the attractiveness of the structure being proposed is that parties will find it in their interests to contest both aboriginal and non-aboriginal seats if they wish to maximize the likelihood of their holding office. In this way, parties that do hold this ambition will be forced to act as aggregators of the wishes of the various cultural communities; their internal processes will become opportunities for seeking compromise and consensus among the groups.

If parties do develop along cultural lines, then the task of cabinet making will become one of coalition-building among whatever cluster of parties is needed to obtain cultural parity on the cabinet. To ensure that this does occur, it may be necessary to stipulate a minimum size for the cabinet. A six-member cabinet, for example, should be enough to prevent a party based in a single cultural community from creating a very small cabinet in an effort to frustrate the purpose of the parity rule.

If parties do not develop, then the Executive Committee will be staffed by the system presently in use, with the aboriginal MIAs and the non-aboriginal MLAs serving as separate electoral colleges, each selecting from amongst its number 50% of the ministers, A consociational system for selecting the Leader of the Elected Members of the Executive Committee could be for the MI-As to vote, with the winner being required to gain a majority overall and a majority of support from both electoral colleges.

Legislative Process

Votes in the Assembly will be decided on the basis of a simple majority of those present and voting. Thus, there are bound to be matters where this procedure could lead to difficulty for a cultural community, for example, a decision might appear to infringe on the powers of its council. We envision possible alternatives to anticipate this. One approach is to stipulate that if a piece of legislation or any constitutional amendment is proposed which a majority of the MLAs of any cultural community identifies as affecting its basic cultural rights as set out in the charter on the document which creates the institutions of government, then in order to be approved, the item in question must receive a majority of votes from the Assembly overall and from each of the cultural communities. In ether words, the cultural veto which some have suggested be ensured by an aboriginal senate is obtained by creating "assemblies within the assembly". An advantage of this system over the senate is that it avoids the cost in terms of dollars and draining political talent from other tasks which would occur with a senate. Rejecting the idea of a senate can also serve as a symbol of equality among the cultural communities, whereas a senate creates the presumption that one community is threatening and the others are on the defensive. Equal protection for all is a proposition which holds the greatest promise of support from all.

The WCF will have to consider carefully how the future government process it is planning will respond if a majority of MIAs of any cultural community views a given issue as affecting its basic rights as set out in the charter and a majority of the MLAs of any other group disagrees. In the interest of ensuring governmental efficiency, it may be thought reasonable to break a deadlock involving an ordinary piece of legislation by referring it to the territorial court for a decision. It is less certain, however, that the cultural communities will accept this type of response in instances involving constitutional amendments, which can change the basic rules of the political game. One cr more cultural communities may demand a maximum of self-protection through a prevision giving each community (or its MLAs) the final power to define an amendment as involving its basic cultural rights and the final power to veto such amendments. To accept such a demand is to run the risk of making constitutional amendments exceedingly difficult to cbtain, hence to risk a very rigid and unresponsive constitution. However, it will secure cultural rights.

A less rigid alternative is that certain sections of the constitution could be identified in advance as affecting cultural communities directly and therefore requiring the cultural groups consent. Other clauses could be amended using a universalistic approach. The decision taken here will be an important statement about the priority which the WCF wishes to assign to cultural protection, at the expense of institutional flexibility.

Executive-Legislative Relations

Once it has been established at the start of the life of an assembly that the Executive enjoys the confidence of the Assembly, the circumstances of the North (and indeed the confusion and dissatisfaction which have arisen on this subject in the South) argue for a general relaxation of the practice of responsible government exercised through votes of confidence. Situations often arise in which MLAs will want to vote against their party's position in order to respond to the deeply felt wishes of their constituents. At the same time, it is in the best interest of all that such votes not deny the government sufficient security of tenure to be able to plan for a reasonable time period and to maintain a reasonable degree of continuity of administration. This suggests that votes on substantive issues not be considered votes of confidence and rather that specific votes of confidence be taken at set times during the life of the Assembly, such as, for example at the start of each legislative session. In this way, the Executive will continue to be accountable, yet the role of legislators in the policy process will be enhanced and the conflicts which they otherwise would feel between their roles as party members and their roles as representatives of their people will be reduced.

While the model being presented distinguishes among aboriginal groups regarding constitutional amendments and the general legislative process, it is suggested that, for Executive decisions concerning the fundamental interests of cultural communities, all aboriginal groups be considered together and balanced on a one to one basis with the non-aboriginal group. This differential treatment represents an attempt to balance the need for efficient government with the need of the various aboriginal groups for protection of their rights as negotiated in their claims settlements and elsewhere. The proposed approach reduces the likelihood of deadlock within the Executive by reducing the number of groups formally and directly represented there. At the same time, it enables each aboriginal group to ensure that the laws and constitutional structures of the Territories do not threaten its basic rights. Collective rights are not threatened because the Executive cannot by itself change the substance of collective rights. Only the Assembly would be in a position to do this, and in the Assembly, each aboriginal group would exercise its own veto.

The Bureaucracy

Native people are grossly underrepresented at the policy-making and professional levels of the public service of the NWT. The importance of the public service in modern governments suggests that this is a serious problem. However, the difficulties of addressing the problem, particularly the fact that to do so may limit the access of native organizations themselves to the highly capable native people they will need to administer their

institutions leads to the conclusion that the cultural composition of the public service is a question whose resolution will require time and a decision by the native groups as to the amount of segmental autonomy (hence administrative personnel) which they wish to have.

The Judiciary

Of all the structures of government in the NWT, this is the least amenable to consociational arrangement. It involves too few personnel to make cultural proportional appointments a practical proposal. Also, the criminal code is a matter of federal, not territorial, jurisdiction. However, it might be possible for federal legislation to allow aboriginal defendants to elect traditional methods of defense in their cases. It can be anticipated that the west will ultimately gain jurisdiction over all aspects of civil law. This will enable it to recognize customary law and indigenous institutions for administering it.

7. DIRECT CONSOCIATION IN THE NWT: SOME IMPLICATIONS FOR THE POLITICAL ACTORS

The above discussion suggests one way in which a directly consociational government might be structured in the western NWT. There are, of course, many alternative structures. What is important is not the details of particular models, but rather the logic which underlies all of them. If the logic is understood and if the various groups come to understand that direct consociation holds cut the greatest promise of securing their interests, the structural details will emerge from the negotiations which take place among the groups, in a process which may not always be easy, but which at least will be coherent.

The relevant task, then, is to assess direct consociation as it affects the interests of the various communities and governments which have a role to play in the overall constitutional process. The following discussion is organized in terms of these actors and Particular points are discussed under orie or another of them. This approach is the most direct in talking, not about abstract benefits, but rather about the interests of particular groups. However, it is also somewhat artificial in that many considerations undoubtedly will affect the interests, hence enter into the calculations of, more than one of the actors. The comments below make basic assumptions about the motivation of the members of the various groups. Obviously, these motivations are not held uniformly by each and every group member. However, they are an essential logical step to the development of the arguments which follow and because of their importance, readers will want to weigh the assumptions as they proceed. Finally, it must be noted that the following discussion is highly abbreviated; for reasons of space, it aims to be suggestive, not exhaustive.

The Government of Canada

The Government of Canada is the overriding actor in the constitutional process because it holds a monopoly of legal power over it. Ottawa can veto any proposals for constitutional change generated in the North, no matter how much popular support the proposals enjoy. Ottawa is also in a legal position to impose any constitutional change it wishes. Ottawa's ultimate constitutional interest in the North is to ensure that future change does not interfere with its ability to use northern resources as an engine for southern economic growth. Proposals for change must meet this test if they are to be received sympathetically. If they do pass the test, then Ottawa may look upon them with favour because it recognizes that the present constitutional situation is viewed as unsatisfactory by northerners; because it wishes as much as possible to put northerners in a position of self-government equal with that enjoyed by other Canadians and because it recognizes that dealing comprehensively with the aspirations of northern native people is a task which cannot be accomplished solely at the claims negotiating table, but rather will require adjustments to the form of public government in the North.

Ottawa probably prefers a universalistic form of government, if only for consistency with the rest of Canada. However, if strong pressure from northerners in favour of consociation develops, Ottawa will find that the system offers it the following advantages:

1. Direct consociation offers probably the best opportunity for integrating the aboriginal first nations self-government process with the public constitutional development process in the NWT. While direct consociation does constitutionally recognize cultural communities, it also gives them an incentive to cooperate. If the two constitutional processes proceed in isolation they may result in the creation of' two completely distinct and competing governments within a single geographic region. Ottawa would surely prefer to avoid this.

2. Ottawa has stipulated consensus on the form of government to be adopted as a precondition for its approval of constitutional change. Given the rejection of the parliamentary model by the Dene and Metis, and given, as explained above, the inapplicability of indirect consociation to the social geography of the western NWT, direct consociation is the likeliest form of government for which a consensus 'of northern support can be created.

3. Presumably, Ottawa will want to avoid entrenching a system which enables any one cultural community to oppress any other. Segmental autonomy eliminates the chance of many forms of majority oppression.

4. The model proposed promises a reasonable degree of decisional efficiency; Ottawa will only approve a form of government that has a reasonable likelihood of meeting the basic standard of public administration, that government must be able to function. The proposed government can govern because of the relaxation of practices regarding votes of confidence, yet the necessary accountability of the executive to the legislature is not sacrificed in that votes of confidence remain part of the system. Deadlocks concerning matters of fundamental importance to the cultural

communities are handled in a fashion which distinguishes between rights and interests and strikes different balances between these concerns on the one hand and the need for government to act and majorities to rule on the other, Veto power exists regarding rights, as is appropriate, but is modified regarding interests. Most important, the segmental autonomy suggested in the form of community councils reduces the likelihood of a deadlocked Assembly. This reduces the probability that Ottawa might have to mount an embarrassing intervention.

5. Consociation can easily accommodate the eastern Arctic should division not occur. To work on developing the consociational model would be to minimize the risk of effort being rendered irrelevant by the collapse of the division concept.

The Government of the Northwest Territories

The interests of the GNWT are complex in that they comprise the interests of the elected members and of the public servants, which are unlikely to be identical. The elected members must be particularly sensitive to the interests of their constituents, whereas the public servants are likely to place more emphasis on the institutional interests of the GNWT itself. Keeping this general distinction in mind, it can be suggested that the interests of the GNWT are to secure the rights and interests of the various cultural communities in order to maximize social harmony; and to increase the legitimacy it receives from its constituents and the powers it receives from Ottawa. Direct ccnsociation can promote these interests in the following ways:

1. By providing a conceptual framework within which to integrate the territorial government and the thrust toward aboriginal first nation self-government, consociation can avoid the situation in which the GNWT ccmes to be viewed as the non-native government, hence must share powers and funding, and compete at every turn, with another government or governments which can claim equal status with it. Consociation creates governments other than the GNWT, but it retains for the GNWT the role of overarching public government for the entire western NWT.

2. Because it, appeals to Ottawa in the ways described above, a consociational model may 'be the best vehicle for gaining the further devolutions of authority from Ottawa which the GNWT seeks.

The Aboriginal Cultural Communities

The aboriginal cultural communities seek to secure their cultural rights and interests in perpetuity, while not jeopardizing claims they may make and retain in the aboriginal rights process. Consociation serves their interests in the following ways:

1. It does not need to rest on the concept of aboriginal rights, hence is not vulnerable to interpretations of aboriginal rights which might weaken the guaranty of their interest which is contained in consociational structures. Similarly, any move to extinguish aboriginal rights will not diminish the protection aboriginal people enjoy in a consociational

system, because their position in it does not. depend on aboriginal rights, Finally, and for the same reason, participation in a consociational government does not prejudice claims based on aboriginal rights. To the contrary, it satisfies the position of the Government of Canada that claims and governmental structures for aboriginal peoples be discussed at separate tables. Depending on the outcome of national negotiations on aboriginal self-government, it may 'be advantageous of the Dene/Metis and/or Inuvialuit to seek to specify the consociational arrangements as embodying their aboriginal right to self-government in full *or in* part.

2. The segmental autonomy provided by direct consociation represents a major form of protection in view of the low probability that non-natives will make fundamental accommodations to native cultural needs in shared institutions. For example, it is exceedingly unlikely that non-native parents will accept as relevant and useful parts of the curriculum developed for native school children. Consociation limits the likelihood of conflict developing over this kind of issue.

3. The symmetry among the cultural communities establishes the principles that aboriginal concerns -- leaving aside special benefits negotiated as part of claims settlements -- are in every way equal to those of non-natives. Unlike the present situation in which the institutions of government are those of the South and familiar and comfortable to the non-native population, consociational forms make no cultural presumptions. They also make no presumptions as to whom the cultural balance will ultimately come to favour, indeed no presumption that imbalance will occur in the future. However, should the population balance among cultural communities change, their ability to protect themselves will not. This could well be a major factor motivating aboriginal peoples to see consociation as highly desirable.

4. Consociation allows for considerable flexibility in meeting the different needs of the various cultural communities. The aboriginal decision-making bodies can proceed under quite different rules than those used by the non-native council and, indeed, the aboriginal councils can differ from one another in their form and operation.

5. Native legislators today feel very acutely the tension between the expectations which their constituents impose on them and the demands of their roles in the Assembly. This pressure is reduced in a consociational system in that it gives them more freedom to represent their constituents than does the conventional parliamentary model and also because segmental autonomy as represented by the cultural councils brings certain very important issues much closer to the people. This greatly reduces the gap between the people and their representatives.

6. Land and resources are a particular *concern.* We anticipate that the federal and territorial governments will attempt to negotiate claims settlements that will enable it to retain as much control as possible. This is a matter which is, of course, outside the scope of this paper. However, one relevant comment is the way in which the federal government has provided for aboriginal participation in decision-making on lands and resources through administrative boards. Although these boards

have much authority, one difficulty is that they operate under ministerial discretion. As noted above, consociational arrangements can provide a method which enables the affected cultural community to retain control over such actions through the use of their elected members or, in the alternative, to force arbitration.

The Non-Native Population of the Western NWT

The interest of this group lies in maximizing the benefits which it receives from government. These benefits include material benefits in the form of laws, regulations, services and pursuit of patterns of economic development which serve its economic interests. They also include psychological benefits in the form of policies and symbols which make them feel secure about their future as a cultural community in the North. In particular they wish to minimize the extent to which any future constitutional arrangements will require them to compromise the values and practices with which they are comfortable and which, indeed, are fundamental elements of their self-definitions. This agenda leads to two constitutional goals. First, non-native northerners want to maximize their control over governmental actions which affect their lives. They have historically pursued greater self-government for the NWT in order to reduce Ottawa's power to take decisions "in the national interest" which in their opinion work against the interests of northerners. Second, non-native northerners seek to maintain the greatest government responsiveness to their concerns when these come into conflict with those of the other, aboriginal, cultural communities. Presumably, if the second condition can be reasonably assured, then they will continue to seek devolution of power from Ottawa to Yellowknife. Consociation offers the following benefits to the non-native population of the Western NW'I'.

1. Segmental autonomy protects essential non-native cultural interests from encroachment by the native community. It also ensures that the decision-making process concerning these basic concerns, as set out in the charter of the western NWT, will not be encumbered by intercultural misunderstanding. In discussing basic rights, it should be noted that non-cultural rights enjoyed by non-natives will continue to be protected by the Canadian " Charter of Rights and Freedoms.

2. Consociation offers perhaps the best prospect of supplying what Ottawa is likely to consider to be prerequisite to further significant devolutions of power, namely, a consensus among the cultural communities on the form of the future government of the western NWT. Given the low probability that the native cultural communities will accept a parliamentary system of government without substantial modifications in the direction of consociation, then the non-native population ought to familiarize itself with the logic of this approach and plan how best to secure its interests within consociation, if it wishes further devolution.

   If, however, Ottawa does not view consensus as a prerequisite for devolution, or if and to the extent that the non-native population is content with the present format of the territorial government, then the incentive it feels to pursue consociation will be reduced accordingly.

3. As noted above, consociation provides a means of at least partially integrating the GNWT and any form of aboriginal self-government which might come into being, thus encouraging positive relations between the two. Also as noted above, this consideration might encourage Ottawa to devolve greater self-government to the North. Thus both directly and indirectly, consociation may hasten the process of devolution which non-native northerners tend to favour.

4. As noted above, consociation could accommodate the East if division did not occur. Given the lack of enthusiasm of non-natives and of all cultural groups from Cambridge Bay west for division, any governmental form which provides a viable alternative to division is in the best interests of the non-native population.

8. PROBLEMS WITH CONSOCIATION

1. While consociation will create a symmetrical set of relations among cultural communities, its establishment will not present itself as involving equivalent sacrifices among the communities because their present relations are not symmetrical. The beneficiaries of the status quo, non-natives, will perceive that they have a great deal to lose. Over the years this group has presumed that, by and large, the future institutional development of the NWT will reflect its values. After all, non-natives values have dominated North American life and politics. It has seemed only natural that as the impact of southern life impresses itself more totally on the North, that the North will repeat the experience of all of the other frontiers which make up the history of North America. Equally the Dene/Metis and Inuvialuit will perceive that they have a great deal to lose to the extent to which they perceive participation in a public government to diminish their aboriginal sovereignty. They may well feel that they will lose more than the non-aboriginal community in that, while government statures will not follow the southern model, northern life in general increasingly will, simply because of the economic, social and cultural scope of the South.

   Consociation holds out the prospect that values other than theirs may " shape their constitutional future and they may have to accept and to some extent work within values which are not their own. This will be difficult because consociation requires the non-native population to change its self-conception. Non-natives have conceived of themselves as the majority and as representing majority culture, in large part because they have seen themselves in the context of all of North America. They will now have to accept that for territorial purposes, they constitute one of several cultural communities. The psychological transition from a position of pre-eminence to one of shared status is likely to be difficult. So too will be the transition from thinking of themselves and other primarily as individuals to thinking in terms of cultural communities. The non-native population has never organized collective organizations which speak for their cultural group in the way that the aboriginal organizations speak for theirs. A non-native cultural council will have less roots in northern society than will the native cultural councils. In addition to these philosophical problems which consociation poses for non-natives, they are also likely to fear that a territorial

government based on direct consociation is more likely than some other form of government would be to enact policies in pursuit of affirmative action or to address specifically aboriginal concerns and thus to work to their disadvantage.

2. Budgetting can be anticipated to be a difficult process under any form of government. A particularly contentious issue is likely to be the allocation of funding to the different ethnic councils. It will be very difficult to base assessments of financial need on any criterion of delivery of equal levels of service because of the different views of the various groups as to acceptable levels of service. Differences over the need for affirmative action and "catch-up" programs will pose similar problems. In general, the different circumstances of the cultural communities may make it difficult to compare their budgetary needs. For example, will the non-native community need nearly the amount of funding which the native communities need for development of curriculum materials given that the non-native population can draw on relatively inexpensive materials already available from the South? Another example is the delivery of health care services. On a per capita basis, it will be cheaper to supply a large population with a given level of service than it will be to supply those services to a small and geographically dispersed group of patients. Because of the different patterns of geographic dispersion of the different cultural communities, this basic fact of health care financing could well provoke a major financial debate. Alternatively, if the native cultural councils feel that they do not need a separate health care delivery system, but rather only supplementary, culturally relevant services, how will the budgetary process respond to a need which they feel as a cultural community, but which the non-native population does not share? A final example is simply that the tax bases from which the councils might draw at least some of their funding differ very greatly; it may not be possible for all of the councils to rely on income taxes to produce the same proportion of total revenue.

3. The budgetary process is always a difficult one in that it is the most tangible reflection of a government's priorities. No governmental system which might be recommended for the North can avoid this reality; nor has the existing system avoided them. Moreover, as the history of federal-provincial relations in the South demonstrates, debates over intergovernmental transfers of funds are unlikely to be easy. Still, a consideration of problems to be anticipated in a system of direct consociation must note the likely prominence of special as well as the usual sources of conflict among the cultural councils, the GNWT and Ottawa over their respective financial responsibilities. It must also assess whether the conflicts would be greater or less if there were several totally separate governments competing with one another for federal funding.

A further set of questions which might be raised relates to entrenchment of a consociational model. However, as these apply to all future forms of government, they logically constitute the subject of a separate paper.

9. CONCLUSION

Consociation will not lay to rest political conflict in the North because conflict is a function of social, not governmental, structure. No society is free from conflict, hence no society is free from politics nor from debates about the differential impacts of constitutional structures upon the interests of the various groups which make up the society.

In this context, the appropriate test of direct consociation is not how closely it approaches some ideal, but rather how much more effectively it meets the needs of the various social and political interests than does any of the alternative forms of constitutional organizations. In the opinion of the authors, consociation represents the best compromise among the interests of the various groups within the western NWT. If they have the will to get on with the task of fashioning a new form of government for the future, they should give consociational approaches the most serious consideration.

APPENDIX A

Possible Constituency Distributions

The following calculations should be read with these features in mind:

1. The assignment of individuals to cultural communities is based on 1981 consensus data which may not reflect the actual count when other criteria are used;

2. The Dene/Metis in the Western Arctic and the Inuvialuit in the Mackenzie are added to the count in the areas in which they are represented by electoral lists. This is why the total of population in the region differs from the sum of the cultural community populations within the region;

3. A minimal residence requirement is assumed because the census data do not permit removing from the calculations people who have not been resident in the western NWT for at least six months, a year or any other specific period of time.

4. The figures include residents of all ages, not just voting age.

5. A great many variations are possible. The following merely represent illustrations of how the formats suggested might actually work out.

The statistics which follow conform to the model suggested in the discussion on the electoral system in section six of this paper.

The three constituencies could be:

i) Western Arctic (which includes)

Paulatuk
Holman
Sachs Harbour
Tuktoyaktuk

Plus the Inuvialuit and the non-aboriginals of:

Inuvik
Aklavik

Population:	Dene/Metis	Inuvialuit	Non-Aboriginal	Total
	35[1]	2,535[2]	**2,200**	**4,735**

ii) North Mackenzie (which includes)

The Dene/Metis of Aklavik and Inuvik
Fort McPherson
Arctic Red River
Sahtu Region
North Slave Region

Population:	Dene/Metis	Inuit	Non-Aboriginal	Total
	5,900[1]	**170**[2]	**8,880**	**14,780**

1. The Dene/Metis in the Western Arctic are added to the Dene/Metis count in the North Mackenzie constituency.

2. The Inuit in the North and South Mackenzie constituencies are added to the Inuvialuit count in the Western Arctic constituency.

iii) South Mackenzie (which includes)

Deh Cho Region
South Slave Region

Population:	Dene/Metis	Inuit	Non-Aboriginal	Total
	4,570	**90**[2]	5,920	10,490

The basic breakdown of seats is:

	Dene/Metis	Inuvialuit	Non-Aboriginal	Total
Western Arctic		2	2	4
North Mackenzie	2		2	4
South Mackenzie	2		2	4
TOTAL	4	2	6	12

As the total population is 30,005 the average number of residents per seat is 2,500.

d. Using the rule that constituencies will receive additional seats until the number represented by each is less than 125% of the average, that is an average of less than 3,125 residents per seat, the North Mackenzie must have one additional seat.

e. This extra seat would be filled from the non-aboriginal list, because the initial allocation of seats to cultural communities under-represents the non-aboriginal community in the North Mackenzie constituency.

f. The requirement that no cultural community can have less than 20% fewer representatives than it would be entitled to on the basis of the number of its members, requires the following calculation:

	Total Population	% of Population
Dene/Metis	**10,470**	**35%**
Inuvialuit	**2,535**	**8%**
Non-Aboriginal	**17,000**	**57%**
TOTAL	**30,005**	**100%**

Using the rule that seats contain no more than 125% of the average number of residents, no additional seats need be distributed because the Dene/Metis have 4 of 13 seats (32.5%); the Inuvialuit have 2 of 13 seats (15%) and the non-aboriginals have 7 of 13 seats (53%).

	Dene/Metis	Inuvialuit	Non-Aboriginal	Total
Western Arctic		2	2	4
North Mackenzie	2		3	5
South Mackenzie	2		2	4
TOTAL	4	2	7	13

Alternatives

If it is thought that this calculation produces an Assembly which is too small, it is possible to start with the assumption that the Assembly must have at least a certain number of seats.

Assume an Assembly of 24 seats. This produces an average number of residents per seat of 1,250. Using the 125% rule, no seats should represent more than 1,563 people.

Therefore the breakdown of seats could be as follows:

i) Western Arctic	Core	Plus	Total
Inuvialuit	2		2 (1,268/seat)
Non-Aboriginal	2		2 (1,100/seat)
TOTAL	4		4

ii) North Mackenzie	Core	Plus	Total
Dene/Metis	2	3	5 (1,180/seat)
Non-Aboriginal	2	5	7 (1,269/seat)
TOTAL	5	7	12

iii) South Mackenzie	Core	Plus	Total
Dene/Metis	2	2	4 (1,143/seat)
Non-Aboriginal	2	2	4 (1,480/seat)
TOTAL	4	4	8

The operation **of** section f. of the electoral model would not change the outcome of 9 Dene/Metis seats; 2 Inuvialuit seats and 13 non-aboriginal seats.

However the constitution might say that the Inuvialuit cannot have less than 10% of the seats in the Assembly and the Dene/Metis cannot have less than 20% of the seats.

The Dene/Metis have more than 20% of the seats. However, the Inuvialuit would require one extra seat to bring them above the guaranteed 10%.

Therefore the final composition of the Assembly would be:

	Dene/Metis	Inuvialuit	Non-Aboriginal	Total
Western Arctic		3	2	5
North Mackenzie	5		7	12
South Mackenzie	4		**4**	**8**
TOTAL	9		**13**	**25**

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INUVIALUIT SELF-GOVERNMENT

IN A WESTERN TERRITORY

prepared for:

The Western Constitutional Forum

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March 1985

This paper is for discussion purposes only. None of the views expressed herein knowingly represent the views of the WCF or any of its Members.

TABLE OF CONTENTS

INTRODUCTION

The Inuvialuit have proposed that a Western Arctic Regional Municipality (WARM) be established in the Beaufort Sea region. WARM's boundaries would "be the same as those of the NWT part of the Inuvialuit land claims settlement.

This paper examines WARM as a proposal for aboriginal self-government and compares WARM to what is available or promised in a western territory. The implications of WARM for communities in the Kitikmeot West area are not addressed.

It is not easy to compare the WARM proposal to the constitutional arrangements being considered by the WCF, because the WARM proposal deals only with regional government, while the WCF is looking at recognizing aboriginal political rights mainly at the community and central levels of government. However, the basic objectives of the Inuvialuit and other aboriginal peoples in the west do not differ geratly: if a flexible approach is taken, there seem to be prospects for accommodating all parties in a western government that are worth exploring.

THE WARM PROPOSAL

a) Purpose

WARM is a model for Inuvialuit self-government within the limitations of GNWT jurisdiction. By excluding Inuvik and the two mainly Dene communities in the Delta - Arctic Red River and Fort McPherson - WARM would accomplish this without departing from the principle of "1 person, 1 vote" in public government.

As a proposal for self-government, the WARM proposal addresses only the regional level of government. Inuvialuit control over community governments appears to be assumed, on the basis that most voters in the communities within WARM's boundaries are Inuvialuit. The population make-up of the region also makes it unnecessary for the Inuvialuit to propose special powers at the central level, if the Inuvialuit regional government has enough power itself, and the population make-up remains stable.

The WARM proposal appears to have the following specific goals:

- to give the Inuvialuit legislative authority over those matters within the jurisdiction of the GNWT that affect the Inuvialuit culture and economy most directly.

- to set up an Inuvialuit institution in the Inuvialuit settlement area that handles the delivery of Territorial and Federal Government programs and services.

  through funding agreements and an independent tax base, to secure the resources required to exercise such authority and operate such an institution.

Whether by design or not, the taxation power proposed for WARM might also end up providing a source of on-going revenue to the Inuvialuit large enough to finance quasi-government programs and services by itself, and contribute directly to Inuvialuit economic development ventures. In this sense, the WARM proposal might serve the further goal of economic self-sufficiency for the Inuvialuit.

b) Legislative Powers

Nature

By-laws and regulations of the WARM council would stand on their own if they are consistent with laws of the central government. Inconsistent by-laws and regulations would also stand unless disallowed by the Commissioner.

It is noteworthy that the power of disallowance usually held by an elected Minister or Cabinet would be held by an appointed officer under the proposal. Either this provision simply recognizes the Ministerial - like role the Commissioner has played in the GNWT until recently, or it suggests that as the political mandate of the Commissioner diminishes in the future, so should the mandate of the central government to overrule the enactments of WARM.

The proposed relationship with the central level of government appears designed to give WARM as much independence within the subject matter of its authority, as is legally possible. In this sense WARM would more closely resemble the relatively independent home rule boroughs in the state of Alaska, than municipal governments in Canada. There is some question whether the GNWT has the power to give to a regional council law-making authority now vested in the GNWT assembly, subject only to a limited executive power of disallowance. Enactments of delegated authorities in Canada are generally subordinate to all inconsistent legislation of their parent authority. In any event, the degree of independence proposed for WARM appears to be unprecedented for a regional municipal government in Canada.

The independence proposed for WARM may be attractive to other cultural groups concentrated in regions in the western territories, such as the Dogrib or Slavey people. In this sense, the WARM proposal may imply not only one exceptionally autonomous region, but several. It seems more likely, however, that other aboriginal groups in the Mackenzie Valley will prefer a special place in the central government to an independent regional government in which their sole guarantee of protection is relative strength of numbers.

Interpretation

The terminology and format of the draft Ordinance in which WARM's powers are described make them difficult to interpret. The ordinance says that WARM's powers must be construed "liberally", and then describes these powers twice - once in a particular and relatively narrow fashion, and later, "without restricting the foregoing", as

unqualified "classes of subjects". It does not help that some of the classes identified, such as "police services" and "economic development" are unusual classes of legislative power in Canada. The reader is caught between the risk of exaggerating the proposal and the risk of construing it too narrowly.

Given this dilemma the author has relied on the more detailed - and admittedly more narrow - description found in the draft and attempted to give this particular description a liberal construction. Even so, on several points a definite interpretation is not advanced here. The following *review* of the subject matter of WARM's powers should be read with the understanding that other reasonable interpretations are possible. It may be that the lack of precision found in the draft ordinance is an invitation to further discussion and debate.

Subject Matter

The legislative powers proposed for WARM involve most of the main heads of GNWT jurisdiction, including wildlife, education, municipal government, administration of justice, government spending, and business licensing and taxation. However, while the powers proposed for WARM are not clearly defined, the proposal appears to leave considerable authority with the central government in these areas.

Game Management

References to game management appear to be comprehensive, and include regulation of harvesting, and regulation of all uses of wildlife including commercial uses. This power would be subject to the Inuvialuit final agreement, which only permits local Inuvialuit committees to restrict Inuvialuit harvesting rights otherwise protected in the agreement.

Education

Specific references to education are confined mainly to matters relating to programs, services and resources. For example, the powers described include the power to establish schools and develop curriculum. At present, schools can be established and curriculum developed without the passing of a regulation or ordinance. Power to impose education taxes on property owners is also proposed.

Economic Development

This power might conceivably encompass a broad range of powers including taxation and even ownership of resources, but the specific references found in the draft Ordinance appear only to deal with government spending. Presumably this power would be used to set spending priorities for the regional government's budget based on the economic priorities of the region rather than those of the central government. This power also may be designed to ensure that preferences can be given in government contract letting and imposed on companies doing business with government, relating to aboriginal and regional residents.

Local Government

This power might possibly include the power to establish or dissolve local governments and to control the delegation of all their authority, but the powers specifically referred to are strictly administrative in nature. The Ordinance says that the regional council would "coordinate", "promote", and "facilitate" community matters - functions more akin to the mandate of the Inuvik regional office than the Minister of Local Government.

"Police Services

The power proposed appears to be broad in that the regional council would make by-laws for the enforcement of all federal, territorial and municipal laws in the region. This would be an extraordinary power not held now by the GNWT. The regional council would take over from all other levels of government the authority and discretion to enforce their laws respecting such matters as environmental protection, navigation, and land use in the region. The power appears to include some of the authority of territorial and federal governments over corrections institutions and programs, but does not include the establishment of a court system.

Taxation and Business Licensing

The proposed power to tax buildings and land and to license business appears to be unqualified. However, it is unclear whether this power would extend to offshore property and businesses or to property and businesses located within community government boundaries. Federal and Territorial authority over sales and income tax are left to those levels of government.

Zoning and Land Use Control

These powers are not specifically proposed in the Ordinance. They are generally considered to be "municipal" powers when exercised locally. The Inuvialuit may propose that this power be transferred to WARM in the future.

Future Powers

Additional powers may be negotiated with the territorial government in the future.

The ordinance also provides that the regional council can negotiate directly with the federal government respecting matters under its jurisdiction. It is not clear whether this clause refers to legislative authority, as for example, land use regulation, or only to administrative matters. An earlier version of the WARM proposal had included health services within the regional government's legislative authority. If that power is planned as a subject of negotiation with the federal government, so might other legislative powers.

c) Administrative Role

The WARM council could develop programs and enter into agreements on behalf of the GNWT in all of the areas of WARM's legislative authority. It could also negotiate directly with the federal government respecting administrative matters under its control.

Program boards would be set up to administer each of the matters within WARM's legislative authority except game management, which would be administered exclusively by the Inuvialuit through their Game Council and Hunters and Trappers Committees.

d) Constitutional Status

Territorial Ordinances are subject to change or repeal by the territorial Assembly. Although WARM has been proposed in the form of a draft ordinance, the Inuvialuit appear to expect that WARM will be entrenched in the new constitution of the territories. Assembly power to amend the WARM ordinance should therefore not be seen as part of the proposal.

Possible alternatives for entrenching WARM could include separate status in the Constitution Act, a Constitution Act requirement that the central government not alter WARM legislation without Inuvialuit consent, or federal legislation requiring action by Parliament to bring about amendments.

e) Relationship to Community Government

The selection process proposed for the WARM council would result in a regional council controlled by community representatives, but not community governments. With the exception of the Chief of the Aklavik Band, council members would be elected directly in the communities.

The mayor would be elected directly in regional general elections. With respect to accountability through the ballot box, the WARM council and community governments within WARM would be independent of each other.

With respect to legislative authority, the generality of the draft WARM ordinance makes it difficult to tell what the precise relationship between community and regional governments would be. A broad interpretation of the draft ordinance would make community governments delegates of and subordinate to the regional council. The more restrictive interpretation suggested here would merely give the WARM council a coordinating role. One thing seems clear. WARM's legislative authority, whatever its scope, would be its own and not subject to a community government override.

With respect to administration and resources, the WARM council would likely have a great deal of influence over community government. It is not clear whether the WARM council would take over the future tax base of community governments in the region, but in any event, the funding and tax base of the council together with its role as deliverer of territorial and federal government services would give the regional council a major say in the allocation of government funding to communities.

REGIONAL AUTHORITY AVAILABLE TO THE INUVIALUIT

This section will look at the combined effect of the Regional/Tribal Council Ordinance, the WCF's tentative principles on regional government and the powers and resources of Inuvialuit institutions under the Inuvialuit final agreement.

a) Purpose

The WCF plans to approach the issue of aboriginal self-government mainly at the central and community levels of government. Thus, the WCF's principles state that at least until models for community and central government are developed, legislative authority will not be proposed for regional councils.

Similarly, aboriginal self-government does not appear to be the main purpose underlying the establishment of regional/tribal councils under the Regional Tribal Council Ordinance. The Dogrib and some Inuit councils appear to view themselves as a step towards this end, but an interim step nonetheless. Part of the reluctance of the Delta Loucheux to incorporate their council under this Ordinance appears to be based on a perception that such a step would not promote and might detract from the goal of self-government for the Loucheux.

The WCF principles and Regional/Tribal Council Ordinance have the following particular goals:

- to consolidate and promote the common interests of communities
- to coordinate existing regional functions
- (eventually) to take over or at least direct the regional administration of government programs and services.

Both the Ordinance and WCF principles add the rider that in achieving these goals, regional council should not diminish the appropriate authority of community government.

Regional councils under the Ordinance and WCF principles would not control an independent resource base. They would therefore not contribute significantly to the goal of economic self-sufficiency for aboriginal peoples.

The major goals of the Inuvialuit final agreement are to provide the Inuvialuit with enough resources to protect their culture and assure them of a strong position in the northern economy. With the exception of the $7.5 million Social Development Fund, the agreement does not deal with government programs and services, and it does not give the Inuvialuit legislative or regulatory powers except insofar as local committees are empowered to control harvesting by Inuvialuit community members. Self-government and a strong resource base are, however, interdependent, and in this sense the goals of the Inuvialuit final agreement and the WARM proposal are similar.

b) Legislative Powers

Neither the WCF principles nor the Regional/Tribal Council Ordinance propose that legislative powers be exercised at the regional level. The WCF principles do not, however rule out the possibility that regional councils may be delegated legislative authority in future as the relationship between community and central government evolves. Delegation of this kind might take several forms, but the emphasis on a strong central authority and non-interference with community government powers in the WCF principles would suggest that any regional legislative authority would be accountable to, rather than independent of the other levels of government. This suggestion is also supported by the terms in the Ordinance and WCF principles which provide for the delegation of administration authority to regional councils by community governments, for opting out of regional councils by community governments, and for dissolution of councils by the members directly appointed by community governments.

The GNWT is presently considering proposals to increase the legislative powers of community governments and to reocgnize the place of aboriginal councils within such governments, but specific measures have not been adopted.

While legislative authority is not a part of the Inuvialuit final agreement, several powers vested in the Inuvialuit under the agreement give the Inuvialuit a degree of influence comparable to that exercised by government as a law-maker. Ownership of 30% of the land within WARM's boundaries will give the Inuvialuit a degree of control over land use in the region not formerly held by anyone but government and industrial corporations. The right to negotiate "participation agreements" on these lands, though subject to arbitration, gives the Inuvialuit a real opportunity to set terms and conditions formerly set by government, relating to jobs, contracts and training. The advisory boards established under the agreement will give the Inuvialuit a formal place, though not a decisive role, in government decision-making relating to wildlife management, parks, and the screening and review of development projects.

c) Administrative Role

This is the area in which the WARM proposal is most consistent with existing policies and proposals for the western territory. Under the Regional Tribal Council Ordinance, councils may establish regional boards of management and deliver government programs and contracts. They may play an administrative decision making role in staff hiring. However, they have no independent resource base, and their capacity to administer federal programs is not addressed in the Ordinance. The WCF principles are consistent with the Ordinance, and go further in suggesting that regional councils may become the prime body in their region, to which other organizations are accountable.

It is noteworthy that regional councils under the Regional Tribal Council Ordinance would have the power to impose "levies" on community governments in order to fund the administration of the council. Such

a power is not included in the WARM proposal. In future discussions the power to levy fees might be considered as an alternative to the independent tax base proposed for WARM.

Under the Inuvialuit settlement, regional Inuvialuit corporations separate from WARM are set up to management Inuvialuit land and resources.

d) Constitutional Status

The WCF principles suggest that special rights should be entrenched in existing levels of government, while the recently created regional level should remain flexible and evolve over time. However. the WCF has left open for discussion the possibility that principles for regional government could be included in a new constitution for the western territory.

The structure and powers of Inuvialuit game committees, regional advisory bodies and regional corporations set out in the Inuvialuit settlement are constitutionally entrenched.

e) Relationship to Community Government

Community government powers and concerns take precedence over those of regional councils under the WCF principles and Regional/Tribal Council Ordinance. In practice, some influence will be lost by communities upon the establishment of any level of government between communities and the central level. This loss may be minimized by the proposals that regional council members be community government representatives and that regional councils not hold legislative authority.

Regional corporations under the Inuvialuit final agreement are indirectly related to the Inuvialuit community corporations. There is no relationship between Inuvialuit community corporations and public community governments under the agreement.

AUTHORITY PROMISED TO THE INUVIALUIT

a) Inuvialuit Final Agreement

The agreement assures the Inuvialuit that if public government for their settlement *area* is restructured the Inuvialuit will be treated as "favorably" as other aboriginal people in the turnover of government powers to the Inuvialuit (Section 4(3)).

This clause appears intended to guarantee in a general way that the Inuvialuit will obtain as much government power as southern groups if Canadian aboriginal peoples achieve self-government and as much as either the Dene/Metis or Inuit in the new constitution for the territories. This guarantee should be read together with Section 3(6) of the agreement, which guarantees the Inuvialuit the right to benefit from "any future constitutional rights for aboriginal people that may be applicable to them".

The agreement does not refer to regional government. Even if another native group were to obtain its powers through regional government, the demands of the agreement would seem to be met if in the transfer or delegation of powers to the Inuvialuit at other levels, the Inuvialuit are treated as well.

The agreement does appear to ensure that the Inuvialuit will be treated distinctly in the political development process: they are identified as a "native group" or "native people" on whom government powers will be conferred.

Finally, it seems likely the other native groups or people to whom the Inuvialuit are compared in the agreement are territorial or at least Canadian. The agreement may require a comparison of the Inuvialuit proposal to the Kativik Regional Government under the James Bay Agreement, but probably not to the Alaska North Slope Borough.

b) Agreement in Principle on a Boundary

The principles of agreement adopted by the WCF and NCF on January 14, 1985 placed the WARM region in a western territory subject to the WCF's commitment to explore ways to guarantee the Inuvialuit a satisfactory future there. The principles recognize that the Inuvialuit seek self-government at a regional level, and they accept that protecting regional and cultural characteristics is important. They do not appear to promise a form of regional government, and they do not appear to restrict the variety of ways in which the Inuvialuit's goals might be met.

PRINCIPLES FOR ACCOMMODATING THE INUVIALUIT IN THE WEST

1. The Inuvialuit are a distinct aboriginal people

If the WCF is willing to recognize the Inuvialuit as a distinct political entity, there are a variety of ways in which their goal of self-government might be accommodated-in a western territory. If not, there appears to be little room for discussion.

The degree to which the Inuvialuit might be recognized as distinct could vary. The Inuvialuit might be granted special influence over legislation of the central government as it affects their region, or as it affects their interest in the region. This influence might be shared in part with the Dene/Metis, if the Inuvialuit were given a say in turn respecting legislation affecting aboriginal concerns in the Mackenzie Valley. There are various other options.

2. All aboriginal groups in the west have equal political rights

The Inuvialuit final agreement appears to guarantee this principle to the Inuvialuit. This does not mean that the Inuvialuit and Dene/Metis need be treated the same. Some powers or resources conferred

on the Dene/Metis at the community or central levels of government could be conferred on the Inuvialuit at the regional level. In implementing this principle, population ratios might be reflected in the distribution of seats and powers. Positive recognition of this principle might allay concern that Inuvialuit interests would be neglected in a western government.

3. Aboriginal people in the west will have special influence over legislation affecting aboriginal interests

This principle is central to both the Inuvialuit and Dene/Metis view of aboriginal political rights. The WCF has accepted this principle in part by agreeing that guaranteed aboriginal representation in the Legislative Assembly may be part of the new western constitution. There are various other ways to give effect to this principle.

4. The political rights of the Dene/Metis and Inuvialuit should reinforce and not undermine each other

This principle adds to the first three that the methods chosen to protect aboriginal political rights should respect Inuvialuit and Dene/Metis autonomy as much as possible.

5. The interests of the Loucheux in the Mackenzie Delta and of the residents of Inuvik should be protected

The current WARM boundaries have the potential to break up the Delta Loucheux as a political entity and to isolate the town of Inuvik. All Delta communities rely on Beaufort industry for jobs, and Inuvik, McPherson and Arctic Red River look to the Beaufort Sea as a potential source of future revenue. It must be recognized, however, that to include these communities in WARM would alter the character of the proposal significantly. The public represented by WARM would be a mixed population. The Inuvialuit would likely seek guarantees of * their political rights at other levels of government as well. It should also be recognized that to include these communities in WARM would not necessarily meet their own objectives. The Delta Loucheux and non-native residents of Inuvik may not wish to occupy a minority position in a regional government. If, however it becomes a choice between a minority position and no participation at all, one way to protect these interests might be to transfer some of the powers sought by the Inuvialuit directly to community governments in the region.

6. The relationship between Inuvialuit community and regional government is solely an Inuvialuit concern

The community-regional government relationship is the main source of concern expressed about strong regional governments in the Mackenzie Valley. This concern reflects how the Dene/Metis wish to organize themselves, as well as the fact that Dene/Metis communities in the Valley would have to share regional government seats with strong and in some cases overwhelming non aboriginal interests.

These concerns do not apply in the Inuvialuit settlement region. If the Inuvialuit wish to form a strong regional body encompassing some of the powers the Dene/Metis prefer to leave to community governments, perhaps this is a matter for the Inuvialuit to determine.

This principle would have to be qualified if WARM's boundaries were altered to include non-Inuvialuit communities.

It does not follow from this principle that any one group should determine the relationship between a regional government and the central government. The central government in the west will require a certain degree of access to and control over the Beaufort Sea region in order to maintain itself, and all parties have an interest in ensuring that the central government's authority and resources in the region are sufficient.

7. Flexibility and compromise will be necessary

For reasons that have been noted, the Dene/Metis are likely to prefer direct protection of their political rights in the structuring and distribution of power in a new public government for the western territory. The Inuvialuit have taken an indirect approach, relying on their relative strength of numbers in their region and a measure of independence from the central jurisdiction to give them control over their government. Recognizing these differences does not mean that both groups might not gain from combining these approaches in some respects.

FEATURES OF A WESTERN GOVERNMENT INCLUDING THE INUVIALUIT

The following outlines reflect alternate ways to implement the foregoing principles. There may be other approaches, and features of these two may be combined.

a) Modified WCF Approach

This approach would redistribute the powers proposed by the Inuvialuit among all three levels of government, and provide them with legislative power over land use on Inuvialuit lands. It would have the following features:

- strong community governments with delegated legislative powers
- special Inuvialuit influence over central government legislation that would override legislation passed by Inuvialuit community governments, or otherwise affect Inuvialuit rights
- community government authority to delegate legislative powers to regional councils
- Inuvialuit or community government legislative power over land use on Inuvialuit lands
- Inuvialuit, community government, or regional council power to tax property and license businesses on Inuvialuit lands outside community boundaries

- regional council power to impose administrative levies on participating community governments
- turnover of funding and administrative authority to the regional council for the delivery of central government programs and services, and formula financing for the regional council
redrawing of the WARM boundaries to include Fort McPherson, Inuvik and Arctic Red River and surrounding lands.

b) Modified WARM Approach

This approach would retain a regional government with legislative authority but modify the WARM proposal to protect non-Inuvialuit interests and preserve a degree of control over and access to the region by the central government. It would include the following features.

- strong regional government with delegated legislative powers subject only to inconsistent central government legislation
- Inuvialuit or regional government legislative power over land use on Inuvialuit lands
taxation and business licensing powers as in a)
- funding arrangements and administrative authority as in a)
- redrawing of the WARM boundaries to exclude Aklavik
- regional government legislative power as follows (depending on the subject, powers could be exercised within community boundaries, on Inuvialuit lands, onshore in the region, or throughout the region):

- game management
  - regional enforcement of central government game laws
  - regulation of harvesting of all populations of wildlife whose range is contained within WARM boundaries
  - authority to set priorities for eligibility for all licenses relating to the commercial use of wildlife in the region

- education
  - subject to general standards, curriculum development
  - establishment of schools to grade 10
  - power to impose an education tax within community boundaries
  - all by-law making powers of Divisional School Boards under the Education Ordinance, as for example, the power to prescribe learning materials

- police services
  - establishment of a regional police force to carry out central government policing responsibilities such as those now carried out by the RCMF under contract with the GNWT

-- establishment of diversion programs and corrections programs and institutions
- enforcement of all by-laws and regulations respecting WARM's legislative authority

- economic development
  - as proposed for WARM, ie. government spending on economic development

- local government
  - as proposed for WARM, ie. coordination of community government functions

SUMMARY

The WARM proposal is a model for aboriginal self-government at the regional level. Legislative authority within GNWT jurisdiction relating to aboriginal concerns would rest in a regional council. The regional council would govern a region whose boundaries ensure aboriginal control while preserving the principle of "one person, one vote". The regional council's laws would supercede those of the central government unless disallowed by the Commissioner. The regional government would have an independent tax "base and the administrative capacity to deliver territorial and federal programs and services in the region.

The WCF approach to constitutional development would address aboriginal self-government mainly at the community and central levels of government. Regional councils would not be constitutionally entrenched. They would be permitted to evolve over time according to the needs of the community and central governments. Initially they would play a strong administrative role similar to that proposed for WARM, but they would have no legislative authority and no independent tax base. The WCF has not proposed independent regional governments at this point in time out of concern that to do so might restrict the chance for community and central levels of government to gain more power and responsibility through the political development process.

The WARM proposal and the WCF approach share-the common goal of protecting aboriginal political rights within public government. The following principles are suggested for accommodating WARM in the west:

- the Inuvialuit are a distinct aboriginal people
  all aboriginal peoples in the west have equal (but not necessarily identical) political rights
- aboriginal peoples in the west will have special influence over the making of laws affecting aboriginal interests
  the political rights of the Inuvialuit and Dene/Metis should reinforce and not undermine each other
- the interests of the Loucheux in the Mackenzie Delta and of the residents of Inuvik should be protected
- within the present WARM boundaries, the relationship between the community and regional levels of government is solely an Inuvialuit concern
- flexibility and compromise will be necessary

Two approaches consistent with these principles are proposed. Other approaches might combine these two. The first would redistribute the powers proposed by the Inuvialuit between all three levels of government. The second would retain a regional government with legislative authority, but modify the WARM proposal to protect non-Inuvialuit interests and preserve a degree of access to and control over the Beaufort Sea region by a central government.

The main features of the modified WCF approach would be as follows:

strong community governments, with power to delegate law-making authority to regional councils
- a degree of Inuvialuit control over central government legislation affecting Inuvialuit interests
- Inuvialuit or community government law-making powers over land use on Inuvialuit lands
- Inuvialuit control over the taxation of property on Inuvialuit lands
extensive funding and administrative powers for regional councils
- inclusion of Fort McPherson, Inuvik and Arctic Red River on the Western Arctic Region council

The main features of the modified WARM approach would be as follows:

- strong regional government with delegated legislative powers subject only to inconsistent central government legislation
- Inuvialuit or regional government law-making powers over land use on Inuvialuit lands
- taxation powers, funding and administrative role as in the WCF approach
- exclusion of Aklavik from WARM
- modification to the legislative powers proposed for WARM respecting education, game management and police services

Whatever approach is adopted, the features of public government protecting aboriginal rights would be constitutionally entrenched, and subject to change only with the consent of the aboriginal people affected.

REGIONAL SELF-GOVERNMENT FOR THE INUPIAT OF ALASKA AND INUVIALUIT OF THE N. W. T.: A COMPARISON OF THE ALASKA NORTH SLOPE BOROUGH AND THE PROPOSED WESTERN ARCTIC REGIONAL MUNICIPALITY

June 3, 1985

This paper is for discussion purposes only. None of the views expressed herein knowingly represent the views of the WCF or any of its Members.

TABLE OF CONTENTS

1. INTRODUCTION

This paper follows upon "Inuvialuit Self-Government in a Western Territory", a discussion of the prospects for accommodating Inuvialuit self-government in the western N.W.T. Here, the Alaska North Slope Borough (NSB) is compared to the Western Arctic Regional Municipality (WARM) proposed by the Inuvialuit.

2. BACKGROUND

The Alaska North Slope Borough was established in 1972 and became a home rule borough in **1974.** Its boundaries encompass about 90,000 square miles, including the offshore to the three mile limit of state jurisdiction. About 10,000 people live in the borough, roughly half of whom are Inupiat. Many of the non-Inupiat inhabitants work at Prudhoe Bay, the base for Beaufort Sea oil and gas activity. The number of non-Inupiat people who qualify to vote under state law is small enough that Inupiat comprise at least two thirds of the electorate in the borough. Most Inupiat live in Barrow and the six or seven small villages in the Borough.

There are 10 other regional - type governments in Alaska, but none are home rule boroughs. Some are borough governments with fewer powers and resources than the North Slope Borough; most are expanded city governments encompassing urban areas and exercising home rule borough and city council functions together in a united municipal government. A map of the Alaska boroughs and unified municipal governments is attached as Appendix A.

The Inuvialuit of the eastern Beaufort Sea region proposed WARM in **1978** as part of their aboriginal claims position, and continue to propose this model of regional government in negotiations respecting division of the N.W.T. WARM's boundaries would encompass approximately 115,000 square miles of land and water. The boundaries proposed for WARM exclude the Town of Inuvik, with the result that the resident Inuvialuit population of approximately 2,000 would make up about 90% of the population of WARM.

3. PURPOSE

The borough system was adopted in Alaska's constitution for reasons having nothing to do with aboriginal rights. The framers of the state constitution believed that the borough system was the most efficient and flexible way to provide local government in Alaska. In the urban areas, borough governments could perform most local government functions. In the vast rural regions, borough governments could either administer or govern their region, depending on their resource base and the wishes of their residents. The "local government" section of the state constitution describes the purpose of this system as follows:

> ... to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions (Article X, s.1) "

The result was a constitutional framework that permitted the establishment of states within a state: "a home rule borough or city may exercise all legislative powers not prohibited by law or by charter" (Article X, s. 11). To further avoid duplication of government functions, the state constitution permits the state to displace community governments entirely with a single borough government. In fact, the state legislation establishing boroughs in Alaska does limit the powers they may exercise free of state interference, as well as the powers they may exercise within community boundaries. (Appendix B to this paper contains a list of the limited powers). However, the broad powers of a home rule borough give it considerable control over the functions of government that affect its residents most directly.

In 1972, just after the passage of the Alaska Native Claims Settlement Act (1971), the strong Inupiat leadership in Barrow and other North Slope communities seized on borough government as a vehicle for aboriginal self-government. Oil and gas development in the region threatened to destroy the Inupiat way of life, but it also provided a tax base large enough to fund a regional government committed to sustaining that way of life and compensating for impacts detrimental to it. The immediate goals were to bring schools and municipal services to the communities in the region. The larger goals were to protect Inupiat values in the face of massive industrial development.

Like the WARM proposal, the NSB is a model for aboriginal self-government at the regional level. The Inupiat have no real influence in the state government, and community governments other than Barrow have little power in the borough. The NSB also resembles the WARM proposal in that it is a strictly public government system - the Inupiat have no special representation in the borough assembly and rely on the ballot box for control. Recent increases in the non-Inupiat voting population in the region are beginning to raise concern among Inupiat. that they may lose control of the regional government in future. The debate over whether aboriginal peoples are better off in a one or two government system - a debate that is familiar to the Dene/Metis - is vigorous among the Inupiat.

4. LEGISLATIVE POWERS

(a) Nature

The powers of the NSB are defined broadly and may be exercised without interference by the executive of the state government. It is the state legislature which, in effect, may "disallow" borough ordinances. State legislation can qualify borough ordinances specifically (e.g. rate limits on borough taxation) or suspend a borough power completely. Industry demanded that the state suspend the NSB's zoning and land use planning power when the borough tabled its first draft comprehensive land use plan. In practice this relationship has promoted a remarkable degree of

cooperation between governments with frequently opposing interests. The borough has been forced to accommodate state concerns, yet the bluntness of the state's instrument of control has made the state hesitant to use it.

The relationship proposed for WARM and the Territorial government resembles this although it would be achieved by different means. State legislation in Alaska must "prohibit" the exercise of a home rule borough power to disallow it: Territorial legislation need only be "inconsistent" with a WARM ordinance to render the ordinance susceptible to disallowance. In practise, the Alaska courts appear to use a test quite similar to that adopted by Canadian courts to resolve conflicts between central government" laws and the enactments of delegated authorities. Unlike the state override, however, the territorial override in the WARM model also requires an executive act - disallowance by the Commissioner - in order to take effect. The rule common to both models is that unless the central legislature acts, regional government laws stand.

(b) Subject Matter

The paper entitled "Inuvialuit Self-Government in a Western Territory'' noted in the introduction to this paper points out difficulties in interpreting some of the powers proposed for **WARM**. In the following comparison the interpretations suggested in "Inuvialuit Self-Government in a Western Territory" are followed.

The legislative powers of the NSB are more broadly defined than those proposed for WARM. For example, the borough power over education (AS 29.33.050) appears to be virtually independent of state laws, whereas WARM's proposed education power would resemble that of a regional school board.

Under the state legislation which establishes home rule boroughs,. there are three sources of borough authority. Home rule boroughs automatically have authority to impose taxes, operate a public school system, and plan for and zone land use. In addition, such boroughs may exercise any city government power outside cities, if the electors in the region vote for the borough to acquire it. The electors of the NSB have given it all such powers. Lastly, cities may irrevocably transfer any of the power they exercise within their boundaries to the borough. (Appendix C to this paper lists the powers of Alaska city *governments.)*

(i) Game Management

The NSB has no legislative authority *over* harvesting but its planning and zoning authority enables it to protect habitat for wildlife management purposes. The NSB has established a regional advisory council to advise the Alaska Game and Fish Board on wildlife issues.

The WARM council would have broad regulatory authority over non-aboriginal harvesters, and subject to their rights under the Inuvialuit land claims agreement, Inuvialuit harvesters.

(ii) Education

As noted above, the NSB'S power over education appears to be virtually independent of state laws. Borough ordinances govern education, and a separately elected regional school board operates the system. WARM's power in this area would be primarily administrative. The WARM council itself would act as the school board for the region.

(iii) Eccnomic Development

While the NSB does not appear to have authority to direct state, federal or borough spending on economic ventures per se, the full employment rate in the borough is due mainly to the huge spending on public services undertaken by the borough assembly.

WARM would appear to have authority to set the priorities for economic development funding allocated to the region by the central level of government.

(iv) Local Government

The NSB government performs most of the functions of local government in the region. The taxation, education, planning and zoning powers of the borough were automatically taken from existing municipal councils upon the establishment of the borough. By decision of the electors, the NSB has also taken from municipal councils in the region all of their powers listed in Appendix C except the following:

harbours, wharves and other marine facilities
watercourse and flood control facilities
cemeteries
cold storage plants
community centres
recreation facilities
fire protection
consumer protection
parking

The WARM council would not displace community governments or directly intervene in the exercise of their *powers.* Its role would be to coordinate their activities. Indirectly however, WARM would likely have considerable influence over community government activities through its administrative control of central government programs and funds.

(v) Police Services

The NSB police force enforces NSB and community government ordinances and by-laws. The NSB does not appear to have authority over corrections programs.

WARM's police force would enforce all laws in the region, and with the agreement of other levels of government, the WARM council could develop and administer corrections programs in the region.

(vi) Taxation and Business Licensing

Prudhoe Bay oil and gas development is the main source of revenue both for the state government of Alaska and the NSB. As owner of the land and sea bed to the **3 mile** limit, the state takes the bulk of its revenues from this region in the form of royalties. As well, the state reserves to itself 90 percent of the property tax base on development in the region, which has a current assessment value of approximately $12 billion U.S. State legislation tightly controls the levels of use and property tax imposed by the NSB. Nevertheless, the tax base left to the NSB has made it extremely wealthy, far wealthier than any other rural region of Alaska. NSB expenditures in **1982** amounted to approximately **$90** million U.S.

The NSB may also impose sales tax. All taxes collected within city boundaries must be fully returned to the city.

When the borough first imposed taxes on the oil and gas companies in the region, the companies challenged the borough's taxation authority in court and lost. The state has since imposed rate limits on borough taxes, but the limits are generous. They do not achieve the state's desire to spread the tax revenues from Prudhoe Bay throughout the unorganized regions in Alaska.

It is not clear whether WARM's real property taxation power would extend offshore or within community government boundaries. The WARM proposal leaves sales tax in the hands of the territorial government. Like the NSB's taxation powers, the proposal to give WARM the power to tax real property in the Canadian Beaufort Sea appears designed to give the regional government a large measure of autonomy in the financial as well as the legislative sphere.

(vii) Zoning and Land Use Control

The NSB's land use plan has been referred to as "the most comprehensive aboriginal planning and management scheme in the word" (Jull, February 15, 1985). The borough encountered strong opposition from industry in the early

stages of development of the plan and zoning laws. Two or three versions were shelved out of concern that they would be vetoed by the state government, before a comprehensive plan and zoning laws were enacted in early 1983.

The North Slope comprehensive plan makes subsistence land use the priority use in the region. To accommodate the ccmpeting interests of subsistence users and the oil and gas industry, a unique permitting system has been introduced under the zoning laws. No uses are prohibited in any zone. Instead, principles prohibiting or guarding against the impacts of various uses apply. Borough decision makers have considerable discretion whether to approve or disapprove a project, The plan and zoning laws do not displace federal and state laws governing development in the region, but they add a third set of standards that must be satisfied before development can proceed.

Industry alleged early in the development of these laws that they were beyond the borough's authority, but the enacted versions have not been tested in court to date. In practise, NSB standards are being incorporated into the state and federal land use regimes. When this process is complete, consistency between jurisdictions will "be ensured and the legislative basis for NSB standards will be secure.

The WARM proposal does not include specific powers over land use planning and zoning. However, as these powers are generally considered to be municipal powers, it appears likely that the WARM council eventually would propose the delegation of these powers to WARM.

(viii) Health Services

General authority over health services and hospital facilities is one of the powers assumed by the NSB through a decision . of its electors.

The Inuvialuit have identified health services as an area of authority for which WARM may negotiate with the federal government in the future.

(ix) Future Powers

Like the WARM proposal, legislation establishing home rule boroughs in Alaska empowers them to take on further powers of the state or federal government by agreement.

5. ADMINISTRATIVE ROLE

The NSB administers programs in the areas of its legislative authority. With its large tax base, the NSB has been able to implement ambitious capital projects and education and cultural programs. The NSB dces

not have express authority to administer state and federal programs, although it may do so by agreement with either government.

While operating within a narrower scope of legislative authority> the WARM council's administrative role would resemble that of the NSB . WARM would have the capacity to enter into agreements to administer territorial and federal programs at the regional level.

6. CONSTITUTIONAL STATUS

The Alaska state constitution empowers the state legislature to establish and abolish borough governments, expand or decrease their powers, and prohibit the exercise of any of their powers in whole or in part.

While the Inuvialuit have proposed that WARM be established under territorial legislation and subject to similar control by the central government's legislature, their long term objective appears to be the constitutional entrenchment of the structure and powers of WARM. After such entrenchment, the WARM constitution could not be changed without Inuvialuit consent, though WARM ordinances would always be subject to disallowance if inconsistent with territorial legislation.

7. RELATIONSHIP TO COMMUNITY GOVERNMENT

With the exception of the Barrow City Council, community governments were not well established in the North Slope when borough government was introduced. With the introduction of the home rule borough government, the Barrow council is likely to be the only community government that will continue to *exercise* significant power in the region. Further, there is no ward system in place for borough government elections, with the result that many of the small villages in the region go practically unrepresented on the borough council.

Although the WARM council would not displace community governments, * its relationship to them resembles that of the NSB in other respects. While *every* community in WARM is guaranteed a seat on the WARM council, councillors are elected generally, and community councils themselves are not guaranteed representation in the regional government. Like the NSB, the WARM council would have a *great* deal of influence over the spending of government funds in communities.

8. CONCLUSION

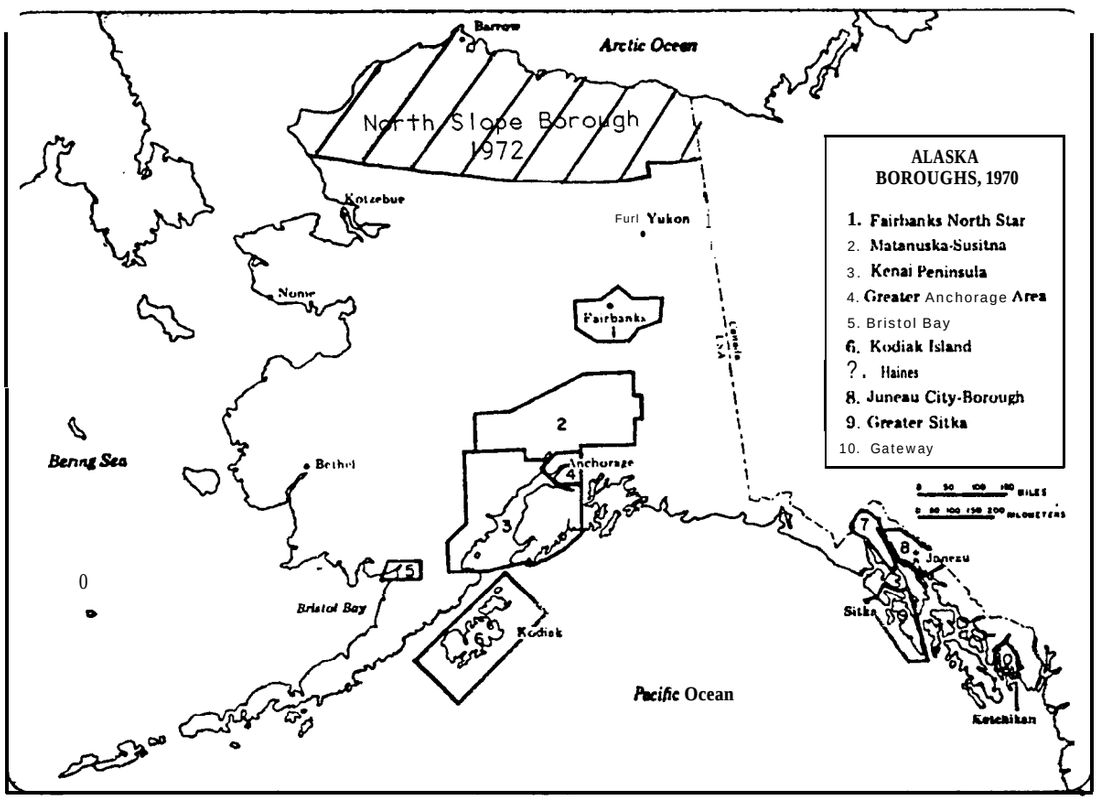
In the North Slope Borough and proposed Western Arctic Regional Municipality, aboriginal peoples have adapted a public, regional form of government to serve the goal of aboriginal self-government. Each model provides an exceptional degree of autonomy to a regional government exercising delegated powers. The NSB virtually displaces local

governments and exercises education and land management powers almost independently of the state government. WARM would play a largely administrative role in local government and education but would have greater independence from central government than that of the NSB in the areas of economic development, game management and police services.

Analysts say that the success of the NSB to date is due more to extraordinary leadership and a huge resource base than to the structure and powers of the borough government. (Jull, McBeath). In 1985 it seems unlikely that the Canadian Beaufort Sea development which would serve as the tax base for WARM will some day reach the scale of Prudhoe Bay development. WARM might be expected to rely more heavily on program and funding agreements with the other levels of government than has the NSB. In any event, the structure and powers proposed for WARM appear designed to give the Inuvialuit a degree of autonomy and self-sufficiency similar to that of the Alaskan Inupiat should the opportunity arise.

APPENDIX A

FIGURE 3-1 ALASKA BOROUGHS



Sources: McBeath & Morehouse, The Dynamics of Native Self-Government, 1980

North Slope Borough Assembly; North Slope Borough, Alaska, General Information and Economic Factors, July, 1976

APPENDIX B

Sec. 29.13.100. Limitation of home rule powers. Only the following provisions of this title apply to home rule municipalities as prohibitions on acting otherwise than as provided. They supersede existing and prohibit future home rule enactments that provide otherwise:

(1) AS 29.13.080 (charter amendment)
(2) AS 29.18.140 (borough transition)
(3) AS 29.23.021 (borough assembly composition and apportionment), and AS 29.23.040 - 29.23.050 (borough assembly members)
(4) AS 29.23.250(a) (election and term of mayor)
(5) AS 29.23.540 (prohibitions respecting appointment and removal of personnel)
(6) AS **29.23.56o** (municipal reports)
(7) AS 29.23.580 (meetings public)
(8) AS 29.28 .010, 29.28.020(b) - 29.28.030 (municipal elections)
(9) AS 29.28.130 - 29.28.250 (recall)
(10) AS 29.33.010(b) (areawide borough powers)
(11) AS 29.33.290(c) (acquisition of additional areawide powers)
(12) AS 29.43.020 - 29.43.o4o (powers of cities outside boroughs)
(13) AS 29.48.033 (garbage and solid waste services)
(14) AS 29.48.035(b) (effect of areawide exercise of borough power)
(15) AS 29.48.035(c) (borough building code jurisdiction within cities)
(16) AS 29.48.037 (extraterritorial jurisdiction)
(17) AS 29.48.040 - 29.48.100 (utilities)
(18) AS 29.48.180 (codification)
(19) (Repealed, § 8 ch 147 SLA 1972.)
(20) AS 29.48.210 (expenditure of borough revenue)
(21) AS 29.48.220 (post audit)
(22) AS 29.53.010 - 29.53.400 (borough and city property taxes)
(23) AS 29.53.415(d) (interest on sales tax)
(24) AS 29.58.180(b) (security for bonds)
(25) AS 29.58.315 (bond attorneys, bond and financial consultants)
(26) AS29.68.010 (annexation and exclusion)
(27) AS 29.68.030 - 29.68.110 (merger and consolidation)
(28) AS 29.68.500 -29.68.580 (dissolution)
(29) AS 29.73.020 (eminent domain)
(30) AS 29.73.030 (adverse possession)
(31) AS 29.73.040 (taxation of municipalities)
(32) AS 29.73.050 (municipal name changes)
(33) AS 29.23.555 (conflict of interest)
(34) AS **29.33.050,** AS 29.41.010(a), AS 14.12.020(a) (responsibility for education on military reservations)
(35) AS 29.58.345 - 29.58.350 (bonded debt for school construction)
(36) AS 29.63.065 (exemption from special assessment)
(37) AS 29.33.090(d) (zoning of state land for homesite entry)
(38) AS 29.48.130(a)(12) (municipal exemption on contractor bond requirements)
(39) AS 29.33.150(b) (applicability of local platting regulations to state land in a municipality)
(40) AS 29.23.060(c) (expulsion of borough assemblyman)
(41) AS 29.23.130(f) (removal of borough mayor from office)
(42) AS 29.23,210(b) (expulsion of city councilman from office)
(43) AS 29.23.255 (removal of mayor from office)
(44) AS 29.28.050(f) (expulsion, removal from office)
(45) AS 29.73.070 (taxpayer notice)
(46) AS 29.88.010 - 29.88.045 (municipal tax resource equalization assistance)
(47) AS 29.89.010 - 29.89.100 (state aid for miscellaneous municipal services) (§ 2 ch 118 SLA 1972; am §§ 2.8 ch 147 SLA 1972; am)

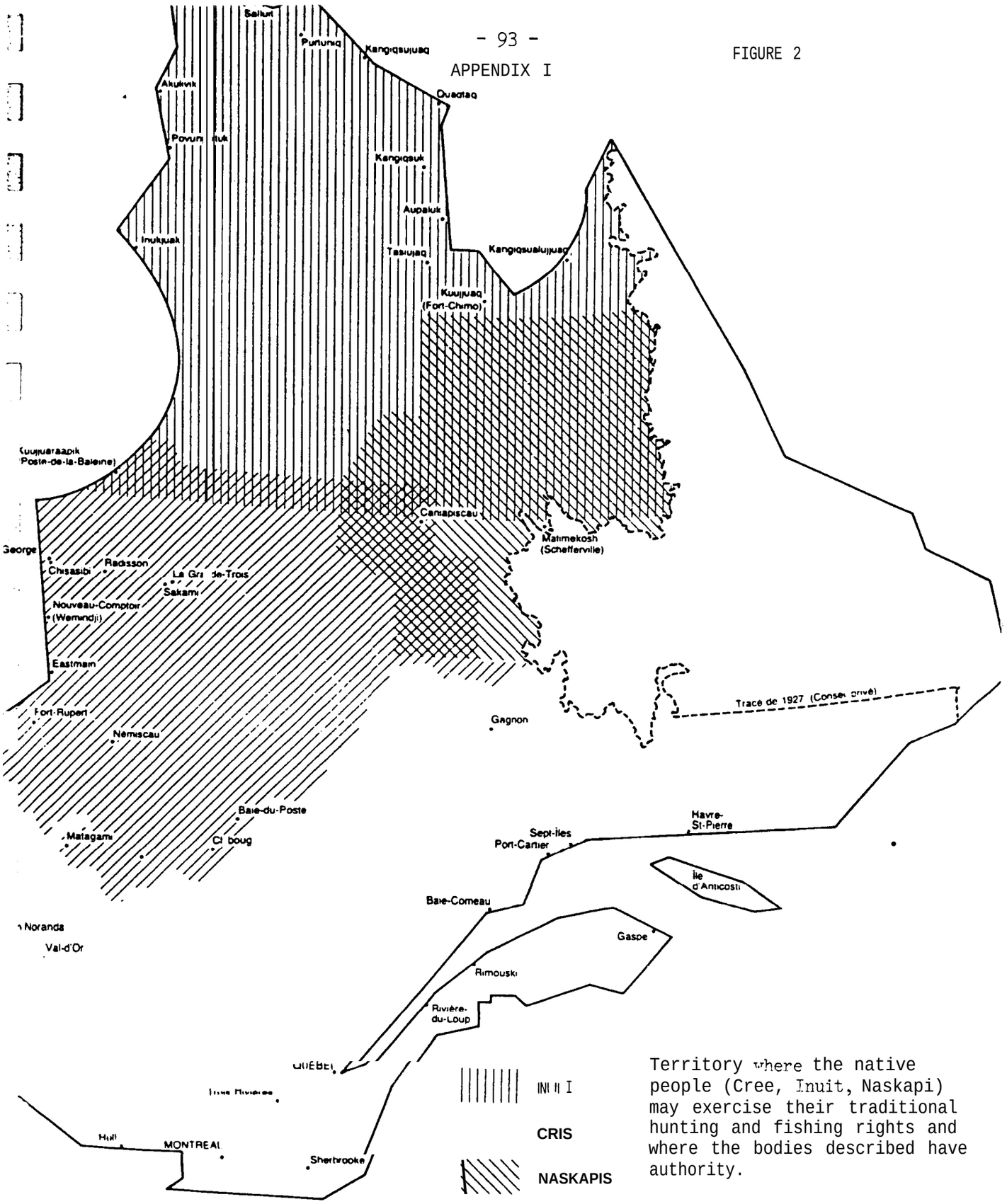
APPENDIX C

Sec. 29.48.030. Municipal facilities and services. (a) A municipality may exercise the powers necessary to provide the following public facilities and services:

(1) streets and sidewalks;
(2) sewers and sewage treatment facilities;
(3) harbors, wharves, and other marine facilities;
(4) watercourse and flood control facilities;
(5) health services and hospital facilities;
(6) cemeteries;
(7) police protection and jail facilities;
(8) cold storage plants;
(9) telephone systems;
(10) light, power and heat;
(11) water;
(12) transportation systems;
(13) community centers;
(14) libraries, visual or performing arts centers, or museums;
(15) recreation facilities;
(16) airport and aviation facilities;
(17) garbage and solid-waste collection and disposal service and facilities subject to AS 29.48.033;
(18) fire protection service and facilities, not in conflict with AS **18.70.075,** but not limited to AS 18.70.075;
(19) parking and parking facilities;
(20) housing and urban renewal, rehabilitation and development
(21) preservation, maintenance and protection of historic sites, buildings and monuments;
(22) consumer protection;
(23) emergency medical services and facilities.

APPENDIX I

FIGURE 2



Territory where the native people (Cree, Inuit, Naskapi) may exercise their traditional hunting and fishing rights and where the bodies described have authority.

Source: " The Cree Indians and the Development of the James Bay Territory "

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REGIONAL GOVERNMENT IN NORTHERN QUEBEC AND THE BEAUFORT SEA REGION: A COMPARISON OF THE KATIVIK REGIONAL GOVERNMENT AND THE PROPOSED WESTERN ARCTIC REGIONAL MUNICIPALITY

June 19, 1985

This paper is for discussion purposes only. None of the views expressed herein knowingly represent the views of the WCF or any of its Members.

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1. INTRODUCTION

This paper follows upon "Inuvialuit Self-Government in a Western Territory", a discussion of the prospects for accommodating Inuvialuit self-government in the western N.W.T. Here, the Kativik Regional Government (KRG) established in Northern Quebec under the James Bay land claims agreement is compared to the Western Arctic Regional Municipality (WARM) proposed by the Inuvialuit in the Beaufort Sea region.

2. BACKGROUND

The jurisdiction of the KRG encompasses approximately 190,000 square miles of Northern Quebec. The 5000 Inuit living in fifteen communities in the region make up more than 80% of its population. The James Bay Hydro project is the sole form of large-scale industrial development in the region. The other native parties to the James Bay Agreement are the Cree and Naskapi who live to the south and east of the Quebec Inuit. The institutions of Cree and Naskapi local and regional government established under the James Bay Agreement are not discussed in this paper. A map of the area of Kativik jurisdiction and the other areas subject to the James Bay Agreement is attached as Appendix 1.

The jurisdiction proposed for WARM covers approximately 115,000 square miles of the sea and land in the Beaufort Sea region of the Northwest Territories. Two thousand Inuvialuit make up at least 90% of the population of the 5 communities in the region, whose boundaries are drawn to exclude the town of Inuvik and its approximately 1500 non-Inuvialuit residents.

3. PURPOSE

The James Bay Agreement was negotiated between 1974 and 1976, before the government of Canada had endorsed the concept of aboriginal self-government. The Northern Quebec Inuit demanded that negotiations of regional government institutions 'be based on the principle of regional autonomy, but government did not fully accept the principle. The result is an institution which is partly autonomous and partly a means of involving the Inuit in the regional administration of provincial government laws and programs. In his presentation of the agreement to the province's Standing Committee on Legislation, the negotiator for the province of Quebec characterized the KRG as an "administration . . . a novel instrument suited to the conditions of the region . . . through (which) 13 municipalities will answer to the Ministry (of Municipal Affairs). Speaking to the Quebec Legislative Assembly in 1983, several Northern Quebec Inuit leaders expressed satisfaction with certain powers of the KRG, in areas such as education. At the same time, however, the leaders argued that the funding and powers of the KRG must be increased. "As it is now perceived", explained Mark Gordon, Vice-President of the Kativik Corporation, "(the KRG) is merely an administrative link between us and the bureaucracy in the South."

In the years since 1976, inadequate funding of the KRG has rendered it ineffective as a decision maker of any kind. No legislation has been enacted. The Makivik Corporation, a not-for-profit corporation created for economic development purposes under the James Bay Agreement, has stepped in to act as the primary Inuit political institution in the region. The Northern Quebec Inuit are currently reviewing the legislation creating the KRG with a view to transforming the institution into a stronger vehicle for self-government. With encouragement from the Premier who in 1983 endorsed the principle of regional autonomy for the Northern Quebec Inuit, the Northern Quebec Inuit Association is working on a specific proposal for realizing aboriginal self-government. The proposal has not been tabled, but it appears likely that a public regional government will remain the principal institution, with greater powers than those of the KRG, a larger and more flexible budget, and possibly a right to share in provincial revenues from hydro-electric development in the region. As well, the Inuit have proposed that electoral boundaries in the province be redrawn to effectively guarantee the Cree and Inuit one seat in the provincial Legislative Assembly.

Given the inactivity of the KRG, it can only be compared to the WARM proposal as another theoretical model of regional government. That is the approach taken in this paper.

Like the WARM proposal, the constitution of the KRG preserves the principle of "one person, one vote". Through their relative strength of numbers, Inuit residents in the region hold a secure balance of power within the KRG. The scope of legislative power of the KRG resembles that of WARM, with the exception that the KRG is delegated land use and zoning authority not yet available to a delegate of the Government of the NWT. In exercising its authority, however, the KRG is subject to broad powers of approval and disallowance exercised by provincial Ministers. With respect to the exercise of its powers, WARM is relatively free of ties to its parent government.

4. LEGISLATIVE POWERS

(a) Nature

Legislation of the KRG that applies within municipal boundaries (ordinances) stands unless disallowed for any reason by the provincial cabinet within 90 days. KRG by-laws, which apply outside municipal boundaries, have no effect unless approved by the provincial Minister responsible. KRG by-laws governing harvesting practices on Inuit lands are an exception - these stand unless disallowed by the Minister within 90 days.

It appears clear that the Minister cannot initiate a decision or substitute his own for that of the KRG with respect to a matter within the KRG's competence. It is less clear whether the provincial Assembly can do what the Minister cannot, bypassinglegislation inconsistent with KRG enactments. The section in the James Bay Agreement prohibiting changes to the constitution of the KRG

without native consent would appear to guard against such measures, but it might be argued that this provision does not extend to inconsistent legislation in a particular instance.

Ordinances of WARM stand unless they are inconsistent with territorial legislation and are disallowed by the Commissioner. In this respect it is fair to say that WARM would be considerably more independent of the central level of government than is the KRG.

In the following section the legislative powers of the KRG are compared to those proposed for WARM.

(b) Subject Matter

The paper entitled "Inuvialuit Self-Government in a Western Territory" noted in the introduction to this paper points out difficulties in interpreting some of the powers proposed for WARM. In the following comparison the interpretations suggested in "Inuvialuit Self-Government in a Western Territory" are followed.

(i) Game Management

After consulting with the joint Wildlife Management Committee set up under the James Bay Agreement, the KRG may pass by-laws to regulate Inuit and non-Inuit methods, locations, and seasons etc. of harvesting on lands on which the Inuit have the exclusive right to harvest (20% of the lands in the region). Further, municipal corporations may delegate to the KRG powers to set local quotas, to protect the health of wildlife populations, to designate species requiring protection, to identify the measures necessary for protection, and to regulate the conduct of wildlife research, so long as these by-laws are more restrictive than provincial and federal laws.

The KRG also administers the Inuit harvesters security program set up under the Agreement.

In comparison, the regulatory powers of WARM over wildlife management would extend throughout the settlement area, and would leave regulation of the exercise of aboriginal harvesting rights to local Inuvialuit committees.

(ii) Education

Under the James Bay Agreement, Inuit involvement in education is provided through a regional school board. The KRG may appoint 1 representative to the board and its executive committee. Other board members are selected by municipal councils in the region. Subject to the provincial Minister's powers of disallowance, the Kativik School Board may make ordinances to develop curriculum, select course materials and establish teaching programs within standards set by

provincial law. The Kativik School Board is in operation, but Inuit leaders say that funding shortages have prevented the Board from taking the initiatives necessary to establish suitable Inuit programming.

Under the WARM model, the regional government itself would have at least the authority held by the Kativik School Board. It is not clear to what extent WARM's education standards would be subject to territorial laws. The WARM council would also have authority to establish schools.

(iii) Economic Development

The KRG has little control over its own spending priorities and no distinct authority over economic development per se. The federal and provincial governments, however, are required under the James Bay Agreement to devolve as much administrative control as possible over their Inuit economic development programs to the KRG and municipal councils. The KRG formally advises both governments on measures to involve the Inuit in natural resource development and related Inuit staffing and training. In particular, the KRG advises on government assistance to Inuit enterpreneurs wishing to become involved in mineral exploration and prospecting. The KRG is also guaranteed involvement in government studies of the transportation infrastructure necessary for economic development in the region.

WARM would have direct authority to plan for and engage in project development and to provide for training opportunities, incentive programs and other support measures for economic development in the region.

(iv) Local Government

The KRG role goes beyond co-ordination of local government activities to advising on the conduct of elections, conciliating disputes over contested elections, violation of community by-laws, and the validity of such by-laws, and advising on community budgets. The KRG may make community council decisions where a majority of council members are in a conflict of interest. Community governments may delegate administrative authority over local matters to the KRG. The KRG is empowered to make ordinances applicable within community government boundaries, for minimum standards respecting public hygiene, water pollution, sewerage, buildings, road construction, public transportation and communications. The KRG has joint authority with community governments to allocate the number of housing units available from the provincial government, within the region.

The WARM council would promote the concerns of community governments, mediate their relationship with other levels of government, and co-ordinate their activities in relation to municipal services and the other areas of WARM jurisdiction.

It is not clear to what extent WARM's "coordinating" function would involve administrative control over local government programs and services with respect to community government legislation. WARM would not have authority to intervene in community government decisions: in this sense the direct link that now exists between community government and the Territorial Minister would remain intact.

(v) Police Services

The authority of the KRG's police force would be limited to enforcement of community by-laws and regional government by-laws and ordinances. The KRG would also advise the provincial government on staffing, training and programs related to corrections and court services.

WARM's authority would appear to include power to establish a police force to enforce all laws in the region, and, if the other levels of government agree, to administer certain corrections programs.

(vi) Real Property Taxation and Business Licensing

The KRG's taxation and business licensing powers apply only outside municipal boundaries and do not extend offshore. The tax base of the KRG is not large enough to finance the preparation of an assessment role, and its taxation power has not yet been exercised.

WARM's taxing and licensing powers would be similar to those of the KRG, although it is not clear whether WARM's authority would apply to the offshore or within municipal boundaries. The Inuvialuit appear to assume that WARM'S tax base will be large enough to fund a sizeable portion of WARM's budget.

(vii) Zoning and Land Use Control

The KRG holds a distinct set of powers over land use by virtue of its status as a municipal corporation for lands in the region outside community boundaries. By-laws exercising these powers must be approved by the provincial Minister responsible in order to have effect. Although the scope of these powers falls short of the scope of the federal government's land use authority over federal Crown lands, by-laws approved by the provincial Minister would have a significant measure of influence over land use in the region. The subject matter of this authority is as follows:

- public security, including public safety standards and control of blasting and firearms
- public health and hygiene, including control of water pollution and waste disposal, and control of smoke, gas and other effluents

– land use planning, zoning and subdivision control (plans and zoning by-laws are binding on developers)

- traffic and transportation - regulation of the transportation of noxious or dangerous substances, and harbours.

The KRG is also involved in advising the provincial and federal governments in matters relating to environmental protection and land development, through five other institutions set up under the James Bay Agreement, as follows:

1) An environmental quality commission advises the Deputy Minister of Environment for Quebec on approval of development projects in the region. Four of its 9 members are KRG appointees, of which 2 must be resident Inuit.

2) Two of the 4 members of the screening committee which recommends to the Federal Minister of Environment whether developers should submit impact statements, are KRG appointees.

3) Two of the 5 members of the review panel which recommends to the federal Minister whether a project should proceed, are KRG appointees, who must be native people or representatives of native people.

4) An environmental advisory committee advises all levels of government in the region on all of their laws and regulations relating to environmental protection and socio-economic impact. Three of this committee's 9 members are KRG appointees.

5) The KRG is also guaranteed involvement in a regional development council set up to advise the provincial government on development in the region.

Legislative power over zoning and land use control has not been proposed specifically for WARM, probably because the Government of the NWT does not yet possess this authority itself. Zoning and land use authority is generally considered to be a municipal power and may be negotiated for WARM in the future. As yet, no formal relationship has been proposed between WARM and the regional institutions set up under the Inuvialuit land claims agreement to advise government on land use planning and environmental screening and review.

(viii) Health and Social Services

The KRG acts as health and social services council in the region. The council has general authority to promote public health in the region, and to regulate and supervise the election of members to the boards of other health and social services establishments in the region. The KRG may appoint 1 member each to the boards of such establishments.

The Inuvialuit have identified health services as an area of authority for which WARM may negotiate with the federal government in the future.

5. ADMINISTRATIVE ROLE

A major part of the KRG's by-law and ordinance - making authority involves administrative and program functions. This is so in the case of the KRG role in economic development, local government, and health and social services, and of the Kativik School Board's role in education. In these areas, the KRG has various degrees of control over the delivery of provincial and federal government programs and services in the region.

While WARM's authority would be mainly administrative in the areas of local government and education, its legislative authority exceeds that of the KRG with respect to game management, police services and economic development.

6. RELATIONSHIP TO COMMUNITY GOVERNMENTS

The KRG council is made up of 1 councillor from each of the municipal councils in the region. WARM councillors would be elected directly in communities.

The KRG would monitor community government procedures and establish minimum standards for community government by-laws. The KRG's direct involvement in community government matters appears designed to ensure that municipal councils in the region operate according to common standards acceptable to the provincial government.

Like the KRG, the WARM council would co-ordinate community government functions, but the WARM council would not be directly involved in community government decision-making. WARM would have considerable influence over the availability of central government programs and funding to communities, but would not play a role in the community government legislative process. Power to approve of disallow municipal by-laws would remain in the Territorial executive. Current legislation governing municipalities in the NWT does not impose minimum standards on community government legislation of the kind envisaged in the James Bay Agreement.

7. CONSTITUTIONAL STATUS

Although its ordinances and by-laws are subject to review by the provincial Minister, the structure and powers of the KRG are constitutionally entrenched and can net be changed without the consent of the James Bay Inuit. This is the combined effect of the James Bay Agreement, section 13.0.3, which prohibits changes to the KRG without native consent, and

section 35 of the Constitution Act, which recognizes and affirms treaty rights, including rights contained in modern land claims agreements. Given that delegated powers are generally subject to inconsistent legislation of the parent authority, there is some question whether these provisions fully protect the Inuit against erosion of KRG authority by inconsistent provincial legislation.

The WARM proposal is currently in the form of a draft ordinance of the N.W.T. Legislative Assembly, but it appears to be the intention of the Inuvialuit that the structure and powers of WARM will be constitutionally entrenched and not subject to change without Inuvialuit consent. The Commissioner would retain the authority to disallow WARM ordinances if they were inconsistent with Territorial ordinances. The Inuvialuit probably assume that the Territorial Assembly could not apply inconsistent legislation to them which effectively undermines the authority held by WARM at the time its powers were constitutionally entrenched.

8. CONCLUSION

The Kativik Regional Council appears to have been conceived as a municipal government responsible for the administration of a vast region outside community government boundaries, and for the supervision of community government proceedings. In this respect the KRG was designed as an extension of provincial government authority as much as a form of aboriginal government. The extension of standard municipal zoning and land use powers to a regional government such as the KRG has interesting implications, including the potential (realized in the case of the Alaska North Slope Borough) to establish priorities for the use of critical resources that reflect regional values first. Unfortunately, inadequate funding and the absense of a substantial tax base have rendered the KRG ineffective, and the Inuit of Northern Quebec continue to seek a form of regional government that will serve their needs and aspirations. The frustrations of the Northern Quebec Inuit underline the importance of resources and related issues such as land ownership, taxation authority, cost-sharing, revenue-sharing, and budget control, to the successful functioning of regional government.

While the Inuit of Northern Quebec are conscious of the need to be represented in their provincial Assembly, their relatively tiny population has lead them naturally to adopt regional autonomy as the basis for self-government. In contrast, the Inuvialuit enjoy a relatively large share of the voting population in the western NWT and share common interests with the larger Dene/Metis population in the territory. Central government reform would appear to be a realistic alternative to regional autonomy as a means of Inuvialuit self-government. In the WARM proposal, the Inuvialuit have clearly opted for the regional approach. While WARM would exercise a range of powers similar to those of the KRG, WARM would have considerably greater freedom from central government supervision in the exercise of its powers.

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MUNICIPAL GOVERNMENT AND LAND WITHIN MUNICIPAL BOUNDARIES

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The Western Constitutional Forum

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INTRODUCTION

Included among the objectives of aboriginal people are a means for self determination and control over land and activities on land. The activities on land include essential hunting, trapping, fishing and gathering activities and the more modern activities of oil and gas exploration and development.

The Federal Government has to date retained control over land and activities on land by virtue of being the principle land owner and by not being subject to Territorial legislation. With the constitutional development now underway in the North and land claims settlements under discussion, various models for control over land and activities on land are under consideration.

This paper examines how the traditional municipal form of government can contribute to self-determination and local control over land and activities, and in what ways it falls short.

This paper also addresses how a 'municipal' level of government can relate to other levels of government and will discuss some potential advantages and disadvantages to the 'municipal' approach.

* * * *

Parts 1 to 3 of the paper give a brief overview of the "usual" municipal government, and its powers, particularly with respect to land.

Part 4 of the paper discusses various potential models for aboriginal government and the issues that arise when aboriginal government or aboriginal corporations interface with Federal, Territorial and other Municipal governments.

Throughout this paper references are made to an "aboriginal government" and "aboriginal corporation".

The term "aboriginal government" is intended to convey the concept of a form of government run by and for aboriginal people.

The term "aboriginal corporation" is used to denote a corporation controlled by and operated for aboriginal people.

The concepts of "aboriginal government" and "aboriginal corporations" are taken largely from Steve Iveson's paper entitled "Several Ways to Interface Aboriginal Self Government with Public Government in the Western Northwest Territories" (May 1985).

* * * *

PART I

BACKGROUND

(a) History

The origin of the municipal form of government can be traced to Roman law. It was initially developed in England largely for the benefit of wealthy land owners and later for the purpose of establishing an entity to administer local affairs. Local government was ultimately achieved by the election of local councils elected by and from the residents of the municipality at large.

Municipal government was introduced in Canada in the middle of the 19th century. The first real "Municipal Act" was passed in 1849.

Municipal corporations were first established, both in England and in Canada, by a grant of "Letters Patent" (a form of Royal Charter). The grant of a charter established a separate legal entity which could sue, make contracts and generally do most things that a corporation could do. Some of the older Canadian cities originally received their charters from the Crown. Others were established or continued as a result of legislation specifically establishing and regulating their affairs (e.g. the City of Vancouver; City of Lloydminster) but these are now exceptions to the general trend.

More commonly some form of "Municipal Government" Act is passed under which new municipal governments are established and as a result of which the municipal government obtains power to pass by-laws and govern the municipality. The Act also regulates and limits the matters in which a municipal government can become involved.

(b) Authority to Make Law About Municipal Government

In the Provinces, the authority of Provincial Legislatures to make laws respecting municipal governments is based on section 92 of the Constitution Act, 1867 which reads in part:

> 92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subject next herein-after enumerated; that is to say, -
>
> 8. Municipal Institutions in the Province.
>
> 9. Shop, Saloon, Tavern, Auctioneer and other licences in order to raise revenues for Provincial, Local, or Municipal purposes.

13. Property and civil rights in the Province.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matters coming within any of the Classes of Subject enumerated in this Section.

16. Generally all Matters of a merely local or private nature in the Province.

These provisions form the legislative authority for Provincial Legislatures to make law about municipal governments.

In the Northwest Territories, using its authority to make provision for the administration, peace, order and good government or "any territory not for the time being included in any Province" (Constitutional Act, 1871), 34-35 Vict., c. 28 (U.K.), the Parliament of Canada empowered the Commissioner of the Northwest Territories, acting by and with the advice and consent of the Council of the Territories (the Legislative Assembly), as follows:

13. The Commissioner in Council may, subject to this Act and any other Act of the Parliament of Canada, make ordinances for the government of the Northwest Territories in relation to the following classes of subjects, namely:

(a) direct taxation within the Territories in order to raise a revenue for territorial, municipal or local purposes;

(b) municipal institutions in the Territories, including local administrative districts, school districts, local improvement districts and irrigation districts;

(e) the licensing of any business, trade, calling, industry, employment or occupation in order to raise a revenue for territorial, municipal or local purposes;

(h) property and civil rights in the Territories;

(x) generally, all matters of a merely local or private nature in the Territories;

(y) the imposition of fines, penalties, imprisonment or other punishments in respect of-the violation of the provisions of any ordinance;

(Section 13 of the Northwest Territories Act)

These provisions form the legislative authority for the Territorial Legislative Assembly to enact the Municipal Act, the Planning Act and generally regulate the activities of municipal governments in the Northwest Territories .

PART 2

LIMITS ON MUNICIPAL POWERS

(a) General

The establishment of a municipal corporation does not of itself give the corporation any powers except those conferred by section 14 of the Interpretation Act, which applies to all corporations established by an Act or regulation in the Northwest Territories. Section 14 of the Interpretation Act reads:

> 14. Words in an enactment making a number of persons a corporation
>
> (a) vest in the corporation power to sue and be sued, to contract and be contracted with by its corporate name, to have a common seal and to alter or change it at pleasure, to have perpetual succession, to acquire and hold personal property or moveables for the purposes for which the corporation is constituted and to alienate the same at pleasure;
>
> (b) vest in a majority of the members of the corporation the power to bind the others by their acts; and
>
> (c) exempt from personal liability for its debts, obligations or acts such individual members of the corporation as do not contravene the provisions of the enactment incorporating them.

A municipal government is distinguished from other corporations because the municipal government can make law, in the form of by-laws, contravention of which can result in a fine or imprisonment. Subject to some exceptions, municipal by-laws are binding on land in the municipality and persons inhabiting or within municipal boundaries, and can be enforced through the courts.

The real authority of a municipal government and the limit on that authority is determined by looking at the legislation under which it is established or under which it exercises its authority.

In the Provinces the range of municipal power is considerable. Some municipal governments administer social programs, have joint jurisdiction with an education authority, own their own utility systems, operate gas wells and have extensive powers over land, planning and development in addition to the more traditional responsibility over garbage collection, sewage disposal and some health matters.

Generally speaking municipal governments have the power to own land and to acquire and dispose of it for municipal purposes. Control over the use and development of land in the municipality is commonly exercised through land use or zoning by-laws and represents a significant power over

the rights of individuals in respect of their own land. Use of the planning power can guide or prohibit certain kinds of land use or development as the municipal government wishes.

It is also common for municipal governments to be given the right to tax property and govern business licensing in the municipality.

While it is true that municipal governments often have a wide range of by-law making powers, it is important to remember that a municipal government can only do those things that legislation says it can do.

Some of the challenges in the North include "oil and gas development; mining; timber; tourism; rights of way; wildlife; environmental protection; agriculture" and the protection of hunting, fishing and trapping rights.

Generally speaking, in the Provinces, municipal governments do not have any or very limited control over the matters listed. This is because most of the issues are not solely "local issues", they affect land and activities outside municipal boundaries and so are generally legislated at a Provincial level. Another argument for Provincial control rather than local or municipal control is that natural resources are considered to be resources for the benefit of the whole Province rather than for the residents of the municipality in which the natural resource may be located. The benefit from the development of the "Provincial resource" is then spread across the Province rather than being confined to a particular municipality.

In considering the by-law making powers of aboriginal corporations, and the ownership of resources, consideration will need to be given to whether an aboriginal corporation should gain both ownership and control to the exclusion of other levels of government and for the benefit of aboriginal residents only, rather than residents of the Territories as a whole.

If boundaries of aboriginal governments are sufficiently large some of the subject matters considered to be "Provincial" may not need to be or perhaps should not be similarly categorized in the Territories.

A partial answer to some of these issues may lie in the establishment of Joint Management Agreements to deal with matters that are not solely "local" concerns. It may well be feasible to consider local by-law control being permitted subject to a regional or Territorial plan or policy, particularly when the aboriginal government has contributed to the development of the plan or policy.

As far as rights of way for roads, pipelines and powerlines are concerned clearly some concerns can be "Territorial" and others "local" concerns. While a Territorial perception may be to find the shortest pipeline route, a local concern may be for the impact on wildlife or local employment. There are no simple answers to these kinds of issues, nor dces the question "who has jurisdiction" resolve the real life issues.

While Provincial municipalities have limited powers over issues of particular concern in the North this is not to say that Northern municipalities should be similarly limited. An aboriginal government will have whatever powers that the legislation establishing it says it will have. Consequently aboriginal governments could be given by-law powers or powers of approval with respect to matters not traditionally thought of as "municipal" powers.

(b) Constitutional Limits

The Territorial Legislative Assembly can only give authority to a municipal government that the Legislative Assembly itself has under the Northwest Territories Act.

Section 14(1) of the Northwest Territories Act also says:

> 14.(1) Nothing in section 13 shall be construed to give the Commissioner in Council greater powers with respect to any class of subjects described therein than are given to legislatures of the Provinces of Canada under sections 92 and 95 of the Constitution Act, 1867, with respect to similar subjects therein described.

It is also of importance to keep in mind that the laws enacted by the Territorial Legislative Assembly are all "subject to" Acts of the Parliament of Canada.

In the Provinces there is considerable doubt as to whether the Parliament of Canada can delegate to a municipal corporation the power to make by-laws.

There is probably not a similarly strong objection to Federal delegation of by-law powers to municipal governments in the Northwest Territories, although the matter is not free from doubt.

(c) Geographic Limits

A municipal government may only make by-laws within the geographic area in respect of which it has responsibility. There may be exceptions to this basic rule but they are very limited and would apply, for example, to a facility that was owned and operated by the council outside municipal boundaries (e.g. a garbage dump). An aboriginal government may have jurisdiction outside "municipal boundaries" in some circumstances (see p. 21 "Other Aspects of Jurisdiction").

(d) Legal Challenge

A by-law is considered valid until a Court declares it to be invalid. Any by-law can be challenged on the basis that it is beyond the powers of the municipal government to enact. A municipal government may only do

those things that it is authorized to do by legislation and if a council purports to pass a by-law for which it has no statutory authority then the by-law can be challenged and declared invalid.

Even though a by-law is within the powers of the municipal government to enact it may still be found by a Court to be invalid if it conflicts with Territorial or Federal legislation. In that sense, by-laws are "inferior laws" and cannot be contrary to Territorial or Federal legislation. This rule applies unless there is legislative provision enacted by the appropriate legislative body (i.e. the Territorial Legislative Assembly; a Provincial Legislature or the Parliament of Canada) saying that the by-law will apply notwithstanding the Territorial, Provincial or Federal legislation, as the case may be.

In the Provinces, the question of conflict between a municipal by-law and a Provincial Act is usually resolved by a section along the following lines:

> "A by-law or resolution that is inconsistent with any Act in force in (the Province) or with the regulations made pursuant to such an Act has no validity in so far as it is so inconsistent."

In dealing with laws that are inconsistent with the Constitution of Canada section 52 of the Constitution Act, 1982 says:

> **52(1)** The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

The effect of this provision is that a court may apply the Constitution Act, 1867 - 1982 to declare that municipal by-laws inconsistent with the Constitution Acts are of no force and effect.

(e) When By-Laws are not Binding

Even though a by-law is properly made and it is within the powers of the municipal government to enact, there are circumstances when the by-law has no effect. These circumstances are described as follows:

(i) Crown in right of Canada

Municipal by-laws are not binding on the Crown in right of Canada.

The Federal and most Provincial Interpretation Acts contain a section saying that the Crown is not bound by an Act unless the Act says that the Crown is bound by the legislation.

In the Northwest Territories, section 13 of the Interpretation Act reads :

> **13.** "No provision of an enactment is binding on Her Majesty or affects Her Majesty's rights or prerogatives in any manner whatsoever unless it is expressly stated there in that Her Majesty is bound thereby.

(NOTE: British Columbia is a notable exception to the "usual" Provincial Interpretation Acts. The Interpretation Act of British Columbia binds the Crown in right of British Columbia unless the legislation says the Crown is not bound.)

The effect of the Federal and Territorial Interpretation Acts is that neither the Federal nor the Territorial governments are bound to comply with zoning or land use by-laws or to obtain municipal licences or permits or to comply with other municipal by-laws. In practice both Federal and Territorial Governments as a matter of policy may, and often do, comply with municipal by-laws.

(ii) Indian reserves

Municipal by-laws are not binding on Indian reserves because the Constitution Act, 1867 reserves the subject "Indians and lands reserved for Indians" as a subject that is exclusively within Federal jurisdiction. ("Lands reserved for Indians" does not include land in the Northwest Territories which DIAND "reserved" for future housing purposes. DIAND "reserved" land would be excluded from municipal by-laws on the basis of it being Crown land, although activities on it may be subject to municipal by-laws.)

(iii) Crown agents

The general rule is that an agency of the Crown is given the same protection as the Crown has itself and consequently Crown agencies and Territorial agencies are probably not bound by municipal by-laws. The exact answer will depend on the interpretation of the Act establishing the agency and the nature of the activity in which the agency is engaged.

(iv) Activities on Crown land

Municipal by-laws may sometimes apply to persons even though an activity occurs on Crown land. The issue here is not clear cut and depends on the legislation affecting the land and the activity on it.

One writer has put it this way:

By-laws regulating the use of land cannot bind the Crown or those occupants who derive their possessary interests from the Crown."

Rogers on The Law of Municipal Corporations
Vol 1 (2nd Edition) para 63.41

The Courts appear to take the view that if an activity engaged in by the Crown occurs on Crown land, a municipal government cannot regulate or control that activity by municipal by-law. However, if the person engaging in that activity on Crown land is not the Crown the activities in which he engages may well be subject to municipal by-laws because he does so in his personal capacity rather than as or as an agent for the Crown.

On this basis a business licensing by-law or building construction by-law may well apply to private individuals engaging in some activity on Crown land, but a land use or zoning by-law may not.

Regina v Concrete Column Clamps (1961) Ltd. (1972 1 OR 42) gives a number of examples of cases when Provincial legislation and by-laws were upheld even-though the activity took place on Crown land.

(v) Water

Water and the bed and shore of rivers, lakes and other bodies of water in the Northwest Territories are owned by the Crown in right of Canada. Municipal by-laws cannot directly affect water or the beds and shores of water bodies.

Section 3(1) of the Northern Inland Waters Act (RSC 1970, c. 28 (1st Suppl) reads in part:

"the property in and the right to the use and flow of all waters are for all purposes vested in Her Majesty in right of Canada"

Waters are defined in the Northern Inland Waters Act as

"waters in any river, stream, lake or other body of inland water on the surface or underground in the Yukon Territory and the Northwest Territories"

In the Provinces water and the beds and shores of rivers, lakes and other bodies of water are owned by the Province. Onwership was granted to the Province either when the Province became part of Canada or as a result of Natural Resources Transfer Agreements and confirming legislation.

The Provinces have control over diversion and use of water. The Federal Parliament retains some jurisdiction over navigable waters.

PART 3

LAND OWNERSHIP AND JURISDICTION OVER LAND

(a) What is "Land"

In legal terms "land" includes the earth and anything permanently affixed to the land or growing on it and would include the beds and shores of water bodies.

Unless there is an exclusion for mines and minerals, land includes everything above and below the surface of the land.

In the Northwest Territories most of the Territories is "Crown land". Crown land is divided between land that is administered by the Crown in right of Canada through a Federal Department and "Commissioner's land" which is still Crown land but the administration of it is transferred to the Commissioner of the Northwest Territories.

In practice, when Crown land is granted or transferred to another person the mines and minerals are excepted from the grant or transfer. Examples in the Northwest Territories include the transfer of land to the Commissioner's administration under the Block Land Transfer Program when mines and minerals are reserved to the Crown in right of Canada.

In the Provinces the practice of excepting mines and minerals from Provincial Crown grants is the same. A recent example in Alberta is the proposal to grant land to the eight Metis settlements in Alberta, but the Crown in right of Alberta will retain ownership of the mines and minerals.

A recent exception to the Crown retaining ownership of mines and minerals is the Inuvialuit Final Agreement which granted both land and mines and minerals in specified areas.

In connection with "land claims" section 25(b) of the Constitution Act, 1982 says

> 25 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
>
> (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

Section 25, of itself, does not give any rights to aboriginal peoples. Section 25 only says that the Charter of Rights and Freedoms does not "abrogate or derogate" from other rights and freedoms aboriginal people have.

Although the Charter of Rights and Freedoms cannot interfere with aboriginal rights, can other Federal, Provincial or Territorial legislation? The answer to this question depends on the degree of protection aboriginal rights have under section 35 of the Charter.

Section 35(1) reads:

"35(l) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

As a result of section 35(3) of the Charter, it is now clear that "treaty rights" include rights that exist through land claims agreements. If land claims agreements are "recognized and affirmed" and the Constitution of Canada, which is the supreme law recognizes and affirms those rights, then an argument can be made that any law inconsistent with aboriginal rights is of no force or affect by virtue of section 52 of the Constitution Act .

In any discussion of "land" it is important to distinguish between land being the surface of land and various rights to subsurface mines and minerals. While a municipal government may have the power to acquire and dispose of the "land", the question as to whether it has the right to mines and minerals under the land will depend on whether, when it acquires land, an exception for mines and minerals is noted on the title.

If an aboriginal government owns the land within its boundaries but the Crown owns the subsurface rights, under existing law in the Northwest Territories, the Crown may recover the mines and minerals or permit a lessee of its rights to do so, subject to Federal legislation. In this scenario the Crown or an agent of the Crown would not be bound by municipal by-laws but a non-Crown lessee would probably be bound by a "business licensing" by-law. (Assuming the by-law was drafted in a way which would cover the activities of the lessee.)

Compensation payable by the Crown or a lessee would be limited unless provisions similar to section 10 of the Inuvialuit Final Agreement were part of a new legislative regime.

(Section 10 of the COPE claim provides for a mini-surface rights compensation scheme with arbitration ultimately resolving disputes if agreement cannot be reached.)

(NOTE: While outside the scope of this Paper, the question of a comprehensive surface rights policy and compensation for surface rights disturbance is a significant issue. While arbitration boards provide an initial answer it may not be desirable to have several arbitration boards each issuing awards in varying amounts on the basis of different legislation or land claims agreements.)

(b) Ownership of Land

It is common for municipal governments to own land and to have authority to acquire land by purchasing or by leasing or licensing land from another person.

('c) Disposal of Land

It is also common for municipal governments to be able to dispose of land that they own either by an outright sale or by means of a short or long term lease.

(d) Jurisdiction Over Land

It is important to draw a clear distinction between the right of a municipal government to own land, in which case it may own and deal with it much like any other corporation or private individual, and the special powers a municipal government has to make laws in respect of that land as a result of the legislative authority that it has.

Perhaps the best example is to think of any "urban" municipality. Within municipal boundaries, land is owned by many different individuals, corporations and the municipal government. The municipal government has jurisdiction to make by-laws over all the land in the municipality, whether the municipal government actually owns the land or not. Jurisdiction to make by-laws is therefore not dependent on ownership and can be exercised irrespective of ownership.

Usually a municipal government has extensive powers over the use and development of land. This includes the use to which land may be put, traditionally referred to as "zoning" of land. Common examples include zoning for residential, commercial, agricultural or recreational purposes.

In addition to control over where various uses of land can take place in a municipality it is common for development to be regulated by by-law. So, for example, a municipal government may require a development permit to be obtained before any building is erected to ensure proper servicing, compliance with building codes and fire safety regulations. The regulation of development can be very complex or comparatively simple depending on the nature of the development and the degree to which the municipal government wishes to involve itself in the development of land or buildings.

Municipal governments do not usually have authority to regulate matters such as hunting, fishing and trapping on land within a municipality. This is a matter which is usually regulated by the Provincial Legislature or the Territorial Legislative Assembly. An example of a very limited municipal power in the Northwest Territories is included in section **183(2)** and **(3)** of the Municipal Act respecting the setting of traps within a municipality. It reads:

> (2) Notwithstanding the provisions of the Wildlife Act a council may make by-laws for prohibiting or controlling the setting of snares and traps in any area within the boundaries of the municipality.
>
> **(3)** Notwithstanding section 50 of the Wildlife Act, where a snare or trap is set contrary to a by-law made pursuant to subsection (2), the snare or trap may be removed and disposed of in the manner set out in the by-law.

(e) Other Aspects of Jurisdiction

The jurisdiction of an aboriginal government may well extend beyond land and should probably be considered from at least three respects, namely territory, persons and subject matter.

Jurisdiction over territory is the traditional municipal model and has been dealt with.

Jurisdiction over persons would involve whether a person was an aboriginal member or not and how that person might come to gain or lose membership in an aboriginal corporation or participate in aboriginal government.

Jurisdiction over subject matter might include how a member of an aboriginal corporation could dispose of any interest he or she had in aboriginal land or property. Jurisdiction in this case would extend beyond municipal boundaries.

These other jurisdictional aspects have particular application to aboriginal governments and to some degree apply to activities on and use of land.

(f) Taxation

In the Provinces it is usual for municipal governments to impose a tax on property. In addition, a "local improvement" charge can be levied on the owners of property benefitting from a particular improvement in a specific locality of a municipality.

In the Northwest Territories, cities, towns and villages all have the right to impose property taxes. In other areas the Commissioner may impose a property tax.

Section 125 of the Constitution Act, 1867 says:

> 125 No Lands or Property belonging to Canada or any Province shall be liable to taxation.

Despite this section, either as a matter of policy or as a matter of legislation, the Crown often pays grants in lieu of taxes which means in effect that the Crown pays the equivalent of property taxes in much the same way as any other person who owns or occupies land. (For example, the Municipal Grants Act (RSC 1970 c. M15) provides for Federal grants in lieu of taxes to certain municipal taxing authorities.)

The obligation of the Crown to pay grants in lieu of tax is of course dependent on the legislation governing the matter, or if there is no legislation, on the policy of the Crown involved.

If Crown land is granted to an aboriginal corporation, and the aboriginal corporation is exempted from paying municipal taxes, the municipality concerned ray lose a potentially valuable source of revenue.

The same kind of issue could theoretically arise if an aboriginal municipality were created on Crown land. As long as the Crown owns the land in the municipality it may be liable (at least by policy) to pay grants in lieu of property tax, (assuming the aboriginal government levies a property tax). If the land in the municipality were granted to an aboriginal corporation a potential source of grants in lieu of taxes would be lost.

As a final note to "taxation" I would mention that the assessment of land for property taxation purposes in the Provinces is sometimes a Provincial and sometimes a municipal responsibility. The result for the assessment of property are often prescribed Provincially although the assessors are sometimes municipally employed.

In the Northwest Territories assessment of land is carried out on a Territorial basis.

PART 4

LAND SET ASIDE FOR ABORIGINAL PEOPLES

This Part addresses some specific issues raised under the following general question.

> "What are the implications, vis a vis jurisdiction of a land that would arise should lands titled to aboriginal communities via claims settlements be administered by exclusive aboriginal municipal corporations ?"

The question is addressed by considering a number of "models" in relation to activities on land.

1. Model 1 - Both the land and the municipal government would belong to the same people, the institution which legally owns the land could be part of either the municipal corporation or a separate corporation.

(a) General

For the purpose of this discussion, it has been assumed that the aboriginal corporation and aboriginal government would be established as a result of Federal legislation rather than Territorial legislation. If the entities were established as the result of Territorial legislation a number of additional complications could arise which at this point in time are probably premature to consider. These "complications" would arise as a result of Territorial legislation being "subject to" Federal legislation.

The simplest scenario would be to envisage an area of land granted to an aboriginal government in which there exists no city, town, village or hamlet. If this scenario were fulfilled the major questions to be answered would be the extent of the powers given to the aboriginal government in the legislation which established it. If the aboriginal government owns the land it would be able to exert some degree of control over the use and activities on land as the owner of land. As an owner the aboriginal corporation could control activities with those who seek to use the land.

However, there are some significant weaknesses in controlling activities on land as an owner. Some examples of the pros and cons of ownership versus jurisdiction are outlined later.

In considering whether all the major challenges of oil and gas development, mining, timber, tourism, rights of way, wildlife, environmental protection and agriculture could be dealt with by agreements satisfactorily, the answer is clearly "no". Wildlife management and environmental protection could clearly not be governed by agreements alone.

A question that needs to be addressed is the degree to which an aboriginal corporation or aboriginal government may subsequently dispose of land that it obtains through a claims settlement.

Is the aboriginal corporation or aboriginal government to be free to dispose of the land in fee simple as soon as it acquires it, if it wishes to do so?

If it is to be so entitled but jurisdiction with respect to the area of land formerly owned is to be retained, than an aboriginal government with municipal-type powers would need to be established by legislation.

This illustrates the need to clearly distinguish whether an aboriginal corporation is to be given jurisdiction and ownership, jurisdiction only, or ownership only, because

(a) if land is owned (but no by-law making powers are given with respect to it) once the land is sold all rights and authority or control over that land are gone. (This scenario is "ownership only" and would not require aboriginal government.)

(b) if land is owned and by-law making powers are given with respect to the land, even if the land is sold the use of that land can be controlled through whatever by-law making powers are given to the aboriginal government. (This scenario is "ownership and jurisdiction".)

(c) if land is not owned by by-law making authority is given to an aboriginal government over an area of land, the ownership of the land does not affect the by-law making power. (This scenario is jurisdiction only.)

If an aboriginal government is established by Federal legislation the question of the application of Territorial law to the aboriginal government must be addressed. Unless some particular provision is included in the legislation it is likely that the general law of the Territories would apply to the aboriginal government although certain Territorial legislation* may not be applicable, depending on the grant of the land to the aboriginal government and the nature of the powers granted to the aboriginal government.

For example, the Territorial Expropriation Act would normally apply to any land in private ownership. If the aboriginal government does not have parituclar protection from the Expropriation Act then it is likely that that Act could apply to land owned by the aboriginal government, assuming of course that the stringent requirements for the expropriation were met.

Municipal governments in the Northwest Territories gain their authority from the Municipal Act, the Planning Act and a number of other Acts passed by the Legislative Assembly. If an aboriginal government only gains its authority from Federal legislation future problems may arise.

For example, if the Territorial Government decided to "devolve" to municipalities responsibility for health or social programs or control

over liquor, or provide them with a share of income tax, none of the aboriginal governments would necessarily gain from that decision unless:

(a) the aboriginal government had authority to receive delegated power from the Territorial government; or

(b) the Federal government passed legislation parallel to the Territorial legislation; or

(c) perhaps, there was some agreement between Federal and Territorial governments for "equality of treatment" for aboriginal governments and the municipal governments in the Territories.

(b) Land Ownership and Government in the Same Hands - No Saie of Land

If land and the aboriginal government belong to the same people and assuming land cannot be permanently disposed of, the need for "by-law" powers to control and regulate activities may be reduced in some respects but could not be totally eliminated. As owners, the aboriginal corporation could regulate many of the activities on its land by means of a series of contracts or agreements. The contracts or agreements would regulate activities in the same way that by-laws could regulate activities if the land were not owned by the aboriginal corporation.

Certainly care would be needed in drafting the contracts, particularly if the contract could be assigned to third parties, but with careful drafting, activities on aboriginal land could be regulated through a series of contractual arrangements.

Taking businesses as an example, in the "usual" municipality, a by-law will prohibit most businesses from starting Up in the municipality unless the businessman first obtains from the municipal government a business licence, pays the fee and meets whatever conditions are imposed under the by-law.

In its operation, the business in the "usual" municipality would have to comply with other by-laws (for example, comply with opening and closing hours; not change the nature of the business so as to conflict with zoning; garbage and health requirements, etc.).

If an aboriginal government owns the land all the things that are normally dealt with by by-law would be included in a form of contract or agreement. For example, a lease would grant the businessman the right to use land for a stated number of years; describe the business permitted; put conditions on how the business must operate (opening and closing hours, etc.).

S'ome Pros and Cons

If there are relatively few contracts a system of controlling land use and development through a contract system may be feasible. It allows for individual arrangements to suit particular needs.

In an active municipality with a considerable amount of development the sheer number of contracts may be a problem. If each contract is negotiable, flexibility may itself create a problem and lead to "favouritism" claims .

If something is "forgotten" in a contract the omission can only be remedied if both parties agree and the contract is amended. With by-law making powers, an amendment to a by-law can be made without the consent of the persons who may be affected by it (e.g. if the contract omitted to include opening and closing hours of the business, the contract could not be changed without the consent of both parties, whereas if a by-law could be passed, the by-law could regulate opening and closing hours without necessarily having the consent of those affected by it.)

There are other long term dangers in trying to control land use and development by contract. First is record keeping. Can the corporation physically keep track over the years of all the individual contracts?

Second is inconsistencies in the contracts. Even with the best of motives the contracts may well be inconsistent and will inevitably become inconsistent after several years.

Contracts a-bout land use can only properly address matters related to land and activities on land. They would not be able to address social issues that might need to be regulated as a result of a settlement being established and people working and living in the area with whom no contract could be entered into.

In addition, if the aboriginal government had no by-law making power other levels of Government may be able to regulate activities which are the subject of the contracts made by the aboriginal corporation. Without some guarantee of protection for its contractual arrangements the ability to regulate and control the use and activity over land by contract may prove illusory. The result then is that ownership does not necessarily mean control.

A major concern for an aboriginal corporation owning land but with no by-law making authority would be which government does have law-making authority and to what extent would the other level of Government interfere with the kinds of activities the aboriginal corporation wishes to encourage or control by contract or agreement. If the law-making cannot be exercised locally who will do it and how will it be exercised?

By-laws don't necessarily answer all these criticisms but do provide a means to correct outdated policies and law and address some social issues.

(c) Sale of Aboriginal Land Permitted

If aboriginal land, although belonging to an aboriginal corporation can be sold or disposed of by long term leases, it would be essential for the aboriginal government to have jurisdiction to make by-laws if it intended to retain any control over the land or activities on the land. This is so because once the land is sold the aboriginal government would have no legal right to say how it was used, the activities on it or anything else. Sale would strip the aboriginal government of any authority unless it had (by virtue of some legislative authority) the power to make by-laws over the use of the land even though it did not own it. Only slightly less of a problem is if the aboriginal government could dispose of land on very long term leases (e.g. 999 years).

(NOTE: It is outside the scope of this Discussion Paper but the question of the right of an aboriginal corporation or government to sell land becomes of significant importance if funds are ever needed to develop the land. Without some form of land security, lending institutions have traditionally been reluctant to lend substantial funds . While there may be ways around this difficulty the experience on Indian Reserves suggests that this is a matter which should not be underestimated if development requiring outside funding is likely in the foreseeable future.)

(d) Land and Government Separately Controlled

If an aboriginal corporation owns the land but an aboriginal government is established to control its use and other activities within the land area granted, then the aboriginal government would have to be given legislative powers to regulate and control the use of the land and activities on the land in much the same way as any other municipal government.

This model assumes that the land owning aboriginal corporation would be bound to comply with the by-laws of the aboriginal government. (It also assumes that the aboriginal government is given legislative authority to make by-laws in the "usual" manner.)

In this model the land-owning aboriginal corporation would be free to contract with other persons for the use and development of land but would have to do so subject to any by-laws of the aboriginal government. The effect of this model is to put the aboriginal corporation on the same footing as any land-owning corporation in a municipality.

So, for example, if the land-owning aboriginal corporation wanted to enter into an agreement with a business enterprise it could only do so if the business were located in an area zoned by the aboriginal government for the "business proposed, and the business would have to obtain a business licence from the aboriginal government in addition to the agreement with the land owning aboriginal corporation. All other applicable by-laws of the aboriginal government would have to be complied with whether the land owning aboriginal corporation like them or not.

2. Model 2 - Land is owned by an aboriginal corporation within an existing hamlet, village, town or city.

The questions arising under this model would probably have to be answered by the legislation granting the land to the aboriginal corporation.

It is assumed that in this model the aboriginal corporation would not have by-law making powers.

The most important question to be answered in the legislation would be:

> "Are the by-laws of the hamlet, town village or city to be binding on the aboriginal corporation in the same way as they would be on any other person?"

This is obviously a critical question for which there is no easy answer.

Looking at "extremes" on a continuum of answers - if by-laws are binding, then the aboriginal corporation may be frustrated in its plans for development if the city, town, village or hamlet zoned the area owned by the aboriginal corporation in an "inappropriate" way or failed to provide necessary municipal services.

Although the aboriginal corporation could prevent certain things happening on its land because of its ownership, it could be frustrated in doing things with the land that it considered appropriate.

At the extreme of the continuum, if municipal by-laws were not to apply to land owned by an aboriginal corporation in a hamlet, village, town or city, proper land use and development could be frustrated by, for example, a development upstream or upwind of a residential development.

There are options between the two extremes. For example,

(i) municipal by-laws not to apply to aboriginal corporation land . unless adopted or approved by the aboriginal corporation;

(ii) municipal by-laws to apply unless vetoed by the aboriginal corporation.

If either of these proposals were considered viable options then provisions for consultation prior to the enactment of the by-law should be mandatory to avoid "surprises". (Other options based on prior notice with a right to object within a stated period can be envisaged.)

It is likely that whatever option is favoured there will ultimately be a need to establish a means of resolving a dispute that cannot be resolved at the local level.

While outside the scope of this paper, many innovative systems for the resolution of disputes have been developed using a system of mediation and, if necessary, arbitration. The dispute resolution system should be in place before the dispute arises.

If the question of conflicting laws is not addressed in the legislation, difficult questions of interpretation will arise particularly if the aboriginal corporation is established Federally and the hamlet, village, town or city operates under Territorial legislation.

3. Model 3 – Land is owned by an aboriginal corporation which surrounds, in whole or in part, an existing hamlet, village, town or city.

In this model it seems most likely that the hamlet, town, village or city would and should continue to exercise the "usual" by-law making authority within its municipal boundaries.

Difficulties may arise if the hamlet, village, town or city seeks to expand its boundaries or if an activity inside or outside the municipality is seen to affect the others' interests.

Neither of these potential difficulties would be unique to the Northwest Territories. One would hope that the opportunity to avoid southern problems of disputes between "urban" and "rural" municipalities can be seized.

One of the more satisfactory means of avoiding conflict and encouraging co-operation could be to establish a buffer of land around existing municipalities . The "buffer" could be the subject of a joint plan and administered through a joint group representing the municipality and the aboriginal corporation or aboriginal government.

Criteria for the use and development of the jointly administered area should be developed (or an agreement for no use or development) with a view to resolving problems before they arise.

Once again an innovative system of mediation and arbitration could be developed to resolve any conflicts.

4. Model 4 - Inuvialuit Settlement - fee simple surface plus sub-surface ownership for a smaller piece of land **(7 (1)** (a) lands in the COPE Agreement.

The models discussed to this point have dealt with surface rights.

The Inuvialuit Final Agreement does not grant by-law making authority to any of the corporations referred to in the agreement. As a result, land use control will need to be exercised by contract or in some cases "participation agreements".

Whether or not Federal or Territorial legislation will apply to the land use and other control exercised under the COPE Agreement is not clear cut because section 4 of the Western Arctic (Inuvialuit) Claims Settlement Act says:

> 4. Where there is any inconsistency or conflict between this Act or the Agreement and the provisions of any other law applying to the Territory, this Act or the Agreement prevails to the extent of the inconsistency or conflict.

Although section **7(97)** of the COPE Agreement says "laws of general application" apply to Inuvialuit lands, that statement is "Except as otherwise provided in the Agreement" and the Agreement provides in section 3(3) that inconsistencies shall be settled in favour of the Agreement.

Each potential "inconsistency" will have to be reviewed on the facts of each case and in light of the provisions of the Agreement. A further complex question is the extent to which an Arbitration Board would be bound by Federal or Territorial legislation in deciding a dispute. If the COPE Agreement does gain status as an "aboriginal right" by virtue of section 35 of the Constitution Act (which seems to be contemplated by section **3(2)** of the COPE agreement stating it is the intention of the parties that the agreement be considered a "land claims agreement" within the meaning of section **35(3)** of the Constitution Act, **1982)** some constitutional protection may be provided to the agreement and the rights arising under it.

If a similar arrangement were proposed for aboriginal corporations in the "Western Territory" the issues to which I have al-ready referred with respect to contracts and land use would apply.

Sub-surface rights create other difficulties depending on whether the surface is owned by the aboriginal government; the Crown or a third party (e.g. an aboriginal corporation or some other entity).

Under Canadian law, if a person owns mines and minerals but does not own the surface of the land, there is an inherent right of the mineral owner to enter on and use the surface to recover them, even if the surface" of the land is disturbed as a result, and whether or not the surface owner agrees to the recovery. The mineral owner's obligation to the surface owner is to pay compensation for actual damage done.

In Western Canada the right to enter on land to remove minerals is qualified by "surface rights" legislation. This legislation usually provides that no entry can be made on land to work minerals without the consent of the owner or an order of a Surface Rights Board obtained under the legislation. The object of the legislation is to ensure subsurface rights are reasonably used and the surface owner adequately compensated.

With very few exceptions, mineral rights in the Northwest Territories are retained by the Crown in right of Canada. The COPE final agreement provides one of the exceptions.

If the same person owns both surface and subsurface rights there is no doubt that the subsurface rights can be exploited or protected as the owner chooses.

In any scheme in which mines and minerals are reserved to the Crown on land owned by an aboriginal corporation, the following issues should be addressed:

(a) has the *Crown or a lessee* from the Crown (e.g. an exploration company) an absolute right to recover subsurface minerals;

Under existing law in the Northwest Territories the answer seems to be "yes". That of course does not mean any new regime of legislation should necessarily continue the existing situation.

(b) should the surface rights owner be able to prevent the subsurface *owner* from recovering mines and minerals -
- at all?
- under certain conditions?
- subject to receiving compensation?

(c) should a municipal government (whether aboriginal or not) be able to control subsurface exploration
- at all?
- under certain conditions?
- through by-laws?

(d) should the Crown and Territorial Government be subject to the same law as anyone else with respect to the recovery of mines and minerals, unless perhaps the Governor General in Council or Parliament of Canada declares the work to be "in the public interest for the general advantage of Canada".

One option to consider might be to vest certain mines and minerals in co-ownership, the co-owners being an aboriginal corporation and the Crown.

(NOTE: It is outside the scope of this Paper to discuss all the issues relating to pipelines and rights of way for pipelines. Nevertheless the issues arising as a reuslt of pipeline rights of way are of significant importance to aboriginal corporations and aboriginal governments. Particular issues arising include:

(a) application of Territorial or Federal Expropriation Acts;

(b) special approvals required before aboriginal land can be expropriated or used for pipeline rights of way;

(c) size and location of rights of way and who decides on the location.)

Should aboriginal or other municipal corporations have the right to assess and tax subsurface rights? In the Western Provinces the answer is "no" although surface rights are assessable and taxable at the municipal level. Land used for a well site or battery site is subject to taxation limits.

5. Model 5 - Relationship that might exist between a regional government (such as the preposed Western Arctic Regional Municipality) and aboriginal municipal government or land owning aboriginal municipal corporation.

(Reference Model 4 of the Paper "Several Ways to Interface Aboriginal Self Government with Public Government in the Northwest Territories" by Steve Iveson.)

The WARM model would likely require, at a minimum the "usual" municipal powers, including the power to regulate and control land use and development.

It is quite conceivable to envisage WARM having additional by-law powers over environmental matters, wildlife, hunting, fishing and trapping perhaps, although not necessarily, subject to Territorial legislation.

If a Territorial interest is maintained it could be done by requiring certain minimum standards but permitting WARM to impose greater standards if it wished to do so.

It would probably be desirable to provide for additional devolution of law making authority to WARM perhaps subject to some agreement between WARM and the Territorial Government. There are considerable possibilities with respect to devolution or delegation of law-making powers which could vary depending on the subject matter, the regional, Territorial and Federal interests including appropriate conditions on the exercise of the power.

The implication of the WARM model would be significant. The questions to be answered include the extent to which WARM legislation would be binding on the aboriginal corporation. Based on the Iveson Model 4, WARM laws would be binding.

Assuming this, the by-laws that an aboriginal government could pass would depend on what WARM devolved or delegated to it.

In addition, unless other legislation prevented this, aboriginal land would be subject to taxation by WARM.

There may be some limits on WARM legislative powers. For example, expropriation might not apply if aboriginal lands had to remain in aboriginal ownership; similarly, aboriginal land could not be sold for non-payment of taxes or other charges deemed to be charges on land.

The "protection" for aboriginal corporations and aboriginal municipalities would depend on WARM rather than independent legislation protecting the aboriginal corporation. (This assumes that the land claims settlement does virtually nothing more than grant land to an aboriginal corporation.)

Depending on how WARM was structured and the degree to which aboriginal governments had an input in or control of some kind over WARM decisions, WARM may or may not be a "threat" or an advantage and benefit to aboriginal governments.

Some interesting possibilities of involving aboriginal governments in WARM decisions can be envisaged. For example, while WARM could have extensive by-law making authority the legislation might provide that WARM by-laws only come into effect if a majority (for example)- of the aboriginal governments within WARM representing 50% of the population approved the by- law.

Subdivision of Land

The matter of the subdivision of land has been left for special treatment because it is an important topic affecting all Models.

The subdivision of land is the dividing up of land to create separate parcels, title to which can then be registered in a land titles office. Subdivision applies not only to freehold interests but also usually to leasehold interests of 3 years or more.

Once land has been dividedupand different titles established it can be sold or leased.

Because of the long-term effects of poorly planned land and the demand for some form of services, it is usual to require subdivision to be approved either by a regional or a central authority having the resources to assess the long-term impact of the subdivision on things like water availability, flooding, drainage, soil stability, etc.

A "good" subdivision makes appropriate provision for roads, makes sure that the size of parcels is appropriate for their use, provides for an area for schools and perhaps a park, takes into consideration topographical features, considers the water SUpply, sewage disposal, pollution and other environmental factors.

To date very little subdivision of land has occurred in the Northwest Territories. As land is granted to aboriginal corporations or aboriginal or other municipal governments and thereby leaves Crown ownership, the control over subdivision will become a more and more important factor.

In the Provinces, subdivision control (i.e. who approves subdivision) varies . Sometimes a central Provincial agency approves or disapproves subdivision, other times a regional or local agency makes those decisions.

Assuming that land is granted to aboriginal corporations or aboriginal government the right to control subdivision of that land should also be considered.

Associated with the subdivision question is the matter in which the sale or lease of land will be recorded and how the proposal will affect the general law relating to land titles.

CONCLUDING REMARKS

The establishment of any form of Government requires that it be given the power to make law (whether called by-laws, regulations, Ordinances or Acts).

When two Governments are given law-making authority, conflicts or inconsistencies inevitably arise. Where three or more levels of government can make law the likelihood of conflict and confusion *grow.*

In the Northwest Territories there are the following major areas of law or law-making bodies:

(a) the Constitution Acts, 1867 - 1982;

(b) Federal Acts

(c) Territorial Acts

(d) Municipal By-laws.

In addition to Federal and Territorial Acts there are numerous regulations made by the Governor General in Council, Federal Ministers and some Federal Boards. At the Territorial level regulations may be made by the Commissioner and on occasion by others.

There is some legislation with special "notwithstanding clauses," including the Indian Act and the Western Arctic (Inuvialuit) Claims Settlement Act.

The potential for conflict between laws is already significant. One of the challenges for any legislation creating new law-making entities will be in seeking a means of resolving as many conflict situations as reasonably possible or to provide a means by which those conflicts can be resolved. The decision may be to "leave it to the Courts to resolve". This would be a traditional and "safe" route to follow.

However, with the unique issues involved in aboriginal rights, other options should be considered not only for the resolution of particular disputes but also for comprehensive decisions that can avoid further disputes of a like nature.

L A N G U A G E R I G H T S

FOR A

W E S T E R N T E R R I T O R Y

Prepared for:

The Western Constitutional Forum

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May 1984

This paper is for discussion purposes only. None of the views expressed herein knowingly represent the views of the WCF or any of its Members.

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INTRODUCTION

One objective of constitutional development in the Western Northwest Territories is to protect and enhance the languages of all aboriginal peoples who might reside in a new western territory.

In this paper I attempt to describe in general terms the current status of aboriginal languages in the Mackenzie Valley, Western Arctic and Kitikmeot West. Then I list a set of assumptions regarding the viability of aboriginal languages and what actions are required to protect and enhance them within their specific milieu. Finally I conclude with a brief discussion of two major routes to realizing the objective, language development and the legislated protection of language rights.

In writing this paper, I felt it was necessary at certain points to express a point of view. This was done not to predetermine an outcome but rather to help stimulate discussion.

GENERAL INFORMATION

There are seven major aboriginal dialects spoken in the western NWT, two Inuktitut and five Dene. They are:

Inuinnaqtun	Bathurst/Bay Chimo Cambridge Bay Coppermine Holman Island
Inuvialuktun	Paulatuk Sachs Harbour Tuktoyaktuk Aklavik Inuvik
Loucheux	Inuvik Aklavik Fort McPherson Arctic Red River
North Slavey	Fort Good Hope Colville Lake Fort Franklin Fort Norman Norman Wells

South Slavey	Fort Wrigley Fort Simpson Jean Marie River Nahanni Butte Trout Lake Fort Liard Fort Providence Kakisa Hay River
Dogrib	Rae-Edzo Lac La Martre Rae Lake Snare Lake Detah Yellowknife
Chipewyan	Fort Resolution Snowdrift Fort Smith Yellowknife

The background material presented in the paper will be brief. For more information I refer the reader to the Government of the Northwest Territories' Department of Information's publication entitled Analysis of the Dene Language Information Review. Unfortunately a similar analysis for the Inuktitut languages is not available. According to this booklet the "... Executive Council felt a need to redress the balance between relatively well-developed government programs for Inuktitut and the much less developed programs for the several complex Dene languages and dialects of the West." Hence this study was undertaken. If the Inuktitut language programs are as well developed as this quote suggests, it is primarily the Inuit of the Eastern Arctic who use syllabics who are being served. The level of services being offered to western Inuit is very similar to that being offered to the Dene.

It should be pointed out that the breakdown of languages by community is not as simple as the above information suggests. For instance within the so-called North Slavey region Fort Good Hope includes Hareskin, Mountain and some Slavey; Fort Norman and Wrigley are Mountain and Slavey; Fort Franklin is Slavey, Dogrib and Hareskin. The Inuvialuktun language in Aklavik is distinctly different from the other Inuvialuktun communities. Fort Smith includes Cree as well as Chipewyan. Yellowknife includes virtually all dialects. The boundaries between regions are not always distinct either. For example Holman Island mixes Inuinnaqtun and Inuvialuktun, and Cambridge Bay mixes Inuinnaqtun and Natsilik, the language of Kitikmeot East. Finally, even within fairly homogeneous regions such as the Dogrib and South Slave areas are vocabulary and distinctive manners of pronunciation vary from one community to the next.

These differences should not be overly stressed however. People can speak to and understand one another within their region and in communities immediately adjacent to their region.

The writing system used by all dialects in the western NWT, both Inuktitut and Dene, is Roman Orthography which is good. All communities east of Cambridge Bay use syllabics. The Roman system is phonetic in nature; a word is spelled the way it sounds. This makes learning to read and write comparatively easy once one has learned the alphabet. Also the alphabetic symbols are the same as those used in English and therefore literate knowledge of one language facilitates learning in another.

One disadvantage of a phonetic writing system is that it allows each community to write its words differently from the next according to slight variations in pronunciation. The consequence, in the short run at least, is the use of different spellings in every community for essentially the same word. This is particularly true since each community (rightly so perhaps) insists on developing its own material locally, e.g. for school books. As the knowledge and practice of writing languages spreads over time then it is very probable that standardized spellings will begin to emerge, at least within language regions, even through individuals from different communities may read the words with the different pronunciations . This movement towards standardization is important for two reasons. First it enhances the ability of government to provide services by reducing the number of sub-dialects it must respond to. Secondly it is more in keeping with the notion that one purpose of language development is to enhance communications between people rather than to reduce it. However the desire for standardization of vocabulary should not be overly stressed. People are interested in the survival and enhancement of their traditional language, not some hybrid developed by interested outside expertise.

The ability of aboriginal people in the west to write in their language varies somewhat from community to community but it is fair to say that in not one community does even a significant minority read and write well. This is in marked contrast to many communities in the east. In general the same holds for speaking aboriginal langauges between east and west although in this case the difference is not so great and there is much more variation within the west itself.

In very general terms the status of languages in western communities is patterned as follows.

a) Elders:

- many speak their first language exclusively although they may know a few basic English phrases
- many others speak their language fluently but also have a basic competency in English
- a minority of elders are fluent in English.

b) Middle aged:

- in general they are strong in their original language although there is some variation between regions
- a good number are at least functional in English
- a minority are fluent in English
- only a minority can read English

c) Young adults:

variations between communities and regions is greatest for this group
- some are fluent in their language
  some understand very well but speak less successfully
  others have only a passive knowledge of their language, i.e. they can understand but cannot speak
  still others understand little or none at all
- the majority can speak English, some better than others
  the majority can read English although there is considerable variations in levels of competency

d) The very young:

the majority are better in English than the aboriginal language
a good number speak and understand English only
- there are exceptions however, communities where the language of the household is Dene or Inuktitut.

The knowledge of aboriginal languages and conversely the knowledge of English varies significantly from region to region and between communities within regions. Dene languages are strongest and English weakest in the South Slavey and Dogrib regions whereas the reverse holds amongst the Loucheux. Similarly within regions, the smaller more isolated communities seem to have retained their languages more successfully than have larger communities which have been exposed to non-natives more intensely and over a longer period of time. For example in the north Slavey region the small community of Colville Lake but also the relatively large but off-river community of Fort Franklin have retained their languages more successfully than have the river communities of Fort Norman and Fort Good Hope.

Also it should not be forgotten that competence in a language is a relative and context specific term, for instance a person may be very competent in a language as it relates to most of his/her day-to-day activities but encounter considerable difficulties in other matters. The same applies to the ability to read. The government report mentioned above states that radio is by far the preferred method of obtaining information. Finally there is a group of individuals who are not really competent beyond basic levels in either language. Their situation is the most disturbing of all.

In the Arctic, language skills in the Inuvialuit communities are roughly the same as for the Loucheux while in Kitikmeot West Innuinnaqtun is still relatively strong.

There has been a fairly rapid decline in the use and quality of aboriginal languages in the last few decades. This decline is expressed in a number of ways. First, there is the loss or dormancy of a number of "old" words or phrases; words with very specific and rich meanings; words that often relate to the land or to traditional society, values, relationship culture. Younger and some middle aged people are liable to have a much smaller vocabulary, speak in contractions or speak in sentences mixing

native and English words. There are also considerable shortcomings in language adaptation; the creation of new words or phrases to express "new" concepts, objects, etc. arising from a rapidly changing north.

Speaking very subjectively, when I lived in Rae, Dogrib was the only language of daily communications. Even teenagers returning home from student hostels for summer holidays spoke to each other more often in Dogrib than in English. People only spoke English when they expressly intended to include non Dene in a conversation. While Dogrib is still a relatively strong Dene language, English is used much more by children and young adults today. English is the language of the household for a number of young families.

However there is also evidence that the reversal of this trend could be equally swift given the proper attention. In general, people still place a high value on their language. The resistance to Dene/Inuktitut language programs, where it exists, is generally based on the fear that their children's opportunity to become fluent in English will suffer as a result. No one wants his/her child to end up on the liability end of the continuum. Fortunately experience in the north and elsewhere indicates that being fluent in one's own language generally enhances one's ability to learn a second. Upon realizing this, resistance in communities to language programs dissipates quickly. Personal/collective enrichment is enough to begin moving people towards protecting and advancing their language.

Some important changes can occur relatively easily. A bilingual person, one who speaks both languages and can read English, can learn to read his own language very quickly. What is missing is the amount and variety of written material required to help his/her new skills grow. However this one example must not shroud the fact that the protection and advancement of aboriginal languages in the north is a complex and challenging task.

ASSUMPTIONS

1. The more functional a language is, the more liable it is to survive and grow. For the purposes of illustration, functionality of aboriginal languages could be expressed as points on a continuum varying from a liability at one end to a material necessity at the other. It is assumed that the farther to the right on this continuum the status of aboriginal languages are, the more likely they are to prosper.

Liability	Personal and Collective Enrichment	Material Enrichment	Material Necessity

a) Liability: Fluency in an aboriginal language is never a liability in itself. The liability only occurs when the individual is not also fluent in English. Ironically it would appear that one fundamental necessity for the development of aboriginal languages is the encouragement of true bilingualism.

b) Personal and Collective Enrichment: Along with land, languages are basic to the survival of northern cultures. Each language provides a unique window on the world, it shapes the nature and quality of communication between members of a culture, and it is a fundamental element of the concept of distinct peoples. It has social, psychological, emotional and spiritual implications. However in a world where material considerations must always be near the forefront, and particularly in a society encountering rapid change and the effects of colonialism, these values will not be enough to ensure:

i) the widespread knowledge and use of a language within a linguistic group.
ii) the maintenance of the quality of a language including its ability to grow.

c) Material Enrichment: If, along with b), a group or individual can be enriched in an economic and/or political sense by a knowledge of their language then the likelihood of its survival is even greater. For example if knowledge of a language were recognized and rewarded by higher salaries and/or if the ability of an individual or group to speak could affect decision-making in its favour then that language would be materially enriching.

d) Material Necessity: The strongest guarantee that an original language is retained occurs when the individual cannot participate effectively in society without it; economically the inability to obtain or hold certain jobs perhaps, politically the inability to hold certain offices or perhaps the inability to participate in decision-making assemblies whose working language for conducting its affairs is the aboriginal language exclusively, and more generally the inability to take full advantage of government services. In essence this is the liability clause once more only this time it is working in reverse. Instead of a person suffering because he is unilingual in a native language, he suffers for being unilingual in English.

Given the objective and assuming the legitimacy of the points above the questions then are;

a) how far along the continuum MUST we go to in order to ensure the objective,

b) how far along the continuum CAN we go given legal, political and economic factors; and

c) what specific steps must be taken to reach the objective and over what period of time?

2. Mere acknowledgement of the right of individuals to retain their language is not nerely enough. Aboriginal languages must be protected in law, preferably at the constitutional as well as legislative level.

.3. Language rights and benefits must be recognized and accommodated in the policies, programs and practices of government as well as in its laws.

b. Languages are dynamic, not static. Aboriginal languages have been under seige for the past three decades at least and this is reflected in both the quality and the status of these languages in northern communities today. Conversely active support for aboriginal languages can reverse this trend.

5. The growth and development of aboriginal languages must be actively fostered by government including the provision of the funds necessary for this purpose.

6. The education system must actively encourage and in various ways provide the support aboriginal languages require. Government cannot hide behind the old cliche that the teaching of language and culture is solely the responsibility of parents.

7. **Laws,** policies, etc. dealing with language should be pragmatic not unrealistic. Government should be aware of the legal obligations, rights and services guaranteed by legislating language provisions before passing them into law. If the capacity to deliver or receive some services is not close at hand guaranteeing these services in law could actually be detrimental.

8. At the same time the recognition of short-term realities should not be allowed to shroud the longer term objective. As aboriginal languages develop and grow with government support; legislation, programs, etc. can grow with them.

9. Aboriginal languages tend to coincide with geographic regions. The focus on application and implementation of aboriginal language rights may be greater at the regional and local levels than at the territorial.

10. The status of languages and the interests of aboriginal peoples in languages may vary from region to region as well as over time. Therefore laws etc., ought to allow a certain degree of flexibility and the region ought to have some say in the roles their language will fulfill at any point in time.

THE OBJECTIVE

TO PROTECT AND ENHANCE THE LANGUAGE OF ALL ABORIGINAL PEOPLES WHO MIGHT RESIDE IN A NEW WESTERN TERRITORY.

Routes to the Objective

There are basically two ways of approaching the objective and both are essential. One is language rights and the other is language development. The two are not mutually exclusive; schools are an important component of langauge development plus education in an aboriginal language may become a matter of right. However, it is convenient to discuss them separately.

1. Language Development

Simple recognition of langauge rights in law will not be enough to reverse the current trend towards unilingualism in English. Active intervention on a large scale by government both directly and perhaps indirectly is required. The objectives of this intervention would be the widespread development of bilingualism in the north; fluency in English and the regional aboriginal language. This would include the quality of language, the revival of traditional words and phrases, grammar and structures; which enrich the language. It would include the dynamism of language; the development of new words and expressions to illuminate concepts and developments unfamiliar to the north. It would include the development of reading and writing skills to complement the oral. As a corollary it would include good training in English as well.

Obviously the education system is central to this project. The teaching of languages in the school and teaching in an aboriginal language are both required. This is no simple matter. Having a teacher who speaks the language and giving her/him some written material in that dialect is not nearly enough. An education program or curriculum, say from kindergarten to grade nine is much more complciated than that. A great deal of research is required dealing with language acquisition, gramr, language structure, language classifications (e.g. what are adjectives) and standardization. Next comes the design of complete programs based upon the research. The approach to teaching must be chosen; an academic skill acquisition approach versus a culturally based approach for example. And different systems are required between teaching in first and second language situations. Add to this the language development and vocabularies, the designing and production of the specific units of the program, the preparation of support materials, the production of all this in different dialects with varying inputs from communities, bridging programs between the teaching in the native languages and English, the training of teachers, the retention of teachers in their home region where their dialect is spoken, and so on.

The work is not just within the Department of Education. It will be necessary and desirable to involve the community; local and regional school boards being two examples. It should also include adult education; it was mentioned above how relatively easy it is for a bilingual person who reads English to learn how to read and write in his other language.

The provision of some services, as well as being an issue of rights, is also important for language enhancement. It enhances the functionality of the language as well as providing an opportunity for practice. This should stress, initially at least, oral communication, radio and the provision of many local services for example, but it should include some written material as well.

Finally, in the long run, it should include language training for at least some non-native civil servants. Though unlikely to produce bilingual speakers, it would give those people an opportunity to appreciate a language and through it, a culture.

Obviously all of this will require considerable funding over an extended period. It will also require a realistic assessment of qualified resources, a Priorizing of activity to make the best use of those resources plus an attention to training to multiply and diversify the skills available to be utilized.

2. Language Rights

Aboriginal languages must be protected in law, preferably at the constitutional as well as legislative level. Language rights and benefits must be recognized and accommodated in the policies, programs and practices of government as well and this includes providing enough funds that the stated intention corresponds to fact.

However, laws and policies must be developed and implemented carefully over time. It is at least arguable that it would not be strategic or even most beneficial to have aboriginal languages proclaimed "official languages" immediately. According to a sessional paper entitled "Official Language in the Northwest Territories" tabled in the Legislative Assembly on May 14, 1984, being an official language within the Constitution Act, 1982 means;

> "A person has the right to use English or French in a debate or other proceedings in Parliament; statues, records and journals of Parliament are to be printed and published in both languages; either language may be used by any person in a court established by Parliament (which would include the Supreme Court of the Northwest Territories); a person has the right to communicate with and receive available services from any head office of an institution of Parliament and government and, has the same right with respect to any other office of such institution where there is significant demand or where, due to the nature of the office, it is reasonable that such services would be available in both languages."

Given the scarcity of money and skilled individuals, the government could find itself obliged to waste valuable quantities of both to provide services that are of no significant value to anyone at this point in time; being obliged to print all legislation and transcripts of the Legislative Assembly in seven dialects which very few people could read being the one obvious example. As aboriginal languages develop and grow with government support; legislation, programs etc., can grow with them.

The merit of this argument however is contingent on the overall objective being maintained. Language rights will need to be firmly entrenched somehow if they are to be guaranteed. An approach might be to include a clause in a constitution that aboriginal languages will be official languages of the new territory but that the clause will not come into full effect until some later date say 1995, thus allowing ten years of language development to ensure that the provision conforms to social reality.

The legal issue of whether or not aboriginal languages can be constitutionally entrenched as "official languages" has been raised. Can they be official? If not what needs to be done to make it possible? Could aboriginal language rights be effectively entrenched in a constitution without *reference* to the designation "official language" and thus sidestep this technical issue entirely? These are legal questions which are beyond the scope of this paper. It is acknowledged that providing protective or enhancement clauses in specific legislation without the protection of the constitution is weaker in the longrun, although we cannot forget that constitutions can be amended as well.

CONCLUSION

Retuning to the continuum analogy for a moment, there *are* a large number of people who rest at the liability end of the spectrum; people who speak and read little or no English. Most of them are older people and they are not going to learn to speak English. Oral communication for them is very important. They must have access to native language programming on radio and to some degree television. Government information should be conveyed to them in various audio-visual forms. As many local and regional civil servants as possible should speak their language, particularly employees administering programs and services which these people depend on most. At the very least competent interpreters should be provided as required.

With regards to personal and collective enrichment, serious efforts by government in the area of language development accompanied by a bilingual approach would go a long way to preserving and enhancing aboriginal languages. The vast majority of people appreciate the value of their *language* in its own right so long as the liability factor is removed.

As for material enrichment and material necessity, provisions in law requiring that certain services, public meetings, etc. be available or conducted bilingually will begin to provide material rewards. for those who speak their language well. Bilingualism should be rewarded financially in virtually any position dealing with a specific public requiring or preferring that service for the obvious reason that the bilingual person is better qualified for that job. For some jobs, particularly in certain departments at the local and regional level, bilingualism could be a necessity.

So often one will hear negative reactions to these proposals which cloaked in terms of qualifications and merit. However it should never be forgotten that all jobs and certainly all lists of job qualifications are human inventions and therefore somewhat arbitrary and subjective.

Who is to say that anyone hired as a game warden in a northern community who does not speak the local language is qualified for that job no matter how much training and experience he might have? As usual issues tend to overlap; guaranteed representation of aboriginal people in the Department of Personnel may be necessary to begin to alter the assumptions about job qualifications which tend to perpetuate the status quo in the name of merit, fair practice and objective assessment.

OFFICIAL STATUS FOR LANGUAGES IN CANADA

DEVELOPMENT OF ISSUES

Prepared for:

The Western Constitutional Forum

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This paper is for discussion purposes only. None of the views expressed herein knowingly represent the views of the WCF or any of its Members.

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I. INTRODUCTION

The law, like many other human endeavors, relies to a large extent on past experience to make decisions on future actions. In legal work precedents are relied upon to provide the wisdom and direction needed to understand and predict the likely resolution of a current concern.

In constitutional law, Canada has entered a period where there is considerable innovation and change, with a corresponding dose of uncertainty. More so than at any other time in the country's history, all the basic premises of government and the accompanying constitutional law are subject to scrutiny and review.

This atmosphere of change is promoted, not only in the political forum, but also in the approach of the courts. The courts are prepared to look at the law, and indeed at the legal system, with new eyes. The smallest assumption can be the subject of new controversy.

This is confirmed in the recent decision in The Queen v. Therens. where Mr. Justice LeDain of the Supreme Court of Canada commented:

> In my opinion, the premise that the framers of the Charter must be presumed to have intended that the words used by it should be given the meaning which had been given . ..by judicial decisions at the time the Charter was enacted, is not a reliable guide to its interpretation and application.
>
> By its very nature a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the courts. . .The task of expounding a constitution is crucially different from that of construing a status. . .It is also clear that the Charter must be regarded, because of its constitutional character, as a new affirmation. . .of rights and freedoms and judicial power and responsibility in relation to their protecting (1)

Having been told by the Supreme Court of Canada that words do not mean the same things as they used to mean, one is in a precarious position when asked to offer an opinion on the implications and meaning of a particular word in a constitutional context. This is especially true when courts to date have been reluctant to venture an opinion as to the meaning of the word, in either statutes or constitutional documents.

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(1) The Queen v. Therens, Supreme Court of Canada, May 23, 1985, not yet published. The immediate issue was the meaning of the word 'detained'. The Court refused to follow the old decisions as to the meaning of the word.

"II. OFFICIAL LANGUAGES : A HISTORY

Since the enactment of the Official Languages Act in 1968, the combination of 'official' and 'language' has become a part of the Canadian legal context. In 1982, the concept of an 'official language' became part of the Canadian Constitution. Although there had been entrenched language rights prior to 1982, including s. 133 of the British North America Act of 1867, official status was an innovation in the constitutional context, introduced at the same time as the Canadian Charter of Rights and Freedoms,

There is no history in the common law of 'official' languages. From the British roots of the law there is a sustained heritage of unilingualism. This unilingualism has been based in a conviction that language should be a unifying force, common to all people of a nation.

If the 'official language' can be found at all in the early British law it would be the idea of a language which separates government transactions from those of ordinary people, rather than bringing them together. The distinction endowed by the use of Latin or French for official transactions and court affairs, even when the language of the majority was English, was one which found favour because of its exclusive nature.

As English developed in its written form and became the language of commerce, it slowly replaced first French and then Latin. The pattern of unilingual English administration of populations whose language was not English is consistent with the British experience. This was continued in colonial governments within British Empire, where unilingualism was seen as a good thing, worthy of promotion both in government and in private life.

In Canada at the time of Union in 1867 there was a political necessity, dictated by the size and strength of the French speaking community, for a guarantee of French language rights. These rights were not intended purely to protect the language itself, but also to protect the distinct culture of the people who spoke the language.

This same objective of cultural protection was secured through constitutionally protected rights to separate school systems based on religious distinctions , and to a civil system of law. The protection of religion and law as additional incidents of culture, constituted added security for the minority culture.

The same political incentives motivated the creation of the Official Languages Act of 1968. It was in large part a response to the movement in the 1960's towards 'bilingualism and biculturalism' flowing from the politically expressed desire of Quebecois for additional status and protection for their culture and its language,

It is clear that French and English language rights have been expanded by the Canada Act, 1982. For example, the right to speak either language in the 'debates' of Parliament (B.N.A. Act, 1867) has become the right to speak either language in the 'debates and proceedings' of Parliament (Canada Act, 1982). This careful amendment of the right extends language rights to include parliamentary inquiries and committees.

The specific language rights contained in the Canada Act, 1982, are close cousins to provisions of the Official Languages Act. Indeed, they were written with the expectation that the Federal Government would not be obliged to make major changes in the services and programs it had provided under the Official Languages Act.

To date, there have been no cases extending language rights based on the provision of the Canada Act which makes English and French official languages. However, the more specific provisions have been used to support and extend language rights for both French and English.

III. OFFICIAL LANGUAGES: THE STATUS

The 'official language' was a creation of the legislatures, and it is only after the various Acts were passed that the Courts were called upon to define the rights that official status carried with it. Canadian legislatures have always been very accommodating in this regard. In each instance the law which created an 'official' language also described, in subsequent sections, the specific rights of the language and its speakers.

In each instance the legislature was concentrated on the aspects of language that they felt were the most politically acceptable, economically feasible, and within their jurisdiction. The various legislatures have described rights which correspond to the nature of the language, the institutions which are judged to be of value, and the nature of the society served by the language.

It is interesting to note that the English (Federal, New Brunswick, Northwest Territories) legislation concentrates on institutional and government services, while the French (Quebec) legislation includes a much more specific set of provisions, more intrusive into the life of the individual, but also more effective in asserting the precedence of the preferred language. It might also be noted that the two sets of legislatures had differing objectives when enacting the legislation; the English to create equality of access, the French to protect and promote a specific language.

This promotion of a language is within the jurisdiction of the legislature. The constitutional difficulties experienced by Quebec language legislation have been based on the denial of rights to English speakers, rather than an excess of rights for the French, a lack of jurisdiction, or an unwarranted interference in the life of the citizenry.

In examining these specific language rights, however, we are still not directly addressing the issue of 'official status' . The question still arises :

> Does 'official' status, in and of itself, confer any district rights?

For this answer we look to existing court decisions. Reliance on the 'official' status of a language was the basis for both the Air Canada v. Joyal case, and the Association des Gens de L'Air v. Lang case.

In each of these cases a dispute arose under the Aeronautics Act, which restricted the language used for in-flight conversation among crew (Joyal) and limited air traffic controllers' use of English (Gens de l'Air). Each case relied on section 2 of the official Languages Act, which states:

> The English and French languages are the official languages of Canada, for all purposes of the Parliament and Government of Canada, and possess and enjoy equality of status and equal rights and privileges as to their use in all the institutions of the Parliament and Government of Canada.

In the Federal Court, Justice Marceau took the following approach to the section;

> ...on the practical level of the legal rights and duties flowing from it, I do not see how s. 2 can be isolated from the whole of the Act. In my opinion it is a 'declaration of status', which could not be formulated in stronger terms, but which remains introductory. Parliament sets out the conclusions to be drawn from it in the following sections where, . ..it defines the 'duties' which it imposes on departments and agencies of the Government of Canada, to give effect to its 'declaration of status'. **(2)**

When the case was taken to the Federal Court of Appeal, Justice Pratte continued that same line of thought:

> ...The concept of an 'official language' is rather a vague one. It refers to the languages used by the Government in its relations with the public. To say that English and French are official languages is simply to state that these two languages are those which are normally used in communications between Government and its citizens. . . a language may be an official language in a country even though, for safety reasons, its use is prohibited in certain exceptional circumstances. (3)

In the same Court, on the same case, Justice LeDain said:

> As I read s. 2, it is more than a mere statement of principle or the expression of a general objective or ideal. (In) relation to the Official Languages Act as a whole (it is) the expression of the essential spirit of the Act to which reference is made in other provisions - but it is also the affirmation of the official status of the two languages and the legal right to use French, as well as English, in the institutions of the Federal Government. Other sections of the Act.. are concerned with what might be done by way of implementation to make this an effective right and a practical reality.

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(2) Ass'n des Gens de l'Air du Quebec, v. Lang, **(1977) 76** D.L.R. (3d) 455@ **466,** Federal Court, Trial Division.

(3) Ass'n des Gens de l'Air du Quebec v. Lang **(1978) 89** D.L.R. (3d) 495 @ 500, Federal Corut of Appeal. The 'prohibition' comment arises from the fact that the aeronautics legislation made it an offence to speak French under certain flight conditions.

As such, it is more than a merely introductory provision, but rather the legal foundation of the right. . . (4)

Despite the Court's high opinion of the section, they decided that its effect was over-ridden by the regulations which prevented the use of any langauge other than English. This decision can be attributed in large part to the fact that both the Official Languages Act and the Aeronautics regulations were merely statutory provisions, and neither had the priority which a constitutional provision would have.

At the same time it should be remembered that language rights, along with other rights in the Charter, can be limited. They are subject to section 1 of the Charter, which permits 'such reasonable limits' on those rights 'as can be demonstrably justified in a free and democratic society'. This would mean that the restrictions objected to in these cases might be able to continue, but only if the government could provide an objective basis and need for any restrictions.

While s. 16 of the Charter adds new strength to the 'official' status of English and French, it still does not improve our ability to present an unambiguous definitionofthe nature of those rights which accompany official status.

Iv. OFFICIAL LANGUAGES: THE ASSOCIATED RIGHTS

From the two preceding cases we can glean a number of conclusions. Firstly, that courts are inclined to assert that official status for a language does have a meaning independent from that of the accompanying specified rights.

Secondly, it is clear (especially from a reading of the Charter of the French Language) that there are any number of practical and applicable language rights which are not associated with 'official' status. Examples of such independent legislated language rights include:

* the use of a language for application forms for employment (s.57)

* the use of a language for signs and posters in the civil service (s.24) or in public announcements (s.61)

* an onus on an employer to show that employment requires the use Of one language (English) as opposed to any other (s.46)

* the requirement that public utilities make their services available in the designated langauge (s.29 (5)

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(4) Ass'ndes *Gens* de l'Air du Quebec, v. Lang (1978) 89 D.L.R. (3d) 495, Federal court of Appeal

(5) Eachofthese sections refers to a provision of the Charter of the French Language chapter C-n, 1977

These legislative provisions extend well beyond the rights that official status would have provided, but fall within the province's authority over 'property and civil rights' (6), as long as they do not infringe on the constitutionally protected rights of other languages.

This ability of governments to extend language rights is confirmed by the decision of the Supreme Court of Canada in Jones v. Attorney General of Canada which states:

> ...there is nothing in it or any other part of the B.N.A. Act, 1867, that precludes the conferring of additional rights and privileges or the imposing of additional obligations respecting the use of English and French, if done in relation to matters within the competence of the enacting legislature. . .There is no warrant for reading this (constitutional) provision. ..as being in effect a final and unalterable determination of the limits of the privileges or obligatory use of English and French in public proceedings, in public institutions, and in public communications. (7)

Thirdly, one can conclude that the nature and contents of the collection of 'official' rights are currently ill-defined. This lack of definition is illustrated by the comments of Judge Deschenes in the Montreal Protestant Schools case when he made the following comments:

> ...as paradoxical as it may seem, this section **(8),** considered alone, has little meaning. The Canadian Constitution does not, in fact, define the concept of 'official language' , and the substance of this concept is not to be discovered or provided in encyclopedia definitions. Professor Bonenfant is correct in saying:
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> > "Following the proclamation that a language is official, laws must be enacted which attach significant legal effect to the consequences of the proclamation. The official character of a language can, as we have seen, be strengthened or weakened according to the frequency of use, but specific laws recognizing the use of the language, or allowing for the legal effects of its use in various areas, are nonetheless needed." (9)

The closest the case law comes to an actual definition of 'official' is the statement by Mr. Justice Ledain, already quoted from the Gens de L'Air case, that "it is the legal right to use (the langauge) in the institutions of the . . . Government." although it should be supplemented by measures which "must be (taken) by way of implementation to make this an effective right and a practical reality."

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(6) British North America Act, **1867,** s.92(13). This power has been very broadly interpreted in favour of provinces by the early constitutional decisions of the Privy Council

(7) Jones v. Attorney General of Canada, **(1974) 16 CCC** (2d) 297 @ 305-6, Supreme Court of Canada.

(8) "French is the official language of Quebec" reads s.1 of the Charter of the French Language, C-n, **1977**

(9) Montreal Bureau of Protestant Schools v. Minister of Education for the Province of Quebec, (1976)C.S. **430** @ **452.**

V. LANGUAGE RIGHTS IN PRACTICE

The most practical discussion of the nature and extent of language rights occurs in the case of Attorney General of Quebec v. Blakie (10), in the Supreme Court of Canada, as well as in a number of other cases heard at lower levels. Blakie addresses rights recognized pursuant to s. 133 of the British North America Act, 186'7, which reads:

> Either the English or the French language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec. The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those languages.

The Blakie cases deal with one provision, S.133, which does not create official status for any language, although the Supreme Court of Canada (11) created an effective analogy by asserting that the section:

> ...requires that official status be given to both French and English in respect of the printing and publication of the statutes of the Province of Quebec.

The decisions in the Blakie cases give some of the most detailed discussion of the extent of language rights. The Courts have based its descriptions of language rights on a generous interpretation of s.133. This generosity will not necessarily be available for the evaluation of other language provisions, in part because the determination is based on an historical analysis of the provision and the context in which it was created.

In s.133 there is protection for languages in legislatures, in courts and in communications with and by government. Each portion has been held to convey certain rights, analogous to those of an official language.

A. LEGISLATION

> Either the English or the French language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec. . .

This provision has been interpreted to protect:

* the right of legislators to use the language of their choice in argument in the House;

(lo) Attorney General of Quebec v. Blakie #2, (1981) 123 D.L.R. (3d) 15, Supreme Court of Canada.

(11) Attorney General of Quebec v. Blakie #1 at (1979) 101 D.L.R. (3d) 394 @ 398, Supreme Court of Canada.

* the requirement that proposed legislation be placed before the House in both languages, with equal authority residing in each version;

* the requirement that regulations and subsidiary legislation originating with cabinet be passed in both languages, with equal authority;

* the requirement that regulations created by Ministers or subject to the approval of Ministers, be available in equally authoritative versions in both languages;

* this requirement does not extend to legislation which is subject to ministerial disallowance;

* this requirement does not extend to municipal bodies and school boards, which may operate in the language of their choice;

B. COURTS

...either of those Languages may be used by any Person in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

This provision has been interpreted to protect:

* the right of a person commencing legal proceedings to do so in the language of his choice;

* the right of the Crown to commence proceedings in the language of its choice (although not necessarily to decide the language of trial) as long as the process is available in the other language; (12)

* the right to submit documents, and make oral and written argument, in the language of choice;

* the right of judges to use an interpreter, if needed, (13) and to deliver opinions in the language of their choice and competence;

* the right of litigants to obtain judgement in the language of their choice;

* the requirement that Rules of Practice be available in equally authoritative versions in both languages;

* these requirements extend to administrative bodies which exercise judicial or quasi-judicial powers (such as licensing boards and tribunals, disciplinary boards, and regulatory boards;

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(12) Walsh v. The City of Montreal, (1980) 55 CCC (2d) Quebec Superior court

(13) Robin v. Le College de Saint Boniface, unreported (March 9, **1984)** Manitoba Provincial Court

C. LEGISLATION

. . .both those Languages shall be used in the respective Records and Journals of those Houses. . . The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those languages.

This provision has been interpreted to protect:

* the equal authority of the versions of documents produced in both languages;

* the requirement that the basic internal working documents and conditions of employment in government be available in either language.

D. COMMENTARY

In reviewing these constitutionally protected rights it should be noted that these, or even the bundle of 'official' language rights, are not the only possible or valuable language rights. There are additional rights which can be created or protected by statutes, *or* by new constitutional protections. In addition, the various official languages acts and specific legislation (such as the language of trial provisions of the Criminal Code) create rights outside of the constitutional context. An effective system of government services may well extend beyond the requirements imposed by 'official' status. It is also possible to provide an effective system of government services, without providing 'official' status.

E. LANGUAGES WITH THE STATUS OF ENGLISH AND FRENCH

The suggestion has been made that it might be worthwhile to say that language "X" is an official language, with the same status as French and English. Unfortunately, this ends up begging the question of the status of English and French. The courts will want to explore that status of English and French. As of what date? In which jurisdictions in Canada? Does this include only federal provisions? Constitutional protections? Rights provided by legislation and regulation? Are the rights frozen at the time of enactment?

The cases of defining phrases such as 'where numbers warrant' for English and French would likely be inappropriate to discussions of rights for aboriginal languages. Aboriginal languages also have a potential to rely on a different set of rights, such as aboriginal rights. In such a case the languages would not benefit from a definition based on the more conventional set of 'official' language rights .

It is probably best not to define one set of-rights by reference to another. This is especially true if the rights used as a reference are still largely undefined. Decisions and definitions in relation to aboriginal languages should not be based on the very different history and usage of English and French.

VI. OFFICIAL LANGUAGES

The question now returns to the use and usefulness of the declaration that a particular language is an official language within a certain jurisdiction.

A. ALTERNATIVE FORMS FOR RIGHTS

Character of Rights; Character of Languages

A designation as an official language is associated with a bundle of rights, some of which may be appropriate for some languages and inappropriate for others. Given the opportunity to address the issue of language rights, the character of the language should be a consideration in determining the character of the rights. The cultural context of a language determines which rights are important for its development, and those rights may not be the rights associated with 'official' status.

Rather than chancing the loose bundle of 'official' rights designed for another context and another set of languages, merit can be found in an independent assessment of the rights which are desirable and viable for the language in question. The provisions recognizing specific rights could then be designed to insure their implementation and effectiveness.

General or Specific Statements

An assertion of official status is a general statement of rights, which will eventually be the subject of controversy and, likely, of court actions in an attempt to define its specific effect. While it is possible to review the existing court decisions, it is not possible to guarantee the outcome of any future court action, nor necessarily to predict the public sentiment which might accompany and affect such a determination.

There is no legal magic associated with the use of the word 'official', and each provision will be interpreted (as was s. 133 in the Blakie cases) in light of the circumstances which prevailed at the time of enactment, and the perceived intentions of its creators. The determination of a future court on any of those issues cannot be guaranteed, and even the best worded provision may have its meaning obscured by time. This openess to redefinition is the major defect of a generally worded provision.

At the same time, it should be acknowledged that a general provision such as the conferring of 'official status' has an ability to expand. and to encompass new issues and situations which were not within the specific contemplation of the legislators when the provision was created. In this way a general provision provides a flexibility that could be of lasting value.

Nature of Rights

In addressing the issue of rights it is also necessary to address the issues of effective implementation, for speakers of the language, for affected institutions, and for those who do not speak the language. Who should have the responsibility of implementing the rights? And the cost? Will we ask people to 'pay for rights' by placing the burden on local institutions? Who will be able to enforce or trigger the rights? A community, a region, an executive order, or an individual?

The character of the rights and the measures adopted for implementation, the timing of implementation and geography of regional rights can be either specific, or left to legislation and regulation. In either instance a strong direction from a constitutional provision can insure that the desired implementation takes place.

B. COMBINING FORMS

The choices presented in determining a constitutional language right are not mutually exclusive. It is possible to make a general statement of rights (whether or not that inclues the designation 'official'), accompanied by specific rights. It is possible to create rights appropriate to the nature of the language served, and to direct the implementation of the rights through a combination of constitutional and legislative provisions.

This effective combination of rights is only possible if the issues are addressed and needs determined. The simple solution of resorting to a generalized right and relying on that alone will not only leave the final determination of rights to a court, it may well miss some of the most practical and effective means of enhancing the desired languages and cultures.

VII. PROTECTION OF LANGUAGE RIGHT'S

Once a decision has been reached on the language rights and the form that they will take, it is important to consider how the rights will be protected.

A. THROUGH LAND CLAIMS AGREEMENTS

Land claims agreements now have the same constitutional status as treaty and aboriginal rights, under s. 35 of the Canada Act. It is also possible that they are 'guaranteed equally' because of 2.35 (3).

The effect of these provisions has not been tested in the courts, but it is anticipated that they will prevent the reoccurrence of cases such as Sikyea v. The Queen (14). These provisions should ensure that land claims agreements could not be overruled by federal (or territorial) legislation. Instead, changes would have to be neogtiated with other parties to the claim.

Language rights, especially as they relate to education or government services, could fall within the parameters of the current land claims process. It appears, however, that they will not play a major part in the claims negotiations in the Northwest Territories, and the prime arena for negotiation of such rights will be within the constitutional process.

The expectation that language rights will be defined through a process of broadly based political negotiation does not preclude the possibility that the negotiated rights could be protected as part of an aboriginal claim. This would be an effective means of protecting languages from changes by government. It would give the people who spoke the languages, through the native organizations, a role in reviewing any change which may be proposed in the future.

B. THROUGH A NEW ACT FOR A WESTERN TERRITORY

Language rights could be protected through an act to replace the current Northwest Territories Act. This would insure that the territorial government respected the rights agreed upon. Unfortunately this would not provide the same degree of protection for the provisions as would using the medium of land claims.

The federal government controls the legislation which creates territorial governments, and can change it without consulting with the territorial government or native organizations, and certainly without receiving their approval for proposed changes.

The Federal government could include a provision which committed them to re-negotiate any changes with the original parties to the negotiations. Although this would have political value, it would not be legally binding. The government cannot 'tie its hands' on matters within its legislative competence by such a commitment.

Until the new western territory becomes a province, or until the old British North America Act of 1871 is amended to give territories the same security of institutions that provinces have, language rights, along with all the institutions and jurisdiction of a new territory, will be subject to change without reference to the legislature or inhabitants of the territory. (15)

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(14) Sikyea v. The Queen, (1964) SCR 642, was a case where the treaty right to hunt for ducks was overruled by a piece of Federal legislation, the Migratory Birds Act.

(15) In 1871, the Imperial Parliament passed an amendment to the British North America Act of 1867. The amendment gave authority to the Federal Government to provide for the "administration, peace, order, and good government of any territory, not for the time being, included in any province." At the same time, it said that" . ..it(was) not competent for the Parliament of Canada to alter the provisions of...any Act hereafter establishing new Provinces in the said Dominion. . ."

C. THROUGH ABORIGINAL SELF-GOVERNMENT

Recent movements in Canadian Constitutional discussions in relation to aboriginal self-government may eventually lead to a third means of securing language rights and other territorial institutions. Although still in the proposal stage, and suffering somewhat from the difficulties exposed at the 1985 First Ministers' Conference, it appears possible that constitutional amendments may create a process for, and a means of protecting, agreements on aboriginal self-government.

With this kind of agreement, a negotiated set of rights for northern forms of government in an aboriginal government context could be characterized as a self-government agreement. It would then receive the same constitutional protection as is currently afforded to land claims agreements.

D. EFFECTIVE PROTECTION

Effective protection of aboriginal language rights depends upon the security of any agreement reached from unilateral change.

Federal legislation such as the current Northwest Territories Act can be changed by the Federal Government alone. In addition it can be changed by the incidental effect of other Federal legislation. There is no legal obligation to negotiate or even consult on such changes, although some would assert that there is a political obligation for long term protection of language rights.

Through either land claims or self-government agreements it should be possible to enter an agreement which is binding on all parties and which cannot be changed without the consent of the parties who made it. This would provide reliable protection for aboriginal languages and insure the continuing role of those who speak the languages in decisions on language rights.

VIII CONCLUSION

The question of language rights, with its close ties to issues of cultural survival has been demonstrated on many occasions to be one of extraordinary political impact. Language questions include a demonstrated potential for backlash and polarization of communities.

The effective protection of language rights requires a close examination of language needs and the capacity (or ability to develop capacity) for language services. Finally, it requires a clear set of goals, followed by a combination of constitutional. legislative and regulatory provisions designed to further these goals.